APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10636
Agency No. A072-565-851

PANKAJKUMAR S. PATEL, JYOTSNABEN P. PATEL, NISHANTKUMAR PATEL,

Petitioners,

versus

UNITED STATES ATTORNEY GENERAL,

Respondent.

(August 19, 2020)

Petition for Review of a Decision of the Board of Immigration Appeals

Before WILLIAM PRYOR, Chief Judge, WILSON, MARTIN, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, TJOFLAT, ED CARNES, and MARCUS, Circuit Judges.*

* Judges Gerald Bard Tjoflat, Stanley Marcus, and Ed Carnes were members of the en banc Court that heard oral argument in this case. Judges Tjoflat and Marcus took senior status on November 19, 2019 and December 6, 2019, respectively, and both have elected to participate in this decision pursuant to 28 U.S.C. § 46(c)(1). Judge Ed Carnes took senior status on June 30, 2020 and has elected to participate in this decision pursuant to 28 U.S.C.

TJOFLAT, Circuit Judge, delivered the opinion of the Court, in which WILLIAM PRYOR, Chief Judge, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, ED CARNES, and MARCUS, Circuit Judges, joined.

TJOFLAT, Circuit Judge:

Pankajkumar Patel seeks review of a final order of removal from the Board of Immigration Appeals ("BIA"). Patel sought discretionary relief under 8 U.S.C. § 1255(i), which permits an alien who entered without inspection to obtain relief from removal if, among other things, the alien is the beneficiary of a labor certification. The BIA determined that Patel was ineligible for such relief because he falsely represented himself as a citizen for a benefit when he applied for a Georgia driver's license. *See* 8 U.S.C. § 1182(a)(6)(C)(ii)(I). Patel now petitions, asking us to resolve two questions. First, he argues that, as a factual matter, he did not falsely represent himself as a citizen because he merely checked the wrong box on the license application form. Second, Patel argues that his misrepresentation was not material because the benefit, a Georgia driver's license, is available to non-citizens.

This case requires us to determine the scope of a jurisdiction-stripping provision in the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(B). That provision provides that "no court shall have jurisdiction to review" "any judgment regarding the granting of relief" for certain enumerated categories of discretionary relief. 8 U.S.C. § 1252(a)(2)(B)(i). Section 1255, the relief for which Patel applied, is one of the enumerated categories in § 1252(a)(2)(B)(i).

---

§ 46(c)(2). Judge Andrew L. Brasher joined the Court on June 30, 2020 and did not participate in this en banc proceeding.

In our first published opinion to interpret § 1252(a)(2)(B)(i), we drew a distinction between "appellate review of discretionary decisions" and "review of non-discretionary legal decisions that pertain to statutory eligibility for discretionary relief." *Gonzalez-Oropeza v. U.S. Attorney General*, 321 F.3d 1331, 1332 (11th Cir. 2003). Since then, we have held in numerous cases that we lack jurisdiction to review discretionary determinations underlying discretionary relief, while we retain jurisdiction to review non-discretionary decisions underlying that relief. The problem: that interpretation is based on the predecessor version of § 1252(a)(2)(B) and is unmoored from the current statutory language. Today, we overrule such precedent, holding that we are precluded from reviewing "any judgment regarding the granting of relief under [8 U.S.C §§] 1182(h), 1182(i), 1229b, 1229c, or 1255" except to the extent that such review involves constitutional claims or questions of law. *See* 8 U.S.C. §§ 1252(a)(2)(B)(i) & (D).

Patel's petition presents both a factual challenge and a question of law. We hold that § 1252(a)(2)(B)(i) precludes our review of the factual challenge. We retain jurisdiction to review the question of law related to whether a Georgia driver's license is a material benefit.

I.

Patel is a citizen of India who entered the United States without inspection. In 2012, the Department of Homeland Security issued a notice to appear to Patel charging him as removable for being present in the United States without inspection. In a subsequent removal proceeding before an immigration judge, Patel conceded that he was removable, but he sought discretionary relief from removal by applying for adjustment

of status under 8 U.S.C. § 1255(i). Section 1255 permits an alien who entered without inspection to obtain relief from removal if, among other things, the alien is the beneficiary of a labor certification. *See* § 1255(i)(1)(B)(ii).[1]

---

[1] 8 U.S.C. § 1255(i)(1) provides:

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—

(A) who—

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of—

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

Patel qualified to apply for relief pursuant to § 1255(i) as he had an approved I-140 employment authorization document.[2]

The Attorney General may adjust an alien's status to that of a lawful permanent resident if the alien meets certain requirements. *See* § 1255(i); *see also* 8 C.F.R. § 1245.10(b) (listing the eligibility requirements for an alien who entered without inspection and is seeking adjustment of status based on a labor certification). The parties agree that Patel meets all the statutory criteria for adjustment of status except one: the applicant must show "clearly and beyond doubt" that he is not inadmissible. *See* 8 U.S.C. § 1229a(c)(2) (in a removal proceeding, an alien applying for admission "has the burden of establishing ... that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible").

Patel's admissibility is in doubt because he falsely represented that he was a U.S. citizen when he applied for a Georgia driver's license in 2008. When applying for the license, Patel checked a box indicating that he is a U.S. citizen. This incident arguably renders Patel inadmissible pursuant to 8 U.S.C. § 1182(a)(6)(C)(ii)(I), which says:

> Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit

---

[2] Patel's wife, Jyotsnaben Patel, and son, Nishantkumar Patel, are also parties to this appeal. They too are subject to removal for entering the country without inspection. They are seeking adjustment of status as derivative beneficiaries of Patel's labor certification. *See* § 1255(i)(1)(B). As Patel is the lead respondent, and the outcome of all three petitions for relief depends on his case, we focus solely on Patel for the convenience of the reader.

> under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.

The BIA has interpreted this section to require three elements: (1) a false representation of citizenship, (2) that is material to a purpose or benefit under the law, (3) with the subjective intent of obtaining the purpose or benefit. *Matter of Richmond*, 26 I. & N. Dec. 779, 786-87 (B.I.A. 2016).

There was no dispute that Patel made a false representation of citizenship. Nor was there any dispute that a driver's license is a benefit under state law. Patel challenged the applicability of the statute on two grounds: (1) he lacked the requisite subjective intent to falsely represent himself as a citizen, and (2) the false representation was not material.

At the removal hearing, Patel argued that he did not have the requisite subjective intent because he simply made a mistake. To prove that it was a mistake, Patel claimed that he provided his alien registration number and his employment authorization card to the Georgia Department of Motor Vehicles with his driver's license application. Patel argued that it would have made no sense to document his non-citizen status if his goal were to pose as a citizen. Patel also argued that a false representation of citizenship was not material to obtaining a driver's license because an alien is eligible to receive a driver's license from Georgia. As proof, Patel observed that he had previously received a license from Georgia.

The Immigration Judge rejected Patel's arguments. The Immigration Judge determined that Patel was not credible. He was evasive when testifying and would not explain to the Court exactly how he had

made a mistake. Furthermore, the Immigration Judge examined the application and determined that Patel did not write his alien registration number on the application. The application asks about citizenship and directs the applicant to provide his alien registration number if he is not a citizen. Patel marked that he was a citizen and did not write down his alien registration number. The application also does not reflect that Patel provided his employment authorization card. In the section on the form where the Georgia official is to list the documents accepted, the only document mentioned is Patel's prior Georgia driver's license. In short, the evidence contradicted Patel's testimony, which the Immigration Judge already suspected was not candid, so the Immigration Judge did not believe Patel's claim that he made a mistake. The Immigration Judge found that Patel willfully and purposefully indicated that he was a U.S. citizen.

The Immigration Judge also held that Patel failed to prove that his false representation was immaterial because he failed to meet his burden of proving that he was otherwise eligible for a driver's license. The fact that Patel had previously obtained a license in Georgia is inconclusive because Patel might have misrepresented his citizenship on his past application too. Alternatively, even if Patel obtained his prior license without claiming citizenship, the rules governing who qualifies for a license in Georgia could have changed in the interim. Patel simply did not provide enough evidence to show that he was otherwise eligible for the license.[3]

---

[3] To prove his theory, Patel asked the Immigration Judge to take judicial notice of Georgia law. The Immigration Judge refused. Federal courts, however, must take judicial notice of state law. *See Lamar v. Micou*, 114 U.S. 218, 223, 5 S. Ct. 857, 859 (1885)

Because Patel failed to show that he was not inadmissible, the Immigration Judge denied his application for adjustment of status and ordered the Patels removed.

The BIA affirmed. It found no clear error in the factual finding that Patel was not credible and made the false representation with the subjective intent to obtain a license. The BIA also agreed that Patel did not produce enough evidence to prove that he was otherwise eligible for a license—i.e., to prove that the false representation was immaterial.

One BIA member dissented. She observed that Georgia law extended driver's licenses to those with lawful status. *See* Ga. Comp. R. & Regs. 375-3-1.02(6) ("Each customer must provide documentation of his or her citizenship *or lawful status* in the United States." (emphasis added)). And an alien with "a pending application for lawful permanent residence" has lawful status for the purpose of a driver's license application. 6 C.F.R. § 37.3. Since Patel had a pending application for lawful permanent residence when he applied for the Georgia license, he did not need citizenship to obtain the license. Thus, the dissenting BIA member reasoned, the false representation was immaterial.

Patel now seeks review of the BIA's decision. A panel of this Court held that under § 1252(a)(2)(B)(i) it lacked jurisdiction to review whether Patel, as a factual matter, had the requisite subjective intent to misrepresent his citizenship status. *Patel v. U.S. Att'y Gen.*, 917

("The law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.").

F.3d 1319, 1322 (11th Cir.), *reh'g en banc granted, opinion vacated*, 786 F. App'x 1005 (11th Cir. 2019). The panel also determined that it had jurisdiction to review Patel's legal challenge and determined that the provision on which the BIA found Patel inadmissible, § 1182(a)(6)(C)(ii)(I), does not contain a materiality element. *Id.* We granted rehearing en banc to resolve the first of these issues—whether this Court has jurisdiction to review the factual findings underlying the BIA's determination that Patel had the subjective intent to misrepresent his citizenship status. In doing so, we must interpret 8 U.S.C. § 1252(a)(2)(B)(i).

II.

To understand the limitations of 8 U.S.C. § 1252(a)(2)(B)(i), one must understand the underlying immigration scheme. This section first provides a quick primer on the background of relief from removal and then outlines the history of judicial review on removal proceedings.

A.

Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S. Ct. 2576, 2583 (1972) (quoting *Boutilier v. INS*, 387 U.S. 118, 123, 87 S. Ct. 1563, 1567 (1967)). Since 1875, Congress has placed restrictions on who can enter and remain in the United States. *Id.*

Prior to 1940, the Executive Branch enforced these restrictions but had no authority to grant discretionary relief for removable aliens. *Foti v. INS*, 375 U.S. 217,

222, 84 S. Ct. 306, 310 (1963).[4] A determination that an alien was removable "necessarily resulted in, and was invariably accompanied by, a deportation order." *Id.* Extenuating circumstances had to be presented via a private bill in Congress. *Id.*; *see also INS v. Jong Ha Wang*, 450 U.S. 139, 140 n.1, 101 S. Ct. 1027, 1029 n.1 (1981). The only other route to relief for aliens who had been ordered deported was via a writ of habeas corpus. *INS v. St. Cyr*, 533 U.S. 289, 306, 121 S. Ct. 2271, 2282 (2001).

With the passage of the Alien Registration Act of 1940, Congress gave the Attorney General some discretion to allow for voluntary departure or to suspend deportation for aliens of "good moral character whose deportation 'would result in serious economic detriment' to the aliens or their families." *INS v. Phinpathya*, 464 U.S. 183, 190, 104 S. Ct. 584, 589 (1984) (quoting the Alien Registration Act of 1940, Pub. L. No. 76-670, § 20,

---

[4] Some have pointed out that the Executive Branch "did have some very limited executive discretion before 1940 through the Seventh Proviso of the Immigration Act of 1917," which provided that "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General and under such conditions as he may prescribe." Kati L. Griffith, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 Geo. Immigr. L.J. 273, 304 (2004) (quoting Immigration Act of 1917, Pub. L. No. 301, 39 Stat. 874 (1917) (codified as amended at 8 U.S.C. § 156 (1917)) (repealed 1952)). Although the Seventh Provisio applied "literally only to exclusion proceedings," it was used as a nunc pro tunc correction of the record of reentry to suspend deportations in some removal proceedings. *Id.* (citing *St. Cyr*, 533 U.S. at 289, 121 S. Ct. at 2282).

54 Stat. 670, 672).[5] In 1948, Congress amended the statute to make suspension available for "aliens who 'resided continuously in the United States for seven years or more' and who could show good moral character for the preceding five years, regardless of family ties." *Id.* (quoting Act of July 1, 1948, ch. 783, 62 Stat. 1206).

In 1952, Congress enacted a comprehensive immigration scheme, the Immigration and Nationality Act ("INA"), which set out "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *Chamber of Commerce v. Whiting*, 563 U.S. 582, 587, 131 S. Ct. 1968, 1973 (2011) (plurality opinion) (quoting *De Canas v. Bica*, 424 U.S. 351, 353, 359, 96 S. Ct. 933, 938 (1976)). Included in that act were multiple categories of relief that the Attorney General could grant, to certain eligible recipients, *in his discretion*. *See* INA, Pub. L. No. 82-414, 66 Stat. 163 (1952); *see also St. Cyr*, 533 U.S. at 295, 121 S. Ct. at 2276 (interpreting INA § 212(c)).

In its most recent iteration, the INA includes many types of relief that are deemed discretionary rather than mandatory. Patel seeks a form of discretionary relief under 8 U.S.C. § 1255, which allows aliens to apply for adjustment of status to a lawful permanent resi-

---

[5] The Alien Registration Act allowed the Attorney General to suspend deportation "[i]n the case of any alien ... who is deportable under any law of the United States and who has proved good moral character for the preceding five years" if "[the Attorney General] finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien." § 20, 54 Stat. at 671-72. However, if the Attorney General suspended deportation for more than six months, it was subject to review by Congress. *Id.* § 20, 54 Stat. at 672.

dent. Other types of discretionary relief include readmission of immigrants in the United States, § 1181, cancellation of removal, § 1229b, and voluntary departure, § 1229c.

