

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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TODD BLANCHE, ACTING)
ATTORNEY GENERAL,)
 Petitioner,)
 v.) No. 25-429
MUK CHOI LAU,)
 Respondent.)
- - - - -

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P R O C E E D I N G S

(10:13 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 25-429, Blanche versus Lau.

Mr. Joshi.

ORAL ARGUMENT OF SOPAN JOSHI

ON BEHALF OF THE PETITIONER

MR. JOSHI: Mr. Chief Justice, and may it please the Court:

When Respondent arrived in the United States in June of 2012, he had, in fact, already committed a crime involving moral turpitude. That meant, under the INA, he was, in fact, seeking an admission and thus was, in fact, eligible for parole and correctly charged with inadmissibility. And what's more, the government proved everything I just said by clear and convincing evidence in Respondent's removal proceedings.

Yet Respondent now seeks to vacate his removal order on the ground that immigration officers at the airport in June of 2012 did not themselves in that moment possess that clear and convincing evidence.

1 That makes no sense. Burdens of proof
2 and evidentiary burdens are things that apply
3 in adversarial proceedings before a
4 decisionmaker, not at the airport, where
5 non-lawyer immigration officers are processing
6 hundreds, maybe thousands, of arrivals a day.

7 Unsurprisingly, Respondent has
8 identified no text, no historical practice, and
9 no precedent imposing an at-the-border
10 clear-and-convincing evidentiary requirement.

11 Instead, Respondent largely focuses on
12 a distraction. He says that DHS immigration
13 officers can't parole him without first
14 determining that he's seeking an admission.

15 We agree, and officers did that here,
16 just not with the clear and convincing evidence
17 that he prefers. So Respondent's argument
18 really just begs the question in this case.

19 Similarly, he says the clear and
20 convincing evidence that DHS presented in the
21 removal proceedings amounts to post hoc
22 justification. But, again, that assumes the
23 conclusion that the border officers needed
24 clear and convincing evidence in the first
25 place.

1 Now we have other arguments that
2 parole decisions are not reviewable and that
3 even an incorrect parole can't be treated as an
4 admission. You don't have to reach those.
5 Respondent's failure to establish his
6 at-the-border clear-and-convincing evidentiary
7 requirement dooms his case and is sufficient on
8 its own to reverse the judgment below.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: I know you -- you're
11 making a distinction between the clear and
12 convincing at the border as opposed to at the
13 hearing, but where does clear and convincing
14 come from? Is it in the INA?

15 MR. JOSHI: No. It is a board
16 decision that has determined that because the
17 INA requires an applicant for admission to
18 establish admissibility by clear and convincing
19 evidence but, on the other hand, requires the
20 government to establish deportability by clear
21 and convincing evidence, the board has sort of
22 looked at those and decided that the threshold
23 question about which one of those two paths it
24 should go down is the government's burden and
25 said clear and convincing seems to be the right

1 standard. And we've accepted that for purposes
2 of this case.

3 JUSTICE THOMAS: But it's not in the
4 statute itself?

5 MR. JOSHI: The -- it's not directly
6 in the statute.

7 JUSTICE THOMAS: So has the board
8 applied that standard at the border?

9 MR. JOSHI: No, never. In fact, the
10 board was quite clear in Valenzuela-Felix that
11 it does not apply at the border. It rejected
12 the precise argument that Respondent is making
13 here today.

14 JUSTICE SOTOMAYOR: Counsel, the
15 statute says an alien lawfully admitted for
16 permanent residence in the United States shall
17 not be regarded as seeking an admission into
18 the U.S. unless the alien has done one of six
19 things, okay? So it's not an alien seeking
20 admission unless it's done one of those six
21 things.

22 So the question becomes if the U.S.
23 meets -- decides that there's a possibility
24 that any group of aliens might have a
25 conviction or might be -- have committed a

1 crime of moral turpitude. The basis for that?
2 Well, for any reason the government can think
3 of, okay, and just willy-nilly paroles LPRs,
4 people with green cards, into the U.S. and says
5 we're just not going to let you be admitted.
6 We're going to take away your green card,
7 you're going to get it stamped -- a stamped
8 card with temporary admission.

9 Is that reviewable?

10 MR. JOSHI: Eventually, if removal
11 proceedings are initiated, the -- it is -- the
12 government will have to show by clear and
13 convincing evidence that, in fact, one of those
14 six criteria applied.

15 JUSTICE SOTOMAYOR: So this statutory
16 command is meaningless at the border?

17 MR. JOSHI: I -- I --

18 JUSTICE SOTOMAYOR: Aliens who possess
19 a green card will be considered applicants for
20 admission at the whim of the government?

21 MR. JOSHI: I don't think that's quite
22 correct. First of all --

23 JUSTICE SOTOMAYOR: Why? Because, if
24 what you're saying to me is that the law saying
25 that they're entitled to come in and be removed

1 under 1227 as opposed to 1182 doesn't apply,
2 why bother with the statutory assumption?

3 MR. JOSHI: So I don't think that it's
4 just at the whim. First of all, there's a --

5 JUSTICE SOTOMAYOR: No, no, I don't
6 think it's at the whim. But my point is, still
7 remains, if it's not reviewable, it can be.

8 MR. JOSHI: It -- and what I'm saying
9 is that that -- the determination about whether
10 the LPR, in fact, satisfied one of those six
11 criteria in the -- in the statute is decided
12 afresh by the immigration judge --

13 JUSTICE SOTOMAYOR: All right.

14 MR. JOSHI: -- in removal
15 proceedings --

16 JUSTICE SOTOMAYOR: What's the
17 difference between 1184 and 1227? You can
18 remove an LPR who has been convicted of a crime
19 of moral turpitude under 1227. So why do you
20 need 1184?

21 MR. JOSHI: 1182, yes. So --

22 JUSTICE SOTOMAYOR: I'm sorry. I
23 misspoke.

24 MR. JOSHI: No, I -- I understood.

25 Respondent happens to be removable

1 under both. But there is an important
2 difference in not just crimes involving moral
3 turpitude but others. But, for the crimes
4 involving moral turpitude in particular, an
5 alien is inadmissible if he commits such a
6 crime at any time after admission but is
7 deportable only if he commits such a crime
8 within five years after his admission.

9 Now the happenstance is Respondent
10 happened to have committed his crime four years
11 and six months after admission. So it turns
12 out, by happenstance, we're lucky in
13 Respondent's case that it doesn't matter. But
14 that's not going to be true of other LPRs.

15 In addition, there are many other
16 differences between admissibility and
17 deportability. Let me give you one example
18 that doesn't apply here but applies to a lot of
19 cases, and that is drug-trafficking offenses.
20 To be deportable under 1227, there's got to be
21 a conviction. It's only commission under 1182
22 for inadmissibility.

23 And I know what you're thinking,
24 the -- the difference between commission and
25 conviction, but that's not the reason it's so

1 important to us, because, generally, we wait
2 for the conviction before trying to remove
3 them. The reason it's important is the
4 categorical approach. Because 1227 requires
5 the conviction, there are a lot of state
6 offenses where their list of controlled
7 substances is slightly broader than the federal
8 list of controlled substances. So convictions
9 we can't rely on. But commission we can
10 because we can say, oh, it was actually
11 cocaine, not this, like, esoteric --

12 JUSTICE SOTOMAYOR: Well, I guess the
13 problem I'm having is LPRs have a legal right
14 to be here. They have a legal right to come
15 back into the country. And Congress is the one
16 who deems the situations in which that right
17 should be taken away from them.

18 So why should it matter? Meaning, why
19 should a temporary removal take away their
20 constitutional right to have that judgment
21 decided under 1227 as opposed to under 1182?

22 MR. JOSHI: So, first, it is not a
23 constitutional right to be deported rather than
24 deemed inadmissible.

25 JUSTICE SOTOMAYOR: It is -- you're

1 right. It's a statutory right.

2 MR. JOSHI: Right. And --

3 JUSTICE SOTOMAYOR: But -- but they
4 have that statutory right. So why should that
5 right be taken away?

6 MR. JOSHI: So I just want to be
7 clear, if there -- if -- when removal
8 proceedings are initiated and the government
9 says we can remove under 1182 as opposed to
10 1227, the government will have to prove that
11 that is, in fact, the correct choice by clear
12 and convincing evidence.

13 JUSTICE JACKSON: But, Mr. Joshi, I
14 guess --

15 JUSTICE BARRETT: Mr. Joshi, what
16 happens in the meantime then? Because this
17 really, as -- as I understand, allows Mr. Lau's
18 argument. It is about timing, whether it has
19 to happen at the border or whether it would
20 happen in the removal proceeding, this
21 threshold determination.

22 What is the consequence for an LPR
23 that is paroled? Do they lose some sort of
24 rights because they have this flag on their
25 status until the removal proceeding begins?

1 MR. JOSHI: No. Parole maintains the
2 alien's status. The LPR remains in LPR status.
3 I know that some of Respondent's amici say
4 that, you know, the -- the temporary I-551,
5 which is the temporary green card, is not as
6 convincing to employers as a permanent green
7 card.

8 But, in the eyes of the law, it's
9 identical status. In fact, even the temporary
10 green cards, they -- they tend to say expires
11 after one year, we don't think that expiration
12 means anything. They're still an LPR all the
13 same.

14 JUSTICE JACKSON: So why -- why are
15 their green cards --

16 JUSTICE BARRETT: So -- I'm sorry, I'm
17 not quite finished.

18 So you think there's practical
19 consequences, but, as a matter of law, there's
20 no legal consequence. The determination is
21 still going to happen. What -- what is the
22 length of time typically between paroling and
23 then the initiation of removal proceedings?

24 MR. JOSHI: It -- it depends. So,
25 typically, what happens -- and as a matter of

1 practice, I think this is pretty uniform -- is
2 when an LPR is paroled for a deferred
3 inspection or prosecution --

4 JUSTICE BARRETT: Right.

5 MR. JOSHI: -- as in this case,
6 they're instructed to report to a deferred
7 inspection station, which is a different
8 location, in 30 days.

9 And then, when they -- just to
10 evaluate what's going on, and then there will
11 be periodic check-ins, rarely if ever longer
12 than 90 days. But it'll basically be tied to
13 the pending criminal proceedings, and they'll
14 just check in and say, okay, we're at pretrial
15 discovery, we're at -- you know, now trial is
16 expected to be at this time or the other, and
17 we'll typically just wait until the proceedings
18 have finished.

19 I think this case is probably fairly
20 typical. They tend to close out within about a
21 year if there's a pending charge, you know,
22 speedy trial and all of that. But that's
23 fairly typical.

24 JUSTICE JACKSON: Mr. Joshi, you
25 suggest that there's no difference, but I'm --

1 I'm wondering then why is the green card
2 removed from the person if they are paroled?

3 MR. JOSHI: I don't know the answer to
4 that.

5 JUSTICE JACKSON: All right. So,
6 obviously, the government is doing something to
7 parolees. They're giving them a different card
8 than the one they had. And we have amici that
9 say that without the permanent card, which the
10 person previously had, there is real
11 uncertainty about their status as a practical
12 matter, that their employment becomes tenuous,
13 that their schooling, there's -- I'm referring
14 to the brief of the Asian American Legal
15 Defense and Education Fund. So we have those
16 practical difficulties.

17 And then I'm wondering, doesn't parole
18 status then put the person in a category that
19 they are eligible for removal, whereas, if they
20 had been admitted, then, based on a subsequent
21 conviction, the government would have had to
22 deport them, and the burdens are different with
23 respect to removability versus deportability,
24 isn't that right?

25 MR. JOSHI: Yes. So if I could answer

1 both of those questions.

2 JUSTICE JACKSON: I mean, that's a
3 legal consequence that does -- it does matter
4 whether you're brought back in as a parolee or
5 you're admitted as a legal -- a lawful
6 permanent resident.

7 MR. JOSHI: If you're paroled, it's as
8 if you're still standing at the border. So,
9 yes, it keeps open the possibility of removal
10 on inadmissibility grounds, in addition to
11 deportability grounds.

