No. 05-___
[CORRECTED]

IN THE
Supreme Court of the United States

Jean Mouelle and Germaine Mouelle,
Petitioners,

v.

Alberto R. Gonzales.

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

PETITION FOR A WRIT OF CERTIORARI

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February 23, 2006

QUESTION PRESENTED

Given Congress's directive in 8 U.S.C. 1255 that paroled aliens may apply to adjust their status under specified conditions, may the Attorney General nonetheless categorically prohibit paroled aliens in removal proceedings from making such an application?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jean and Germaine Mouelle respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-13a) is published at 416 F.3d 923. The Eighth Circuit's order denying rehearing and rehearing en banc (Pet. App. 14a) is unpublished. The order of the Board of Immigration Appeals ("BIA") denying petitioners' motion to re-open their removal proceedings (Pet. App. 15a-16a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2005. The petition for rehearing and rehearing en banc was denied on October 26, 2005. On January 18, 2006, Justice Thomas extended the time to file this petition to and including February 23, 2006. App. 05A644. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Section 245 of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1255, provides, in relevant part:

> (a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 1154(a)(1) of this title or [sic] may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is

> eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 C.F.R. 1245.1(c) provides, in relevant part:

> The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act [8 U.S.C. 1255]:
>
> * * *
>
> (8) Any arriving alien who is in removal proceedings pursuant to section 235(b)(1) or section 240 of the Act * * *.

STATEMENT

In 8 U.S.C. 1255, Congress expressly provided that "paroled" aliens – that is, aliens who have been given temporary leave to enter the United States – may apply to adjust their status and become legal residents if they meet specified criteria. Notwithstanding this specific statutory directive, in 1997 the Attorney General issued 8 C.F.R. 1245.1(c)(8), which categorically prohibits paroled aliens from even applying to adjust their status if they are in removal proceedings at the time of the application.[1] The

[1] As part of the Homeland Security Act of 2002, the operations of the Immigration and Naturalization Service ("INS") were transferred to the Department of Homeland Security ("DHS"), and the regulations were duplicated and renumbered. See Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.* As the court of appeals explained (Pet. App. 5a n.6), there are now, as a result, two functionally identical provisions: 8 C.F.R. 1245.1(c)(8) and 8 C.F.R. 245.1(c)(8). Section 245.1(c)(8) applies to the United States Citizenship and Immigration Services of the DHS, while Section 1245.1(c)(8) applies identical requirements to the immigration courts and the Board of Immigration Appeals ("BIA") of the Department of Justice. Accordingly, for ease of reference,

Eighth Circuit in this case upheld the regulation as valid. In so holding, the court recognized that its decision conflicted with the precedent of the First Circuit, which struck down the regulation as an invalid construction of Section 1255; two other circuits have subsequently joined the First Circuit in holding the regulation invalid.

1. Section 1255 comprehensively addresses the categories of aliens eligible, and ineligible, to apply for adjustment of status – *viz.*, the aliens able to apply for permanent resident status without having to leave the country. For example, the statute expressly excludes from eligibility alien crewmen, aliens continuing or accepting unauthorized employment, aliens admitted in transit without a visa, 8 U.S.C. 1255(c), and aliens who were married in the United States while in judicial proceedings, *id.* § 1255(e). Congress added further precision to this statutory scheme by creating exceptions to the exclusions – that is, restoring the eligibility of certain aliens who would otherwise be ineligible to apply for adjustment of status. See, *e.g.*, *id.* § 1255(i) (aliens rendered ineligible by § 1255(c) may nonetheless be eligible to apply for adjustment of status if specified criteria are met). See also *id.* § 1255(e)(3) (aliens who would otherwise be ineligible under § 1255(e) may apply for adjustment of status provided they entered into marriage in good faith).

By contrast, and particularly relevant to this case, Congress in Section 1255 specifically included among those eligible to apply for adjustment of status an "alien who was * * * paroled into the United States" – that is, an alien who was given temporary leave to enter the United States, see 8 U.S.C. 1182(d)(5)(A). Section 1255 in this respect departs from prior law. Until 1960, an alien who wished to become a permanent resident, but whose non-immigrant visa had expired, was required to leave this country and obtain an

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petitioners follow the court of appeals' practice of citing 8 C.F.R. 1245.1(c)(8) to encompass both regulations.

immigrant visa from a U.S. consular post abroad. See *Succar* v. *Ashcroft*, 394 F.3d 8, 13 (CA1 2005). This requirement imposed an unnecessary hardship on aliens who were otherwise eligible for permanent resident status. In 1960, Congress provided relief, amending 8 U.S.C. 1255(a) to expressly include paroled aliens in the category of individuals eligible to adjust their status while remaining in the United States.

Since its extension of eligibility for adjustment of status to paroled aliens in 1960, Congress has amended the provisions governing the eligibility criteria for other classes of aliens – including two amendments to Section 1255(a) itself – but has kept the eligibility of paroled aliens intact. See *Succar*, 394 F.3d at 24 n.20 (citing Historical and Statutory Notes, 8 U.S.C. 1255).

While specifying precisely who is eligible and ineligible to apply for adjustment of status under Section 1255, Congress vested the Attorney General with discretion to decide whether to grant the adjustment of status. See 8 U.S.C. 1255(a). Congress also granted the Attorney General the authority to promulgate regulations to guide the exercise of that discretion. See *id.* § 1103(g)(2).

