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In *Blanche v. Lau*, the Supreme Court Rewards the Solicitor General's Bait-and-Switch at Green Card Holders' Expense

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In a highly disingenuous opinion, the U.S. Supreme Court in [Blanche v. Lau](#) cast a shadow over the lives of 12.8 million lawful permanent residents. The [question in Lau](#) was whether border officers need evidence to place a returning lawful permanent resident on parole after travel. [Parole](#) is an immigration term for treating the person as though they were still at the border for legal purposes even after they physically enter, and placement on parole has immediate consequences for permanent residents since they lose possession of their green cards. (I participated in an [amicus brief](#) on behalf of law professors submitted in the case that describes some of these consequences.)

In *Lau*, the respondent is Muk Choi Lau, a 69-year-old man who became a lawful permanent resident in 2007. Slightly less than five years later, he traveled outside the United States. When he returned, the border officer noted that Mr. Lau had a pending criminal case in New Jersey involving counterfeiting allegations. The border officer erroneously concluded that Mr. Lau was subject to removal on grounds that apply to people who have not yet been admitted into the country, took away his physical green card, and placed him in parole status. In fact, [there was no evidence](#) at that stage that Mr. Lau was subject to removal. Later, Mr. Lau was convicted of the offense and was placed in removal proceedings. The government argued that it could use the later conviction to justify its prior decision to place Mr. Lau on parole at the border. The Second Circuit disagreed and found that Mr. Lau should not have been placed on parole and was not subject to the grounds of removal that apply to new applicants.

The Solicitor General sought certiorari and [argued](#) that no court could scrutinize the parole decision because decisions at the border are unreviewable. The Solicitor General argued that all that matters is the evidence that the government gathers later if and when it brings proceedings in front of an immigration judge.

The Court ignored the government's argument on unreviewability of the border officer's decision and instead focused on the question of whether the border officer should meet a clear and convincing evidence test for assessing whether a lawful permanent resident can return without facing parole or detention, an argument the government had not litigated below and on which it had not sought certiorari. In his opinion for the 6-3 majority, Justice Clarence Thomas criticized the clear and convincing evidence test that the Second Circuit applied below and said that he would not reach the lower standard the government presented in its reply brief (opinion fn 2), and then simply announced that there was nothing left to consider about whether it was correct for the border officer to parole Mr. Lau. As Justice Ketanji Brown Jackson noted in the dissent, which Justices Sonia Sotomayor and Elena Kagan joined, this is a remarkable sleight of hand. Ordinarily, if the Court rejects a test applied below, and reserves questions about the right test, it will remand for the lower court to decide the question (Jackson at 12). But the 6-3 majority did not do that. It instead remanded solely on an unrelated question left open in the case.

Later cases might flesh out the proper burden for border officers and whether there is a way to challenge improper placement on parole. Justice Samuel Alito had suggested at argument that the Solicitor General was "swinging for the fences" by seeking more than a decision that applied narrowly to a person like Mr. Lau who had been arrested prior to travel ([oral argument](#) at 20). The Solicitor General had assured the Court that there is no reason to suppose that border officials would use their authority in bad faith (oral argument at 21). These days, that is [cold comfort](#) for lawful permanent residents.

The *Lau* decision carries an ominous message for immigrants about the laws and norms that will apply to their cases. Here the Court granted certiorari on a promise that the case was about a different question, and then ignored the fact that the Solicitor General was making arguments that it had forfeited below and in the certiorari papers. The Court's lack of concern about process is particularly telling given that the very same day the Court reaffirmed in another decision that it would not consider "newfound ... arguments" ([Pung v. Isabella County](#) at 11). The Solicitor General never showed how its arguments fit the statute's text in [8 U.S.C. § 1101\(a\)\(13\)](#) about how a permanent resident "shall not" be treated as a new applicant for admission unless certain conditions apply. Indeed, as Justice Jackson noted (p. 4-5 of dissent), the Court did not address how the "shall not" language implies a sequence in which there must be adequate evidence at the border that an exception applies. For the Solicitor General, the lesson is clear: it can get cases before the Court on one basis, argue something else, make policy arguments, and in the end score a win.

Lawful permanent residents are left to wonder when it is safe to travel for business, family

reasons, or pleasure without jeopardizing their permanent residency status and their day-to-day lives. As Justice Jackson warned, the threat extends far beyond lawful permanent residents who have a pending criminal arrest.

FEATURED IMAGE: Exterior view of the U.S. Supreme Court Building on June 22, 2026 in Washington, DC. The U.S. Supreme Court Justices are expected to release opinions throughout the week. (Photo by Anna Moneymaker/Getty Images)