12 JUSTICE JACKSON: Okay. So it does
13 make a difference. And so the question then
14 becomes, looking at the statutes that Justice
15 Sotomayor pointed out, if a lawful permanent
16 resident under the statute is supposed to be
17 brought in or let in as admitted unless six
18 different possibilities for turning that person
19 into a parolee rather than an admittee, I'm
20 wondering why the government's position is that
21 the determination of any of those six
22 categories doesn't have to happen at the time
23 in which the border person is making a
24 determination about this person's
25 admissibility.

1 I think your argument is, at some
2 point later in the future, we can decide
3 whether or not the person fits into one of
4 those six categories. But it would seem to me
5 that that would -- that's a prerequisite to the
6 initial assessment as to whether or not they
7 come in as admitted or they come in as a
8 parolee, which we've determined makes a
9 difference.

10 MR. JOSHI: Yes. So I want to tease
11 out two concepts here. You said we can decide
12 at a later time whether he fits into one of
13 those six categories. That's not quite right.
14 We decide in the removal proceedings -- rather,
15 the immigration judge decides in the removal
16 proceeding as the government burden to prove
17 that the alien in the past fit, past tense,
18 into one of those six categories, so we're --

19 JUSTICE JACKSON: I understand, but --
20 but timing matters because, at the border,
21 you're making the determination as to whether
22 or not this person comes in under the lawful
23 permanent resident admitted status or whether
24 they're coming in as a parolee.

25 And if that decision turns on the

1 assessment of the six categories, I would think
2 it would have to be done at that time.

3 MR. JOSHI: Yes, but not with clear
4 and convincing evidence. That's a thing that
5 applies in removal proceedings before a neutral
6 decisionmaker.

7 JUSTICE JACKSON: So what is the
8 standard at the time?

9 MR. JOSHI: So let me give you
10 three -- a three-part answer to that. The
11 first is I'm going to tell you that we don't
12 think there is a standard. The second is I'm
13 going to say, if you insist on one, what it is,
14 and it's going to involve satisfaction of --
15 satisfactory evidence to the border officer.
16 And then the third, I'm going to try and
17 respond to what I anticipate will be your
18 response to my first two answers.

19 (Laughter.)

20 JUSTICE KAGAN: Because -- because --
21 that would be because the first two won't sound
22 very good?

23 (Laughter.)

24 MR. JOSHI: No, they'll -- they'll --
25 they'll sound fine. They'll just lead to a

1 point that some of the amici, Respondent's
2 amici, make.

3 So my first point is that burdens of
4 proof are just not something we think about as
5 applicable in a border environment where an
6 officer -- as I -- as I said, it's typically an
7 adversarial proceeding with the decisionmakers
8 where you have burdens of proof. If you take
9 away one of the adversaries, we typically don't
10 talk about burdens of proof. We say, like,
11 prima facie case or something, and if you --

12 JUSTICE JACKSON: Can I just -- can I
13 stop you for a second, though, because
14 you're -- you're -- you're caught up in
15 assessing whether or not there's a burden of
16 proof. I'm just trying to understand how the
17 border officer is to make the determination
18 that this person is let in as a lawful
19 permanent resident versus a parolee.

20 MR. JOSHI: So --

21 JUSTICE JACKSON: And whether we call
22 it burdens of proof or what -- you know, fine,
23 and we don't think about it in those terms, but
24 they have to have some standard, and what is
25 it?

1 MR. JOSHI: Okay. So I'll jump to my
2 second point then, which is the standard is we
3 think, because the INA doesn't speak directly
4 to this issue or impose any kind of burden, the
5 standard would be the same standard that is
6 longstanding and traditional in immigration
7 law, even predating the INA, going back a
8 century or more, which is, when the sovereign
9 controls who enters the country at the border,
10 it's the person arriving has to establish to
11 the satisfaction of the officer that they're
12 entitled to be let in.

13 This Court in *Sing Tuck*, I think it's
14 a 1904 case, used the word "satisfactory." The
15 INA codifies this principle in places, I think
16 Section 1361 it says "establish to the
17 satisfaction of the border officer." Our
18 regulations, 235.1, that we cite --

19 JUSTICE JACKSON: Okay. And this
20 person --

21 JUSTICE ALITO: Well, Mr. Joshi,
22 you're --

23 JUSTICE JACKSON: -- the person at
24 the --

25 JUSTICE ALITO: -- you're -- you're

1 swinging for the fences here. In this case,
2 the Respondent was charged with a criminal
3 offense at the time when he tried to reenter --
4 come back to the United States, is that
5 correct?

6 MR. JOSHI: Correct.

7 JUSTICE ALITO: And the question that
8 is before us is whether that had to be shown at
9 the border by clear and convincing evidence.

10 MR. JOSHI: Whether the commission of
11 the offense, yes.

12 JUSTICE ALITO: Now the statute says
13 "has committed." It doesn't say "may have
14 committed." It also doesn't say "has been
15 convicted," which is language that appears in
16 a -- in the provision to which a
17 cross-reference is made. But something has to
18 be determined at the border, right? Now the
19 Third Circuit said it's probable cause. You
20 think that's too high?

21 MR. JOSHI: I -- I don't -- I
22 understand that the Third Circuit has said that
23 and it has derived it from kind of due process
24 avoidance. I don't know that it really makes
25 sense to just pull probable cause out of the

1 air and import it.

2 I think you just decided a case
3 earlier this term in which you refused to just
4 blindly impose probable cause on, I think it
5 was warrantless searches for emergency aid.

6 And -- and I think, you know, it --
7 that would certainly be better than the Second
8 Circuit's rule, and we could, you know,
9 certainly try and live with that. But I think
10 the right answer is the background immigration
11 rule of to the satisfaction. And let me, like,
12 spell out --

13 JUSTICE ALITO: Well, I mean, what --
14 so what if the immigration officer just says,
15 you look very shifty, I think that you have
16 committed a criminal offense, and, therefore,
17 you -- you cannot be admitted, you're going to
18 be paroled?

19 MR. JOSHI: Yeah, that -- that
20 would -- that would be wrong. That would be an
21 officer acting in bad faith. But let me try
22 and reassure you that you shouldn't have your
23 interpretation of the INA turn on that kind of
24 assumption, number one. Parole -- immigration
25 officers, line officers, are not authorized to

1 grant parole. It has to be granted by the head
2 of the port or a supervisor of a certain GS
3 level.

4 Second, as I was mentioning to Justice
5 Barrett, parole -- this kind of parole requires
6 a check-in at 30 days and periodic. Those are
7 at separate stations manned by different
8 officers. My understanding is it's usually
9 rotating officers.

10 So you would have to think that if
11 this is going to be long-lasting or anything
12 other than a very temporary defeasible decision
13 made by one rogue officer, that's just not
14 true, and you would have to think the entire
15 agency is acting in bad faith. And more than
16 that, you would have to think they're acting in
17 bad faith in a way that imposes more work on
18 themselves.

19 I mean, if the LPR is clearly -- you
20 know, clearly ought to be let in, DHS is not
21 going to keep paroling him in bad faith --

22 JUSTICE ALITO: Well --

23 MR. JOSHI: -- when it requires their
24 officers to do more work.

25 JUSTICE ALITO: -- can I just ask you

1 a -- a practical question? And you may well
2 not have this information, but, in practice,
3 are -- are people treated the way Respondent
4 was treated if they have not already been
5 charged with a criminal offense? How would the
6 immigration officer know that, let's say,
7 someone is under investigation someplace?

8 MR. JOSHI: Yeah, as a practical
9 matter, no, at -- at least not in clause 5,
10 which is the one we've been talking about. You
11 know, I can imagine a circumstance in clause 3
12 which says -- that's the one that says, if the
13 LPR is engaged in criminal activity overseas, I
14 think if there's, like, an Interpol alert, I
15 think that's a circumstance where that's not
16 even a charge; that's just law enforcement
17 saying we think this LPR might have
18 committed -- might have engaged in criminal
19 activity overseas. We think that would be an
20 adequate basis for the border officer to
21 determine that the LPR engaged in criminal
22 activity and therefore to parole him.

23 If and when removal proceedings are
24 launched, DHS, the government, is going to have
25 to prove by clear and convincing evidence that,

1 in fact, at that time, the LPR did engage in
2 the criminal activity overseas.

3 JUSTICE KAGAN: I guess what seems a
4 little mysterious is that once you admit that
5 much, that there is a clear and convincing
6 evidence standard and that that standard is
7 what applies not to the removal, right, it's
8 what applies to the reentry so that the --
9 the -- the IJ at the removal proceeding is
10 going to be thinking about this past question
11 about how the person should have been
12 classified at the reentry, once that becomes
13 the appropriate inquiry or the -- the inquiry
14 that's relevant in this case, why the standard
15 shouldn't apply at the time that inquiry is,
16 like, right in front of you when the person has
17 reentered?

18 MR. JOSHI: For the same reason that
19 you don't apply the beyond a reasonable doubt
20 standard at the indictment or at the filing of
21 a criminal information. That's a standard that
22 applies in the ultimate proceeding to determine
23 ultimate innocence or guilt in the criminal
24 case. And in the removal proceeding, the
25 reason the IJ looks at it is --

1 JUSTICE KAGAN: Well, that would be
2 true -- I -- I understand that, that if -- if
3 that's the way you look at it, this is kind of
4 the charging stage and that's the adjudication
5 stage. But it does seem like the questions --
6 it -- it seems bizarre that the adjudication
7 stage would sort of look back and ask the
8 question about reentry.

9 It's -- it's -- it's --

10 MR. JOSHI: Right.

11 JUSTICE KAGAN: Usually, when we're
12 talking about charging and adjudication, the
13 ultimate question is the one that's decided at
14 adjudication. You're not looking back to some
15 prior question. Once you have to look back to
16 some prior question, why aren't you just
17 applying the standard there?

18 MR. JOSHI: So two things. The first
19 thing I'll say is you're not -- I -- I just
20 want to be clear about this. The IJ is not
21 reviewing the immigration officer's decision.
22 The IJ is taking a fresh look at the evidence
23 and determining whether, in fact, the LPR fit
24 one of those six categories. So that -- that's
25 number one.

1 Number two, the reason for that oddity
2 is actually just, once you stare at the INA
3 long enough, you realize that that has to be
4 how it is because, number one, the INA says --
5 and this is 1229(a)(3) -- it's at page 5a of
6 our opening brief -- that the removal
7 proceedings, setting aside expedited removal,
8 are the sole and exclusive procedure for
9 determining admissibility or removability.

10 And then later, it says -- and -- and
11 earlier in (a)(1), it says that the immigration
12 judge is determining whether he can be deported
13 or removed. And then later, in (e)(2) -- this
14 is at page 6a to 7a of our opening brief -- it
15 defines "removable" in terms of in the case of
16 an alien not admitted and in the case of an
17 alien admitted.

18 And it's that threshold thing which is
19 actually part of the removability determination
20 is what the IJ is doing. It just so happens in
21 the case of an LPR in this circumstance that
22 when the LPR comes in, he is admitted or not
23 admitted depending on whether he satisfies one
24 of these six exceptions. And parole, in that
25 case, when the LPR is paroled, it's like

1 hitting a pause button and saying let's pause
2 things. It's as if the line at Newark Airport
3 took a year for him to get to the front of the
4 line.

5 And so it's just this weird confluence
6 of things is why the IJ is looking backward in
7 point of time, but it is not at all to, like,
8 review the DHS immigration officer's decision.
9 And that's why you don't apply the burden of
10 proof at the airport.

11 And it just really would be weird to
12 do that because Congress, in IIRIRA, clearly
13 wanted LPRs to be treated just like any other
14 alien in these six circumstances. Congress
15 surely knew that the border environment, where
16 there are just hundreds, thousands of people a
17 day -- I mean, to give you a sense of
18 perspective, every year, approximately,
19 actually, a little over, 8 million LPRs enter
20 the United States, and those 8 million LPRs
21 effect 40 million separate entries, so an
22 average of five apiece.