In 1997, pursuant to her authority under 8 U.S.C. 1103(g)(2), the Attorney General issued new regulations that she indicated were intended to implement the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). Although Congress in the IIRIRA had neither imposed any limitations on the eligibility of paroled aliens to apply for adjustment of status nor given "the Attorney General discretion to redefine eligibility," *Succar*, 394 F.3d at 35, the Attorney General nonetheless provided, in 8 C.F.R. 1245.1(c)(8), that "[a]ny arriving alien who is in removal proceedings" is categorically ineligible to apply for adjustment of status. The category of arriving aliens in removal proceedings prohibited from applying for adjustment

of status under the regulations includes "paroled aliens," see 8 C.F.R. 1001.1(q), because they are subject to statutorily mandated removal proceedings if not "clearly and beyond a doubt" entitled to admission, see 8 U.S.C. 1225(b)(2)(A).

2. Petitioner Jean Mouelle is a citizen of the Republic of Congo. Pet. App. 1a. In 1989, he entered the United States on a J-1 student exchange visa to pursue a Ph.D. in forestry. *Id.* 1a-2a. His wife, petitioner Germaine Mouelle (who is also a citizen of the Republic of Congo) entered the country as his dependent. *Id.* 2a.

After their visas expired, petitioners attempted to obtain permanent resident status. In 1994, Dr. Mouelle won the diversity lottery, a program that awards visas to immigrants from countries from which fewer than 50,000 immigrants have been awarded resident status in the preceding five years. Despite Dr. Mouelle's best efforts, however, the Congolese government failed to provide him with the necessary paperwork before his opportunity to obtain the diversity visa expired. Pet. App. 2a n.2.

On May 31, 1996, Dr. Mouelle filed an application for asylum and withholding of removal. Pet. App. 2a. Because members of his tribe were being targeted by the Congolese government, Dr. Mouelle averred that he and his family would be persecuted if they returned to Congo. See Petrs. Mot. for Stay of Removal 3.

In April 1998, the Immigration and Naturalization Service ("INS") began removal proceedings against petitioners. Pet. App. 2a. The charges (as subsequently amended) asserted that petitioners had failed to present a valid non-immigrant visa or border-crossing identification card when they had re-entered the United States from Canada after a one-day 1997 trip. See *id.* 3a.[2]

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[2] Petitioners had made the trip so that Dr. Mouelle could conduct field research and assist a class he was teaching. Pet. App. 2a. To ensure that they would be able to re-enter the country,

In response to the removal proceedings, petitioners renewed their request for asylum and withholding of removal, which the INS had not yet addressed. In August 1999, an immigration judge denied their claims and found that they were removable. In February 2003, the BIA affirmed the immigration judge's order. See Pet. App. 3a.

While the removal proceedings were pending, the INS approved a petition for a work visa that Germaine's employer had previously filed on her behalf, making the couple eligible to apply for permanent residence. Pet. App. 3a-4a. Petitioners accordingly requested that the BIA re-open removal proceedings and remand to the immigration judge to adjust their status as authorized under 8 U.S.C. 1255. *Ibid.*

The BIA denied petitioners' motion in July 2003. Relying on 8 C.F.R. 1245.1(c)(8), the BIA concluded that, because petitioners were arriving aliens in removal proceedings, they were categorically ineligible to apply to adjust their status. Pet. App. 4a.[3]

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petitioners applied for and received "advance parole," which may be issued to aliens in the United States who have "an unexpected need to travel abroad * * * and whose conditions of stay do not otherwise allow for readmission after temporary departure." U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 83 (2004), *available at* http://www.uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf. Like all paroled aliens, advance parolees are not considered "admitted," see 8 U.S.C. 1182(d)(5)(A) – that is, lawfully inspected aliens authorized to enter, 8 U.S.C. 1101(a)(13)(A). Thus, after the conditions of advance parole are met, advance parolees are subject to investigation regarding their eligibility for admission. See *id.* § 1182(d)(5)(A).

[3] In December 2003, the BIA also denied petitioners' motion for reconsideration of its July 2003 denial of the motion to re-open. See Pet. App. 17a-19a. That denial is not at issue here. See *id.* 4a n.4.

3. Petitioners timely appealed the BIA decision to the Eighth Circuit. Petitioners argued, *inter alia*, that 8 C.F.R. 1245.1(c)(8) is invalid because it categorically prohibits an entire class of aliens from applying for adjustment of status notwithstanding Congress's explicit directive in 8 U.S.C. 1255 that such aliens are eligible to apply in appropriate circumstances. That argument had been adopted by the First Circuit in *Succar*, *supra*. According to the First Circuit, the regulation was invalid under the first step of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because in Section 1255 "'Congress ha[d] directly spoken to the precise question at issue'"– *viz.*, whether paroled aliens, such as petitioners, could be eligible to apply for adjustment of status. *Succar*, 394 F.3d at 22 (quoting *Chevron*, 467 U.S. at 842).

The Eighth Circuit expressly rejected the holding of *Succar*. Pet. App. 8a. First, the Eighth Circuit explained that in its view, 8 C.F.R. 1245.1(c)(8) is not "properly evaluated under *Chevron*'s first step, given the discretionary nature of the relief available under 8 U.S.C. § 1255." *Ibid.* Thus, although the Eighth Circuit agreed with the First Circuit that "Congress surely did speak to eligibility in" Section 1255, it construed the statute to leave "the question whether adjustment-of-status relief should be granted to the Attorney General's discretion." *Ibid.* Such discretion, the court emphasized, may be exercised either "by rule or on a case-by-case basis." *Id.* 9a (citing *Bellis* v. *Davis*, 186 F.3d 1092, 1094-95 (CA8 1999)).