Through these provisions, "Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances." *INS v. Chadha*, 462 U.S. 919, 954, 103 S. Ct. 2764, 2786 (1983). The Attorney General can establish regulations, review administrative determinations,[6] delegate his authority, and perform other such acts as he deems necessary to effectuate his authority to grant discretionary relief. 8 U.S.C. §§ 1103(g)(1) & (2). Pursuant to those directives, the Attorney General and the Secretary of Homeland Security have promulgated regulations interpreting the INA. *See* 8 C.F.R. §§ 100-507. In addition, the Attorney General delegated his authority to determine removability to the Executive Office of Immigration Review, which includes the immigration courts and the BIA.[7] *See* 6 U.S.C. § 521 (establishing the EOIR);

---

[6] While the Attorney General can review decisions of the BIA, he cannot dictate the actions of the BIA. *See* 8 U.S.C. §§ 1003.1(d)(7) & (h); *Marcello v. Bonds*, 349 U.S. 302, 311, 75 S. Ct. 757, 762 (1955) ("[T]he Attorney General cannot, under present regulations, dictate the actions of the Board of Immigration Appeals."); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267, 74 S. Ct. 499, 503 (1954) ("[A]s long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.").

[7] Certain responsibilities under the INA were also delegated to the Immigration and Naturalization Service ("INS"). *Jaramillo v. INS.*, 1 F.3d 1149, 1151 (11th Cir. 1993) (en banc). In 2003, Congress abolished the INS and transferred its functions to three agencies within the newly formed Department of Homeland Secu-

8 U.S.C. § 1103 (Attorney General has control of the EOIR); 8 C.F.R. § 1003.0 (listing the offices that encompass the EOIR).

The discretion delegated to the Attorney General, and in turn to the immigration courts, to grant ultimate relief for otherwise removable aliens has been likened to "probation or suspension of criminal sentence," that is, it functions as "an act of grace." *Jay v. Boyd*, 351 U.S. 345, 354, 76 S. Ct. 919, 924 (1956) (quoting *Escoe v. Zerbst*, 295 U.S. 490, 492, 55 S. Ct. 818, 819 (1935)). Aliens are not entitled to the relief as a matter of right. *Id.* They are, however, given a right to a ruling on such relief.[8] *Id.* Applicants who do not meet the threshold statutory requirements are ineligible for consideration of discretionary relief. Applicants who meet the threshold requirements are eligible for a favorable exercise of discretion but are not entitled to it as a matter of right. *Id.; see also Barton v. Barr*, 140 S. Ct. 1442,

---

rity: U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and U.S. Immigration and Customs Enforcement. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 451, 471, 116 Stat. 2135, 2192, 2195-97, 2205. Thus, Congress has delegated the authority to administer and enforce immigration and naturalization laws to both the Secretary of Homeland Security and the Attorney General. *See* 8 U.S.C. § 1103.

Since Patel's petition arises in the removal context, we focus on that avenue rather than on prosecutorial discretion to grant relief.

[8] Depending on the applicable regulations, an alien may or may not be entitled to a ruling on whether certain eligibility requirements are met. *INS v. Rios-Pineda*, 471 U.S. 444, 449, 105 S. Ct. 2098, 2102 (1985) ("[I]f the Attorney General decides that relief should be denied as a matter of discretion, he need not consider whether the threshold statutory eligibility requirements are met." (citing *INS v. Bagamasbad*, 429 U.S. 24, 26, 97 S. Ct. 200, 201 (1976))).

1445 (2020) ("If a lawful permanent resident meets those eligibility requirements, the immigration judge has discretion to (but is not required to) cancel removal and allow the lawful permanent resident to remain in the United States.").

Even if an alien is eligible for relief, an immigration judge can still decide—for any number of reasons—that a favorable exercise of discretion is not warranted. "[E]ligibility in no way limits the considerations that may guide the Attorney General in exercising her discretion to determine who, among those eligible, will be accorded grace." *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 31, 117 S. Ct. 350, 353 (1996). For example, the Attorney General can promulgate regulations that allow immigration judges to consider "confidential information" in their assessment. *See Jay*, 351 U.S. at 349-50, 76 S. Ct. at 922 (upholding the immigration judge's determination that although the applicant "met the statutory prerequisites [for] the favorable exercise of the discretionary relief," favorable action was not warranted in light of certain "confidential information").[9]

---

[9] The special inquiry officer and the BIA considered certain confidential information pursuant to then-8 C.F.R. § 244.3, which provided, "In the case of an alien qualified for * * * suspension of deportation under section * * * 244 of the Immigration and Nationality Act the determination as to whether the application for * * * suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security." *Jay*, 351 U.S. at 347-48, 76 S. Ct. at 921. Current regulations allow immigration judges to consider confidential information to determine the admissibility of arriving aliens. *See* 8 C.F.R. § 235.8.

Alternatively, based on the circumstances presented, immigration judges can make case-by-case determinations that a favorable exercise of discretion is not warranted. In *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77, 77 S. Ct. 618, 621 (1957), the Supreme Court upheld the BIA's determination that, even though "deportation ... would result in a serious economic detriment to an American citizen infant child," discretionary relief was not warranted because the applicants waited to apply for relief until after their son was born and had no other close family ties in the United States.[10] *Id.* at 75-76, 77 S. Ct. at 620 (quoting the eligibility requirement of § 19(c) of the Immigration Act of 1917). The Supreme Court has stated that, in exercising their discretion, immigration judges can consider the "flagrancy and nature of [aliens'] violations" of immigration laws, *Rios-Pineda*, 471 U.S. at 451, 105 S. Ct. at 2103, as well as the egregiousness of an alien's unconnected entry fraud, *Yueh-Shaio Yang*, 519 U.S. at 31, 117 S. Ct. at 353. Immigration judges, however, have no discretion to disregard the statutory eligibility requirements to grant relief for an ineligible alien. *Jay*, 351 U.S. at 349, 76 S. Ct. at 922.

Over time, with the increase of regulations interpreting the INA as well as precedential BIA decisions that "provide clear and uniform guidance to ... immigration judges ... on the proper interpretation and administration of the Act and its implementing regulations," 8 C.F.R. § 1003.1(d)(1), the scope of an individual

---

[10] The Court held that it was not error for the BIA "to take cognizance of present-day conditions and congressional attitudes" by looking to the policy reasons underlying the enactment of the 1952 INA in exercising its discretion. *Hintopoulos*, 353 U.S. at 78, 77 S. Ct. at 622.

immigration judge's discretion to grant relief has narrowed. As the Supreme Court has said, "[t]hough the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion.'" *Yueh-Shaio Yang*, 519 U.S. at 32, 117 S. Ct. at 353 (quoting 5 U.S.C. § 706(2)(A)). This Circuit has likewise recognized that promulgation of regulations "could limit the Attorney General's discretion in ways that make the ... determination effectively nondiscretionary." *Bedoya-Melendez v. U.S. Att'y Gen.*, 680 F.3d 1321, 1326 (11th Cir. 2012).

Still, in seeking relief, an alien has the burden of establishing that he (i) "satisfies the applicable eligibility requirements"; and (ii) "with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion." 8 U.S.C. § 1229a(c)(4)(A). In applying for admission, the alien must show "clearly and beyond doubt" that he "is not inadmissible under section 1182." *Id.* § 1229a(c)(2)(A). If an immigration judge determines that an alien is removable and orders that the alien be removed, the judge shall inform the alien of the right to appeal to the BIA and the consequences for failure to depart. *Id.* § 1229a(c)(4)(C).

The BIA reviews an immigration judge's findings of fact for clear error and reviews "questions of law, discretion, and judgment and all other issues" de novo. 8 C.F.R. § 1003.1(d)(3). If an alien seeks to appeal the BIA's final order of removal, he shall file a petition for review with the court of appeals for the judicial circuit

in which the immigration proceedings took place. 8 U.S.C. § 1252(b).

B.

Now, 8 U.S.C. § 1252 streamlines judicial review in the Courts of Appeals and imposes certain limits on the scope of that review. We outline the statutory changes that lead to the current scheme.

Before 1952, "the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court." *St. Cyr*, 533 U.S. at 306, 121 S. Ct. at 2282; *see also Heikkila v. Barber*, 345 U.S. 229, 230, 73 S. Ct. 603, 604 (1953). Courts consistently rejected attempts to use other types of relief to challenge deportation orders, recognizing that "Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution." *Heikkila*, 345 U.S. at 234, 73 S. Ct. at 605. Specifically, the Immigration Act of 1917 stated that deportation orders of the Attorney General should be "final," and the Supreme Court interpreted that language to preclude judicial review except by habeas corpus. *Id.*; *see also Shaughnessy v. Pedreiro*, 349 U.S. 48, 52, 75 S. Ct. 591, 594 (1955).

Like the Immigration Act of 1917, the INA of 1952 used language that deportation orders should be "final." *Pedreiro*, 349 U.S. at 52, 75 S. Ct. at 594. However, in 1955, the Supreme Court was forced to reconcile its previous interpretation of this language with the right of review provided by the Administrative Procedure Act (the "APA").[11] *Id.* The Court concluded that

[11] Congress enacted the APA in 1946. Section 10 of the APA provides a right of review for "final agency action[s]" except so far

the finality language in the 1952 INA was ambiguous and could not be read as foreclosing judicial review, especially given the purposes of the APA. *Id.* Hence, the lack of explicit judicial review limitations in the INA of 1952 opened other pathways for aliens to obtain judicial review of deportation orders. *Id.*; *St. Cyr*, 533 U.S. at 306, 121 S. Ct. at 2282.

That period of full judicial review was short lived, curtailed by amendments made to the INA in 1961. *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 650. The 1961 Act withdrew jurisdiction from the district courts and consolidated review in the courts of appeals. *St. Cyr*, 533 U.S. at 306 n.26, 121 S. Ct. at 2282 n.26; *Foti*, 375 U.S. at 225, 84 S. Ct. at 312. "[T]he plain objective of [§] 106(a) was 'to create a single, separate, statutory form of judicial review of administrative orders for the deportation of ... aliens.'" *Foti*, 375 U.S. at 225, 84 S. Ct. at 312. Section 106(a) of the 1961 Act provided the "sole and exclusive procedure for, the judicial review of all final orders of deportation," which included determinations related to discretionary relief. *Id.* at 221, 84 S. Ct. at 310 (quoting 75 Stat. at 651). It was implemented for the express purpose of "abbreviat[ing] the process of judicial review of deportation orders" and preventing "dilatory tactics in the courts." *Id.* at 224, 84 S. Ct. at 311.

In 1996, Congress amended the INA with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 309, 110 Stat. 3009-626 (1996). The IIRIRA made significant revisions to federal immigration law. One major change

---

as (1) "statutes preclude judicial review" or (2) the action is, by law, committed to agency discretion. Administrative Procedure Act, Pub. L. No. 79-404, § 10, 60 Stat. 237, 243 (1946).

was in terminology; "Congress abolished the distinction between exclusion and deportation procedures and created a uniform proceeding known as 'removal.'" *Vartelas v. Holder*, 566 U.S. 257, 262, 132 S. Ct. 1479, 1484 (2012). Another change was to significantly revise the judicial-review scheme. *See Calcano-Martinez v. INS*, 533 U.S. 348, 350, 121 S. Ct. 2268, 2269 (2001); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475, 119 S. Ct. 936, 940 (1999).

The IIRIRA included permanent rules that would go into effect on April 1, 1997, as well as temporary rules that applied during the transition period. *See* Pub. L. No. 104-208, § 309, 110 Stat. at 3009-626. The transitional rules provided that "there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act)."[12] *Id.* § 309(b)(4)(E). The permanent rules set up the current judicial-review structure providing that, "Notwithstanding any other provision of law, no court shall have jurisdiction to review" "(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or" "(ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a)." *Id.* at § 306.

In 2001, the Supreme Court grappled with the judicial-review limitations in the permanent rules. In *St. Cyr*, 533 U.S. at 314, 121 S. Ct. at 2287, the Supreme Court determined that the writ of habeas corpus was still available to alien petitioners despite the limitations

---

[12] These sections correspond to 8 U.S.C. §§ 1182(h), 1182(i), 1229b, 1229c, and 1255.

of "judicial review" in the IIRIRA. The INS argued that three provisions of the IIRIRA—8 U.S.C. § 1252(a)(1), 1252(a)(2)(C), and 1252(b)(9)—precluded the District Court from exercising its jurisdiction to consider St. Cyr's habeas corpus petition.[13] *Id.* at 310-11, 121 S. Ct. at 2285. The Supreme Court concluded that, because "judicial review" is a historically distinct term from "habeas corpus," the limitations in these statutes did not bar jurisdiction under 28 U.S.C. § 2241, the general habeas statute. *Id.* at 312-13, 121 S. Ct. at 2285-86. The clear import of *St. Cyr* was that judicial review of questions of law regarding removal orders needed to be preserved in some manner to avoid creating serious constitutional problems. *See id.* at 300, 121 S. Ct. at 2279 ("A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."). *St. Cyr* found that such review was preserved by the availability of habeas corpus, but left open the possibility that Congress could otherwise restrict the availability of the writ of habeas corpus as long as "question[s] of law" could be answered in a judicial forum. *Id.* at 314, 121 S. Ct. at 2287.

Following *St. Cyr*, Congress enacted the Real ID Act of 2005, which added another provision to § 1252. *See* Pub. L. No. 109-13, 119 Stat. 231. Section 1252(a)(2)(D), as currently enacted, states:

---

[13] St. Cyr challenged the Attorney General's conclusion that, as a matter of statutory interpretation, he was not eligible for discretionary relief. He alleged that the restrictions on discretionary relief for aliens convicted of offenses involving moral turpitude or the illicit traffic in narcotics contained in the Antiterrorism and Effective Death Penalty Act of 1996 and the IIRIRA do not apply to aliens who pleaded guilty to those crimes before the enactment of the restrictions. *St. Cyr*, 533 U.S. at 293, 121 S. Ct. at 2275.

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

See 8 U.S.C. 1252(a)(2)(D); Pub. L. No. 109-13 at § 106(a)(1)(iii), 119 Stat. at 310.[14]

The Real ID Act also added a provision that a petition for review filed with the Court of Appeals in accordance with § 1252 should be the "sole and exclusive means for judicial review of an order of removal" and that "judicial review" included "habeas corpus review." *Id.* § 106(a)(1)(B)(5); *see also Nasrallah v. Barr*, 140 S. Ct. 1683, 1690 (2020) (recognizing that 8 U.S.C. § 1252(a)(5) supersedes *St. Cyr*).

In its entirety, 8 U.S.C. § 1252(a)(2)(B) now reads:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceed-

---

[14] The Real ID Act also added prefatory language to § 1252(a)(2)(B) & (C), by inserting "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D)," § 106(a)(1)(ii), 119 Stat. at 310, and "regardless of whether the judgment, decision, or action is made in removal proceedings," *id.* at § 101(f).