23 And it would sort of be unthinkable
24 for Congress to think that the border officer
25 in the moment, just with people coming through

1 the line, is going to have clear and convincing
2 evidence without doing, in Justice Ginsburg's
3 memorial phrase, you know, convening a -- a
4 piepowder court.

5 JUSTICE BARRETT: But how would --

6 JUSTICE KAGAN: Well, you would,
7 though, wouldn't you? Because you could just
8 check conviction records, and -- and -- and
9 that's the way it would work. If somebody has
10 already been convicted, you would be put in one
11 pipeline. If the person had not already been
12 convicted, you would be put in another
13 pipeline. And, yes, would that miss some
14 people maybe like the Respondent here, but, you
15 know, close enough for government work.

16 MR. JOSHI: So I -- I don't think
17 that's right because it would really undermine
18 Congress's pretty considered choice to
19 partially abrogate and expand upon the --
20 the -- and pull back, curtail, I should say,
21 the Fleuti doctrine because Congress very
22 clearly chose to say "committed an offense,"
23 not "is inadmissible under the provision."

24 What's more, it happens that crimes
25 involving moral turpitude and I think some

1 controlled substances offenses require a
2 conviction or admission of guilt for
3 inadmissibility, but most of the crimes do not.
4 Drug trafficking, human trafficking,
5 prostitution, they don't require a conviction.
6 So too with the overseas criminal activity.

7 You would really be gutting all six of
8 these provisions and really just not giving
9 effect to what Congress seemed to want to do
10 really, really strongly in IIRIRA.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas?

14 JUSTICE THOMAS: Mr. Joshi, how was
15 this -- the offense here determined at the
16 border?

17 MR. JOSHI: At the border, it was
18 because of the pending charge and --

19 JUSTICE THOMAS: No. Where was --
20 where was that? I mean, what did the border
21 patrol have before him or her?

22 MR. JOSHI: The immigration officer,
23 searching a -- a -- a -- a federal database in
24 which states can put in their criminal charges
25 and things like that, searched that and found

1 the arrest and pending charge that Respondent
2 was facing at that time.

3 JUSTICE THOMAS: And that basically
4 said the offense had been committed by this
5 person?

6 MR. JOSHI: The border officer in good
7 faith concluded that that was the answer, yes,
8 in the same way that the prosecutor who filed
9 the charge -- I mean, we always think this when
10 prosecutors file charges or seek --

11 JUSTICE THOMAS: Yeah.

12 MR. JOSHI: -- indictments, that the
13 prosecutor in good faith believes I think you
14 did it and I think I'm going to be able to
15 prove to a jury that you did it.

16 And the border officer is making
17 exactly those same conclusions, and he's
18 entitled to credit the prosecutor's --

19 JUSTICE THOMAS: Well, the only point
20 I'm making is that it wasn't arbitrary. It
21 came from a database. And that seems to
22 somehow be lost here.

23 MR. JOSHI: Yes. That's entirely
24 correct. And, indeed, Respondent and his amici
25 have had every incentive to go find examples of

1 bad-faith paroles where we're willy-nilly
2 paroling LPRs, and they just haven't found any
3 because we don't do that. It's not in our
4 interest to do that.

5 JUSTICE THOMAS: So was this ever --
6 was this process challenged before the removal
7 hearing?

8 MR. JOSHI: No. This was -- this was
9 raised at the removal hearing, where we
10 concededly --

11 JUSTICE THOMAS: So whatever burdens
12 that the parole imposed were not challenged
13 before the removal?

14 MR. JOSHI: That's right. In
15 fairness, I'm -- I'm not sure there is a path
16 to --

17 JUSTICE THOMAS: Yeah.

18 MR. JOSHI: -- judicial review for it,
19 but that is correct.

20 JUSTICE THOMAS: Yeah.

21 CHIEF JUSTICE ROBERTS: Justice Alito?
22 Justice Sotomayor?

23 JUSTICE SOTOMAYOR: You're presuming
24 something I can't. You're presuming -- well,
25 let me start with you didn't have proof at the

1 moment he presented himself that he had
2 committed a crime of moral turpitude, right?
3 You had just a charge.

4 MR. JOSHI: So I think the charge is
5 enough to -- for an officer to conclude that.

6 JUSTICE SOTOMAYOR: But you -- do
7 you -- could you have excluded him --

8 MR. JOSHI: Oh.

9 JUSTICE SOTOMAYOR: -- with the charge
10 alone?

11 MR. JOSHI: I see. Because it's a
12 crime involving moral turpitude, no, but that's
13 just -- but there are many other offenses
14 listed in 1182(a)(2) for which we could have.
15 The vast majority of them don't require a
16 conviction to be removable as inadmissible.
17 So, for example, if the pending charge had
18 been --

19 JUSTICE SOTOMAYOR: I -- I don't -- I
20 want to go just with this one because that's --

21 MR. JOSHI: Yeah.

22 JUSTICE SOTOMAYOR: -- the issue.

23 MR. JOSHI: No -- well --

24 JUSTICE SOTOMAYOR: Could you have at
25 the time -- at the time that he was at the

1 border, could you statutorily have excluded him
2 for having committed a crime of moral turpitude
3 on the basis of the charge alone?

4 MR. JOSHI: The border officer -- as a
5 practical matter, they don't do this, but
6 nothing would have -- nothing forecloses the
7 officer --

8 JUSTICE SOTOMAYOR: I -- I -- I --

9 MR. JOSHI: I'm going to answer you
10 directly.

11 JUSTICE SOTOMAYOR: Yeah.

12 MR. JOSHI: Nothing would have
13 foreclosed DHS at that moment from initiating
14 removal proceedings, potentially detaining him
15 under 1226, and by the time of the hearing
16 before the IJ, we would have to prove that, in
17 fact, he was seeking an admission when he
18 arrived at the airport and --

19 JUSTICE SOTOMAYOR: I'm sorry. What
20 you're saying is yes, that you had enough proof
21 to bar his admission?

22 MR. JOSHI: I'm not saying that we
23 would have won in front of the immigration
24 judge. What I'm saying is --

25 JUSTICE SOTOMAYOR: I -- just answer

1 the question.

2 MR. JOSHI: Well, that -- that is my
3 answer.

4 JUSTICE SOTOMAYOR: Did you have a
5 right at the border -- did you have enough
6 proof that he had -- that he had committed a
7 crime of moral turpitude?

8 MR. JOSHI: The border officer made a
9 conclusion that he had.

10 JUSTICE SOTOMAYOR: That he had
11 probable cause to believe?

12 MR. JOSHI: That he -- the border
13 officer concluded that Respondent had --

14 JUSTICE SOTOMAYOR: Could he have gone
15 to a hearing at that time and won?

16 MR. JOSHI: I don't know. By the time
17 of a hearing, we would have probably gathered
18 additional evidence.

19 JUSTICE SOTOMAYOR: No, no. At that
20 moment, if he had gone to a hearing, could he
21 have won?

22 MR. JOSHI: In a -- in a removal
23 hearing, we would have a clear --

24 JUSTICE SOTOMAYOR: Counsel, at that
25 moment --

1 MR. JOSHI: I --

2 JUSTICE SOTOMAYOR: -- and this is the
3 decision at issue --

4 MR. JOSHI: I don't know --

5 JUSTICE SOTOMAYOR: -- at that moment,
6 could he prove it?

7 MR. JOSHI: I don't know what hearing
8 you're referring to.

9 JUSTICE SOTOMAYOR: I'm not -- at the
10 moment he made the decision.

11 MR. JOSHI: At the moment he made the
12 decision, the border officer --

13 JUSTICE SOTOMAYOR: Did he have enough
14 proof?

15 MR. JOSHI: The border officer --

16 JUSTICE SOTOMAYOR: Did he have enough
17 proof at that moment? Forget --

18 MR. JOSHI: For whom? For whom?

19 JUSTICE SOTOMAYOR: For him.

20 MR. JOSHI: Yes, the border officer
21 had enough proof for himself.

22 JUSTICE SOTOMAYOR: To do what?
23 Parole him --

24 MR. JOSHI: Yes.

25 JUSTICE SOTOMAYOR: -- or to exclude

1 him?

2 MR. JOSHI: I -- I'm not sure what you
3 mean by "exclude." With -- I'm sorry.

4 JUSTICE SOTOMAYOR: He could have just
5 said you're not admissible, bye --

6 MR. JOSHI: Yes. But then that
7 would require --

8 JUSTICE SOTOMAYOR: -- and not parole
9 him.

10 MR. JOSHI: That would require
11 initiating removal proceedings. And as I said
12 earlier --

13 JUSTICE SOTOMAYOR: And so, at that
14 moment, if there was an IJ there, sitting
15 there, he could not have won that removal,
16 correct?

17 MR. JOSHI: Probably not --

18 JUSTICE SOTOMAYOR: Okay.

19 MR. JOSHI: -- because we have a clear
20 and convincing burden.

21 JUSTICE SOTOMAYOR: So --

22 CHIEF JUSTICE ROBERTS: I'm sorry.
23 Maybe if you -- would you like to finish that
24 answer?

25 MR. JOSHI: Thank you. In a removal

1 proceeding, which is where this would be
2 adjudicated, so if the officer thought he was
3 inadmissible, he would hand him a notice to
4 appear and say you are being charged as
5 inadmissible because you have, you know,
6 committed a crime involving moral turpitude.

7 And the IJ is sitting right there and
8 the IJ would say, great, we're now in removal
9 proceedings. Government, you have to prove
10 that, in fact, he was seeking an admission by
11 clear and convincing evidence. Do you have it?

12 And the answer is no, which is the
13 whole reason we're fighting this case, is
14 because border officers are rarely going to be
15 able to collect clear and convincing evidence.

16 JUSTICE SOTOMAYOR: What Justice
17 Sullivan said is allowing DHS to defer a parole
18 eligibility determination and take a
19 wait-and-see approach, contingent on whether a
20 conviction eventually materializes, effectively
21 nullifies the clear command that LPRs should be
22 admitted.

23 That's the clear command of the
24 statute. You've got to admit them unless
25 they've done these six things.

1 And you're admitting that at that
2 moment, he may have had reason to believe he
3 committed these things, but you didn't have
4 proof that he had committed those things yet.

5 MR. JOSHI: With all respect to Judge
6 Sullivan, he jumbled two things. He conflated
7 the deferral of a decision on inadmissibility
8 with a parole eligibility determination. He
9 did not --

10 JUSTICE SOTOMAYOR: All right. Could
11 I just ask you one final question? In what
12 other administrative context when an agency --
13 and the agent is the agency here -- makes a
14 determination do we permit them to develop new
15 evidence after the decision they're charged
16 with making is made?

17 I thought that we only review the
18 evidence they had at the time they made the
19 decision.

20 MR. JOSHI: Removal proceedings are
21 themselves administrative proceedings. So,
22 yes, a court would review only the evidence
23 presented at the removal proceeding.

24 JUSTICE SOTOMAYOR: Assuming that the
25 parole was valid.

1 MR. JOSHI: Whether or not it's valid.
2 Even if the parole's invalid, we would have to
3 show that, in fact, in reality, Respondent was
4 seeking an admission on June 15, 2012, when he
5 landed at Newark Airport. We would have to
6 prove that by clear and convincing evidence to
7 an immigration judge, and we did.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Mr. Joshi, am I right
10 that your theory depends on the ability to
11 parole the -- the person coming in? You know,
12 in other words, you're saying, if you parole
13 that person, everything is suspended until the
14 IJ can get their hands on this determination.

15 So everything really depends on the
16 parole, is that correct?

17 MR. JOSHI: Yes and no. Our view is
18 that once the immigration officer determines
19 that he -- he's satisfied -- or he is not
20 satisfied that none of the six exceptions
21 applies, so he says, I think you're seeking an
22 admission, so I'm going to treat you just like
23 any other arriving alien even though you're an
24 LPR. You still have your LPR status, but
25 you're going to be inspected and have to prove

1 your admissibility just like every other
2 arriving alien.