Second, the Eighth Circuit rejected the First Circuit's reasoning that Section 1255's "unequivocal[]" statement that "statutorily eligible aliens must be allowed to apply for status adjustment" precluded the Attorney General from nonetheless by regulation categorically excluding those very aliens from applying for adjustment of status. Pet. App. 10a (citing *Succar*, 394 F.3d at 28). The Eighth Circuit concluded instead that the Attorney General's determination to categorically prohibit applications from aliens in removal

proceedings was consistent with the discretion conferred by Section 1255. The court found no reason why the Attorney General should "be forced to exercise his discretion through rules that speak only to the ultimate relief rather than eligibility[.]" Pet. App. 10a.

The court next rejected the First Circuit's view that this Court in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), had held that "if Congress had spoken to eligibility, then an administrator with discretion to grant relief cannot impose eligibility requirements that are not found in the statute." Pet. App. 11a. The Eighth Circuit distinguished *Cardoza-Fonseca* on the ground that 8 C.F.R. 1245.1(c)(8) "does not purport to interpret statutory eligibility standards but rather rests on the discretionary authority that Congress explicitly gave the Attorney General to grant adjustment-of-status relief." *Ibid.* Further, unlike the regulation at issue in *Cardoza-Fonseca*, the court below found that Section 1255 does not manifest a "congressional intent * * * that limits the Attorney General's ability to determine by regulation which statutorily eligible aliens will get the relief that he has the power, but not the duty, to grant." *Id.* 11a-12a.

After concluding that the regulation does not contravene Congress's express intent, the court moved to the second prong of the *Chevron* analysis. The Eighth Circuit expressly rejected the First Circuit's determination that the regulation was unreasonable because it "effectively barred most paroled aliens" from adjusting status. Pet. App. 12a n.9 (citing *Succar*, 394 F.3d at 18). The court first rejected, "as an evidentiary matter," the First Circuit's conclusion that the regulation bars "most" paroled aliens from adjusting their status. *Id.* 12a-13a n.9. In any case, that fact would not render the regulation invalid in the Eighth Circuit's view, because it found nothing in Section 1255 demonstrating "a congressional intent to vest a few, most, or all paroled aliens with the right to adjust their status." *Id.* 13a n.9.

The court then upheld the regulation as "reasonable" given the Attorney General's goal of expediting the removal of aliens. Pet. App. 12a. The Eighth Circuit reasoned that because applications for adjustment of status "would necessarily lengthen removal proceedings * * * and expediency was one of the goals of the 1996 [IIRIRA]," 8 C.F.R. 1245.1(c)(8) is valid. Pet. App. 12a-13a.

Judge Bye dissented. He would have held 8 C.F.R. 1245.1(c)(8) invalid for the reasons outlined by the First Circuit in *Succar*. See Pet. App. 13a.

4. Soon after the Eighth Circuit's ruling, two other circuits – the Third and Ninth – expressly rejected the Eighth Circuit's holding in this case and agreed with the First Circuit that Section 1245.1(c)(8) is invalid. *Zheng* v. *Gonzales*, 422 F.3d 98 (CA3 2005); *Bona* v. *Gonzales*, 425 F.3d 663 (CA9 2005). Although petitioners' petition for rehearing and rehearing en banc specifically apprised the Eighth Circuit of the contrary decisions in *Zheng* and *Bona*, see Petrs. Pet. for Reh'g and Reh'g En Banc 1-2, 11-12, the court nonetheless denied rehearing and rehearing en banc, Pet. App. 14a.

In the Third and Ninth Circuit cases, the government requested that those courts hold further proceedings in abeyance and stay the mandate pending the outcome of this petition for certiorari. Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Zheng* v. *Gonzales*, 422 F.3d 98 (CA3 2005) (No. 03-3634); Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Bona* v. *Gonzales*, 425 F.3d 663 (CA9 2005) (Nos. 03-71596 & -72488). The government explained that the question presented was both "an issue that affects the eligibility of numerous aliens to apply for adjustment of status to lawful permanent resident" and the subject of a clear and recurring circuit conflict that this Court could resolve in this case. *Ibid.*

This petition followed.

REASONS FOR GRANTING THE WRIT

The courts of appeals are intractably divided over whether, and if so why, 8 C.F.R. 1245.1(c)(8) is a valid interpretation of 8 U.S.C. 1255. This conflict is untenable not only because it results in the disparate treatment of paroled aliens across the country, but also because of the extraordinary impact of the question presented on the lives of those affected by the regulation. This case presents the ideal vehicle to resolve the question presented, which was squarely addressed below and was the sole basis for the court of appeals' decision. Finally, certiorari is also warranted because the Eighth Circuit's decision is wrong on the merits.

I. The Courts of Appeals Are Intractably Divided Over the Question Presented.

8 C.F.R. 1245.1(c)(8) precludes *all* paroled aliens in removal proceedings from applying for adjustment of status. Whether the regulation is a valid interpretation of 8 U.S.C. 1255 is the subject of a widely acknowledged circuit conflict. Two circuits – the First and Ninth – hold that the regulation is invalid under the first step of the analysis of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because Congress considered and decided the question when it enacted the statute. The Third Circuit has also concluded that the regulation is invalid but disagrees with the reasoning of the First and Ninth Circuits, holding instead that the regulation survives the first step of *Chevron* but fails the second because it unreasonably interprets the statute. By contrast, only the Eighth Circuit has upheld 8 C.F.R. 1245.1(c)(8) as a valid interpretation of Section 1255.