> ings, no court shall have jurisdiction to review—
>
> **(i)** any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title,[15] or
>
> **(ii)** any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

Before proceeding to the merits of Patel's petition, we must assess whether we have jurisdiction under § 1252 to consider his petition.

III.

We start where we always start—with the language of the statute. Section 1252, entitled "Judicial review of orders of removal," first gives the Courts of Appeals jurisdiction to review "final order[s] of removal." 8 U.S.C. § 1252(a)(1).[16]

---

[15] "Sections 1182(h) and 1182(i) address waivers of inadmissibility based on certain criminal offenses, and fraud or misrepresentation, respectively; § 1229b addresses cancellation of removal; § 1229c, voluntary departure; and § 1255, adjustment of status." *Kucana v. Holder*, 558 U.S. 233, 239 n.2, 130 S. Ct. 827, 832 n.2 (2010).

[16] A final order of removal encompasses "the rulings made by the immigration judge or Board of Immigration Appeals that affect the validity of the final order of removal." *Nasrallah*, 140 S. Ct. at 1691. Review of a final order of removal extends to "all matters on which the validity of the final order is contingent." *Id.*

But what Congress giveth, it can also taketh away. And in § 1252(a)(2), the statute explicitly lists certain "[m]atters [that are] not subject to judicial review." Included among these matters are "[d]enials of discretionary relief." Within that section are two categories of "judgment[s], decision[s] or action[s]" that "no court shall have jurisdiction to review." *Id.* § 1252(a)(2)(B). The first—at issue here—strips courts of the jurisdiction to review "any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title." *See* § 1252(a)(2)(B)(i). The second strips courts of the jurisdiction to review decisions that are statutorily specified to be in the discretion of the Attorney General or the Secretary of Homeland Security. *See* § 1252(a)(2)(B)(ii).

Section 1252(a)(2)(D) then restores our jurisdiction to review constitutional claims or questions of law. Such a claim must be colorable. *Arias v. U.S. Att'y Gen.*, 482 F.3d 1281, 1284 (11th Cir. 2007). In other words, a party may not dress up a claim with legal or constitutional clothing to invoke our jurisdiction. *Id.* Therefore, as the Supreme Court has interpreted the jurisdiction-stripping provision of § 1252(a)(2)(B), "a noncitizen may not bring a factual challenge to orders denying discretionary relief." *Nasrallah*, 140 S. Ct. at 1694.

Patel sought relief under § 1255(i)(1)(B)(ii). There is no question that § 1255 is among the enumerated categories that § 1252(a)(2)(B)(i) bars from review. A

(quoting *Chadha*, 462 U.S. at 938, 103 S. Ct. at 2777 (internal quotation marks omitted)). As a final order of removal is contingent on the denial of discretionary relief, the immigration judge's evidentiary findings regarding discretionary relief are merged into the final order of removal. *Id.*

straightforward reading of the jurisdiction-stripping statute indicates that we lack jurisdiction to review Patel's petition except to the extent that he raises constitutional claims or questions of law.

The parties disagree with this plain-reading interpretation, arguing that we have jurisdiction to review certain types of judgments, but diverging as to the scope of our jurisdiction.[17] Patel argues that the statute only strips our jurisdiction to review the ultimate discretionary relief determination, but that we retain jurisdiction to review factual, legal, and constitutional challenges to any eligibility determination. On the other hand, the Attorney General, relying on a string of cases interpreting an earlier version of this statute, argues that we are precluded from reviewing both the ultimate decision and factual challenges to discretionary eligibility determinations, but can consider factual challenges to non-discretionary eligibility determinations. Under its interpretation, we retain jurisdiction to review all constitutional and legal challenges.

This section proceeds in two parts. We first explain why the statute strips us of jurisdiction from considering Patel's claim that, as a factual matter, he checked the wrong box and thus lacked the requisite subjective intent. We then explain why the parties are misguided in their analyses.

---

[17] Even though the parties agree that this Court has some limited jurisdiction, we must consider jurisdictional issues *sua sponte*. *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S. Ct. 641, 648 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.").

A.

We lack jurisdiction to review the immigration court's determination that Patel was ineligible for relief because, as a factual matter, he misrepresented his citizenship. The statute means what it says, "no court shall have jurisdiction to review" "any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of [Title 8]." Except, as stated in § 1252(a)(2)(D), we maintain jurisdiction to review constitutional claims or questions of law. We start with the language of § 1252(a)(2)(B)(i) itself and then look at the statutory scheme.

1.

At heart, the varying approaches disagree over the definition of judgment in § 1252(a)(2)(B)(i). The word "judgment" is not defined in Title 8, Chapter 12 of the United States Code. *See* 8 U.S.C. § 1101. Therefore, in interpreting the statute, we give "each word its ordinary, contemporary, [and] common meaning." *Artis v. Dist. of Columbia*, 138 S. Ct. 594, 603 n.8 (2018) (internal quotation marks and citation omitted). Black's Law Dictionary offers numerous definitions for judgment. Here are a few representative samples:

- The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination;
- The final decision of the court resolving the dispute and determining the rights and obligations of the parties;
- Determination of a court of competent jurisdiction upon matters submitted to it.
- An opinion or estimate.

Judgment, Black's Law Dictionary (2020). Some of these definitions suggest that "judgment" refers to a final decision. Others suggest that "judgment" refers to any decision made by a court. *See id.* ("Terms 'decision' and 'judgment' are commonly used interchangeably.").

Other dictionaries tell the same story. The Oxford English Dictionary provides the following relevant definitions for "judgment":

- The action or result of forming or pronouncing an opinion.
  - The formation of an opinion or conclusion concerning something, esp. following careful consideration or deliberation. Also: the opinion or conclusion thus formed; an assessment, a view, an estimate.
  - That which has been formally decided and pronounced to be the case; any formal or authoritative decision, as of an umpire or arbiter.
  - The pronouncing of a deliberate opinion upon a person or thing, or the opinion pronounced.
- The action or result of pronouncing a legal decision, and related uses.
  - A decision formally made in regard to a matter under consideration in a court of law or comparable context; a judicial decision, pronouncement, or order; the action or act of making or announcing such a decision.

Judgment, Oxford English Dictionary (2nd ed. 1989), https://www.oed.com/view/Entry/101892?redirectedFro

m=judgment#eid (last visited May 29, 2020).[18] Similarly, the following definitions are found in Merriam-Webster:

- An opinion or estimate so formed.
- A formal utterance of an authoritative opinion.
- A formal decision given by a court.
- A proposition stating something believed or asserted.

Judgment, Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/judgment (last visited May 3, 2020). These definitions fall into one of two camps: either judgment means the final decision of a court, such as a sentence, or it is broad and means any decision. Any decision is the better fit, because the statutory language is not limited to a final judgment of removal, but rather "any judgment" regarding the five enumerated categories of relief.

Further, any doubt regarding the meaning of "judgment" in § 1252(a)(2)(B)(i) should be resolved in favor of a more expansive meaning given the modifying phrases "any" and "regarding." As the Supreme Court has "repeatedly explained," "any" is expansive. *Babb v. Wilkie*, 140 S. Ct. 1168, 1173 n.3 (2020). The word "any" means "[o]ne indiscriminately of whatever kind." Black's Law Dictionary (6th ed. 1990); *see also Babb*, 140 S. Ct. at 1173 n.3 ("The standard dictionary definition of 'any' is '[s]ome, regardless of quantity or number.'" (quoting American Heritage Dictionary 59 (def. 2) (1969)). Thus, "[r]ead naturally," the word "any" has an expansive effect on the word that it modifies. *Unit-*

[18] There are other definitions referring to "judgment" as a faculty (e.g., one has good judgment), among other more obscure uses. Those are not relevant here.

ed States v. Gonzales, 520 U.S. 1, 5, 117 S. Ct. 1032, 1035 (1997). In addition, modifiers such as "respecting" and "regarding" have a broadening effect, "ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018). Thus, read in context, § 1252(a)(2)(B)(i) precludes us from reviewing "whatever kind" of judgment "relating to" the granting of relief under the five enumerated sections.

2.

To interpret the scope of our jurisdiction, we must also consider the rest of the statutory scheme. Section 1252(a)(2)(D) restores our jurisdiction to review constitutional claims or questions of law. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068 (2020). To invoke jurisdiction under § 1252(a)(2)(D), a petitioner must "allege at least a colorable constitutional violation." *Arias*, 482 F.3d at 1284. A colorable claim need not involve a "substantial" violation, but "the claim must have some possible validity." *Id.* at 1284 n.2 (quoting *Mehilli v. Gonzales*, 433 F.3d 86, 93-94 (1st Cir. 2005)). "A petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb." *Id.* at 1284 (quoting *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001)). The Supreme Court also recently addressed the scope of "questions of law" in § 1252(a)(2)(D), determining that it restores the Court's jurisdiction to review the "application of a legal standard to undisputed or established facts." *Guerrero-Lasprilla*, 140 S. Ct. at 1068. The BIA, in reviewing an immigration judge's decision, establishes the facts and makes legal determinations. On review, we are juris-

dictionally limited to considering only colorable constitutional or legal challenges to those established facts.

Reading § 1252(a)(2)(B)(i) in combination with § 1252(a)(2)(D), we determine that we lack jurisdiction to review Patel's challenges to "any judgment regarding the granting relief" under § 1255 unless such challenges involve a viable constitutional or legal claim. As the Seventh Circuit wrote, "while the purpose of the door-closing statute appears to be to place discretionary rulings beyond the power of judicial review (hence the caption of subsection (B)), the statute itself, read literally, goes further and places all rulings other than those resolving questions of law or constitutional issues beyond the power of judicial review." *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006); *cf. Jean v. Gonzales*, 435 F.3d 475, 480 (4th Cir. 2006).

Logically, the Seventh Circuit's reasoning makes sense given the background of *St. Cyr*. The Supreme Court recognized that historically, habeas was a mechanism to review "*questions of law* that arose in the context of discretionary relief." 533 U.S. at 307, 121 S. Ct. at 2283 (emphasis added). But "the courts generally did not review *factual determinations* made by the Executive." *Id.* at 306, 121 S. Ct. at 2282 (emphasis added). The current judicial-review scheme ensures that courts maintain jurisdiction to review "questions of law" while streamlining the process of judicial review. *See Foti*, 375 U.S. at 22425, 84 S. Ct. at 311-13. The dissent argues that "judgment" must be read narrowly because *St. Cyr* and other opinions emphasize a strong presumption in favor of judicial review of administrative action. Dissenting Op. at 57-59. The presumption cautions against "foreclos[ing] all forms of meaningful judicial review," *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496, 111 S. Ct. 888, 898 (1991), and has led

courts to preserve review of "questions of law," *St. Cyr*, 533 U.S. at 307, 121 S. Ct. at 2283. Such review is preserved under our interpretation.[19] Applicants who have been denied a form of discretionary relief enumerated in § 1252(a)(2)(B)(i) can still obtain review of constitutional and legal challenges to the denial of that relief, including review of mixed questions of law and fact. *See Guerrero-Lasprilla*, 140 S. Ct. at 1071. Via explicit instruction from Congress, however, we are restricted from reviewing factual challenges to denials of certain kinds of discretionary relief.

The presumptions do not require a garbled interpretation of the statute to ensure the broadest possible review, especially to allow review of subordinate decisions underpinning an ultimately unreviewable decision. We conclude that the best interpretation of § 1252(a)(2)(B)(i) is that we lack jurisdiction to review "any judgment regarding the granting of relief" under the five enumerated categories, unless the petitioner asserts a constitutional or legal challenge to the denial of such relief.

B.

The Attorney General argues for a mixed model. In his view, courts have jurisdiction to review non-discretionary determinations underlying an alien's removal order, but lack jurisdiction to review discretionary determinations, except to the extent that those determinations raise questions of law or constitutional claims. Patel argues that we retain broad jurisdiction

---

[19] And, as the dissent points out, our interpretation of § 1252(a)(2)(B)(i) in no way restricts our jurisdiction to review the legal and factual predicates for an alien's *removal*. Dissenting Op. at 82-83; *see also* § 1252(b)(9).

to review final orders of removal; courts are precluded only from reviewing the ultimate grant of discretionary relief. Under his interpretation, "judgment" refers only to the agency's exercise of "grace," and no judgment is exercised in determining whether an alien meets the statutory eligibility requirements. Therefore, the argument goes, we are prohibited from reviewing the ultimate decision of who among eligible persons is granted relief but maintain jurisdiction to review whether an alien meets threshold eligibility determinations. Both interpretations lack a statutory basis and are circuitous run-arounds on the judicial-review limitation.

1.

Under the Attorney General's interpretation, which the dissent adopts, some of the eligibility requirements are discretionary and others are not. The Attorney General's delineation is flawed because determining whether an alien is statutorily eligible for relief is not a "discretionary" decision. All eligibility determinations are "non-discretionary." As the Supreme Court has said, eligibility determinations are "substantive decisions ... made by the Executive."[20] *Kucana*, 558 U.S. at 247, 130 S. Ct. at 837. Each enumerated section in § 1252(a)(2)(B)(1) sets forth specific statutory requirements that must be met before any act of grace can be bestowed upon the alien. For relief under § 1129b(b), for example, an alien is eligible for discretionary relief only if the alien has "(A) a continuous physical presence of not less than 10 years, (B) good moral character, (C) a lack of certain criminal convictions, and (D) establishes exceptional and extremely

[20] In removal proceedings, these decisions are made by an immigration judge and subject to review by the BIA.

unusual hardship to a qualifying relative." For an adjustment of status under § 1255(i), such as the one that Patel seeks, the Attorney General may adjust the status of qualified aliens[21] only if "(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence," and "(B) an immigrant visa is immediately available to the alien at the time the application is filed."

In assessing our jurisdictional boundaries, we—and other Circuits—have often characterized these eligibility requirements as "discretionary" or "nondiscretionary" determinations.[22] For example, we have held that the "exceptional and extremely unusual hardship" determination is a discretionary decision, while the continuous physical presence requirement is a nondiscretionary determination. *Najjar v. Ashcroft*, 257 F.3d 1262, 1298 (11th Cir. 2001); *see also Gonzalez-Oropeza*, 321 F.3d at 1332. In *Najjar*, we explained that determining whether an alien met the presence requirement was not an exercise in discretion but was simply "a matter of applying the law to the facts of the case." 257 F.3d at 1298. Hardship, on the other hand, was a "discretionary decision" because Congress had delegated the authority to construe the meaning of that

---

[21] *See* 8 U.S.C. § 1255(i)(1).

