No. 24-46

IN THE

Supreme Court of the United States

SINTIA DINES NIVAR SANTANA,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The parties agree that Ms. Nivar Santana bears the "*burden* of proof" on the question whether she is "admissible to the United States for permanent residence." 8 U.S.C. § 1255(a) (emphasis added). They disagree, however, on what *standard* of proof applies to that question. *See Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 100 n.4 (2011) (distinguishing between these two concepts). The Government does not contest that the Fourth Circuit answered that pure question of statutory interpretation by assigning "controlling weight" to the Board of Immigration Appeals' interpretation of the Immigration and Nationality Act (INA). Pet. App. 11a. That judicial abdication is the product of the bygone *Chevron* doctrine. So at a minimum, this Court should grant, vacate, and remand in light of *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Contrary to the Government's argument, the Fourth Circuit would be free to hold on remand that the preponderance standard governs Ms. Nivar Santana's burden.

Alternatively, this Court should grant plenary review to resolve the entrenched circuit split on the standard of proof. The answer to that question affects thousands of people who seek adjustment of status each year. And the assimilation theory the Fourth Circuit adopted flouts the text and structure of the INA. Finally, this case is a suitable vehicle for setting the law right. Ms. Nivar Santana is an outstanding elder-care worker who has lived in this country for decades without issue, and under the proper standard

of proof she can establish her eligibility for adjustment of status.

I. The Court should grant, vacate, and remand in light of *Loper Bright*.

The Government does not dispute that the Fourth Circuit exhibited the reflexive deference which caused this Court to abandon the *Chevron* framework, Pet. 11-13. And the Government concedes that this Court has vacated a series of immigration-related decisions in light of *Loper Bright* that, like the decision here, expressly relied on *Chevron.* BIO 21. But it argues that a GVR is unwarranted because the Fourth Circuit would in any event be "bound by" its prior decision in *Dakura v. Holder*, 772 F.3d 994 (4th Cir. 2014). BIO 21.

Not so: *Dakura*'s passing mention of the standard of proof was dicta. The "reasoning" in a prior decision "must be followed" only if "necessary to the outcome"; otherwise, a later panel is "not so bound." *Payne v. Taslimi*, 998 F.3d 648, 655 (4th Cir. 2021). The standard of proof in *Dakura* was an unnecessary "assumption," *Payne*, 998 F.3d 654: Because the facts establishing inadmissibility were undisputed, the outcome in *Dakura* would have been the same regardless of whether the standard was "clearly and beyond doubt" or preponderance. *Dakura*, 772 F.3d at 997. That's why neither party briefed, nor did the court actually analyze, the correct standard of proof.

Moreover, the Fourth Circuit's rejection of the assimilation theory in a related context should inform its analysis on remand. In *Aremu v. DHS*, 450 F.3d 578 (4th Cir. 2006), the Fourth Circuit refuted the

idea that "adjustment of status qualifies as an 'admission.'" *Id.* at 582. As the Fourth Circuit explained, "[t]his analysis conflates and confuses 'admission' with 'admissibility.'" *Id.* It therefore "does not follow" that requiring a noncitizen "to possess the qualifications labeled 'admissibility'" turns that noncitizen into an applicant for admission. *Id.*; *see also Bracamontes v. Holder*, 675 F.3d 380, 385-86 (4th Cir. 2012); *Leiba v. Holder*, 699 F.3d 346, 353-54 (4th Cir. 2012).

Because the Fourth Circuit so clearly relied on *Chevron* deference, Ms. Nivar Santana's case contrasts sharply with the two cases the Government cited where this Court declined to GVR, BIO 21-22 (citing *Kerr v. Garland*, 144 S. Ct. 2715 (2024), and *Debique v. Garland*, 144 S. Ct. 2715 (2024)). The decision in those cases turned on binding circuit precedent. *See Kerr v. Garland*, 2023 WL 193629, at *1 (2d Cir. Jan. 17, 2023); *Debique v. Garland*, 58 F.4th 676, 681 (2d Cir. 2023). Furthermore, in neither case did the decision from which review was being sought rely directly on *Chevron*. *Id.*

The Government's forfeiture argument, BIO 21, is equally unpersuasive. It presumes that on remand, Ms. Nivar Santana would need to ask the Fourth Circuit to overturn *Dakura*. She would not; she would simply renew her argument that *Dakura* is not controlling. *See* Petr. C.A. Br. 15-17.