In recent pleadings to the Third and Ninth Circuits, the government itself has recognized that the question presented "has created a significant circuit split,"[4] as have the courts of

[4] Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Bona* v. *Gonzales*, 425 F.3d 663 (CA9 2005) (Nos. 03-

appeals. See Pet. App. 8a; *Zheng* v. *Gonzales*, 422 F.3d 98, 111-12, 119-20 (CA3 2005); *Bona* v. *Gonzales*, 425 F.3d 663, 668 n.6 (CA9 2005). The BIA and commentators have similarly acknowledged the division in the circuits. *E.g.*, *In re Toussaint*, No. A96 001 425, 2006 WL 211046, at *1 n.1 (B.I.A. Jan. 10, 2006); *In re Cano-Porras*, No. A29 466 462, 2005 WL 3016055, at *2 (B.I.A. Aug. 15, 2005); Gerald Seipp, *Law of "Entry" and "Admission": Simple Words, Complex Concepts*, 05-11 IMMIGR. BRIEFINGS 1, 22 n.129 (Nov. 2005); *Ninth Circuit Joins First and Third Circuits in Invalidating Regulations Rendering "Arriving Aliens" in Removal Proceedings Ineligible for AOS*, 82 INTERPRETER RELEASES 1793, 1799-1800 (2005).

1. As the Eighth Circuit acknowledged, see Pet. App. 8a, its holding directly conflicts with the precedent of the First Circuit. In *Succar* v. *Ashcroft*, 394 F.3d 8 (2005), the First Circuit relied on the first prong of *Chevron* to hold that 8 C.F.R. 1245.1(c)(8) is invalid because it directly conflicts with 8 U.S.C. 1255. See 394 F.3d at 35-36.[5] Because Congress in Section 1255(a) "defined certain categories of aliens who were eligible to apply for adjustment of status * * * and refined the definition by specifically excluding certain aliens from eligibility" elsewhere in the same provision, the First Circuit reasoned that Congress had "unambiguously reserved to itself the determination" of which aliens may apply. 394 F.3d at 24. Section 1245.1(c)(8) fails the first step of *Chevron*, the court

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71596 & -72488); Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Zheng* v. *Gonzales*, 422 F.3d 98 (CA3 2005) (No. 03-3634).

[5] See also *Rivera* v. *Ashcroft*, 394 F.3d 37, 40 (CA1 2005) (remanding the BIA's denial of a parolee's motion to apply for adjustment of status, holding that the order could not be sustained because Section 1245.1(c)(8) provided "the sole basis" for the agency's action).

concluded, because it conflicts with Congress's explicit determination in Section 1255 that paroled aliens in removal proceedings who meet specified criteria be eligible to apply for adjustment of status. *Id.* at 24-26.

The conclusion that the regulation is an invalid implementation of Section 1255 is bolstered, the First Circuit found, by the broader statutory scheme, through which "Congress clearly stated that most parolees would be in removal proceedings." 394 F.3d at 26. While acknowledging that Congress had authorized the Attorney General to decide "whether to grant permanent resident status" in individual cases, the court held that Congress had *not* authorized the Attorney General to render ineligible the entire class of paroled aliens in removal proceedings without any consideration of individual circumstances. *Id.* at 28. Citing *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 443 (1987), the First Circuit explained that "[t]he mere fact that a statute gives the Attorney General discretion as to whether to grant relief after application does not by itself give the Attorney General the discretion to define eligibility for such relief." 394 F.3d at 10.

Finally, the First Circuit concluded, the legislative history confirms that deeming paroled aliens in removal proceedings ineligible to apply for adjustment of status would actually "re-institute the very problems which Congress attempted to eliminate" in Section 1255. 394 F.3d at 34. In particular, the court found that Congress intended to make the application process more efficient by abolishing the wasteful practice of requiring a paroled alien to leave the country in order to apply for adjustment of status, a practice that Section 1255 was meant to end, but which the regulation would once again reinstate for many paroled aliens. *Id.* at 33.

The Ninth Circuit has similarly acknowledged the circuit conflict and invalidated the regulation. In *Bona* v. *Gonzales*, 425 F.3d 663, 668 n.6 (CA9 2005), that court expressly "reject[ed]" the holding of the Eighth Circuit in this case and instead adopted the First Circuit's holding in *Succar*. *Id.* at

665. Like the First Circuit, the Ninth Circuit reasoned that the regulation fails the first step of the *Chevron* analysis because it contradicts Congress's explicit determination "of which aliens were eligible to apply for adjustment of status." *Id.* at 669-70. The court further emphasized that the contradiction was "absurd" given "the larger statutory scheme." *Ibid.*

The Third Circuit, in turn, also has expressly rejected the Eighth Circuit's ruling in this case, although it reached that result under the second step of the *Chevron* analysis. See *Zheng* v. *Gonzales*, 422 F.3d 98, 120 (CA3 2005). Unlike the First and Ninth Circuits, the Third Circuit concluded that Congress's statutory determination of eligibility and ineligibility for some categories of aliens "does not in itself conclusively prove that the Attorney General cannot declare other categories ineligible by regulation." *Id.* at 116. The Third Circuit noted that this Court held in *Lopez* v. *Davis*, 531 U.S. 230 (2001), that the Bureau of Prisons had statutory discretion to deny early release to a class of prisoners by regulation. Though it found the question "close," the Third Circuit accordingly held that Section 1245.1(c)(8) is not invalid under the first step of *Chevron* because Section 1255 is "ambiguous as to whether the Attorney General may regulate eligibility to apply for adjustment of status." 422 F.3d at 116.