3 At that point, typically, there are
4 three options. One is admit. Two is removal
5 proceedings. And then the third, which is
6 entirely in DHS's discretion, is parole because
7 I'm not sure if you actually are inadmissible,
8 the final thing, or if you should be admitted,
9 and so I'm going to parole to hit the pause
10 button. We can both develop our evidence.

11 JUSTICE KAGAN: Okay. So that's --
12 that's close enough to a yes that I'm going to
13 ask you --

14 MR. JOSHI: Sure.

15 JUSTICE KAGAN: -- my second question
16 because the parole is the pressing of the pause
17 button in this case.

18 MR. JOSHI: Yes.

19 JUSTICE KAGAN: And the question is,
20 what entitles you to press that pause button?
21 In other words, what entitles you to give
22 parole before you've made the determination?

23 Because, as I understand it, you're
24 only parole eligible if you've committed these
25 various crimes, which sounds like a strange

1 thing to say, like, that you've committed the
2 crimes and so you're parole eligible, but
3 that's the truth of the matter.

4 MR. JOSHI: Right.

5 JUSTICE KAGAN: And so -- so don't you
6 have to make the determination before you give
7 parole? And -- and -- and -- and then, since
8 the determination is the trigger for the
9 parole, which is what suspends the proceedings,
10 it would seem as though you need to satisfy
11 your burden before you give the parole.

12 MR. JOSHI: I was with you until that
13 very last point. So, yes, there is a
14 determination made, but it's not clear and
15 convincing evidence. It is something lower
16 than that by the nature of the border
17 environment. And -- and that's our critical
18 submission here. And -- and so --

19 JUSTICE KAGAN: Yeah. Even though, I
20 mean, it's -- it's -- then you're -- you're --
21 you've lost your kind of this is the charging
22 stage and that's the adjudication stage because
23 now what's critical is whether you've made the
24 appropriate showing in order to grant parole,
25 which is a different question than anything

1 that the IG is going to have to face. And
2 you're saying that in order to grant parole,
3 all you need is kind of to the satisfaction of.

4 MR. JOSHI: Correct. That -- that is
5 right. And -- and that is how the rest of the
6 INA works. If you're a citizen and you walk in
7 and you say, I'm a citizen, you have to show
8 that you are, in fact, a citizen to the border
9 officer's satisfaction. And if you don't, you
10 can be detained. That's the Sing Tuck case.
11 This Court held you can be detained and there's
12 no problem with that.

13 So that's a standard feature of the
14 immigration laws, is that someone coming in has
15 to establish to the satisfaction of the officer
16 that he's allowed in. And the way that
17 eventually gets litigated is in the removal
18 proceeding, when the government will bear the
19 burden to show that historical fact was correct
20 or incorrect. But that's where things get
21 litigated. There's not a clear and convincing
22 standard at the border.

23 JUSTICE KAGAN: Well, one last -- just
24 to pick up on -- on something that you were
25 saying with Justice Sotomayor. You were going

1 to explain what you think Judge Sullivan got
2 wrong. So tell me what you think Judge
3 Sullivan got wrong.

4 MR. JOSHI: So Judge Sullivan, in the
5 passage that I think Justice Sotomayor was
6 reading, said the government's not allowed to
7 defer the parole eligibility determination, and
8 I think you and I were just talking about that.

9 We're not deferring that
10 determination. It's just the border officer
11 makes it with a certain level of confidence,
12 and then, in removal proceedings, the
13 government has to prove that the alien -- that
14 the LPR was, in fact, seeking admission by a
15 higher evidentiary standard in that adversarial
16 proceeding and convince the immigration judge
17 of it.

18 So we're not deferring the parole
19 eligibility. And I think he was jumbling
20 deferral of the admissibility determination
21 with the -- with the threshold question.

22 JUSTICE KAGAN: Got it. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: Just a couple quick

1 questions. Do we have to decide what the
2 standard for parole is in this case? I mean,
3 couldn't one simply say, whether he was paroled
4 lawfully or not, he was paroled, and did you
5 meet your burden in the removal proceedings?
6 Answer that yes or no.

7 MR. JOSHI: Exactly.

8 JUSTICE GORSUCH: Okay. And then,
9 with respect to the parole decision, you say
10 you're not sure whether that would be
11 reviewable independently. Your friend on the
12 other side, on page 34 of his brief, says that
13 it would be reviewable under 1252(a)(2)(B) as a
14 question of law involving any decision or
15 action in the discretion of the government.

16 I can also see an argument perhaps
17 that it might be reviewable under 704 of the
18 APA for questions that are otherwise
19 unreachable, final agency actions. Thoughts?

20 MR. JOSHI: So our longstanding
21 position of the government, as you might
22 expect, is that parole decisions are not
23 reviewable either in a petition for review from
24 a removal order or under the APA.

25 JUSTICE GORSUCH: No, I'm not talk --

1 I'm not talking about through a petition
2 through -- involving the removal proceedings.
3 I'm talking about could he have brought a -- a
4 distinct challenge under 1252, could he have
5 brought a distinct challenge under 704 to
6 challenge the -- the parole decision at the
7 time or shortly after he came into the country.

8 MR. JOSHI: So -- so our -- our
9 longstanding position is no.

10 JUSTICE GORSUCH: Okay. I -- I got
11 that. What do you say about those two
12 statutory provisions?

13 MR. JOSHI: Also no, that the --

14 JUSTICE GORSUCH: Do you have any
15 reasons for no?

16 (Laughter.)

17 MR. JOSHI: Yeah. So the -- the
18 reason -- the reason is that under 1252, in the
19 zipper clause, we think everything coming out
20 of a -- a removal proceeding has to be
21 channeled to the removal proceeding. And --
22 and this parole determination was.

23 So then the question is, well, can he
24 just bring a stand-alone APA action or an ultra
25 vires action while he's on parole? And I'm not

1 aware of that ever happening. This is the very
2 odd case in which an alien doesn't want to be
3 paroled. Usually, they complain when we
4 terminate their parole. And you've seen those
5 cases. But it's very rare that an alien says,
6 I don't want to be paroled.

7 JUSTICE GORSUCH: All right.

8 MR. JOSHI: So we've never faced that
9 situation. So --

10 JUSTICE GORSUCH: All right. Okay.
11 Thank you.

12 MR. JOSHI: -- we'll have to deal with
13 it --

14 JUSTICE GORSUCH: Thank you.

15 MR. JOSHI: -- when it arises.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 Justice Barrett?

19 JUSTICE BARRETT: So, Mr. Joshi, I
20 agree with you this is a weird thing to think
21 about at the border a clear and convincing
22 evidence standard applying because there is no
23 adjudicatory proceeding. And it seems to me
24 that -- I mean, you've conceded for purposes of
25 this case that a clear and convincing standard

1 applies to that threshold admissibility, like
2 which track you're on.

3 It seems to me that, I mean, either
4 that's wrong or, when you're at the border --
5 I'm trying to imagine if you lose this case
6 what happens and if it's actually more
7 favorable to an LPR, because it seems to me
8 that if a clear and convincing standard applies
9 when the LPR arrives, like, you know, as
10 Mr. Lau did, if it's a clear and convincing
11 standard and you really do want to apply --
12 either you would have to gut it and say, well,
13 we just can't show because it's impractical in
14 the airport or at the border or otherwise to
15 show that there's clear and convincing evidence
16 that someone engaged in criminal conduct abroad
17 or, you know, committed a crime -- it doesn't
18 say convicted -- so you either just give it up
19 and gut those provisions, or what do you do?
20 Do you detain the LPRs and you set up some sort
21 of adjudicatory proceeding? And how would --
22 would that be judicially reviewable? How would
23 we know whether the border officer had clear
24 and convincing evidence? There would be no
25 administrative record.

1 MR. JOSHI: Correct. That's exactly
2 right. And that's why I think Justice Ginsburg
3 in *Vartelas*, you know, memorably said you don't
4 call into session a piepowder court. But
5 that's essentially what we'd have to do if we
6 were to, like, enforce the -- the seeking
7 admission provision.

8 The other alternative, I suppose,
9 would just be to initiate removal proceedings,
10 potentially detain him under 1226, and then use
11 that time to -- to gather the right evidence.
12 But that doesn't really benefit anyone.

13 Parole has a significant public
14 benefit in these circumstances. It benefits
15 the public because it means someone facing a
16 criminal charge can be held responsible for his
17 crimes. It benefits in most instances the LPR
18 because they can organize their defense from
19 within the country while they're free and not
20 detained and can maybe even plea bargain down
21 to charges that don't carry immigration
22 consequences.

23 And it benefits the government because
24 we don't have to have detention -- you know,
25 fill up a detention bed with -- with someone

1 who's maybe otherwise safe, and we don't have
2 to incur those expenses, and we can -- and both
3 sides can gather the evidence they need for the
4 removal proceeding.

5 JUSTICE BARRETT: So, if you lose this
6 case and we say that, yes, the border patrol
7 officer has to have clear and convincing
8 evidence, then detention of the returning LPR
9 is a route that you might take?

10 MR. JOSHI: In some cases, yes.

11 JUSTICE BARRETT: In some cases, yes?

12 MR. JOSHI: Yeah.

13 JUSTICE BARRETT: So, rather than
14 being paroled, they might face detention and
15 immediate removal proceedings?

16 MR. JOSHI: That is correct because --

17 JUSTICE BARRETT: Which would not
18 benefit the --

19 MR. JOSHI: Right, because, by
20 hypothesis, if we lose this case, parole would
21 be taken off the table. So then we would be
22 just facing the choice of admit them even
23 though the officer in good faith thinks they
24 shouldn't be admitted, or --

25 JUSTICE BARRETT: Detain.

1 MR. JOSHI: -- initiate removal
2 proceedings, detain them, and take our chances.
3 It's not a great choice. That's why we've been
4 doing this for so many years.

5 JUSTICE BARRETT: If -- if you lose
6 this case, are you going to challenge that the
7 clear and convincing evidence standard applies?
8 Because you've conceded it for purposes of this
9 case, but the statute doesn't say it, which is
10 another reason to think that there's not an
11 adjudicatory proceeding contemplated.

12 MR. JOSHI: I don't know the answer to
13 that. Obviously, the Attorney General can
14 himself take a BIA case and -- and issue a
15 decision, but I don't know the answer to that.

16 JUSTICE BARRETT: Okay. So that's
17 another way in which a win for Mr. Lau might
18 not have long-term benefit for aliens or LPRs
19 seeking to return to the country?

20 MR. JOSHI: I think that's right.

21 JUSTICE BARRETT: Okay.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: So, Mr. Joshi, I
25 guess I am struggling to understand why parole

1 is a significant public benefit. That was the
2 conversation that you had with Justice Barrett
3 right now. And I -- I guess I start where the
4 statute starts, which is the recognition that
5 lawful permanent resident status is the gold
6 standard in immigration law. These are people
7 who have gone through the immigration gauntlet
8 and have achieved what is the next closest
9 thing to citizenship status in terms of their
10 ability to work, to live, to do things here in
11 the United States, and they have left the
12 country for the requisite amount of time and
13 they're returning, and the statute says that
14 those people shall not be regarded as seeking
15 an admission for the purpose of the immigration
16 laws.

17 That's the background, that this
18 person has a green card and they're supposed to
19 be let in. So I appreciate that your border
20 officer might have some suspicions or might not
21 want to bring them back or might think, ooh,
22 look, there's some evidence in a database
23 somewhere that suggests that this person might
24 be a problem. But this person under the
25 statute is supposed to be let in. That's the

1 beginning.

2 So then the question becomes to what
3 extent can the border officer decide, in good
4 faith or not, that this person is not going to
5 be let in, that I'm deciding right now here at
6 the border that, despite your green card
7 status, you have to not be admitted?

8 And Congress was pretty clear that
9 there are six and only six circumstances. One
10 is that this person has committed an -- an
11 offense. And it doesn't just say has committed
12 an offense; Border Patrol Officer, you figure
13 that out. It says has committed an offense
14 identified in a particular section. And then,
15 when we go to that section, the person who is
16 inadmissible under that section is one who is
17 an alien convicted of or who admits having
18 committed this offense.