II. Alternatively, this Court should grant plenary review.

The Fourth Circuit acknowledged that its decision here added to a split over the standard of

proof applicable when a noncitizen previously admitted to the United States seeks relief from removal based on adjustment of status. Pet. App. 12a. If the Court does not GVR, it should grant plenary review to resolve that conflict.

1. *Split*. The Government acknowledges that under *Romero v. Garland*, 7 F.4th 838 (9th Cir. 2021) (per curiam), the preponderance standard governs a noncitizen in Ms. Nivar Santana's situation. BIO 17. Lest there be any doubt, at oral argument in this case, counsel for the Government expressly stated that "if I go to the Ninth Circuit, *Romero* is the law out there." Oral Argument at 18:10-18:18, *Santana v. Garland*, 92 F.4th 491 (4th Cir. 2024), https://tinyurl.com/yuhpnab9. The Ninth Circuit thus squarely disagrees with the Fourth Circuit, as well as with the Second, Sixth, Eighth, and Tenth Circuits.

Nevertheless, the Government now suggests that *Romero* somehow does not reflect the law of the Ninth Circuit because it purportedly "conflicts" with four prior circuit decisions. BIO 17-18. That's wrong. One of those cases holds only that a noncitizen must demonstrate current admissibility at the time of his application for adjustment of status. *Campos v. INS*, 402 F.2d 758, 760 (9th Cir. 1968). That holding says nothing about the standard of proof. And as the Government admits, the Ninth Circuit distinguished *Romero* from the remaining cases "on the ground that the noncitizen in *Romero* had previously been admitted." BIO 18. In those cases, the noncitizens were "applicant[s] for admission" under the INA's plain text because they either entered unlawfully or were stopped at the border. *See* 8 U.S.C. § 1225(a)(1).

The Government's argument that *Romero*'s distinction is not "convincing," BIO 13, is all the more reason for this Court to grant certiorari: The question whether a noncitizen's prior lawful admission affects the standard of proof when seeking relief from removal goes to the heart of the question presented. *See* Pet. i. The Ninth Circuit and Ms. Nivar Sintana say yes; the Government and other circuits say no.

2. *Importance*. The question presented has profound consequences for 4,500 noncitizens every year who, like Ms. Nivar Santana, seek adjustment of status as relief from removal. Pet. 19.

The Government attempts to downplay the stakes by noting that "a showing of deportability may by itself establish inadmissibility as well," regardless of the burden the noncitizen bears at the relief stage. BIO 20. But the Government's use of the word "may" is telling: It concedes that there will be cases where the showing of deportability does *not* establish inadmissibility. Ms. Nivar Santana's case is one such example. She was removable because she overstayed her visitor visa. But the parties disagree over whether she is inadmissible, and the answer to that question may turn on the standard of proof at the relief stage.

What's more, the Government's argument that removability equals inadmissibility does not address the even larger number of noncitizens who seek adjustment of status outside of removal proceedings, but who are nonetheless currently required to meet a standard of proof contained only in a provision that governs noncitizens in removal proceedings. *See* Pet. 19 n.4.

3. *Vehicle*. Ms. Nivar Santana's case is an excellent vehicle for resolving the question presented. While most adjustment of status denials occur outside removal proceedings, courts have consistently held that only those that occur within the removal context are judicially reviewable. *See Momin v. Jaddou*, 113 F.4th 552, 558 (5th Cir. 2024) (collecting cases).

The Government's only vehicle contention is that petitioner might not satisfy the preponderance standard. BIO 19. That's wrong. Ms. Nivar Santana had enough evidence to meet a preponderance standard on the question whether she checked the citizenship box: her own testimony that she did not and the supporting testimony of her two supervisors. *See* Pet. 21. So when the immigration judge and the Board of Immigration Appeals (BIA) used the word "inconclusive," BIO 19 (citing Pet. App. 22a, 30a), they spoke to whether the evidence was conclusive "beyond a doubt." Pet. App. 22a. This was an entirely different context than the Fourth Circuit case quoted by the Government, BIO 19, which involved a preponderance standard. *See Ullah v. Garland*, 72 F.4th 597, 603 (4th Cir. 2023). Evidence that is "inconclusive" if the standard of proof is "clearly and beyond doubt" could well meet the preponderance standard.