The Third Circuit nonetheless held that 8 C.F.R. 1245.1(c)(8) is invalid under the second step of *Chevron*. The court reasoned that the regulation was an unreasonable interpretation of Section 1255 because it contravenes "Congress's clearly expressed intent * * * to allow most paroled aliens to apply for adjustment of status," by barring almost every parolee from applying for such adjustment. 422 F.3d at 119. See also *id.* at 117 ("It is clear from the statutory text that Congress intended for virtually all parolees to be in removal proceedings.").

2. Only this Court can resolve the circuit conflict. In concluding that 8 C.F.R. 1245.1(c)(8) is a valid interpretation of Section 1255, the Eighth Circuit expressly acknowledged the contrary holding of the First Circuit and proceeded to reject not only the result but also every aspect of that court's reasoning. See *supra* at 8-9. The Eighth Circuit subsequently refused to reconsider its position, denying rehearing en banc even after petitioners drew its attention to the subsequent contrary decisions of the Ninth and Third Circuits. See Petrs. Pet. for Reh'g and Reh'g En Banc 1-2.

The positions of the other circuits are similarly entrenched. Before reaching its conclusion in *Zheng*, the Third Circuit devoted nine pages of its opinion to rejecting the reasoning of both the First and Eighth Circuits. See 422 F.3d at 111-20. The Third Circuit subsequently denied the Attorney General's petition for rehearing. And although the First Circuit was the first court of appeals to address the question presented, it issued two separate opinions outlining its *Chevron*-based reasoning at length. See *supra* at 11-12. The Ninth Circuit, which explicitly adopted the First Circuit's rationale in *Bona*, *supra*, has since reaffirmed that holding in a unanimous panel decision without even hearing oral argument on the question. See *Ali* v. *Gonzales*, 154 Fed. Appx. 608 (Nov. 16, 2005) (unpublished).

3. The question presented would not benefit from further percolation. Although the courts of appeals have fully considered each other's approaches, they have then employed divergent reasoning to reach diametrically conflicting results. Indeed, this legal issue cannot develop further because the circuits have reached every possible analytical result under the two-step *Chevron* analysis: the First and Ninth Circuits hold that 8 C.F.R. 1245.1(c)(8) is invalid at step one; the Third Circuit holds that the regulation is invalid at step two; and the Eighth Circuit holds that the regulation is valid.

4. Nor is there any genuine prospect that the circuit split will be resolved by withdrawal or amendment of the

regulation. Three successive attorneys general have vigorously enforced the regulation through two presidential administrations. Attorney General Gonzales continued to defend Section 1245.1(c)(8) in the Third, Eighth, and Ninth Circuits even after the First Circuit struck the regulation down in January 2005.[6] In fact, the Department of Homeland Security ("DHS") has attempted to enforce the regulation in the Ninth Circuit even after that court found it invalid in *Bona*. See *Ali*, 154 Fed. Appx. at 608. Further, the BIA has consistently rejected challenges to Section 1245.1(c)(8) in circuits that have not held the regulation invalid. See, *e.g.*, *Toussaint*, 2006 WL 211046, at *1 (acknowledging the circuit split but remaining unpersuaded "that the First Circuit's decision in [*Succar*] warrants a different result"); *Cano-Porras*, 2005 WL 30016055, at *2 (acknowledging *Succar* but nonetheless holding paroled alien ineligible to seek adjustment of status).

5. This case provides the ideal vehicle for deciding whether 8 C.F.R. 1245.1(c)(8) is a valid interpretation of 8 U.S.C. 1255. The issue was squarely presented and preserved below and is outcome-determinative for petitioners, who may apply to adjust their status only if this Court decides that 8 C.F.R. 1245.1(c)(8) is invalid.[7]

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[6] Cf. *Plumaj* v. *Gonzales*, 141 Fed. Appx. 186 (CA4 Aug. 19, 2005) (per curiam) (upholding BIA denial of aliens' motion to reconsider its order denying aliens the opportunity to apply for adjustment of status because aliens were ineligible under Section 245.1(c)(8)).

[7] The court of appeals did not reach the separate question whether petitioners satisfy other statutory eligibility requirements. See Pet. App. 5a-6a; Petrs. C.A. Br. 16-20; Resp. C.A. Br. 17-24. That question remains open for decision on remand. Cf. *Neder* v. *United States*, 527 U.S. 1, 25 (1999).

II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented.

The conflict over the validity of 8 C.F.R. 1245.1(c)(8) merits this Court's attention in light of the question's undeniable importance. Whether the regulation is valid – and, thus, whether aliens such as petitioners are eligible to apply for adjustment of status – has widespread implications for a large group of individuals. The government agrees. Despite previously citing "internal statistics" suggesting that few paroled aliens are affected by the regulation, see Resp. Supp. Br. Post-Arg. 13 n.1, the government subsequently advised the courts of appeals that the question presented "affects the eligibility of *numerous* aliens."[8]

In 2003, the last year for which the relevant data is reported, 264,777 paroled aliens entered the United States. See U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 81 tbl.G (2004), *available at* http://www.uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf. As the Third and First Circuits have both recognized, "virtually all parolees will be in removal proceedings" – and thus subject to the regulation – at some point given the mandate of Section 1225(b)(2)(A). *Zheng*, 422 F.3d at 117; *Succar*, 394 F.3d at 27 ("Congress purposefully classified paroled individuals as 'inadmissible,' and it also determined that they should generally be placed in removal proceedings.").