19 So I guess my question is your busy
20 border officer, under this statutory scheme, it
21 seems to me he's supposed to say, I see here
22 that you have been indicted. But the statute
23 says a person is inadmissible if they're
24 convicted of or admitted to. Those things
25 don't exist. So the background rule of letting

1 this person in is supposed to be what happens
2 right now.

3 Now, if that's the case, first of all,
4 let me ask you, is that the end of Mr. Lau's
5 story? I mean, I thought he could still be
6 deported if later he's convicted of this crime
7 that he's been accused of. He can still be
8 deported, right?

9 MR. JOSHI: In his particular
10 circumstance, yes, but that will not be true of
11 all LPRs. In his particular circumstance, it's
12 the happenstance that he committed that crime
13 four months and -- four years and six months
14 after admission rather than five years and one
15 month.

16 JUSTICE JACKSON: You're saying
17 because of the statute -- because of the
18 statute of limitations, there may be -- right,
19 but that's in Congress's -- that's in
20 Congress's purview as well. They've decided
21 that a person who is beyond the five years,
22 that should not be a reason to deport them.

23 So I don't understand why the border
24 officer suddenly has so much power to deprive a
25 person who has a green card, based on a

1 suspicion or even an indictment, when the
2 statute seems to require conviction for this
3 particular kind of exclusion.

4 MR. JOSHI: Okay. So two things.
5 First, the statute does not require a
6 conviction. This Court -- I mean, the -- the
7 difference between commission and conviction
8 runs throughout the INA. This Court recognized
9 it in Barton against Barr. That is a
10 difference. If Congress had intended to pick
11 up --

12 JUSTICE JACKSON: Yeah.

13 MR. JOSHI: -- the conviction for
14 crimes involving moral turpitude, and not all
15 of the offenses listed require a conviction --

16 JUSTICE JACKSON: Right.

17 MR. JOSHI: -- it would have just said
18 inadmissible under 1182(a)(2). Congress didn't
19 say that. It said committed an offense. So --

20 JUSTICE JACKSON: Okay. So then the
21 question becomes who decides committed an
22 offense and when.

23 MR. JOSHI: Right. Yes.

24 JUSTICE JACKSON: And your rule is the
25 border patrol officer gets to decide whether or

1 not he's committed an offense, but you say it's
2 a pause. We know he can't really do it. So
3 we'll assume that it's okay for him to treat
4 this person as inadmissible during the period
5 of time in which we're figuring out whether or
6 not he actually is.

7 Is that -- that's the government's
8 position, right? You can parole him, meaning
9 strip his green card, treat him as inadmissible
10 for this period of time while we are
11 determining whether or not he is actually
12 inadmissible?

13 MR. JOSHI: Parole does not change his
14 status. He's still an LPR. I understand that
15 the amici don't like the form of the government
16 document that proves that he is still an LPR.
17 They -- they say that --

18 JUSTICE JACKSON: So will the
19 government commit to letting the person keep
20 their green card? You said you don't know why
21 they take it.

22 MR. JOSHI: I --

23 JUSTICE JACKSON: If that's true, then
24 can they keep their green card?

25 MR. JOSHI: I -- I -- I don't -- I'm

1 sure there are very good administrability
2 reasons why we have to keep the green card. As
3 it turns out, for example, one reason might be,
4 I'm not saying this is the reason, but I am
5 just aware of this fact that seems relevant,
6 which is that of the LPRs who are paroled,
7 approximately 25 percent are no shows. They
8 just don't show up to their -- to their
9 deferred inspection. We can't find them.

10 JUSTICE JACKSON: Okay.

11 MR. JOSHI: That's probably a pretty
12 good reason why we hang on to that card.

13 JUSTICE JACKSON: All right. Let me
14 just finally really kind of drill down on the
15 concern that I have.

16 You -- you said in -- in your response
17 to Justice Thomas that it really isn't in
18 the -- in the government's interest to engage
19 in sort of a bad-faith paroling kind of
20 scenario.

21 And my concern is that I could
22 actually see a world in which it would be, in
23 which it would be in the government's interest.
24 And it's a situation in which people who are
25 lawful permanent residents who have green cards

1 leave the country and, when they return, based
2 on a suspicion or even an indictment that's in
3 the government's control, they flag this person
4 as being returning under parole as opposed to
5 lawful admission.

6 They take this person's green card,
7 which then makes it much, much harder for this
8 person to actually live and work and continue
9 in their life here in the United States,
10 perhaps so much so that this person
11 self-deports because it's really, really
12 difficult without a green card to operate in
13 this country.

14 So you could imagine a world in which
15 a government that really is not interested in
16 immigration and having immigrants here, living
17 and working, could use this kind of thing to
18 inappropriately parole people rather than admit
19 them so that it depresses immigration.

20 Can you respond to that?

21 MR. JOSHI: I don't think you -- I
22 don't think this Court should interpret the INA
23 on the assumption that the entire executive
24 branch is operating in bad faith.

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Dvoretzky.

4 ORAL ARGUMENT OF SHAY DVORETZKY
5 ON BEHALF OF THE RESPONDENT

6 MR. DVORETZKY: Mr. Chief Justice, and
7 may it please the Court:

8 The Court should either affirm or DIG.
9 The government came to this Court with a
10 dispute about when it must meet its burden to
11 prove that a lawful permanent resident may be
12 treated as seeking an admission to the United
13 States: At the border or before an IJ.

14 Only now, in its merits reply and here
15 today, does the government say the case is
16 about the burden of proof, a question that it
17 forfeited before the Second Circuit and
18 conceded in its cert reply was not contested.

19 The INA's text and structure plus
20 historical practice make clear that an officer
21 must decide at the border whether an LPR is
22 seeking an admission. And at the cert stage,
23 Mr. Lau argued that this case was a poor
24 vehicle because the government had not briefed
25 the standard for that determination and the

1 Second Circuit hadn't decided it.

2 In response, at page 11 of the
3 government's cert reply, it said, "the
4 government is not challenging the clear and
5 convincing evidence standard. This case is
6 about when the government must carry that
7 burden."

8 On that understanding, the principal
9 merits briefs focused solely on timing, until
10 the government changed the question in its
11 reply brief. At page 2 of the merits reply,
12 the government says "that the timing issue is
13 not in dispute because whether an LPR is
14 seeking an admission must be determined at the
15 border."

16 The government now claims that "the
17 requisite level of proof is the crux of the
18 dispute in this case." What is that requisite
19 level of proof? Something lower than clear and
20 convincing evidence. Maybe satisfaction.
21 Maybe probable cause. None of that has been
22 briefed.

23 So much for square corners in a case
24 about square corners. Even putting aside
25 gamesmanship, the Court shouldn't decide the

1 burden question without full briefing and a
2 lower court decision. The Court thus should
3 affirm on timing alone or alternatively DIG.

4 Doing so would not be disruptive.
5 Border agents can determine whether a returning
6 LPR can be regarded as seeking an admission
7 using their ordinary interview and background
8 check techniques.

9 And because the Second Circuit didn't
10 decide the burden question because, again, the
11 government failed to address it, the government
12 could press its preferred standard in another
13 case. The Court should hold the government to
14 square corners.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: What precisely do you
17 think the standard should be or what the
18 officer should do at the border --

19 MR. DVORETZKY: So, again, we haven't
20 briefed --

21 JUSTICE THOMAS: -- in this instance?

22 MR. DVORETZKY: Again, the question of
23 what precisely the standard should be has not
24 been briefed by either side in this case
25 because the government disclaimed putting that

1 at issue.

2 Nonetheless, if -- if you're asking me
3 what I think it should be, I -- I do think it
4 should be clear and convincing evidence, and
5 what the officer should do at the border,
6 consistent with what border officers have done
7 for over a hundred years, is to check to see
8 whether there is a conviction or whether the
9 returning LPR will admit to the elements of the
10 offense.

11 That is what border officers do every
12 day under 1182 and what they have done, as I
13 said, for over a century because Congress has
14 said that -- that -- that -- that -- excuse me,
15 non-citizens at the border who have committed
16 certain offenses are not admissible.

17 JUSTICE BARRETT: Counsel, but in your
18 brief, you talk about Ellis Island and people
19 coming on the ships and how some of these
20 filters were applied by immigration officers at
21 the border then. But it wasn't by clear and
22 convincing evidence, right?

23 MR. DVORETZKY: I don't think anybody
24 ever talked about the standard, but I think
25 that what clear and convincing evidence means

1 in this context is do you have evidence of a
2 conviction or --

3 JUSTICE BARRETT: But the statute
4 doesn't say "conviction." It says "committed."
5 And -- and what about the one about engaged in
6 criminal conduct overseas? That doesn't say
7 "conviction."

8 And Mr. Joshi said it could be like an
9 Interpol alert that caused someone -- I mean, I
10 think clear and convincing evidence, if you're
11 going to give effect to these exceptions for
12 LPRs, I think it would contemplate clear and
13 convincing evidence, some sort of adjudication
14 or some sort of a trial where the border
15 officer would have to say what the evidence
16 was.

17 MR. DVORETZKY: I -- I don't think it
18 contemplates a mini-trial at the border. I
19 think what it contemplates, to use a phrase I
20 think Mr. Joshi used, is a level of confidence
21 by the officer, what information does the
22 officer have before them, and how -- does that
23 suffice, does that satisfy the level of
24 confidence required to conclude that this
25 returning LPR, who has a statutory right to

1 return to the country, should nonetheless be
2 stripped of that right subject to an exception.

3 JUSTICE ALITO: Well, but it also
4 says --

5 MR. DVORETZKY: But the government --

6 JUSTICE BARRETT: Is that only
7 satisfied by a conviction?

8 MR. DVORETZKY: I'm sorry?

9 JUSTICE BARRETT: Is that only
10 satisfied -- you kind of suggested a moment ago
11 that it would be satisfied only by a
12 conviction.

13 MR. DVORETZKY: No -- no. I think
14 most commonly it would be satisfied either by a
15 conviction or by an admission to the elements
16 of the offense. Again, here, if you look at
17 the --

18 JUSTICE KAVANAUGH: Is that it, those
19 two?

20 MR. DVORETZKY: I'm sorry?

21 JUSTICE KAVANAUGH: Are those two it?
22 To follow up on Justice Barrett's question, you
23 said most commonly. I just want to make sure.
24 Is there anything else?

25 MR. DVORETZKY: The reason I said

1 that, I think you could imagine a situation
2 where perhaps -- which is not presented here,
3 where perhaps somebody returns to the country
4 and there's evidence in the -- in their
5 suitcase that they had committed an offense. I
6 don't know, you find their diary in their
7 suitcase or something and that's what it says.

8 You could imagine a situation like
9 that, but the reason I say most commonly is
10 that I think, typically, it is going to be
11 either a record of conviction, which officers
12 already have access to in a database, or an
13 admission.

14 And if you look at what happened in
15 this case, if you look at Joint Appendix pages
16 13 -- 13 to 18, it has a transcript of the
17 officer's interview of Mr. Lau. The whole
18 thing was transcribed in the moment.

19 And what that exchange shows is that
20 the officer identified the pending charge and
21 from that didn't even conclude that -- that Mr.
22 Lau was subject to an exception. He concluded
23 that he was actually inadmissible, meaning,
24 from the pending charge, he found a conviction.

25 That is not what this statute --

1 JUSTICE BARRETT: Could he, consistent
2 with the statute, call in witnesses and say,
3 well, I see you have this -- like, if you won
4 this case, I'm just trying to game out what
5 might happen. Could he then say, well, I see
6 you have this pending conviction, so I'm just
7 going to detain you here at the border and
8 we're just going to call in some witnesses to
9 find out about this counterfeiting charge?

10 MR. DVORETZKY: As a practical matter,
11 that would obviously take too long. And I
12 don't see any authority in the statute that
13 would allow him to detain -- that would allow
14 the officer to detain somebody in Mr. Lau's
15 position at the border, at the --

16 JUSTICE BARRETT: Well, why not?
17 Because he has to make the decision. So, if he
18 has to do it at the border, I mean, we have to
19 give him time to do it. And if what he has to
20 do is gather clear and convincing evidence,
21 that would take some time.