[22] *See, e.g., Najjar v. Ashcroft*, 257 F.3d 1262, 1298 (11th Cir. 2001); *Gonzalez-Oropeza*, 321 F.3d at 1332; *Gomez-Gomez v. INS*, 681 F.2d 1347, 1349 (11th Cir. 1982); *Twum v. Barr*, 930 F.3d 10, 19-20 (1st Cir. 2019); *Barco-Sandoval v. Gonzales*, 516 F.3d 35, 39-40 (2d Cir. 2008); *Mejia-Castanon v. Att'y Gen.*, 931 F.3d 224, 232 (3d Cir. 2019); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 216 (5th Cir. 2003); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 890 (9th Cir. 2003); *Sabido Valdivia v. Gonzales*, 423 F.3d 1144, 1149 (10th Cir. 2005); *Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982 (10th Cir. 2005).

phrase to the Attorney General. *Id.* (citing *Jong Ha Wang*, 450 U.S. at 145, 101 S. Ct. at 1031); *see also Gomez-Gomez*, 681 F.2d at 1349.

This distinction between discretionary and non-discretionary determinations arose from our interpretation of the IIRIRA transitional rules, which barred the appeal of "any discretionary decision" under five enumerated sections of the INA. *See Najjar*, 257 F.3d at 1298 ("Section 309(c)(4)(E) does not preclude our review of all decisions under § 244 of the INA, but applies only to 'any discretionary decision' under the enumerated provisions."). When the permanent rules went into effect, we grafted the distinction onto the permanent rules without considering the difference in statutory language. *Gonzalez-Oropeza*, 321 F.3d at 1332 (applying the discretionary distinction from "1252(a)(2)(B)'s predecessor"). Other lines of cases subsequently adhered to this precedent without further consideration.[23]

---

[23] *See, e.g., Jimenez-Galicia v. U.S. Att'y Gen.*, 690 F.3d 1207, 1209 (11th Cir. 2012); *Bedoya-Melendez v. U.S. Att'y Gen.*, 680 F.3d 1321, 1324 (11th Cir. 2012); *Camacho-Salinas v. U.S. Att'y Gen*, 460 F.3d 1343, 1347 (11th Cir. 2006).

We are not the only circuit to have erroneously relied on precedent interpreting the transitional rules to demarcate our jurisdiction under the permanent rules. For example, in *Garcia-Melendez v. Ashcroft*, 351 F.3d 657, 661 (5th Cir. 2003), the Fifth Circuit cited *Gonzalez-Torres v. INS*, 213 F.3d 899, 901 (5th Cir. 2000), for its holding that the continuous presence requirement is a factual determination subject to appellate review. *Gonzalez-Torres* of course interpreted the transitional rules, not the permanent rules. 213 F.3d at 901. In *Aburto-Rocha v. Mukasey*, 535 F.3d 500, 502 (6th Cir. 2008), the Sixth Circuit quoted language from *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 711 (6th Cir. 2004), for its conclusion that it could review non-discretionary decisions underpinning discretionary relief. Appellate jurisdiction in

But the permanent rules do not include the "any discretionary decision" language. Instead, the statute bars review for "any judgment," a broader term that encompasses both discretionary and non-discretionary determinations. It provides a blanket prohibition on review of judgments relating to these five categories. A change in statutory language generally connotes a change in meaning to the statute. *In re BFW Liquidation, LLC*, 899 F.3d 1178, 1191 (11th Cir. 2018). Therefore, "in the absence of any evidence to the contrary, one can plausibly infer that, by replacing" any discretionary decision "with new language that omits any such requirement, Congress intended to eliminate [that requirement], and to replace that requirement with something substantively different." *Id.*; *see also Prado v. Reno*, 198 F.3d 286, 290-92 (1st Cir. 1999) ("[T]he permanent rules remove more than 'discretionary decisions' from review in the courts of appeals.").

Clinging to the discretionary and non-discretionary distinction flies in the face of the statutory language specifically used by Congress. And it is a misnomer. We have previously described "discretionary" decisions as those that lack "an objective legal standard on which a court can base its review." *Bedoya-Melendez*, 680 F.3d at 1325. In *Bedoya-Melendez*, we contrasted a question of law—which involves "the application of an undisputed fact pattern to a legal standard"—to a discretionary decision, which "requires an adjudicator to make a judgment call." *Id.* at 1324. As a matter of jurisprudence, rather than of jurisdiction, we—as well as the BIA—would be unable to review a judgment that truly lacked any standards of review. *Cf. Heckler v.*

Billeke-Tolosa was based on the transitional rules of the IIRIRA. 385 F.3d at 710.

Chaney, 470 U.S. 821, 830, 105 S. Ct. 1649, 1655 (1985) ("[E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.").

The threshold eligibility determinations, however, are not discretionary decisions—immigration courts cannot grant relief if they are not met. As the Supreme Court has said, "[e]ligibility [for discretionary relief] is governed by specific statutory standards which provide a right to a ruling on an applicant's eligibility." *Jay*, 351 U.S. at 353, 76 S. Ct. at 924. Eligibility determinations—both those that we have previously deemed "discretionary" and those that we have deemed "non-discretionary"—involve the same decisional process: applying the law to a set of facts. And, "the application of law will necessarily involve judgment." Henry M. Hart Jr. & Albert M. Sacks, Legal Process: Basic Problems in the Making and Application of Law 375 (1958). If the statutory standards for eligibility are less specific, it gives an immigration judge more leeway in interpreting and applying the law. But qualitative standards such as "good moral character" or "exceptional and extremely unusual hardship" are not in themselves discretionary decisions. An immigration judge must find that the alien meets such standards before she can grant relief.[24] Not only does the Attorney General's

---

[24] The dissent reads our analysis to say that judgment means "findings of fact." Dissenting Op. at 64. While we don't dispute that a factfinder may need to use judgment to assess witness credibility, weigh evidence, evaluate competing evidence, and draw inferences, we read "judgment" to encompass eligibility determinations rather than requiring appellate courts to assess whether a particular finding reflects an exercise of "judgment" before a de-

interpretation—allowing appellate review of factual decisions underlying some statutory eligibility determinations but not others—lack a statutory basis, it is also illogical as a matter of policy. If Congress intended to block our review of the ultimate decision to grant relief, why would courts be entitled to assess the evidence for the more objective eligibility requirements, such as residency requirements, while being barred from weighing the evidence for the qualitative requirements, such as the character requirements?[25] A more consistent read-

---

termination of whether they have jurisdiction to review that finding.

[25] The dissent answers our inquiry with the simple explanation that there are questions about which the Attorney General "simply might be wrong." Dissenting Op. at 79. Perhaps in recognition that the actual eligibility requirements under § 1255 and the other enumerated categories of relief are not merely "straightforward" criteria, the dissent reaches for a hypothetical age requirement to contextualize how obvious some errors can be. Dissenting Op. at 53. We are unpersuaded.

First, the hypothetical assumes that an immigration judge's factual findings are the end of the story. Before an applicant can petition this Court for review, however, he must appeal to the BIA, which reviews the immigration judge's factual findings for clear error. 8 C.F.R. § 1003.1(d)(3). For example, in Patel's appeal, the BIA identified the three factors upon which the Immigration Judge concluded that Patel's testimony was not credible and found no clear error. The BIA's review should correct obvious errors. *See, e.g., In Re B-*, 21 I. & N. Dec. 66, 71 (BIA 1995) (declining to accept the immigration judge's adverse credibility finding). Furthermore, erroneous factual findings are subject to correction via a motion to reconsider. *See* 8 C.F.R. § 1003.2(b)(1).

Second, to the extent that an immigration judge's factual conclusions reflect a lack of "reasoned consideration" (or lack any reasoning, as in the hypothetical), those rulings are subject to legal and constitutional challenges. *See Indrawati v. U.S. Att'y Gen.*, 779 F.3d 1284, 1302-03 (11th Cir. 2015); *Tan v. U.S. Att'y Gen.*, 446 F.3d 1369 (11th Cir. 2006).

ing of "judgment" is that, under § 1252(a)(2)(B)(i), all eligibility determinations for the five enumerated categories of discretionary relief are barred from review.

Finally, § 1252(a)(2)(B) must be read in conjunction with § 1252(a)(2)(D). *See Guerrero-Lasprilla*, 140 S. Ct. at 1073. Rather than engaging in mental gymnastics to determine if a particular decision is "discretionary or not" and then determining whether the alien's claim presents a question of law or a constitutional challenge, the logical interpretation of the statutory scheme is that "judgment" encompasses all decisions made by the BIA and that we are foreclosed from reviewing those determinations unless the alien presents a legal or constitutional challenge. We thus lack jurisdiction to review factual challenges to a denial of discretionary relief.[26] *Nasrallah*, 140 S. Ct. at 1694; *Guerrero-*

Finally, it is still unclear why we can review the BIA's erroneous determination of age for the hypothetical age requirement, but lack jurisdiction to review the same factual finding when it relates to the "extreme hardship" or "good moral character" requirement.

[26] The dissent highlights one potential quirk of our interpretation—that we retain jurisdiction to review factual determinations when made in the removability context but lack jurisdiction to review the same facts when made in the discretionary relief context. Dissenting Op. at 82-83. This difference arises not because of our interpretation of "judgment," but is due to the very nature of discretionary relief. A charge of removal is a separate determination from a finding of ineligibility for discretionary relief.

For example, the due process considerations at the two stages differ. *See Matovski v. Gonzales*, 492 F.3d 722, 738 (6th Cir. 2007). The government bears the burden of proving removability by clear and convincing evidence, while the applicant bears the burden of establishing admissibility clearly and beyond doubt. *Id.* The government must inform the alien of the specific allegations which would justify removal but need not list all grounds for inadmissibility in the notice to appear. *See Aalund v. Marshall*, 461

Lasprilla, 140 S. Ct. at 1073 ("The Limited Review Provision, however, will still forbid appeals of factual determinations—an important category in the removal context.").

The two pathways—that judgments are barred from review, except to the extent they raise a constitutional or legal claim, and that discretionary decisions are barred from review—may often reach the same result. As the Second Circuit pointed out in *Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010), the "two characterizations" are "congruent: BIA statutory interpretation pursuant to an eligibility determination is nondiscretionary and therefore reviewable precisely because it presents a legal question. In contrast, the BIA's fact-finding, factor-balancing, and exercise of discretion normally do not involve legal or constitutional questions, so we lack jurisdiction to review them." *See also Jean*, 435 F.3d at 480 (concluding that the Court need not consider "the scope of subsection (a)(2)(B)" in light of the enactment of subsection (D) by the REAL ID Act); *Reyes v. Holder*, 410 F. App'x 935, 939 (6th Cir.

F.2d 710, 712 (5th Cir. 1972); *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006). Aliens are entitled to effective assistance of counsel during the removal proceeding yet lack the same constitutional protection when seeking discretionary relief. *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999). Applicants cannot mount substantive due process challenges to eligibility considerations for discretionary relief because, we have held, they lack the requisite liberty interest. *Mohammed v. Ashcroft*, 261 F.3d 1244, 1250-51 (11th Cir. 2001).

Given that these differences follow from the government's charging decisions, it is not surprising that our jurisdiction to review the two determinations may also differ. Congress explicitly limited our jurisdiction to review "any judgment regarding the granting of relief under" § 1255 and included among those judgments are factual determinations regarding inadmissibility.

2011) ("[I]t remains unclear whether the two categories ... overlap entirely or almost entirely.").

Regardless of how we have characterized eligibility determinations in the past, they are threshold requirements.[27] The Attorney General and immigration judges have no discretion to grant relief unless the statutory criteria are met.

2.

Relying on the Ninth Circuit's en banc opinion in *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1142 (9th Cir. 2002), Patel argues that "[t]he only judgment exercised regarding the order or decision lies in the Attorney General's discretionary authority to determine who among the eligible persons should be granted discretionary relief." Because "[n]o judgment is exercised with respect to the mere eligibility for discretionary relief," he asserts that § 1252(a)(2)(B)(i) does not bar review of whether an alien meets the statutory criteria for relief. *Id.*

The Ninth Circuit held that it had jurisdiction to consider whether Montero-Martinez's adult daughter

---

[27] By treating all eligibility decisions as non-discretionary, we eliminate the case-by-case determination of whether an eligibility decision is discretionary or non-discretionary and bring stability to the law. *See, e.g.*, *Jimenez-Galicia*, 690 F.3d at 1210 ("The other circuits that have examined ... whether the catchall provision [for good moral character] is discretionary have not come to a uniform result."); *Twum*, 930 F.3d at 19 (explaining the juxtaposition of conflicting case precedent about whether particular eligibility determinations provide objective criteria); *Wilmore v. Gonzales*, 455 F.3d 524, 527 (5th Cir. 2006) (noting the split between the Ninth and Tenth Circuits on whether the determination of "extreme cruelty" is discretionary).

qualifies as a "child" under 8 U.S.C. § 1229b(b)(1)(D)[28] because this "purely legal and hence non-discretionary question" is not a "*judgment* regarding the granting of relief." *Id.* at 1140-41 (emphasis added). The Ninth Circuit based its interpretation on three arguments. First, the Court looked to the way the term "judgment" was used throughout the INA. Second, the Court considered the structure of § 1252(a)(2)(B). Third, the Court compared the jurisdiction-stripping language in § 1252(a)(2)(B)(i) with other provisions that limit judicial review. The Court concluded that, based on these factors as well as the background principle of narrowly construing restrictions on jurisdiction, § 1252(a)(2)(B)(i) did not unambiguously bar review over "all decisions by the BIA regarding discretionary relief." *Id.* at 1144. Instead § 1252(a)(2)(B)(i) "eliminates jurisdiction only over decisions by the BIA that involve the exercise of discretion." *Id.*

We disagree. While a discretionary decision, such as the "grace" of ultimately granting relief, necessarily involves the exercise of judgment, the meaning of judgment does not end there. *Compare* Black's Law Dictionary (defining "administrative discretion" as "[a] public official's or agency's power to exercise judgment in the discharge of its duties" and "judicial discretion" as "[t]he exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law"), *with Judgment*, Black's Law Dictionary (6th ed. 1990) ("Determi-

---

[28] For cancellation of removal under § 1229b(b), an alien must, inter alia, establish that "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D).

nation of a court of competent jurisdiction upon matters submitted to it."). The Ninth Circuit so narrowly construed the word "judgment" that it contorted its meaning.[29]

As the dictionary definitions above indicate, "judgment" is a broad term, encompassing both the process of forming an opinion as well the pronouncement of the result. That process includes both legal and factual determinations and is not arbitrarily limited to decisions involving the exercise of discretion. As the panel in *Montero-Martinez* initially held, "§ 1252(a)(2)(B)(i), by its plain terms, appears to encompass all decisions regarding cancellation of removal, including determinations of statutory eligibility." 249 F.3d 1156, 1158 (9th Cir.), *as amended* (May 30, 2001), *rev'd*, 277 F.3d at 1137.