The regulation not only affects a large group of aliens, but it also has significant ramifications for each of the affected individuals. Put simply, what is at stake is the opportunity to stay in a country in which one has made a

[8] Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Zheng* v. *Gonzales*, 422 F.3d 98 (CA3 2005) (No. 03-3634) (emphasis added); Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Bona* v. *Gonzales*, 425 F.3d 663 (CA9 2005) (Nos. 03-71596 & -72488) (same).

home. Many of those affected by this regulation have established deep roots in the United States and have become active members of their communities. "Until the final order of removal, which in some circumstances * * * can take years, paroled aliens in removal proceedings * * * live, work and form relationships within the United States." *Succar*, 394 F.3d at 16.

Indeed, petitioners themselves epitomize the profound impact of this regulation. During the seventeen years they have been in the United States, the Mouelles have integrated themselves into their community. They have become valued employees,[9] are active members of their church, and own a home. Petitioners are raising two children, ages twelve and fourteen, who were born in the United States, are U.S. citizens, and have never been to Congo. See Petrs. Mot. to Stay the Mandate 3.

Should petitioners be forced to return to Congo – a country still recovering from civil conflicts that began in 1997 and continued through December 2003 – their lives would change drastically. Congo, which has a seventy-percent poverty rate, remains politically unstable as "[u]ncontrolled and unidentified armed elements remain[] active in" parts of the country. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: REPUBLIC OF CONGO (2004), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41598.htm. The State Department has found that "the Government's human rights record remain[s] poor," ethnic

[9] See Letter from Trancey B. Williams, Minn. Dep't of Nat'l Resources (Apr. 17, 2001) (administrator indicating that he would "gladly give up ten other employees just to hold on to [Dr. Mouelle]"), attached as Ex. to Petrs. Response to DHS Opp. to Mot. to Reopen; Memo. from John Boughton, Mgr. of Int'l Nurse Recruitment, LLC to Bureau of Citizenship and Immigration Services (Mar. 19, 2003) (describing Germaine Mouelle as a "valued employee"), attached as Ex. to Petrs. Mot. to Reopen to Apply for Adjustment of Status.

discrimination "remain[s] a problem," and security forces beyond the government's control commit serious human rights abuses that include rape and arbitrary arrest and detention. *Ibid.*

Given the importance of the question presented, it is not surprising that the regulation has been the subject of repeated recent challenges. Four circuits have decided the question. The regulation has also been challenged in the Fifth and Eleventh Circuits and at least one district court (in the Second Circuit), but those courts did not reach the question.[10] Additional cases challenging the regulation are currently pending in the Second, Fifth, Seventh, and Eleventh Circuits,[11] and there is no reason to believe that the pace of litigation will slow.

Particularly given that the Constitution contemplates "an uniform Rule of Naturalization," U.S. CONST. art. I, § 8, the notion that an alien's eligibility to apply for adjustment of status depends on the fortuity of the circuit in which he resides is entirely untenable. The very point of having federal

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[10] See *Diarra* v. *Gonzales*, 137 Fed. Appx. 627, 631-32 (CA5 2005); *Shah* v. *United States Attorney Gen.*, 151 Fed. Appx. 748, 751 (CA11 2005) (per curiam); *Kadriovski* v. *Gantner*, No. 04 Civ. M3168, 2004 WL 2884261, at **4-5 (S.D.N.Y. Dec. 13, 2004). Although the Fourth Circuit has not addressed the regulation's validity, that court has applied it in at least one case. See *Plumaj* v. *Gonzales*, 141 Fed. Appx. 186 (CA4 2005) (per curiam).

[11] See *Li* v. *Gonzales*, Nos. 03-41059 & 04-0902 (CA2); *Sanchez-Montoya* v. *Gonzales*, No. 04-1071 (CA2); *Singh* v. *Gonzales*, No. 04-0136 (CA2); *Salman* v. *Gonzales*, No. 04-60895 (CA5); *Dhurota* v. *Gonzales*, No. 05-2083 (CA7); *Scheerer* v. *Gonzales*, No. 04-16231-CC (CA11); *Sampedro-Dominguez* v. *Gonzales*, No. 05-13390-AA (CA11); *Garcia* v. *Gonzales*, No. 05-12059-DD (CA11); see also Mary A. Kenney, *American Immigration Law Foundation Practice Advisory: Adjustment of Status for "Arriving Aliens" in Removal Proceedings: Strategy Decisions to Challenge 8 C.F.R 245.1(c)(8)* 12-13 (2005), *available at* http://www.ailf.org.

rules rather than local control over immigration is undermined by an intractable split among the circuits.

III. The Text and Structure of 8 U.S.C. 1255 Establish Congress's Intent to Extend to Petitioners the Ability to Apply for Adjustment of Status.

Certiorari is also warranted because the decision below is wrong on the merits. The detailed eligibility scheme established by 8 U.S.C. 1255 manifests Congress's intent to allow certain classes of aliens, including many paroled aliens, to apply for adjustment of status. By categorically precluding "[a]ny arriving alien who is in removal proceedings," 8 C.F.R. 1245.1(c)(8), from seeking an adjustment of status, the regulation excludes individuals who fit within the category of persons Congress specifically determined should be entitled to seek adjustment. The regulation thereby conflicts with the plain terms of Section 1255 and upsets the carefully calibrated eligibility scheme established by the statute.