22 It just isn't clear to me that it
23 would benefit LPRs to have a situation in which
24 then you're being detained.

25 MR. DVORETZKY: I -- I don't think

1 there is statutory authority to detain in order
2 to decide whether the -- whether an exception
3 is satisfied, at least not for more than a -- a
4 de minimis administrative sort of period of
5 time when you're actually standing there at the
6 border.

7 JUSTICE BARRETT: Well, then how can
8 you apply a clear and convincing standard?
9 Because that necessarily assumes some
10 opportunity to pony up evidence, right?

11 MR. DVORETZKY: Well, I --

12 JUSTICE BARRETT: You really are just
13 narrowing it down to say conviction only.

14 MR. DVORETZKY: Two points, Justice
15 Barrett. One, conviction or admission. And,
16 again, as the pages in the Joint Appendix that
17 I cited show, there is an opportunity, in fact,
18 a requirement, for the officer to interview the
19 returning LPR. And so there's a conversation.
20 The LPR might admit to the elements of the
21 crime, or, again, there might be evidence --

22 JUSTICE ALITO: So -- so let's say --

23 MR. DVORETZKY: -- of a conviction.

24 Second --

25 JUSTICE ALITO: -- there's the

1 alien -- I'm sorry, go ahead.

2 MR. DVORETZKY: No. Well, the -- the
3 only -- the only other point I was going to
4 make is, to the extent this is a difficult
5 burden for the officer, which I actually don't
6 think it is, that simply reflects Congress's
7 choice that returning LPRs do have a right to
8 return home, and that doesn't leave the
9 government without tools. It can pursue
10 deportation later.

11 JUSTICE ALITO: Well, the statute does
12 not say "has been convicted." And other
13 related provisions talk about conviction. So
14 assume for the sake of argument that it doesn't
15 require conviction.

16 You say the only other alternative is
17 for the officer -- let's say the -- this
18 individual arrives at Newark Airport and the
19 officer looks in a database and says, I see
20 that you have been indicted in federal court in
21 Los Angeles for -- I know this is a state
22 charge -- but let's say you're indicted in
23 federal court in Los Angeles for
24 counterfeiting. Do you admit it? And the
25 alien says, no, I don't admit it. Okay, fine.

1 Then that's the end of it? That's -- that's
2 the scheme you think Congress had adopted?

3 MR. DVORETZKY: I think the scheme
4 that Congress has adopted does not allow -- as
5 Judge Sullivan recognized, does not allow DHS
6 to parole somebody in order to later determine
7 whether they were subject to parole. Again,
8 going back to the statute, the --

9 JUSTICE ALITO: Well, I think your
10 answer to that is yes, that's -- that's the
11 only thing that can happen at the border.
12 Unless there's a conviction and the alien says,
13 okay, or there's a charge and the alien says,
14 okay, I admit it, I admit that I did it,
15 someone who's pend -- who has a pending
16 criminal charge, unless one of those two
17 circumstances is met, that's the end of it?

18 MR. DVORETZKY: Because what -- yes,
19 because what the statute contemplates is that
20 the person will be admitted unless an exception
21 applies, and the only way that parole is
22 available is if an exception applies.

23 What the government can't do is what
24 it did here, which is to parole somebody in
25 order to determine whether they are eligible

1 for parole. The government can't exercise the
2 very power that it is -- that it says it needs
3 more facts before it can exercise.

4 JUSTICE JACKSON: And it's not --

5 JUSTICE GORSUCH: Counsel --

6 JUSTICE JACKSON: -- the end of it
7 insofar as he could be deported, correct --

8 MR. DVORETZKY: Correct. The --

9 JUSTICE JACKSON: -- later?

10 MR. DVORETZKY: Correct. The
11 government has other tools, including the
12 deportation authority, after the -- the LPR is
13 admitted and returns home, as the statute
14 contemplates.

15 JUSTICE GORSUCH: Counsel, can we
16 really say your client was admitted? I mean,
17 whether he was paroled correctly or
18 incorrectly, how do we -- how do we get from
19 that to he was admitted?

20 MR. DVORETZKY: He presented himself
21 at the border for entry into the United States.

22 JUSTICE GORSUCH: Sure. Yeah.

23 MR. DVORETZKY: The -- the officer let
24 him in. Those are real-world facts on the
25 ground. And now --

1 JUSTICE GORSUCH: They paroled him.

2 MR. DVORETZKY: The government is
3 now -- parole is a legal status. The
4 government is now --

5 JUSTICE GORSUCH: Okay.

6 MR. DVORETZKY: -- attaching a legal
7 label to what it is that happened when he was
8 allowed into the country. If the government
9 did not have the authority to parole him --

10 JUSTICE GORSUCH: Right. I understand
11 that -- that there's a question there. I get
12 it. But he was paroled. I mean, that's just a
13 fact on the ground. And I guess I'm kind of
14 curious -- the same question to you that I
15 asked the other side is, if -- if that parole
16 decision were so -- had such negative
17 consequences for your client, was there a means
18 for him to challenge that decision?

19 MR. DVORETZKY: I am not aware of one.

20 JUSTICE GORSUCH: Well, you say in
21 your red brief you think there is under
22 1252(a)(2)(B) on page 34. And I also wonder
23 about 704 of the APA and --

24 MR. DVORETZKY: But to --

25 JUSTICE GORSUCH: -- just welcome your

1 thoughts.

2 MR. DVORETZKY: The -- the -- the path
3 in our red brief there, the 1252 path --

4 JUSTICE GORSUCH: Mm-hmm.

5 MR. DVORETZKY: -- it -- the -- the --
6 the decision whether to admit him or to parole
7 him is something that gets wrapped up into the
8 final order of removal, and so it can be
9 reviewed at the end of the process.

10 But I understood your question,
11 Justice Gorsuch, to be whether -- and maybe I
12 misunderstood it -- to be whether there was a
13 path to challenge that before it got to a
14 removal hearing.

15 JUSTICE GORSUCH: Yeah.

16 MR. DVORETZKY: And that -- and that
17 path I'm not aware of.

18 JUSTICE GORSUCH: How about 704?

19 Or -- or -- or why not 1252 itself?

20 MR. DVORETZKY: So 1252 itself talks
21 about a petition -- I think 1252(a) talks about
22 a petition for review from a removal order.

23 JUSTICE GORSUCH: Mm-hmm.

24 MR. DVORETZKY: So, again, you need to
25 wait for the removal order.

1 JUSTICE GORSUCH: Okay. You think
2 that's it for that. All right.

3 MR. DVORETZKY: Whether -- whether
4 704 -- look, I go back to my earlier point
5 about all of the issues that have not been
6 briefed in this case.

7 JUSTICE GORSUCH: Yeah. Do you -- do
8 you have any thoughts about it?

9 MR. DVORETZKY: Theoretically, it
10 might. We'd certainly argue it. They'd
11 certainly oppose it. 704 obviously operates as
12 a -- as a catch-all of sorts.

13 JUSTICE GORSUCH: A catch-all, right.

14 MR. DVORETZKY: I don't know what a
15 court would do with that. Congress didn't
16 leave the status of LPRs to that kind of
17 uncertainty.

18 JUSTICE GORSUCH: Okay.

19 MR. DVORETZKY: And to -- to the
20 extent you believe that the Court -- to the
21 extent you believe this case turns on that sort
22 of thing, again, this hasn't been briefed, and
23 the more appropriate case -- the more
24 appropriate course would be either to affirm on
25 the very narrow ground that the government has

1 brought this case to the Court on or to DIG the
2 case.

3 JUSTICE GORSUCH: Thank you.

4 JUSTICE BARRETT: Counsel, can you
5 address the consequences of the deferred parole
6 decision? This is from the amicus brief
7 Justice Jackson was referring to before. You
8 know, Mr. Joshi says that from a legal
9 perspective, you know, the -- your client was
10 still an LPR. You know, those admitted under
11 this circumstance are still LPRs.

12 But the amicus brief says there are
13 practical consequences like job insecurity.
14 Can you address those consequences?

15 MR. DVORETZKY: Sure. I think, as
16 Mr. Joshi said, Mr. Lau's green card was taken
17 away. It was replaced with a temporary stamp.
18 These temporary stamps expire after a year.
19 The government didn't even initiate the removal
20 proceedings against Mr. Lau for more than a
21 year.

22 Losing the green card is significant,
23 as the amici explained. Employers are hesitant
24 to hire people with only the temporary stamp
25 because they may not be permanent residents for

1 much longer. In -- in an era where ICE agents
2 are conducting enforcement campaigns, a green
3 card is a much more reliable means of
4 identification if you're stopped on the street
5 than a temporary stamp, which can be subject to
6 counterfeiting.

7 And so there are very real practical
8 consequences to this. And it is -- it is in
9 itself a form of a loss of liberty. In other
10 areas of the law, where we're talking about a
11 loss of liberty, clear and convincing evidence
12 is the appropriate standard to apply.

13 But, again, I come back to the point
14 that what is the appropriate level of evidence,
15 the level of confidence at the border, just
16 hasn't been briefed here. Mr. Joshi is -- is
17 acknowledging that there does have to be a
18 determination at the border. He just says this
19 entire case now comes down to the level of
20 confidence. That's -- that's, again, not what
21 has been fleshed out before this Court.

22 JUSTICE KAVANAUGH: Can you address
23 his point, 25 percent don't show up, just --
24 you heard him say that?

25 MR. DVORETZKY: I did hear him say

1 that. Again, the deportation authority, if you
2 initiate deportation proceedings, would give --
3 would also come with detention authority. And
4 so the government has that tool available to it
5 if that -- if that becomes a problem.

6 JUSTICE SOTOMAYOR: That seems to
7 suggest that if we rule in your favor, then the
8 government's choice is detain somebody at the
9 border and charge them with removability, and
10 is that acceptable to you?

11 MR. DVORETZKY: I don't think -- it's
12 not acceptable, and I don't think that the
13 government would have that authority under
14 1226. If -- if someone in Mr. Lau's position
15 is required to be admitted, at that point, the
16 inadmissibility -- 1182 is off the table
17 because he has been admitted.

18 And then the question becomes, do they
19 have a basis to initiate deportation
20 proceedings? First, they would have no
21 incentive to initiate deportation proceedings
22 at that point because all there is is a charge.
23 Their incentive is to wait and see whether
24 there's a conviction and, if so, for what
25 offense and, if so, with what sentence. The

1 government has no incentive to use its
2 resources, no good incentive to use its
3 resources, in order to detain people in order
4 to wait and see whether they're convicted.

5 Second, I also don't think that they
6 would have authority to do that. 1226(c)
7 wouldn't apply because 1226(c) is, again, about
8 inadmissibility, and inadmissibility is off the
9 table if we win this case and someone in
10 Mr. Lau's position has to be admitted.

11 And I don't think 1226(a) would apply
12 either because they would simply have no basis
13 for the warrant that 1226(a) requires when
14 there hasn't been a conviction at that point.

15 JUSTICE SOTOMAYOR: Do you know in --
16 well, I guess, how many LPRs are subject to
17 pending charges? Do you have any idea what
18 that number is? And how many of that would not
19 be defying a court order? Meaning, in my
20 experience, when someone's charged with any
21 kind of meaningful crime in New York, they
22 weren't permitted to travel.

23 MR. DVORETZKY: Right. So a couple
24 points on that. One, at the cert stage, the
25 government argued that this was an important

1 case because it affected a lot of cases, a
2 lot -- a lot of -- a lot of pending cases with
3 returning LPRs.

4 They provided no statistics on that.
5 We don't have those statistics. We tried to
6 call them out on their failure to provide
7 statistics. They didn't come back with any.

8 You would think that the number would
9 be relatively few, in part for the reason that
10 you suggest, Justice Sotomayor. If somebody
11 has committed a very serious crime under state
12 law, presumably, the state authorities would
13 prevent that person from -- might either detain
14 that person or, at a minimum, restrict their
15 right to travel out of the country.

16 So the universe of cases in which an
17 LPR is returning to the United States with a
18 pending relatively minor state offense is
19 probably quite small.