After the Supreme Court decided *St. Cyr*, the Ninth Circuit granted Montero-Martinez's petition for rehearing en banc, 277 F.3d at 1137, and then re-interpreted the meaning of "judgment" to conform the statutory language to what it thought *St. Cyr* required.[30] Mysteriously, the Ninth Circuit's en banc

---

[29] The Ninth Circuit referenced a dictionary for its footnote that other common definitions of "judgment" include "a formal utterance of an authoritative opinion" or the "process of forming an opinion or evaluation," but it did not cite a dictionary or other common-meaning source for its conclusion that "judgment" means either "any decision" or "any decision involving the exercise of discretion." *Montero-Martinez*, 277 F.3d at 1141 & n.4.

[30] The Ninth Circuit is not alone in re-interpreting the meaning of "judgment" after acknowledging that its plain meaning bars review of all decisions. *Compare Morales Ventura v. Ashcroft*, 348 F.3d 1259, 1262 (10th Cir. 2003) ("On its face, [8 U.S.C. § 1252(a)(2)(B)(i)] seems to foreclose judicial review completely."), *with Sabido Valdivia v. Gonzales*, 423 F.3d 1144, 1148 (10th Cir.

opinion never addresses the common meaning of judgment. And *St. Cyr* merely acknowledged that some form of judicial review for questions of law needed to be preserved—such as via the writ of habeas corpus—not that "judgment" can only mean decisions involving the exercise of discretion. With the enactment of the Real ID Act of 2005, Congress embedded these protections in § 1252(a)(2)(D), which preserves appellate review of "purely legal" questions, such as whether an adult daughter qualifies as a child.

We are unpersuaded by the Ninth Circuit's other arguments. By the Court's own reasoning, it is impossible to give the word "judgment" the same meaning throughout the INA. *Montero-Martinez*, 277 F.3d at 1141. Sometimes, when preceded by the modifier "discretionary," it means "discretionary judgment." *Id.* n.5; *see also* 8 U.S.C. § 1226(e); 8 U.S.C. 1252(b)(4)(D). Other times, when preceded by "formal" or when the provision includes the word "final," judgment refers to a final judgment. *See* 8 U.S.C. § 1101(a)(48)(A); § 1158(b)(2)(A)(ii); § 1227(a)(2)(D); § 1229a(c)(3)(B)(i); § 1324b(i)(2); § 1375c(a)(3). Because, "[a] given term in the same statute may take on distinct characters from

---

2005) (adopting the Ninth Circuit's analysis in *Montero-Martinez*); *Mancha-Chairez v. Reno*, 224 F.3d 766 (5th Cir. 2000) "[8 U.S.C. § 1252(a)(2)(B)(i)] forestalls any judicial review of Board judgments, regardless of the conclusion reached."), with *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 216 (5th Cir. 2003) ("[8 U.S.C. § 1252(a)(2)(B)(i)'s] ban on review of "judgment[s] regarding the granting of relief" precludes review only of *discretionary* decisions." (emphasis in original)), *and Prado*, 198 F.3d at 290 ("[T]he permanent rules remove more than 'discretionary decisions' from review in the courts of appeals."), *with Mele v. Lynch*, 798 F.3d 30, 32 (1st Cir. 2015) ("[W]e lack jurisdiction to review the purely discretionary decisions made under the other statutory sections identified in § 1252(a)(2)(B)(i).").

association with distinct statutory objects calling for different implementation strategies," *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574, 127 S. Ct. 1423, 1432 (2007), the use of the term in other parts of the statute says little about its meaning in § 1252(a)(2)(B)(i).

Our interpretation of "judgment" also does not make the "any other decision" language in § 1252(a)(2)(B)(ii) superfluous. *See Montero-Martinez*, 277 F.3d at 1142. Section 1252(a)(2)(B) limits our review of discretionary relief. Section 1252(a)(2)(B)(i) enumerates five types of relief. *See Kucana*, 558 U.S. at 246-47, 130 S. Ct. at 836. But those five categories aren't the only provisions in the INA that allow for discretionary action. *Id.* at 248, 130 S. Ct. at 837 (citing § 1157(c)(1); § 1181(b), & § 1182(a)(3)(D)(iv) as examples). Section 1252(a)(2)(B)(ii) is therefore a "catchall provision" to preclude our review of those other categories of discretionary relief. *Id.* at 247, 130 S. Ct. at 836.

The dissent expounds on this structure argument, pointing to the Supreme Court's decision in *Kucana* for additional support. Dissenting Op. at 69-70. In *Kucana*, the Supreme Court looked to the structure of § 1252(a)(2)(B) to support its holding that the "any other decision" language in § 1252(a)(2)(B)(ii) refers to decisions "made discretionary by legislation" rather than by regulation. *Id.* at 248, 130 S. Ct. at 837. Therefore, the dissent reasons, § 1252(a)(2)(B)(i) must also apply only to discretionary decisions. Dissenting Op. at 69-70.

That is a faulty conclusion. As we explained above, eligibility determinations are not discretionary. While the ultimate decision of whether to grant of relief is discretionary; eligibility for the relief is not. *Kucana*

read "other" to align with the five types of *relief* enumerated in § 1252(a)(B)(ii). *See id.* at 247-48, 130 S. Ct. at 836-37. It said nothing about how to interpret the meaning of "judgment[s] regarding the granting of [that] relief."

Furthermore, our interpretation is the only one that appropriately reads § 1252(a)(2)(B)(i) & (ii) harmoniously. If, as Patel contends, "judgment" is limited to the ultimate grant of grace, there is little need for § 1252(a)(2)(B)(i) because our review of that final decision is already circumscribed by § 1252(a)(2)(B)(ii). *Id.* at 246-47, 130 S. Ct. at 836 & n. 13. If eligibility criteria are deemed discretionary because Congress "itself set out the Attorney General's discretionary authority in the statute," those determinations would be barred from review by § 1252(a)(2)(B)(ii), not by § 1252(a)(2)(B)(i). *Id.* at 247, 130 S. Ct. at 837. And if, as the dissent reasons, eligibility criteria are deemed discretionary for some other reason, then *Kucana* provides no guidance because its holding was based on what Congress "made discretionary by legislation." *Id.* at 246-47, 130 S. Ct. at 836. Accordingly, we do not read "any other decision" to import a discretionary gloss on "any judgment."

Finally, the use of the words "decision" or "individual determination" in other judicial-stripping provisions in the INA does not convince us that "judgment" in § 1252(a)(2)(B)(i) is arbitrarily limited to decisions involving discretion. Such a cursory comparison overlooks the words "any" and "regarding" in § 1252(a)(2)(B)(i). If Congress intended to prohibit our review of only the ultimate determination of relief, it merely needed to say that "[n]o court shall have jurisdiction" to review "the ultimate judgment granting re-

lief" under the enumerated provisions, rather than stripping our jurisdiction to review "whatever kind" of judgments that "relate to the subject." *See Babb*, 140 S. Ct. 1173 n.3; *Appling*, 138 S. Ct. at 1760. And, as we have said before, "whatever kind" of judgments that "relate to the subject" include even the most objective seeming eligibility requirements.

Patel's interpretation—that § 1252(a)(2)(B) bars review only of the final grant or denial of relief—renders our jurisdictional limits meaningless. Enabling review of each individual determination underpinning the final decision effectively allows for review of the grant of relief. *See Lee v. U.S. Citizenship & Immigration Servs.*, 592 F.3d 612, 620 (4th Cir. 2010) (finding that eligibility determinations cannot be divorced from the denial of discretionary relief). We cannot accept such a run-around of our limitations.

Because § 1252(a)(2)(B)(i) contains no modifying phrases that would indicate that "judgment" refers exclusively to a discretionary decision, we hold that we are precluded from reviewing any judgment relating to Patel's request for relief, except to the extent that he raises a constitutional claim or a question of law.

III.

On appeal, Patel does not assert any constitutional claims regarding the denial of relief under § 1255. He claims that the BIA erred in its determination that he lacked the requisite subjective intent to misrepresent his citizenship status. Such a challenge presents a fac-

tual question. We lack jurisdiction to such a claim under § 1252(a)(2)(B)(i).[31]

---

[31] The dissent interprets § 1252(a)(2)(B)(i) to allow judicial review of this question, but fails to explain why a finding that Patel's false claim of citizenship was made with subjective intent is a "non-discretionary" finding subject to judicial review. In the dissent's view, Patel is either admissible or he is not; "[n]o discretion is required to make these decisions." Dissenting Op. at 74. That is an overly simplistic way of looking at the inadmissibility criteria in 8 U.S.C. § 1182(a).

For one, some of the inadmissibility criteria are statutorily specified to be in the discretion of the Attorney General. *See, e.g.*, § 1182(a)(3)(D)(iv) (discretionary waiver for applicants who have affiliated with a totalitarian party). Other criteria include statutory definitions to minimize discretion. *See, e.g.*, § 1182(a)(3)(B)(iii) & (iv) (defining "terrorist activity" and "engage in terrorist activity"). Others list regulations or statutes that should guide the Attorney General's opinion. *See, e.g.*, § 1182(a)(1)(A)(i) & (iii) (determinations of inadmissibility based on certain health-related grounds should be made "in accordance with regulations prescribed by the Secretary of Health and Human Services"); § 1182(a)(4)(A) & (B) (listing factors to consider in the determination of whether an applicant is "likely at any time to become a public charge"). And, still others clearly require the Attorney General "to use judgment to place someone in a subjective category that lacks clear, self-explanatory boundaries." Dissenting Op. at 78. For example, a determination that an applicant "seeks to enter the United States to engage solely, principally, or incidentally in" "any activity a purpose of which is the opposition to ... the Government of the United States" is hardly self-explanatory or easily verified as correct or incorrect. *See* § 1182(a)(3)(A)(iii). The same goes for the provision on which Patel was found inadmissible. *See* § 1182(a)(6)(C)(ii)(I). To complicate the inquiry further, the Attorney General has discretion to grant inadmissibility waivers, including for the ground on which Patel was found inadmissible. *See, e.g.*, § 1182(g) (waiver for health-related grounds); § 1182(h) (waiver for marijuana offenses); § 1182(i) (waiver for fraud or misrepresentation grounds).

Patel also claims that the BIA used the wrong legal standard to determine that he is ineligible for relief. The Panel appropriately retained jurisdiction to consider that claim. We need not disturb the panel's ruling that the statute lacks a materiality element. *See Patel v. U.S. Att'y Gen.*, 917 F.3d 1319, 1322 (11th Cir. 2019).

SO ORDERED.

The dissent's interpretation assumes that an inadmissibility determination is one straightforward, non-discretionary decision. In reality, that eligibility determination is the culmination of a variety of judgments.

MARTIN, Circuit Judge, joined by WILSON, JORDAN, ROSENBAUM, and JILL PRYOR, Circuit Judges, dissenting:

Pankajkumar Patel applied to immigration authorities to adjust his immigration status so that he could continue living in the United States. His application for adjustment of his status was denied, and Mr. Patel then turned to this Court to review that denial of relief. Originally, a three-judge panel of this Court affirmed the ruling of the Board of Immigration Appeals ("BIA") and also affirmed the final order directing his removal from this country. Our en banc Court then vacated that panel opinion and reheard Mr. Patel's petition so the whole court could decide the proper scope of 8 U.S.C. § 1252(a)(2)(B)(i), a jurisdiction-stripping provision of the Immigration and Nationality Act ("INA"). Today the majority of the judges on this Court rule that a "straightforward reading" of § 1252(a)(2)(B)(i) tells us we lack jurisdiction to review any element of Mr. Patel's petition other than constitutional questions or errors of law. Maj. Op. at 25.

My reading of the statute leads me to a different understanding. The majority opinion analyzes the statute extensively. But it pays scant attention to the two foundational canons of statutory construction that must guide our interpretation of jurisdictional restrictions placed on us by the INA. First, there is a longstanding presumption in favor of judicial review of administrative actions. Time and again, the Supreme Court has told us that when a jurisdiction-stripping provision "is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Guerrero-Lasprilla v. Barr*, 589 U.S. ___, 140 S.

Ct. 1062, 1069 (2020) (quoting *Kucana v. Holder*, 558 U.S. 233, 251, 130 S. Ct. 827, 839 (2010)). And the second tenet neglected by the majority is the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[1] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449, 107 S. Ct. 1207, 1222 (1987). The majority's failure to employ these canons of statutory construction gives us an interpretation of the statute that vests immigration officials with the ability to insulate immigration court rulings from judicial review based solely on their own charging decisions. The Supreme Court has warned against such an "extraordinary delegation of authority." *Kucana*, 558 U.S. at 252, 130 S. Ct. at 840.

Once the proper canons of construction are applied, § 1252(a)(2)(B)(i) cannot properly be read to strip this Court of jurisdiction to review a finding of fact that is contradicted by the record. Rather, the statute more naturally allows our Court to review findings of fact that are mistaken. And that review properly extends even to eligibility determinations made by an Immigration Judge ("IJ"), where those determinations are based on facts belied by the record. This is so because, among other reasons, factual findings related to a person's *eligibility* for discretionary relief are generally not discretionary, and § 1252(a)(2)(B)(i) strips our jurisdiction to review only discretionary determinations. For example, assume the immigration statute says only people over the age of 40 years are eligible to remain in

---

[1] "Alien" is not my preferred term, but it is the word used in the statute. I use it here when quoting the agency decision or the text of the INA, but otherwise have adopted the term "noncitizen" as equivalent to the statutory term. *See Barton v. Barr*, 590 U.S. ___, 140 S. Ct. 1442, 1446 n.2 (2020).

the country. The record contains much evidence of the applicant's actual age of 50 years, including her birth certificate and even photographs from her 40th birthday party, showing that it took place ten years ago. The IJ nevertheless finds that the applicant is only 30 years old, and rules as a result that the applicant is not eligible for discretionary relief. The applicant then comes to our Court to point us to the substantial evidence of her actual age of 50 years. I say our Court is empowered to review this obviously mistaken finding of fact that was the basis for denial of discretionary relief. It is also true, of course, that if the IJ had got the 50-year age right, and *then* the applicant was denied discretionary relief, our Court would have no jurisdiction to review the ultimate denial of relief.