1. When analyzing the validity of an agency regulation, the first step is to determine – based on "traditional tools of statutory construction" – "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9, 842 (1984). If so, the courts and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. Moreover, as in all immigration cases, any residual ambiguity should be resolved in favor of petitioners and result in invalidation of the regulation, in accord with the "longstanding principle of construing any lingering ambiguities in [removal] statutes in favor of the alien." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

In Section 1255, Congress clearly anticipated that aliens such as petitioners – *i.e.*, paroled aliens in removal proceedings – would be eligible to apply to adjust their status. First, in Section 1255(a), Congress extended eligibility to apply to adjust status to two broad classes of aliens – (1) those inspected and admitted; and (2) paroled aliens, who are

considered "applicant[s] for admission," see 8 C.F.R. 1001.1(q). Second, Congress established a detailed statutory scheme that generally results in paroled aliens being placed in removal proceedings: Section 1225(b)(2)(A) expressly provides that an "applicant for admission * * * *shall* be detained for a [removal] proceeding" unless he is clearly entitled to be admitted. 8 U.S.C. 1225(b)(2)(A) (emphasis added). See also *Zheng* v. *Gonzales*, 422 F.3d 98, 117 (CA3 2005) (statute explicitly envisions that the overwhelming majority of paroled aliens "will *necessarily* be in removal proceedings").[12]

Section 1245.1(c)(8), by contrast, prohibits all "arriving alien[s]" in removal proceedings from applying to adjust their status. Because all paroled aliens are deemed arriving aliens[13] and, as noted above, will generally be in removal proceedings, the regulation directly conflicts with Section 1255 by categorically barring adjustment of status applications from one of the two broad classes of aliens – *viz.*, paroled aliens – that Congress expressly specified are eligible to apply.

2. Having established broad eligibility for two classes of aliens – those who are inspected and admitted and those who are paroled – Congress in Section 1255 further refined eligibility for adjustment of status. As the First Circuit noted, Congress "made numerous and explicit policy choices about who is eligible for adjustment of status relief, who is ineligible, and of those ineligible, who is nonetheless eligible

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[12] As the Third Circuit has stressed, "[p]arole is a form of relief from immigration *detention*; it is not a form of relief from *removal proceedings*." *Zheng*, 422 F.3d at 117.

[13] Pursuant to 8 C.F.R. 1001.1(q), an arriving alien is, *inter alia*, "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry." Paroled aliens are considered "applicant[s] for admission." *Ibid.*

with certain application restrictions." *Succar* v. *Ashcroft*, 394 F.3d 8, 29 (2005).

This reticulated scheme demonstrates that Congress has specified which aliens who might otherwise fall within Section 1255(a)'s broad eligibility definition are nonetheless ineligible to apply for adjustment of status. Significantly, none of Congress's refinements to the statute categorically provide "that an alien is ineligible to adjust status if he is in removal proceedings." *Succar*, 394 F.3d at 25.[14]

Section 1255(c), for instance, restricts the eligibility of alien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without a visa. Section 1255(i) adds further precision to the regulatory scheme, extending adjustment of status eligibility to aliens who obtain work-related visas even if they would otherwise be ineligible pursuant to Section 1255(c).

That Congress took great care in defining eligibility to adjust status is also reflected in 8 U.S.C. 1255(e), the only provision that deems relevant an alien's presence in removal proceedings. Section 1255(e) carves out a small class of otherwise eligible aliens – those applying for adjustment of status based upon a marriage entered into while in removal proceedings – as ineligible to adjust their status. Reading Section 1255 to grant the Attorney General power to categorically prohibit all paroled aliens in removal proceedings from applying to adjust their status renders the eligibility scheme carefully constructed by Congress – and in particular Section 1255(e) – surplusage. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause,

[14] The absence of any indication in the statute that presence in removal proceedings should be relevant to eligibility is particularly significant because Congress has amended Section 1255 more than a dozen times since 1960, but has never suggested that aliens in removal proceedings are ineligible to adjust their status.

sentence, or word shall be superfluous, void, or insignificant." (internal quotes omitted)).

The degree of specificity and complexity exhibited on the face of this statute demonstrates that "Congress unambiguously reserved to itself the determination of who is eligible to apply for adjustment of status relief." *Succar*, 394 F.3d at 24. This conclusion is bolstered, not weakened, by *Lopez* v. *Davis*, 531 U.S. 230 (2001).[15] Contra *Zheng*, 422 F.3d at 113-14. In *Lopez*, this Court held that the imposition by regulation of eligibility requirements for an early-release program beyond those established by statute was a valid exercise of agency discretion. The Court relied on the fact that the statute in question, beyond granting discretion to reduce sentences of nonviolent offenders, did not identify "any further circumstance in which the Bureau either must grant the reduction, or is forbidden to do so." 531 U.S. at 242. By contrast, 8 U.S.C. 1255, which is replete with such references – varying eligibility to apply for adjustment by reference to, *inter alia*, work status, marital status, and residency status – reflects Congress's intent to constrain the Attorney General's discretion to establish categorical eligibility requirements.

3. The regulation also frustrates Congress's purposes in enacting 8 U.S.C. 1255. Congress sought to make application

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[15] *Lopez* is relevant to the first step of the *Chevron* inquiry, when Congress has answered the precise question at issue in the case. In *Zheng*, the Third Circuit asserted that *Lopez* puts the agency's "discretionary authority squarely within the second step of the *Chevron* framework." 422 F.3d at 113. This is only because "where Congress has enacted a law that does not answer 'the precise question at issue,' all we must decide is whether the [agency] * * * has filled the statutory gap 'in a way that is reasonable in light of the legislature's revealed design.'" *Id.* at 113-14 (quoting *Lopez*, 531 U.S. at 242). When, as here, Congress has answered the precise question at issue, the analysis properly takes place within the framework of the first step of *Chevron*.

for adjustment of status less burdensome on the applicant and on the government by eliminating needless departures and re-entries:

> Congress, in amending the adjustment of status statute, wished to avoid a situation that, "not only necessitate[s] the reinstatement of the fallacious procedure known as 'preexamination' and consisting of round trips to Canada for the sole purpose of obtaining an immigrant visa, but will certainly greatly increase the number of private bills."