In any event, the Government's vehicle argument poses no barrier to granting certiorari: How Ms. Nivar Santana would fare under the preponderance standard is a question for the agency on remand. Reversal is appropriate when agencies impose the wrong standard of proof. *See* Pet. 20 (collecting cases).

4. *Merits*. The crux of the Government's merits argument is that Ms. Nivar Santana should be treated as an "applicant for admission" within the meaning of 8 U.S.C. § 1229a(c)(2)(A). And because such applicants must meet the "clearly and beyond doubt" standard to defeat removability, *id.*, she too must meet that standard to establish eligibility for relief from removal through adjustment of status. But the Government's argument fits neither the text nor the structure of the INA.

a. Start with the text. Ms. Nivar Santana is an applicant for adjustment of status, not an applicant for "admission." She is not seeking "lawful entry . . . into the United States"—the INA's definition of "admission," 8 U.S.C. § 1101(a)(13)(A)). She was admitted in the year 2000 and has lived here since then.

When Congress wanted to treat someone who is already here as an "applicant for admission," it did so expressly—through a provision that "deemed" certain categories of physically present individuals to be "applicants for admission." 8 U.S.C. § 1225(a)(1); *see* Pet. 23-24 (citing *Sturgeon v. Frost*, 587 U.S. 28, 47 (2019)). Ms. Nivar Santana is not covered by any of those categories. And the BIA has no power to extend Congress's legal fiction to other groups by "assimilating" them into the category of applicants for admission.

Ms. Nivar Santana's argument is a classic example of *expressio unius*: "[E]xpressing one item of [an] associated group or series excludes another left unmentioned," *United States v. Vonn*, 535 U.S. 55, 65

(2002). The Government's example of dogs, "non-dogs," and their tails, BIO 10, thus simply won't hunt.

b. The structure of the INA also defeats the Government's attempt to engraft the heightened standard of proof contained in Section 1229a(c)(2)(A), which governs the burden and standard of proof for a noncitizen to defeat removability, into Section 1255(a), which governs the burden and standard of proof for a noncitizen to obtain an adjustment of status.

First, the Government's reading of Section 1229a(c)(2)(A) is logically unsound. The provision states that "if the [noncitizen] is an applicant for admission," then she must show she is "clearly and beyond doubt entitled to be admitted" and is "not inadmissible." *Id.* The Government claims that "any noncitizen who chooses to prove admissibility rather than lawful presence is ipso facto an 'applicant for admission.'" BIO 10. But that does not follow. Section 1229a(c)(2)(A) requires only that applicants for admission show admissibility, but not that anyone seeking to show her admissibility is turned into an applicant. A simple example proves the point: Suppose a restaurant has a dress code that requires all men to wear a jacket. This does not mean everyone who wears a jacket in the restaurant is necessarily a man.

Second, the Government's theory wrongly imports a standard of proof from the first phase of removal proceedings into the second. Removal proceedings consist of two discrete phases: "(1) determination of the alien's removability; and (2) consideration of applications for discretionary

relief," including, for example, adjustment of status. *Matovski v. Gonzales*, 492 F.3d 722, 727 (6th Cir. 2007).

At the *first* phase, there are, as the Government notes, two "exclusive and comprehensive" paths listed in the statute to defeat removability. BIO 10. And with respect to each path, the INA imposes a separate heightened standard of proof. A noncitizen who is an "applicant for admission" must meet the "clearly and beyond doubt" standard. 8 U.S.C. § 1229a(c)(2)(A). A noncitizen who is not an "applicant for admission" must show by "clear and convincing evidence" that she is "lawfully present in the United States pursuant to a prior admission." 8 U.S.C. § 1229a(c)(2)(B). Ms. Nivar Santana could, in theory, have attempted to use the second path (proving by "clear and convincing evidence" that she was "lawfully present"), but she instead conceded removability.