Nearly every one of our sister circuits have adopted the reading of the jurisdiction stripping provisions that would allow courts to reverse findings of fact contradicted by the record. Under this widely accepted reading of § 1252(a)(2)(B)(i), our Court is entitled to review mistakes made by the IJ about the cold hard facts of Mr. Patel's eligibility for adjustment of status. And this review can extend to the immigration judge's credibility finding when that finding is based on facts plainly contradicted by the record. Since I believe the majority opinion misreads § 1252(a)(2)(B)(i), I respectfully dissent.

I.

The majority has ably described the history of Mr. Patel's appeal, so I review it only briefly here. The Department of Homeland Security ("DHS") served Mr. Patel a notice to appear ("NTA") in April 2012 that charged him as being removable because he is an "alien" present in the United States without being admit-

ted or paroled, pursuant to 8 U.S.C. § 1182(a)(6)(A)(i). The NTA did not charge Mr. Patel with being inadmissible. Mr. Patel conceded he was removable and applied for adjustment of status under 8 U.S.C. § 1255(i), based on an approved employment-related visa petition filed on his behalf. Mr. Patel's wife, Jyotsnaben, and one of his sons, Nishantkumar, also applied for derivative status based on Mr. Patel's application for adjustment. On May 9, 2013, the IJ found that Mr. Patel was not eligible for adjustment of status because, during his time living in the United States, he once falsely claimed United States citizenship. The IJ said this rendered Mr. Patel inadmissible under 8 U.S.C. § 1182(a)(6)(c)(ii)(I) and therefore not eligible for discretionary relief.

Mr. Patel appealed to the BIA. In a divided decision, the BIA affirmed the IJ's factual findings that Mr. Patel was not a credible witness and had falsely represented himself to be a U.S. citizen for purposes of obtaining a noncommercial Georgia driver's license. The BIA found no clear error in the IJ's rejection of Mr. Patel's argument that he "made a mistake" in checking a box on a form, indicating that he was a U.S. citizen. Board Member Wendtland dissented, noting that Mr. Patel was not inadmissible under *Matter of Richmond*, 26 I & N Dec. 779 (BIA 2016), since under Georgia law he was eligible to receive a driver's license whether or not he was a U.S. citizen. Thus, according to Board Member Wendtland, Mr. Patel's answer to the citizenship question was immaterial to the issuance of his license.

Mr. Patel asked our Court to review the BIA's rejection of his claim. What matters for this discussion is Mr. Patel's argument that, since he did not intend to check the U.S. citizenship box on the driver's license

application form, he lacked the requisite subjective intent to be found inadmissible on the ground that he made a false claim of U.S. citizenship. *See Patel v. U.S. Att'y Gen.*, 917 F.3d 1319, 1326 (11th Cir. 2019). As mentioned above, the panel that originally heard Mr. Patel's case affirmed the BIA ruling against him. The panel concluded that it lacked jurisdiction to review any factual findings about Mr. Patel's intent that were made in support of the denial of adjustment of status, including the IJ's finding that Mr. Patel's false claim was made with subjective intent. *Id.* at 1327.

On September 13, 2019, a majority of this Court's active judges voted to rehear Mr. Patel's petition en banc and vacated the panel opinion. We asked the parties to brief the question of whether Mr. Patel's subjective intent to obtain a purpose or benefit was a "nondiscretionary finding pertaining to statutory eligibility for immigration relief" and whether we had jurisdiction to review that finding.

II.

Before I address the text of § 1252(a)(2)(B)(i), I first review the statutory framework and interpretive canons that must guide our analysis. Remarkably, the majority mentions these principles only in passing. *See* Maj. Op. at 31-32. But they are foundational and compel a different conclusion than that reached by the majority.

First, the default rule of the INA is that the agency's legal holdings and factual findings are subject to judicial review. 8 U.S.C. § 1252(b)(2) and (9) tell us that appeals from the findings of immigration judges will be channeled through petitions for review to the federal courts of appeals, which have jurisdiction to review "all

questions of law and fact ... arising from any action taken or proceeding brought to remove an alien from the United States."

True, other sections of § 1252 limit this general grant of jurisdiction. But in applying those limits, we must follow two familiar canons of statutory interpretation. As for the first, the Supreme Court again recently reminded us that there is a "well-settled" and "strong presumption" favoring judicial review of administrative actions. *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496, 498, 111 S. Ct. 888, 898, 899 (1991)). The Court has "consistently applied" the presumption of reviewability when it interprets immigration statutes. *Id.* (quoting *Kucana*, 558 U.S. at 251, 130 S. Ct. at 839); *see also INS v. St. Cyr*, 533 U.S. 289, 298, 121 S. Ct. 2271, 2278 (2001). It has told us there is a "heavy burden" for dislodging the presumption in favor of judicial review, *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 672, 106 S. Ct. 2133, 2136 (1986), and this burden requires "clear and convincing evidence" that Congress intended to preclude review. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64, 113 S. Ct. 2485, 2499 (1993). For these reasons, when a statute is reasonably susceptible to different interpretations, we must adopt the interpretation permitting federal court review. *Kucana*, 558 U.S. at 251, 130 S. Ct. at 839.[2]

---

[2] The majority suggests that, because its interpretation preserves review of "questions of law" under § 1252(a)(2)(D), it does not run afoul of this principle. Maj. Op. at 31-32. That is a non sequitur. The presumption of judicial review is not a jurisdictional floor. It is a rule of statutory interpretation that guides our reading of any statute limiting federal court jurisdiction to review administrative action, including by limiting our review of non-

The presumption of judicial review is further buttressed by the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449, 107 S. Ct. at 1222. We use this rule of construction because, as the Supreme Court has explained, "deportation is a drastic measure and at times the equivalent of banishment or exile." *INS v. Errico*, 385 U.S. 214, 225, 87 S. Ct. 473, 480 (1966) (quotation marks omitted). Because "the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom[] beyond that which is required by the narrowest of several possible meanings of the words used." *Id.* (quotation marks omitted).

Ignoring the guideposts of the strong presumption of judicial review and the narrow interpretation of deportation statutes, the majority sets off on the wrong path entirely. Since we are not legislators writing laws

---

discretionary factual determinations. *See Kucana*, 558 U.S. at 251, 130 S. Ct. at 839.

St. Cyr does not support the majority's reasoning. In *St. Cyr*, the Supreme Court considered whether portions of the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") "stripped the courts of jurisdiction to decide the question of law presented by respondent's habeas corpus application." *St. Cyr*, 533 U.S. at 298, 121 S. Ct. at 2278. Applying the canons favoring judicial review and constitutional avoidance, it concluded that the disputed statutes did not withdraw the power of federal courts to review such questions. *Id.* at 305, 121 S. Ct. at 2282. Whether those statutes withdrew jurisdiction to review findings of fact was not before the Court. Thus, it is unsurprising the Court preserved only the authority to review questions of law. Nothing in *St. Cyr*, or any other decision I am aware of, implies that preserving review of questions of law independently satisfies the presumption of judicial review of agency action.

to enforce our own views, our job in interpreting the jurisdiction-stripping provisions of the INA is to determine the degree to which Congress clearly intended to remove this Court's ability to review executive action. In fact, "[s]eparation-of-powers concerns ... caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Kucana*, 558 U.S. at 237, 130 S. Ct. at 831. The following discussion demonstrates ambiguity within the text of § 1252(a)(2)(B). I believe my narrower reading of the statute (allowing more judicial review) resolves this ambiguity better than the broad interpretation (allowing much less judicial review) given it by the majority. I do not say that my narrow reading is the only possible one. But it is certainly a natural and available interpretation. Thus, absent clear evidence to the contrary, and with the presumption in favor of judicial review as well as the presumed narrow reading of removal statutes, it is the interpretation we must adopt. With this in mind, I turn to the text of the statute.

III.

Section 1252(a)(2)(B) is titled "Denials of discretionary relief." It has two subsections. Subsection (i) strips courts of jurisdiction to review "any judgment regarding the granting of relief" under §§ 1182(h), 1182(i), 1229b, 1229c, or 1255. Each of those five enumerated sections of the INA describes a form of relief that may only be granted in the discretion of the Attorney General.[3] Subsection (ii) strips jurisdiction to re-

[3] *See* 8 U.S.C. § 1182(h) ("The Attorney General may, in his discretion, waive the application of subparagraphs ... [of this section]."); § 1182(i)(1) ("The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of sub-

view "any other decision or action ... the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." Thus, I read § 1252(a)(2)(B) to say that subsection (i) strips courts of jurisdiction to review only discretionary decisions related to eligibility and the granting of relief under any of the five statutes listed there. Then, subsection (ii) strips courts of jurisdiction to review any other decisions that are explicitly specified to be "discretionary" in the INA.[4]

No one disputes that § 1252(a)(2)(B) removes our jurisdiction to review the ultimate discretionary decision of the Attorney General about whether to grant the five forms of relief enumerated in subsection (i). But the majority reads the statute to do much more than that. There are often many factual and legal questions that must be decided in determining whether a person is even eligible for discretionary relief. And the majority opinion says § 1252(a)(2)(B) leaves us no jurisdiction to review any of those factual findings made by immigration judges in deciding this eligibility question. *See* Maj. Op. at 24-25. Under the majority's interpretation, our Court has jurisdiction to review only legal and constitutional questions under the jurisdiction-restoring provisions of § 1252(a)(2)(D).

---

section (a)(6)(C) [of this section]."); § 1229b(b)(1) ("The Attorney General may cancel removal ...."); § 1229c(a)(1) ("The Attorney General may permit an alien voluntarily to depart the United States ...."); § 1255(a) ("The status of an alien ... 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 ....").

[4] Subsection (ii) does not apply Mr. Patel's petition for review and its meaning is not in dispute here.

But the statute does not require such a diminished role for federal courts. First, when the statute removes our jurisdiction to review "any judgment regarding the granting of relief," the word "judgment" refers to exercises of judgment. It does not naturally include findings of fact. The INA simply does not use the word "judgment" to convey all the meanings given it in the majority opinion. Second, the adjacent statutory text supports involvement of the courts in some of the fact-finding related to eligibility determinations. It shows that where Congress intended to eliminate all review other than legal and constitutional error, it knew how to do so. And reading "judgment" to so broadly inhibit judicial review, as the majority does here, renders superfluous other adjacent statutory language. Third, the structure of the INA and of removal proceedings weigh heavily against interpreting § 1252(a)(2)(B) as eliminating all jurisdiction of this Court to review basic findings of fact. Perhaps it is these reasons that have led all but one of our sister circuits who have considered this issue to conclude that § 1252(a)(2)(B) does not eliminate review of factual or legal determinations related to eligibility for discretionary relief. *See Singh v. Gonzales*, 413 F.3d 156, 160 n.4 (1st Cir. 2005); *Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006) (per curiam); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 178 (3d Cir. 2003); *Garcia-Melendez v. Ashcroft*, 351 F.3d 657, 661 (5th Cir. 2003); *Aburto-Rocha v. Mukasey*, 535 F.3d 500, 502 (6th Cir. 2008); *Iddir v. INS*, 301 F.3d 492, 497 (7th Cir. 2002); *Ortiz-Cornejo v. Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002); *Sabido Valdivia v. Gon-*

zales, 423 F.3d 1144, 1149 (10th Cir. 2005).[5] I hoped this Court would join the majority of our sister circuits.

A.

I first turn to the meaning of the word "judgment." Again, § 1252(a)(2)(B)(i) removes our jurisdiction to review "any judgment regarding the granting of relief" under five specified sections of the INA. The majority thinks the meaning of this word tells us quite a lot about the scope of our jurisdiction. But "judgment" is not defined in the statute and, in ordinary conversation, it can convey different meanings.

"In determining the meaning of a statutory provision, we look first to its language, giving the words used their ordinary meaning." *Artis v. District of Columbia*, 583 U.S. ___, 138 S. Ct. 594, 603 (2018) (quotation marks omitted). The INA does not define the term "judgment." *Montero-Martinez*, 277 F.3d at 1141. And at the time § 1252(a)(2)(B)(i) was written, Black's Law Dictionary gave many definitions for the word, including: "[t]he official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination"; "[t]he final decision of the court resolving the dispute and determining the rights and obligations of the parties"; "conclusion[s] of law upon facts found or admitted by the parties"; and the "[d]etermination of a court of competent jurisdiction upon matters submitted to it." *Judgment*, Black's Law Dictionary (6th ed. 1990). Other contemporary dictionaries also swept broadly. They included definitions such as "the sentence of a court of justice, a judicial de-

[5] The Fourth Circuit has reached a similar conclusion to that of the majority. *See Jean v. Gonzales*, 435 F.3d 475, 480-81 (4th Cir. 2006). The D.C. Circuit has not yet taken up this question.

cision or order in court," *Judgment*, Oxford English Dictionary (2nd ed. 1989); "a formal utterance or pronouncing of an authoritative opinion after judging," *Judgment*, Webster's Third New International Dictionary (1993); and "the mental or intellectual process of forming an opinion or evaluation by discerning and comparing" or "an opinion or estimate so formed," *id.*

The majority says these definitions fall into two categories: (1) final decisions or conclusions of a court based on the application of law to fact and (2) any decision reached by a court. Maj. Op. at 28. But a judgment can also be the exercise of discretion. *See Montero-Martinez*, 277 F.3d at 1144 (holding that the word "judgment" could mean "a decision involving the exercise of discretion" (quotation mark omitted)). This idea is supported by definitions like the "process of forming an opinion or evaluation by discerning and comparing." *Judgment*, Webster's Third New International Dictionary (1993). And I do not agree with the majority that "any decision" is the only natural meaning in the context of § 1252(a)(2)(B)(i). In particular, I reject the majority's definition that extends the meaning of the word "judgment" to include findings of fact. This seems to me a highly eccentric use of the word.[6]

---

[6] The majority cites a sentence from *Nasrallah v. Barr*, 590 U.S. ___, 140 S. Ct. 1683 (2020), saying that under § 1252(a)(2)(B) "a noncitizen may not bring a factual challenge to orders denying discretionary relief." *See id.* at 1693-94; Maj. Op. at 25. However, the Court made this statement (without attendant analysis) only in response to a potential counterargument regarding the scope of a separate jurisdiction stripping statute, § 1252(a)(2)(C). *See Nasrallah*, 140 S. Ct. at 1693-94. And as we note, *see infra* at 52, the case the Supreme Court cited for this proposition, *Kucana*, actually supports the opposite principle—that is, that § 1252(a)(2)(B) strips jurisdiction of only discretionary decisions.