20 JUSTICE JACKSON: And even so, you
21 could imagine a world, like the one that I
22 tried to explore with Mr. Joshi, that there are
23 likely a lot of LPRs who leave the country and
24 come back. And I suppose, under the
25 government's rule, that if we just need

1 suspicion by the border patrol officer or some
2 as yet to be determined level of concern, we
3 could have a problem of people just having
4 their green cards removed on the basis of some
5 suspicion that they might have committed a
6 crime of moral turpitude in the opinion of the
7 border patrol officer.

8 Is that -- is that a legitimate
9 concern?

10 MR. DVORETZKY: I -- I think that -- I
11 think it is a very real risk that if the Court
12 rules in favor of the government in this case
13 and gives the government that power that the
14 power may be used for all it's worth.

15 And so you can imagine a situation
16 where border officers -- and I'm not suggesting
17 that this is as part -- as part of an -- an
18 overarching policy -- but where individual
19 border officers do decide to just parole
20 returning LPRs in large numbers.

21 They don't need to satisfy any
22 standard under the government's view other than
23 whatever satisfies the officer. And then that
24 can just -- that can just continue indefinitely
25 while the government pursues a fishing

1 expedition until --

2 JUSTICE ALITO: Well, Mr. Dvoretzky,
3 is -- is -- does your argument depend on our
4 acceptance of this conspiracy theory?

5 MR. DVORETZKY: No. It -- it depends
6 on -- it's simply the logical consequence of
7 the government's argument that if there is no
8 meaningful check on the ability to parole LPRs,
9 then that power might be used.

10 And it might lead to a situation
11 where, again, LPRs are paroled just based on a
12 mere suspicion, as your own hypothetical
13 suggested to Mr. Joshi early on in the
14 argument, you look kind of fishy to me. That
15 can then go on for a long time.

16 JUSTICE ALITO: Yeah, but that's not
17 what we have here. We have a criminal charge.
18 And the -- the immigration officer didn't make
19 that up. The charge was leveled by the State
20 of New Jersey. I guess the State of New Jersey
21 is in on this conspiracy?

22 MR. DVORETZKY: Again, I don't think
23 it's a conspiracy, but what I do think is that
24 the charge is not -- a charge does not show
25 that the person has actually committed the

1 offense, that there's still a -- a presumption
2 of innocence at that point. And the charge
3 doesn't show that he's committed the offense.

4 JUSTICE ALITO: Well, it doesn't
5 say -- 5 doesn't say was convicted. How about
6 Romanette iii, has engaged in illegal activity
7 after having departed the United States? Same
8 rule there?

9 MR. DVORETZKY: I think it would be
10 the same rule. The question is, is there some
11 evidence before the officer or does the LPR
12 admit to something in an interview? Again,
13 people do admit to things in interviews that
14 perhaps they shouldn't, and -- and that's how
15 that would be applied.

16 But, again, to -- to the --

17 JUSTICE ALITO: Let's say an -- an
18 LP -- I'm sorry. Go ahead.

19 MR. DVORETZKY: No, no, please.

20 JUSTICE ALITO: An -- an LPR leaves
21 the United States, goes to France, flies back
22 to the United States. While the plane is in
23 the air, the federal government receives an
24 urgent message from the French police, he shot
25 somebody while he was here just before he got

1 on the plane, but he hasn't been convicted,
2 and in that instance, he hasn't even been
3 charged.

4 Would he fall -- would that person
5 fall within Romanette iii, has engaged in
6 illegal activity after having departed the
7 United States?

8 MR. DVORETZKY: I -- I don't think so.
9 I think, in that situation, we -- we don't know
10 that. But, again, all of this goes to the
11 question of what is the level of proof required
12 at the border. That question has not been
13 briefed.

14 These are complicated questions that
15 are not directly answered by the statute. They
16 involve background principles. They might
17 involve policy considerations. None of that
18 has been briefed. And, in fact, the government
19 expressly disclaimed that in the cert briefing
20 and didn't present it to the Second Circuit
21 either.

22 JUSTICE JACKSON: And how --

23 CHIEF JUSTICE ROBERTS: Did I
24 understand your -- your answer to Justice
25 Alito's question was no, he could not be

1 detained?

2 MR. DVORETZKY: If all we have is --

3 CHIEF JUSTICE ROBERTS: All you have
4 is a phone call from the French police saying
5 we think he just shot -- shot somebody, he
6 comes to the border, and the -- the officer at
7 the border cannot detain him?

8 MR. DVORETZKY: I think that would be
9 no more than the equivalent of a charge, which
10 doesn't prove that he actually engaged in the
11 conduct. But, again, whether or not that would
12 be sufficient, I think the point is there is
13 some burden at the border to -- to show that
14 one of these exceptions was satisfied, and
15 the --

16 CHIEF JUSTICE ROBERTS: No, no, I know
17 your -- I know your general rule. It just
18 seems to me to be pretty bizarre to say that in
19 that situation they couldn't even be detained.

20 MR. DVORETZKY: Again, perhaps he --
21 perhaps he could be detained in that situation.
22 My point is none of this has been fleshed out.
23 These are questions that the government has
24 actually disclaimed.

25 CHIEF JUSTICE ROBERTS: So they --

1 they could say, look, all I have is a call from
2 the -- the -- the police in France that you
3 just killed somebody, we need to flesh that out
4 a little bit?

5 MR. DVORETZKY: Well, it -- it -- what
6 it might be is probable cause for -- for a
7 non-immigration arrest in that situation. You
8 could imagine that, that it satisfies probable
9 cause. But whether probable cause is enough to
10 show that one of these exceptions applies, it
11 doesn't show that the person -- a tip does not
12 show that the person has actually committed an
13 offense.

14 CHIEF JUSTICE ROBERTS: No, it's not
15 a -- it's not a tip. It's a call from a French
16 police official.

17 MR. DVORETZKY: So -- so, if it's a
18 call from French police officials, you could
19 take that as a basis, I would think, for --
20 wholly apart from the immigration laws, for
21 arresting the person and potentially
22 extraditing them to France on that basis.
23 That, I think, is a different question than
24 what's presented by -- by this case or by these
25 exceptions here.

1 JUSTICE BARRETT: Can I ask you a
2 question about the -- I'm sorry, Mr. Chief
3 Justice, were you finished?

4 CHIEF JUSTICE ROBERTS: No, I'm done.

5 JUSTICE BARRETT: Okay. About the
6 burden of proof, I thought your argument
7 depended on it being clear and convincing
8 evidence. Why would you say that that hasn't
9 been briefed?

10 I might not be following -- I mean, I
11 know that Mr. Joshi is saying, well, for
12 parole, there's a satisfied standard and then
13 we defer the admissibility determination and
14 that is by clear and convincing proof in the
15 context of the removal proceeding.

16 But I thought that you did have a
17 position that it's clear and convincing at the
18 border.

19 MR. DVORETZKY: So what our argument
20 depends on, because of the way in which this
21 case has been teed up from the Second Circuit
22 on, is that there is a determination that has
23 to be made at the border.

24 JUSTICE BARRETT: Mm-hmm.

25 MR. DVORETZKY: The government's

1 position in the Second Circuit was we have no
2 burden at the border. Our only burden is in
3 the ultimate removal hearing. So our position,
4 again, the way this has been teed up, is yes,
5 you do have a determination -- an obligation to
6 make a determination at the border.

7 Now the government has never
8 challenged, never disputed that if a
9 standard -- or until the -- until the end of
10 this case has not disputed that if a burden
11 applies on it at the border, that that
12 border -- that that burden is clear and
13 convincing evidence.

14 Now, if we were to brief and argue
15 what --

16 JUSTICE KAGAN: I guess I don't really
17 understand Mr. Joshi to have said this. And he
18 might be right or he might be wrong. But, as I
19 understand it, he says there is a burden at the
20 border or maybe he says this was like part of
21 his 1, 2, 3, answer. One is that there's
22 really no burden at the border, but 2 was
23 there's like a, you know, are you reasonably
24 satisfied burden at the border.

25 MR. DVORETZKY: That is what he says

1 today. The point is that 2 and 3 in his
2 three-part answer are new as of today and the
3 merits reply.

4 JUSTICE KAGAN: And -- and why is
5 that? That, you know, maybe I haven't focused
6 enough on this, but when I'm -- I'm staring at
7 the QP in the -- in the first brief, and it
8 says whether to remove as inadmissible an LPR,
9 blah, blah, blah, whether to remove that
10 person, the government must prove that it
11 possessed clear and convincing evidence that
12 the alien committed the offense at the time of
13 his reentry.

14 So why doesn't that set up the
15 question that you're saying was not involved?

16 MR. DVORETZKY: I take your point
17 about the question presented, Justice Kagan.
18 That's precisely why in the BIO we said: Wait
19 a minute, it looks like your argument might
20 depend on the Court deciding not only whether
21 there is a burden at the border but what that
22 burden is.

23 And this case would be a poor vehicle
24 for it because you didn't raise that issue of
25 what the burden would be in the Second Circuit.

1 Cert reply, page 11, what they then came back
2 with and said is, "To confirm, the government
3 is not challenging the clear and convincing
4 standard. This question is about when the
5 government must carry that burden. Because the
6 Second Circuit created a circuit conflict and
7 disrupted immigration enforcement rather
8 than" -- sorry, "disrupted immigration
9 enforcement by incorrectly requiring the
10 government to carry that burden at the border,
11 this Court's review is" -- "is warranted."

12 The whole case was teed up on the
13 assumption that if a standard applies at the
14 burden, it's clear and convincing, but their
15 argument was there is no burden at the border
16 at all.

17 JUSTICE BARRETT: But that's because
18 they thought that they could parole at the
19 border. I think, if we accept your argument
20 that the admissibility determination has to be
21 made at the border, then it necessarily means
22 that the clear and convincing standard applies,
23 as the government has teed up this case.

24 I agree, for purposes of this case,
25 they said, as for the admissibility

1 determination, clear and convincing is the
2 standard. But, if you win, it's necessarily
3 saying that the clear and convincing
4 determination applies at the border. I might
5 not be tracking.

6 MR. DVORETZKY: I -- I don't think
7 that's quite right, Justice Barrett.

8 JUSTICE BARRETT: Okay.

9 MR. DVORETZKY: If -- if we win, all
10 the Court needs to hold is that contrary to the
11 government's initial argument and arguments to
12 the Second Circuit, Judge Sullivan was correct
13 that there is a burden at the border. The
14 government does need to show at the -- as of
15 the time at the border the returning LPR was
16 subject to one of the exceptions. The Court
17 could --

18 JUSTICE BARRETT: So the government
19 can parole -- you're conceding then that the
20 government can parole in Mr. Joshi's kind of 1,
21 2, 3 formulation that he can parole, the
22 officer can do so at the border, but you're
23 just saying, well, maybe it's not clear and
24 convincing?

25 MR. DVORETZKY: No. He -- he can

1 parole at the border.

2 JUSTICE BARRETT: Mm-hmm.

3 MR. DVORETZKY: Our argument would
4 be -- again, if it were briefed or in a -- in a
5 future case, our argument would be that the
6 correct standard is clear and convincing
7 evidence. But the government would be free to
8 argue that it's something less.

9 The government would at that point be
10 free to argue, and the BIA could have the first
11 crack at this, to say, okay, we accept the
12 Court's holding that there is a burden at the
13 border; we think that's less than clear and
14 convincing evidence.

15 JUSTICE BARRETT: I am so confused,
16 though. I thought that your argument was that
17 they had to make the determination whether one
18 of the exceptions applied at the border, which
19 goes --

20 MR. DVORETZKY: Correct.

21 JUSTICE BARRETT: -- to whether they
22 were seeking admission and that that standard
23 was clear and convincing. And if they have to
24 make the admissibility, like, whether one of
25 these exceptions applies, so whether the LPR

1 counts as someone seeking admission or not, why
2 wouldn't -- if the admission -- if that -- if
3 that determination has to be made at the
4 border, why wouldn't the clear and convincing
5 standard apply on your theory of the case?