Succar, 394 F.3d at 33 (quoting S. REP. NO. 86-1651 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3124, 3137). In making this determination, "Congress clearly evaluated the administrative inconvenience to the INS of the expanded category of those eligible to apply for adjustment of status and nonetheless altered the prior procedure." *Id.* at 34.

The Attorney General's regulation returns a significant class of intended beneficiaries – paroled aliens – to precisely the situation the 1960 amendments were intended to avoid. This case is a perfect example. Under the agency's rule, not only must petitioners return to Congo and face a potentially threatening political climate before applying for adjustment of status, but they will then remain inadmissible to the United States for ten years, see 8 U.S.C. 1182(a)(9)(B)(i)(II), after which they may only apply from outside the United States. This is exactly what Congress intended to prevent with Section 1255.

4. To be sure, Section 1255 provides that the Attorney General retains discretion to decide whether eligible applicants will ultimately receive a status adjustment. See, *e.g.*, 8 U.S.C. 1255(a) ("status * * * may be adjusted by the Attorney General"); *id.* § 1255(i)(2) ("the Attorney General may adjust the status"). The statute's provisions must, however, be read as a whole. See *Pollard* v. *E. I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001). The Attorney

General's discretion cannot be read so broadly as to undo Congress's determination to permit paroled individuals to seek adjustment of status relief and its more general determination to specify the classes of persons who are, and are not, eligible to apply.

Notwithstanding the discretion retained by the Attorney General under Section 1255, the categorical bar created by Section 1245.1(c)(8) results in individual paroled aliens who would otherwise receive adjustment of status being denied the ability even to apply. In considering whether to exercise his discretion with respect to a particular application to adjust status, the Attorney General conducts an individualized determination, looking at such factors as family ties, hardship, and length of residence in the United States. See *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).[16]

He weighs those favorable factors against any adverse factors – such as a preconceived intent to remain in the United States or deliberate misstatements to a U.S. consul. See CHARLES GORDON ET AL., 4-51 IMMIGRATION LAW AND PROCEDURE § 51.05 (2005). "In the absence of adverse factors, adjustment will ordinarily be granted * * *." *Elkins*, 435 U.S. at 667 (citing *Arai*, 13 I. & N. Dec. at 496) (emphasis omitted). And even if adverse factors are present, favorable factors – in particular, an applicant's status as the immediate relative of a U.S. citizen or a lawful permanent resident, see *Matter of Ibrahim*, 18 I. & N. Dec. 55, 57-58 (B.I.A. 1981) – generally "will be considered as countervailing factors meriting favorable exercise of administrative discretion." *Elkins*, 435 U.S. at 667.

Thus, although the Attorney General would otherwise be very likely to exercise his discretion in favor of aliens – such

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[16] In *Elkins*, this Court relied on the BIA's then-recent decision in *Matter of Arai*, 13 I. & N. Dec. 494, 496 (B.I.A. 1970), noting that "[a]lthough adjustment of status is a matter of grace, not right," *Arai* was "binding" law on how that discretion was to be exercised. 435 U.S. at 667.

as petitioners – with close ties to the United States and the prospect of significant hardship if they were required to return to Congo, those aliens are unable even to apply for adjustment of status merely by virtue of being paroled aliens in removal proceedings. Given that significant numbers of paroled aliens *would* receive adjustments of status if they were accorded the individualized determination contemplated by Congress, the Attorney General has provided no reason why he should be permitted to categorically exclude *all* paroled aliens in removal proceedings from consideration.

5. The text, structure, and history of 8 U.S.C. 1255 clearly communicate Congress's intent regarding the precise issue at question in this case – *i.e.*, whether the Attorney General has discretion to declare all arriving aliens in removal proceedings ineligible to apply for adjustment of status. The answer to this question being no, the Court need not reach step two of the *Chevron* framework to determine whether the regulation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

But even if this Court were to find that 8 U.S.C. 1255 "is ambiguous as to whether the Attorney General may regulate eligibility to apply for adjustment of status," *Zheng*, 422 F.3d at 116, the regulation would still be invalid because it is manifestly contrary to the statute and not "'reasonable in light of the legislature's revealed design.'" *Ibid.* (quoting *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)). The strongest indication of the regulation's unreasonableness is the effect it would have on paroled aliens. As detailed above, "[w]e are thus faced with a statute providing that, in general, aliens paroled into the United States may apply to adjust their status, and a regulation providing that, in general, they may not." *Zheng*, 422 F.3d at 119. While administrative agencies generally receive broad deference in interpreting statutes, courts "have an even higher obligation to respect the clearly expressed will of Congress." *Id.* at 120. Here, when the regulation "essentially reverses the eligibility structure set out by

Congress," *ibid.*, in a manner that would make "a nullity of the statute," *INS* v. *Yang*, 519 U.S. 26, 31 (1996), that obligation mandates setting aside 8 C.F.R. 1245.1(c)(8) and allowing petitioners to apply for adjustment of status.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 23, 2006