Take, for example, the decision of whether to grant cancellation of removal under § 1229b(a), which is one of the five forms of discretionary relief listed in § 1252(a)(2)(B)(i). To be eligible for cancellation of removal, a permanent resident must show that she has been a lawfully admitted permanent resident for at least five years; she has resided continuously in the United States for seven years after being admitted; and she has not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a). These eligibility requirements are simply a matter of fact: either you've been in the United States for five years, or you haven't. And a recitation of this fact (one way or the other) would not naturally be described as a "judgment." Of course, I can't say that no one has ever used the word "judgment" to mean "findings of fact," but it does not reflect the most natural understanding of the term.

And the INA uses the word "judgment" in other places, where its meaning is never as broad as that as-

---

The question we address today was not before the Court in *Nasrallah*. And the Court did clarify that its decision "has no effect on judicial review of those discretionary determinations" described in § 1252(a)(2)(B). *Id.* The statement quoted by the majority is therefore indisputably dictum. Dicta, and especially Supreme Court dicta, can be persuasive but we are not required to follow it where "the point now at issue was not fully debated." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548, 133 S. Ct. 1351, 1368 (2013) (declining to follow "dictum contained in a rebuttal to a counterargument"). Thus, this statement from *Nasrallah* is properly viewed in light of the facts that: the Supreme Court conducted no analysis of § 1252(a)(2)(B) in connection with its mention of factual challenges; the Court referenced *Kucana*, which seems to link the jurisdiction stripping to discretionary decisions only; and nine circuits say § 1252(a)(2)(B) does not strip jurisdiction of federal courts to review fact-finding related to eligibility. While ordinarily we find Supreme Court dicta to be persuasive, for these reasons the quotation from *Nasrallah* is less so.

signed to it by the majority opinion. It is a well-established canon of interpretation that we presume the same word is intended to have the same meaning when used in different parts of the same act. *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574, 127 S. Ct. 1423, 1432 (2007). The word "judgment" is used thirteen times in the INA. *See Montero-Martinez*, 277 F.3d at 1141 n.5. When not referring to the final decision of a court, the term "judgment" is used exclusively to refer to discretionary decisions, including: the Attorney General's "judgment" of whether to establish DHS offices in foreign countries, 8 U.S.C. § 1103(a)(7); the Attorney General's "discretionary judgment[s]" regarding the apprehension and detention of noncitizens, *id.* § 1226(e); the Attorney General's "discretionary judgment" about whether to grant asylum, *id.* § 1252(b)(4)(D); and the Attorney General's judgment of whether removal of a noncitizen to the country of the noncitizen's designation would "impair the obligation of the United States under any treaty ... or otherwise adversely affect the foreign policy of the United States," *id.* § 1537(b)(2)(A). I'm aware the Supreme Court has also cautioned that "most words have different shades of meaning and consequently may be variously construed," even when used in the same statute. *Duke Energy Corp.*, 549 U.S. at 574, 127 S. Ct. at 1432 (quotation marks omitted) (alteration adopted). But the fact that the INA never uses the word judgment" to mean "any decision" or "findings of fact" surely weighs against imposing those meanings on the text of § 1252(a)(2)(B).[7]

---

[7] It is true that in some places in the INA, Congress used the phrase "discretionary judgment," rather than just the word "judgment." I do not think the use of this phrase in other parts of

The surrounding statutory language casts further doubt on the majority's conclusion. The title of the subsection, "Denials of discretionary relief," suggests that Congress intended to preclude review of the ultimate discretionary decision, as opposed to the factual findings that must be made prior to the exercise of that discretion. *See St. Cyr*, 533 U.S. at 308-09, 121 S. Ct. at 2284 (holding that the title of a statute cannot limit the plain meaning of the text but can shed light on ambiguous words or phrases).

Also, if we construe "judgment" to mean "any decision," this would render the accompanying subsection, § 1252(a)(2)(B)(ii), superfluous. If "judgment" includes all decisions, discretionary and non-discretionary, then there would be no need for subsection (ii) to preclude review of "other decision[s] or action[s]" which are specified as discretionary. *See Montero-Martinez*, 277 F.3d at 1143 n.7; *Torres v. Lynch*, 578 U.S. ___, 136 S. Ct. 1619, 1628 n.8 (2016) (noting courts ordinarily "as-

---

the statute tells us much about what Congress meant when it used the word "judgment" alone. The sections of the INA that use the phrase "discretionary judgment" do not appear in statutes with similar construction as § 1252(a)(2)(B), and were not made part of the statute at the same time. *See Gomez-Perez v. Potter*, 553 U.S. 474, 486, 128 S. Ct. 1931, 1940 (2008) (holding that the inference from negative implication is strongest when "the relevant statutory provisions were considered simultaneously when the language raising the implication was inserted" (quotation marks omitted)); *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-436, 122 S. Ct. 2226, 2234 (2002) (holding that presumptions from negative implication "grow[] weaker with each difference in the formulation of the provisions under inspection."). But I do think it significant that neither the phrase "discretionary judgment" nor the word "judgment" alone are ever used to mean "findings of fact" or "any decision."

sum[e] that Congress, when drafting a statute, gives each provision independent meaning").

Likewise, there are adjacent subsections of the statute, in which Congress clearly meant to strip courts of jurisdiction over *all* matters related to an immigration order or decision, and did so unequivocally and without ambiguity. Section 1252(a)(2)(A)(i), which immediately precedes § 1252(a)(2)(B), says that "no court shall have jurisdiction to review ... *any individual determination* or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title." § 1252(a)(2)(A)(i) (emphasis added). The jurisdiction-stripping effect of this statute is similar to the effect the majority would give § 1252(a)(2)(B): it precludes all judicial review of any factual determinations or applications of law to fact. *See Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. ___, 140 S. Ct. 1959, 1966 (2020). Congress also spoke clearly to remove jurisdiction elsewhere in § 1252 of the INA. Section 1252(a)(2)(C) states "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense" under certain enumerated sections. In contrast, § 1252(a)(2)(B)(i) precludes review of only "any judgment regarding the granting of relief."

An examination of the language of these three adjacent sections shows that if Congress wanted § 1252(a)(2)(B) to eliminate review over all decisions underlying the grant of discretionary relief, it knew exactly how to do it. And it did not do so. *See Montero-Martinez*, 277 F.3d at 1143 (holding that the contrast between "[t]he broad and all-inclusive scope of subsection (A)(i)" and "the far more limited language of (B)(i)" show that Congress intended (B)(i) to apply only to dis-

cretionary decisions). This comparison also shows that when Congress wanted to refer to a broad range of decisions that include findings of fact, it did not use the word "judgment." Instead it used the words "decision" or "determination," which are significantly broader terms. This strongly suggests that § 1252(a)(2)(B)(i) limits review only of decisions left to the discretion of the Attorney General, as opposed to the factual findings related to eligibility.

Also worthy of note, the Supreme Court interpreted the scope of § 1252(a)(2)(B)(ii) in *Kucana*, 558 U.S. 233, 130 S. Ct. 827. In doing so, it strongly suggested that § 1252(a)(2)(B)(i) only applies to discretionary decisions. *See id.* at 246. The Supreme Court said that "[e]ach of the statutory provisions referenced in clause (i) address a different form of discretionary relief from removal, ... and each contains language indicating that the decision is entrusted to the Attorney General's discretion." *Id.* The Supreme Court then explained:

> Congress added in clause (ii) a catchall provision covering 'any other decision ... the authority for which is specified under this subchapter.' The proximity of clauses (i) and (ii), and the words linking them—'any other decision'—suggests that Congress had in mind decisions of the same genre, *i.e., those made discretionary by legislation.* The clause (i) enumeration, we find, is instructive in determining the meaning of the clause (ii) catchall. Read harmoniously, *both clauses convey that Congress barred court review of discretionary decisions* only when Congress itself set out the Attorney General's discretionary authority in the statute.

Id. at 246-47 (emphasis added). Though I acknowledge this passage is dicta, the discussion is closely related to the statute and the concepts before us here. *Kucana* essentially tells us that § 1252(a)(2)(B)(i) applies only to discretionary decisions and it does so in a context that provides persuasive authority to guide us here.

Because of the presumption in favor of judicial review as well as the rule favoring narrow interpretation of deportation-related laws, it is not necessary for me to show that majority's understanding of "judgment" is impossible. I must show only that their interpretation barring judicial review is not required. And this statute just as naturally accepts the narrower definition I have given it. *See Montero-Martinez*, 277 F.3d at 1144 ("The meaning of 'judgment' in § 1252(a)(2)(B)(i) is unclear because the statute does not define the term, and it could mean 'any decision' of the BIA, or it could mean 'a decision involving the exercise of discretion.'") In light of the ambiguity of this statutory provision, the statute does not clearly remove this Court's jurisdiction to review factual findings related to eligibility for the enumerated forms of discretionary relief.

B.

The best interpretation of § 1252(a)(2)(B) is that it excludes review of decisions that involve the exercise of discretion. I recognize that this may include both the final decision of whether to grant any of the five enumerated forms of relief, as well as some other discretionary findings related to eligibility for relief. But it does not include findings of fact that require no discretionary evaluation from the factfinder. This narrower interpretation, which has been adopted by almost every circuit court, best comports with the structure and language of the INA. *See supra* at 62. It also best aligns

with our own precedent. *See Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1332 (11th Cir. 2003) (per curiam) (holding that § 1252(a)(2)(B) does not prevent review of "non-discretionary legal decisions that pertain to statutory eligibility for discretionary relief" (citing *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1298 (11th Cir. 2001)); *Mejia Rodriguez v. Dep't of Homeland Sec.*, 562 F.3d 1137, 1143 (11th Cir. 2009) (per curiam) (holding that "simply because the Secretary has the ultimate discretionary authority to grant an immigration benefit does not mean that every determination ... regarding an alien's application for that benefit is discretionary, and hence not subject to review"); *Alvarado v. U.S. Att'y Gen.*, 610 F.3d 1311, 1314 (11th Cir. 2010) (holding that the Court had jurisdiction to review the IJ's conclusion that respondent had failed to timely request voluntary departure because that was a "non-discretionary judgment regarding ... statutory eligibility to request discretionary relief").

1.

A review of the history and structure of removal proceedings is helpful to clarify the meaning of "discretionary decisions." Courts have long recognized that within immigration proceedings there is "a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *St. Cyr*, 533 U.S. at 307, 121 S. Ct. at 2283; *Jay v. Boyd*, 351 U.S. 345, 353, 76 S. Ct. 919, 924 (1956) (distinguishing eligibility for relief from the decision about whether to grant that relief); *Judulang v. Holder*, 565 U.S. 42, 48, 132 S. Ct. 476, 481 (2011) (describing two-step process of determining eligibility for discretionary relief and then determining whether to grant that relief). The first step, eligibility for relief, is generally "governed by specific statutory standards" for de-

termining who may receive it. *St. Cyr*, 533 U.S. at 307-08, 121 S. Ct. at 2283 (quoting *Jay*, 351 U.S. at 353, 76 S. Ct. at 924); *see also Zadvydas v. Davis*, 533 U.S. 678, 688, 121 S. Ct. 2491, 2497 (2001) ("The aliens here ... do not seek review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority under the [INA]. And the extent of that authority is not a matter of discretion.").

A noncitizen faces the discretionary decision of the immigration authorities only once she has established that the statute makes her eligible for that discretionary form of relief. *Foti v. INS*, 375 U.S. 217, 228 n.15, 84 S. Ct. 306, 313 n.15 (1963) (holding that since an immigration officer "cannot exercise his discretion ... until he finds the alien statutorily eligible ..., a finding of eligibility and an exercise of (or refusal to exercise) discretion may properly be considered as distinct and separate matters"); *McGrath v. Kristensen*, 340 U.S. 162, 165, 71 S. Ct. 224, 227 (1950) ("Eligibility is a statutory prerequisite to the Attorney General's exercise of his discretion to suspend deportation in this case."). Unlike eligibility, the decision about whether to grant a form of relief for which a noncitizen is eligible "is in all cases a matter of grace," and in most cases is not guided by clear statutory standards. *See St. Cyr*, 533 U.S. at 307-08, 121 S. Ct. at 2283 (quotation marks omitted); *Kucana*, 558 U.S. at 247, 130 S. Ct. at 837 (describing the enumerated forms of relief in § 1252(a)(2)(B)(i) as "matter[s] of grace" (quotation marks omitted)).

Mr. Patel's case illustrates the distinction between eligibility for relief and the discretionary decision of whether to grant that relief. Mr. Patel entered the United States without inspection but applied for adjustment of status under 8 U.S.C. § 1255(i). Section 1255(i) provides that the Attorney General "may adjust

the status" of a noncitizen who entered the United States without inspection to that of a lawful permanent resident. § 1255(i)(1)(A)(i), (2). In order to be eligible for the Attorney General's exercise of his discretion to make that adjustment, the applicant carries the burden of showing he meets a number of criteria. He must show he is eligible for an immigrant visa which is immediately available. § 1255(i)(2)(B). For this, he is either eligible as a matter of fact, or he is not. He must show he is admissible to the United States for permanent residence. § 1255(i)(2)(A). Again, he is either admissible, or he is not. And an applicant who, like Mr. Patel, is the beneficiary of a labor certification must also show that he was physically present in the United States on December 21, 2000. § 1255(i)(1)(C). For this as well—he was either in the United States on December 21, 2000 or he was not. No discretion is required to make these decisions. But once he has established that he meets all of these eligibility criteria, the Attorney General then "may" grant his application. As the word "may" indicates, and as § 1252(a)(2)(B)'s reference to § 1255 confirms, the discretionary decision is the decision of whether to grant the request of an eligible applicant to adjust status. Characteristically, the statute carefully defines the conditions of *eligibility* for adjustment but gives no guidance as to which eligible candidates should receive this discretionary relief. That, of course, is left to the discretion of the Attorney General.[8]

---

[8] The majority says that enabling review of non-discretionary decisions related to eligibility would render § 1252(a)(2)(B)(i) meaningless by "effectively allow[ing] for review of the grant of relief." Maj. Op. at 48. But of course, the narrow reading of the statute I propose here would still preclude review of all discretion-

In examining this area of the law, I recognize that some findings about eligibility are also left to the discretion of the Attorney General. In this regard, the majority offers the example of a noncitizen seeking cancellation of removal under § 1229b(b). That person is required to show (A) continuous physical presence for not less than 10 years; (B) good moral character; (C) that he has not been convicted of certain criminal offenses; and (D) that removal would result "in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b). For the factfinder, there is surely discretion involved in deciding whether a person's absence from the country would cause "exceptional and extremely unusual hardship" on their family members. Two fair-minded factfinders could look at the same facts and make a different finding. Perhaps as a result, this Court and others have consistently held that the decision about whether removal would result in "exceptional and extremely unusual hardship" is one left to the discretion of the Attorney General, and so is not subject to review under § 1252(a)(2)(B). *See Gonzalez-Oropeza*, 321 F.3d at 1333; *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003). Unlike non-discretionary factual findings (like whether the respondent was present in the United States on a certain date), assessing "exceptional and extremely unusual hardship" is a "subjective question that depends on the value judgment of the person or entity examining the issue." *Romero-Torres*, 327 F.3d at 891 (quotation marks omitted).