6 MR. DVORETZKY: Again, I think it
7 would. Under Mr. Joshi's theory of the case,
8 they seem to now be acknowledging that there is
9 a determination that has to be made at the
10 border. But he says perhaps that standard is
11 just determination to the satisfaction of the
12 officer, or maybe it's the Third Circuit's
13 standard at most, determination supported by
14 probable cause.

15 The question of what standard should
16 apply at the border is something that the BIA
17 could explore in another case, the lower courts
18 could explore in the first instance, but it's
19 not something that has been briefed or fleshed
20 out here other than in today's argument and in
21 passing in the reply brief.

22 JUSTICE JACKSON: And that's because,
23 Mr. Dvoretzky -- I'm just trying to make sure I
24 understand as well. I was, with Justice
25 Barrett, a little confused. So it's because

1 the government's initial argument was that we
2 don't have to have the border agent determining
3 whether or not the person is in any of those
4 buckets they can just parole the person in?

5 MR. DVORETZKY: Correct.

6 JUSTICE JACKSON: That was their
7 original thing, that we -- you don't have to --
8 and now the government is saying we admit that
9 the person has to be seeking admission and,
10 therefore, one of these five have to apply, but
11 now they're arguing the standard for
12 determining whether or not one of those applies
13 is something less than clear and convincing?

14 MR. DVORETZKY: Right. Their -- their
15 argument was parole first --

16 JUSTICE JACKSON: Yes.

17 MR. DVORETZKY: -- figure out whether
18 parole was proper later. Judge Sullivan, for
19 the Second Circuit, correctly rejected that
20 argument because that is not the sequence that
21 the INA contemplates.

22 JUSTICE JACKSON: And you understand
23 them to today be agreeing that that's not the
24 sequence. We need to have a determination --
25 some determination made. And now the dispute

1 is over what level of proof is necessary --

2 MR. DVORETZKY: Correct.

3 JUSTICE JACKSON: -- to make that
4 determination.

5 MR. DVORETZKY: They -- they just
6 think, here today and in passing in the reply
7 brief, that that standard of proof is just to
8 the officer's satisfaction, or maybe it's
9 probable cause. We would say it's clear and
10 convincing evidence. None of that has been
11 briefed or developed. Those should be issues
12 for another case after this Court either
13 affirms on the narrow timing question or DIGs.

14 And, look, I'm not going to be the
15 lawyer who stands here and tell -- tells you
16 what the Court will or won't do in an April
17 argument, but I think this would be an -- an
18 appropriate case in which to DIG rather --

19 (Laughter.)

20 JUSTICE KAGAN: You should have been
21 here yesterday.

22 (Laughter.)

23 MR. DVORETZKY: An appropriate case in
24 which to DIG rather than take on these
25 questions.

1 CHIEF JUSTICE ROBERTS: Just to be
2 clear, we will take appropriate action without
3 regard to --

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: -- without
6 regard to the calendar.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: I am a bit baffled by
10 what you're saying about what question is
11 before us. I read the question presented the
12 way Justice Kagan did. The government -- the
13 question presented says the question is
14 whether -- "whether the government must prove
15 that it possessed clear and convincing evidence
16 of the offense at the time of the LPR's last
17 reentry into the United States."

18 And the passage that you read from on
19 page 11 of the cert reply just says, "the
20 government is not challenging the clear and
21 convincing standard. The case is about when
22 the government must carry that burden."

23 So I interpreted that to mean they
24 admit at least for the purposes of this case
25 that clear and convincing is the standard at

1 the removal proceeding. But they never -- but
2 the -- the question of what is the standard at
3 the time when the alien is trying to come back
4 into the United States is something different.

5 MR. DVORETZKY: I -- I think it is
6 something different, but, as I read page 11, I
7 think what that is saying is the case is about
8 when the government must carry the clear and
9 convincing evidence standard. It's not about
10 whether there is some other burden or standard
11 that the government could conceivably have to
12 satisfy instead. It's do we carry clear and
13 convincing evidence at Time 1 or do we carry
14 clear and convincing evidence at Time 2?
15 That's the premise on which the government
16 brought this case to the Court.

17 JUSTICE ALITO: Yeah. And you're
18 saying they have to do it at Time 1.

19 MR. DVORETZKY: We're saying that it
20 has to be at Time 1 because they haven't
21 disputed that, if there is a burden, that is
22 the burden. If they want to dispute that, they
23 are free to do so in another case where they
24 present that to the lower courts, perhaps with
25 BIA guidance to go on.

1 JUSTICE ALITO: Okay. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

4 JUSTICE SOTOMAYOR: That's the point,
5 which is they've never said to us, except here,
6 this is our burden at the border.

7 MR. DVORETZKY: Correct. And -- and
8 in -- in brief passing in the reply brief for
9 the first time.

10 JUSTICE SOTOMAYOR: They've suggested
11 there's no burden at the border --

12 MR. DVORETZKY: Right.

13 JUSTICE SOTOMAYOR: -- essentially.

14 MR. DVORETZKY: Right.

15 JUSTICE SOTOMAYOR: Unreviewable
16 burden.

17 MR. DVORETZKY: That's right, Justice
18 Sotomayor.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?
20 Justice Gorsuch?

21 JUSTICE GORSUCH: Briefly. I -- I --
22 I had thought the case -- maybe I'm -- you can
23 correct me, but I -- I thought the case was
24 about whether the government could satisfy its
25 burden in a removal proceeding by clear and

1 convincing evidence showing at that time the
2 facts without regard to what happened in a
3 separate parole proceeding at the border.

4 MR. DVORETZKY: I wouldn't think of it
5 as a separate parole proceeding at the border.

6 JUSTICE GORSUCH: Well --

7 MR. DVORETZKY: I -- I think what the
8 case is about is whether --

9 JUSTICE GORSUCH: It's a removal
10 proceeding, right?

11 MR. DVORETZKY: Yes.

12 JUSTICE GORSUCH: That's what's before
13 us. And the question is, does the government
14 have to prove its burden with respect to
15 whether the immigrant committed the crime by
16 clear and convincing evidence at Time 1 or Time
17 2, right?

18 MR. DVORETZKY: But -- but, Justice
19 Gorsuch, the only way that we ever got to that
20 removal proceeding --

21 JUSTICE GORSUCH: No, I -- I
22 understand.

23 MR. DVORETZKY: -- was -- was
24 because --

25 JUSTICE GORSUCH: Because there was a

1 parole proceeding that preceded it.

2 MR. DVORETZKY: Right.

3 JUSTICE GORSUCH: I understand that.

4 Yeah. Okay. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice

6 Kavanaugh?

7 Justice Barrett?

8 Justice Jackson?

9 Thank you, counsel.

10 MR. DVORETZKY: Thank you.

11 CHIEF JUSTICE ROBERTS: Rebuttal,

12 Mr. Joshi?

13 REBUTTAL ARGUMENT OF SOPAN JOSHI

14 ON BEHALF OF THE PETITIONER

15 MR. JOSHI: Thank you, Mr. Chief

16 Justice. Just four quick points.

17 First, on Respondent's new request for

18 a DIG, I think we've read the -- we've had the

19 QP read aloud a couple of times. We clearly

20 were challenging the requirement that there be

21 a clear and convincing evidentiary requirement

22 at the border. The Second Circuit said yes.

23 We say no. That's all you need to say. That's

24 fairly encompassed in the question presented.

25 As my response to Justice Jackson

1 said, we don't think there is any evidentiary
2 requirement at the border. We think that the
3 government can satisfy its burden, as Justice
4 Gorsuch just said, in the removal proceeding by
5 proving that the -- that Respondent was, in
6 fact, seeking an admission at the time.

7 My -- you know, my -- my friend says
8 that our original position was that we can, you
9 know, parole someone to defer a decision on
10 whether parole is possible and we've only
11 recently switched tracks.

12 We have never said that. He has not
13 quoted a single line from any brief below or
14 here in which we said that. And, in fact, I'll
15 just -- sorry to do this -- read to you from
16 our opening brief in this Court on page 32:
17 "Observing that the INA authorizes the
18 Secretary to parole any alien applying for
19 admission, Respondent has argued that 'the
20 government must determine whether an LPR is
21 treated as an applicant for admission before
22 the non-citizen is paroled into the country.'
23 True enough."

24 We never disputed that. We just said
25 that obligation in no way implies that in

1 subsequent removal proceedings the government
2 must prove that it made the correct
3 determination by offering only the evidence
4 that it had in hand at that prior time.

5 That's what the Second Circuit held.
6 That holding is clearly wrong. And the circuit
7 split it created is intolerable right now. I
8 mean, JFK is in one circuit. Newark is in
9 another. Houston Hobby -- or Houston
10 International is in a third. Each of these
11 three circuits has a different rule, and it's
12 going to be incredibly hard to manage if you
13 DIG this case. And if you affirm, all of the
14 consequences that Justice Barrett and -- and
15 others have been discussing are -- are going to
16 hold. It's -- we're basically going to find
17 that the "seeking admission" clause is -- is
18 unenforceable at the border.

19 That leads me to my second point,
20 which is Mr. Dvoretzky basically said you're
21 going to need a conviction or just an admission
22 of guilt. I don't see how that's consistent
23 with the INA's text. It says "committed an
24 offense." It's certainly not consistent with
25 Romanette iii about criminal activity abroad.

1 It's not even consistent with offenses
2 identified in 1182(a)(2) because most of them,
3 as I said, don't require a conviction to be
4 inadmissible, the -- the human trafficking, the
5 drug trafficking, the prostitution, some of the
6 other ones. So you're going to need a
7 conviction just to determine whether you've
8 committed an offense, but then you don't need
9 the conviction to render you inadmissible.
10 That's completely topsy-turvy. That can't
11 possibly be what Congress wanted.

12 And that's to say nothing, as I said,
13 of the other five clauses. If it's clear and
14 convincing, even something as straightforward
15 as Romanette ii, I think, is if you've been
16 absent for 180 days from the country, and
17 suppose a border officer says, well, I see your
18 passport stamp and your round-trip ticket was
19 200 days ago, so you've been absent for 180
20 days, and the LPR says, oh, no, I haven't,
21 although that's my round-trip ticket, in the
22 interim, I've been driving back and forth into
23 this country several times, so I don't have 180
24 days of absence.

25 Does the officer have clear and

1 convincing evidence that the LPR is not telling
2 the truth? I can't imagine that he does. But
3 that's exactly the sort of thing where the
4 officer might say, all right, I'm going to
5 parole you and we're going to figure this out.
6 In 30 days, show up and show me that you've
7 been driving back and forth across the border
8 where we don't stamp your passport, and if
9 necessary, we'll go to removal proceedings and
10 then the IJ will decide on the stand whether
11 he's credible or not.

12 Under Respondent's view, even if that
13 LPR were not telling the truth, too bad because
14 the border officer in the moment didn't have
15 clear and convincing evidence of this
16 untruthful assertion. That, again, cannot
17 possibly be right.

18 Finally, in terms of the -- the
19 statement that my friend made that there's just
20 no meaningful check on the ability to parole
21 LPRs, as I said, number one, there is the
22 presumption of regularity. And you would
23 really have to have a DHS-wide conspiracy for
24 the parade of horrors that Respondent talks
25 about to materialize.

1 It is telling that our rule has been
2 the background rule for decades, if not over a
3 century. It certainly has expressly been the
4 rule in this circumstance in the Fifth Circuit
5 for more than a decade.

6 You haven't seen these consequences.
7 The Third Circuit, since 2011, probable cause
8 but still much lower than clear and convincing.
9 You haven't seen these circumstances. So I
10 just don't think it's reasonable to say that.

11 Congress provided that parole
12 decisions are unreviewable. It made a judgment
13 that they're unreviewable. And I know that's
14 always going to cause some heartburn and
15 difficulty when you say something's
16 unreviewable, but unless you think all of DHS
17 is composed of, to use a phrase, monsters or
18 idiots, that's just the system that Congress
19 enacted.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 The case is submitted.

23 (Whereupon, at 11:42 a.m., the case
24 was submitted.)

25

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