That brought Ms. Nivar Santana to the *second* phase—consideration of applications for discretionary relief. And the two "exclusive and comprehensive" paths in 8 U.S.C. § 1229a(c)(2) have nothing to do with that second phase. The statutory provisions governing the second stage are at 8 U.S.C. § 1229a(c)(4) (relief from removal) and 8 U.S.C. § 1255(a) (adjustment of status). And those provisions do not themselves contain any heightened standard of proof. In fact, they contain no express standard of proof at all.

Given this statutory silence, the appropriate standard for adjustment of status claims—as for all other forms of relief from removal, Pet. 27—is "preponderance of the evidence" because that is the

default "standard generally applicable in civil actions," *Octane Fitness LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 557-58 (2014) (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983)). This Court has explained that in the face of statutory "silence," courts "should not depart from the '[c]onventional rul[e] of civil litigation'" that requires the party bearing the burden of proof "to prove his case 'by a preponderance of the evidence.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (quoting *Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 714 n.3 (1983)).

All the more so when Congress has "expressly erected a higher standard of proof elsewhere" in the same statute. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 107 (2016). Put another way, the inclusion of a heightened standard in some provisions confirms that the preponderance standard applies to provisions that do not contain a "specific evidentiary burden, much less such a high one." *Id.* (quoting *Octane Fitness, LLC*, 572 U.S. at 557); *see also Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 178 n.4 (2009); *Desert Palace*, 539 U.S. at 99. The Court should take the same tack here: In seeking relief from removal, Ms. Nivar Santana must meet the preponderance of the evidence standard to establish her eligibility for an adjustment of status.

Finally, the Government is mistaken when it suggests that because Section 1229a(c)(4)(A) requires a noncitizen meet the "applicable eligibility requirements," she must meet the "clearly and beyond doubt" standard applied to applicants for admission, BIO 11. The Government's argument conflates two

"distinct" concepts: the "burden of proof," which identifies the party that must persuade the factfinder, and the "standard of proof," which goes to "the degree of certainty by which the factfinder must be persuaded." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 100 n.4 (2011). To be sure, Ms. Nivar Santana bears the burden of proof to show that she is admissible, which requires her to show that she did not falsely claim to be a U.S. citizen. But while Section 1229a(c)(4)(A) imposes "the burden of proof" on Ms. Nivar Santana, "it includes no express articulation of the standard of proof," *Microsoft Corp.*, 564 U.S. at 100. And that silence means that the standard is preponderance.

c. The Government's arguments with regard to statutory history fare no better. The Government points out that Congress enacted Section 1255(a) to "streamline" the process for obtaining permanent legal residence. BIO 12. But by enabling some noncitizens "to obtain lawful-permanent-resident status without having to depart and reenter the country," *id.*, Congress avoided requiring them to be admitted a second time. The Government thus errs in asserting Congress expected identical legal treatment of individuals seeking permanent residence "whether the noncitizen is within or without the United States, or whether the noncitizen was or was not previously admitted," *id.* 13.

Rather, the different treatment of noncitizens within and outside the United States permeated immigration law at the time of the INA's enactment. For example, a noncitizen admitted into the country was constitutionally entitled to due process, while "an

alien on the threshold of initial entry" had no constitutional entitlement to processes beyond those Congress authorized. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

Finally, the Government suggests that Congress somehow implicitly ratified the BIA's assimilation fiction by subsequently amending the INA without expressly repudiating that administrative practice. BIO 14-15. "But the significance of subsequent congressional action or inaction necessarily varies with the circumstances." *United States v. Wells*, 519 U.S. 482, 495 (1997). Here, none of the four amendments to which the Government points, BIO 14 n.2, dealt with standards of proof. And Congress had no reason to consider the assimilation theory when it expanded the availability of adjustment of status to certain noncitizens "who had not previously been admitted to the United States," *id.* 13. Noncitizens who were never admitted are definitively "treated as applicants for admission." 8 U.S.C. § 1225(a)(1). The assimilation theory is therefore irrelevant as to them.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be vacated, and the case should be remanded in light of *Loper Bright*. Alternatively, the Court should grant certiorari and set the case for plenary review.

Respectfully submitted,

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