---

ary decisions, including the ultimate decision of whether to grant discretionary relief to eligible respondents.

There is a clear difference between straightforward factual findings and discretionary judgments. With this in mind, the narrower interpretation of "judgment" as "discretionary decision" produces a more coherent reading of the statute as a whole. In drafting subsections (i) and (ii), "Congress had in mind decisions of the same genre, *i.e.*, those made discretionary by legislation," *Kucana*, 558 U.S. at 246-47, 130 S. Ct. at 836. Under this interpretation, subsection (i) would exclude from our review discretionary judgments, even including eligibility requirements that call upon the factfinder to employ discretion, and the ultimate decision about whether to grant relief, and subsection (ii) would function as a "catchall" clause to remove our jurisdiction over those discretionary decisions other than the granting of relief under subsection (i). This reading harmonizes the common meaning of "judgment," the adjacent statutory language, and longstanding precedent recognizing the distinction between discretionary and non-discretionary decisions. Certainly, this interpretation is at least as plausible as that given by the majority. And since we must construe the immigration statutes in favor of judicial review absent clear statutory language to the contrary, the ambiguity in § 1252(a)(2)(B) does not allow the broader removal of our jurisdiction mandated by the majority opinion.

The majority claims the distinction between discretionary and non-discretionary determinations has no statutory basis. Maj. Op. at 35-36. Yet this distinction has been repeatedly recognized by the Supreme Court. And as demonstrated here, it also emerges naturally from the structure of removal proceedings, the text of § 1252(a)(2)(B)(i), and the uniquely discretionary nature of some eligibility determinations left to the discretion of the Attorney General. But the majority does not

stop there. It goes further to argue that there is no difference between discretionary and non-discretionary eligibility decisions, since all application of law to fact "will necessarily involve judgment." Maj. Op. at 38 (quotation marks omitted). But this argument ignores the obvious differences between such straightforward eligibility-related factual findings as the length of time of continuous presence in the United States, and the more nuanced findings required in deciding whether there is "exceptional and extremely unusual hardship" in any given case. The first determination is self-explanatory and can most often be easily verified as either correct or incorrect. But the same cannot be said of the second. That "hardship" determination requires the Attorney General to use judgment to place someone in a subjective category that lacks clear, self-explanatory boundaries. *See Moosa v. INS*, 171 F.3d 994, 1013 (5th Cir. 1999) (noting that the term "extreme hardship" is "not self-explanatory" and that reasonable people could differ as to its construction (quotation marks omitted)). There is no need for "mental gymnastics" to see the difference between these two categories, as the majority claims. Maj. Op. at 39. This Court and our sister circuits have been ably distinguishing them for decades. *See, e.g., id.*; *Gonzalez-Oropeza*, 321 F.3d at 1332-33.

I also reject the view of the majority that the distinction between discretionary and non-discretionary eligibility findings is illogical as a matter of policy. Maj. Op. at 38-39. There is good reason to leave discretionary decisions in the hands of the Attorney General while maintaining appellate review of nondiscretionary findings. For example, when interpreting the phrase "extreme hardship" in a predecessor statute to § 1229b, the Supreme Court recognized that "[t]he Attorney

General and his delegates have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so" and that imposing a different interpretation would "shift the administration of hardship deportation cases from the Immigration and Naturalization Service to this court." *INS v. Jong Ha Wang*, 450 U.S. 139, 145-46, 101 S. Ct. 1027, 1031-32 (1981) (per curiam). Similarly, we do not review the ultimate decision of whether to grant discretionary relief because it is not bounded by clear statutory standards and requires the application of the Attorney General's subjective judgment. *See St. Cyr*, 533 U.S. at 307-08, 121 S. Ct. at 2283. But there is no good reason to commit straightforward factual findings to the unreviewable discretion of the executive branch. After all, those are questions about which the Attorney General simply might be wrong.

2.

The majority says we must read § 1252(a)(2)(B)(i) in conjunction with § 1252(a)(2)(D). Maj. Op. at 30-31, 39-40. True, but in doing so, I draw the conclusion opposite from that of the majority. Congress added § 1252(a)(2)(D) through the REAL ID Act of 2005 to restore circuit courts' jurisdiction to review legal and constitutional claims in immigration cases. REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a), 119 Stat. 231, 310 (2005). Its purpose was to channel those cases out of district courts and into the appellate courts, thereby avoiding "'bifurcated and piecemeal litigation.'" *Balogun v. U.S. Att'y Gen.*, 425 F.3d 1356, 1359-60 (11th Cir. 2005) (quoting 151 Cong. Rec. H2813, H2873). This was a response to the Supreme Court's decision in *St. Cyr*, which held that §§ 1252(a)(1), (a)(2)(C), and (b)(9) did not strip the district courts of jurisdiction to consider habeas petitions under 28 U.S.C. § 2241. *See Chen v.*

U.S. Dep't of Justice, 471 F.3d 315, 327 (2d Cir. 2006) (describing legislative history of § 1252(a)(2)(D) (citing H.R. Rep. No. 109-72, at 174-75 (2005))).

Nothing in the text or legislative history of § 1252(a)(2)(D) suggests that it was meant to expand the jurisdiction-stripping effect of § 1252(a)(2)(B). In fact, the legislative history weighs against the majority's interpretation.[9] When Congress passed the REAL ID Act in 2005, many circuits were already reading § 1252(a)(2)(B) narrowly, so as to permit judicial review of straightforward factual findings about eligibility. In the face of this precedent, Congress could have amended § 1252(a)(2)(B) to stop this type of review. But it did not. Rather, it *expanded* the jurisdiction of courts to review legal and constitutional error that had previously been barred. Thus, Congress's actions strongly suggest it did not intend § 1252(a)(2)(B) to strip courts of this jurisdiction over anything other than the discretionary decision related to certain forms of relief. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349, 104 S. Ct. 2450, 2455 (1984) ("The congressional intent necessary to overcome the presumption [favoring judicial review] may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it.").

C.

Finally, I must address another serious problem with the majority's interpretation of § 1252(a)(2)(B). When it sweeps all factual findings and discretionary

---

[9] We review legislative history only when there is ambiguity in the text of the statute. *Harris v. Garner*, 216 F.3d 970, 976-77 (11th Cir. 2000) (en banc). I have set out why I believe there is such ambiguity here.

judgments into § 1252(a)(2)(B), the majority opinion gives the government the ability to insulate agency findings from judicial review, solely by the way its charges a case. This is not proper. In *Kucana*, the Supreme Court told us that IIRIRA, which added § 1252(a)(2)(B) to the INA, "did not delegate to the Executive authority to" "pare[] back judicial review." *Kucana*, 558 U.S. at 252-53, 130 S. Ct. at 840. Since the majority's interpretation would allow the Attorney General and his delegates to do just that, it is directly at odds with Supreme Court precedent.

Removal proceedings have two stages. First, the government has the burden of establishing, by clear and convincing evidence, that the noncitizen is removable. *Bigler v. U.S. Att'y Gen.*, 451 F.3d 728, 732 (11th Cir. 2006) (per curiam). The grounds for removability include both grounds of inadmissibility, 8 U.S.C. § 1182(a), and grounds of deportation, 8 U.S.C. § 1227(a). *See Judulang*, 565 U.S. at 45-46, 132 S. Ct. at 479 (describing the evolution of modern removal proceedings and explaining that, since 1996, there has been a unified procedure for both excluding and deporting noncitizens). Then, if the government proves removability, or the noncitizen concedes it, the noncitizen may apply for various forms of discretionary relief. *See Matovski v. Gonzales*, 492 F.3d 722, 727 (6th Cir. 2007). These discretionary forms of relief include seeking an adjustment of status, as Mr. Patel did here. *Id.* For this, he bears the burden of proving eligibility. *Id.*

To be eligible for some forms of discretionary relief, such as adjustment of status under § 1255(i), the applicant must be "admissible." 8 U.S.C. § 1255(a)(2). But being inadmissible is also an independent ground for removal. So, in some cases, a noncitizen could be both removable and ineligible for discretionary relief based

on the same facts. Now under the interpretation the majority gives to § 1252(a)(2)(B), our jurisdiction to review whether a noncitizen is admissible will, in many cases, depend entirely on the Attorney General's charging decision. If the government charges a noncitizen as removable for being inadmissible, and the IJ finds the noncitizen inadmissible, our Court will retain jurisdiction to review that finding under § 1252(b)(9). That provision grants us jurisdiction to review "all questions of law and fact ... arising from any action taken or proceeding brought to remove an alien from the United States." But if the government does not charge the noncitizen as removable for being inadmissible, and the IJ finds the noncitizen ineligible for discretionary relief because he is inadmissible, our Court will lack jurisdiction to review that finding. In both cases, the IJ will have found the noncitizen inadmissible, but the government's charging decision alone will have established the scope of our jurisdiction.

And that is exactly what happened to Mr. Patel. The government issued Mr. Patel an NTA that charged him with being removable for being an alien present in the United States without being admitted or paroled, pursuant to 8 U.S.C. § 1182(a)(6)(A)(i). However, the NTA did not charge him with being inadmissible for falsely representing his citizenship under § 1182(a)(6)(C)(ii). Had it done so, it is indisputable that the IJ's factfinding at issue here would have been reviewable. Instead, the government raised inadmissibility only in opposition to Mr. Patel's application for adjustment of status. As a result, and because today's majority ruling says we now cannot review any factual determinations related to Mr. Patel's eligibility for adjustment of status, the government's charging decision

has fully insulated from judicial review the IJ's finding that Mr. Patel is inadmissible.

This outcome is at odds with *Kucana*. In *Kucana*, the Supreme Court interpreted § 1252(a)(2)(B)(ii) as precluding judicial review of decisions made discretionary by statute, but not of decisions made discretionary by agency regulation. 558 U.S. at 252-53, 130 S. Ct. at 840. It held that "[b]y defining the various jurisdictional bars by reference to other provisions in the INA itself, Congress ensured that it, and only it, would limit the federal courts' jurisdiction." *Id.* at 252, 130 S. Ct. at 839. Giving the executive branch a "free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary'" would be an "extraordinary delegation of authority" which "cannot be extracted from the statute Congress enacted." *Id.* at 252, 130 S. Ct. at 840.

If § 1252(a)(2)(B) does not permit the executive branch to insulate its decisions from review by regulation, surely it does not allow it to do the same through the exercise of its immigration charging discretion. Indeed, the Supreme Court has specifically disapproved of leaving eligibility for discretionary immigration relief to "the fortuity of an individual official's [charging] decision." *Judulang*, 565 U.S. at 58, 132 S. Ct. at 486. Doing so subjects identically situated noncitizens to different outcomes and turns deportation proceedings into a "sport of chance."[10] *Id.* at 59, 132 S. Ct. at 487 (quotation marks omitted).

---

[10] The majority accepts this delegation of authority as permissible because § 1252(a)(2)(B)(i) limits review of decisions related to the grant of discretionary relief, not removability. Maj. Op. at 40 n.26. But *Kucana* was similar to Mr. Patel's case. In *Kuca-*

Today, the majority gives precisely this extraordinary degree of authority to immigration officials. The INA or Supreme Court precedent do not permit this. And this startling result offers an independent reason to reject the rule adopted by the majority here.

IV.

In holding the IJ's factual findings unreviewable, the majority ignores a narrower interpretation of § 1252(a)(2)(B)(i) that is at least as plausible as its own. My narrow interpretation better fits the natural meaning of "judgment" and its use in the INA; the legislative history of the § 1252(a)(2)(B) and (D); and the structure of removal proceedings. And it does not vest the executive branch with the authority to insulate its own decisions from judicial review based solely on charging decisions. I understand § 1252(a)(2)(B)(i) to permit us to review the IJ's finding that Mr. Patel's false claim of citizenship was made with subjective intent.

---

na, the Supreme Court addressed its jurisdiction to review denials of motions to reopen, an arguably discretionary form of relief. 558 U.S. at 242, 130 S. Ct. at 834. It did not address determinations related to removability. *Id.* The Court held that the executive branch may not render decisions on motions to reopen unreviewable under § 1252(a)(2)(B)(ii) even by promulgating regulations categorizing those decisions as discretionary. *Id.* at 252-253, 130 S. Ct. at 840. I am therefore not persuaded by the majority's argument that we may delegate such extraordinary authority to the executive branch even in the context of discretionary relief.

APPENDIX B

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10636
Agency No. A072-565-851

PANKAJKUMAR S. PATEL, JYOTSNABEN P. PATEL,
NISHANTKUMAR PATEL,
Petitioners,

versus

U.S. ATTORNEY GENERAL,
Respondent.

March 6, 2019

Petition for Review of a Decision of the Board of Immigration Appeals

Before: Tjoflat, Marcus and Newsom, Circuit Judges.

TJOFLAT, Circuit Judge:

This case presents interesting, and rather complicated, questions of statutory interpretation.

Pankajkumar Patel, an immigrant facing removal, asks us to review a decision by the Board of Immigration Appeals. The Board held that Patel is inadmissible, and thus cannot get relief from removal, because he falsely represented himself as a citizen when applying for a Georgia driver's license. The relevant statute

provides that an alien is inadmissible if he falsely represents himself as a U.S. citizen "for any purpose or benefit" under the law. 8 U.S.C. § 1182(a)(6)(C)(ii)(I). Under the Board's previous interpretation of the statute, an alien is inadmissible only if he makes the false representation with the intent to obtain the purpose or benefit, and if the false representation is material to the purpose or benefit sought. *Matter of Richmond*, 26 I. & N. Dec. 779, 786-87 (BIA 2016). Patel argues that he simply checked the wrong box, and that citizenship did not affect the application. His case presents two questions.

First, whether we have jurisdiction to review Patel's claim that, as a factual matter, he checked the wrong box and thus lacked the requisite subjective intent to trigger the statute. Second, whether we must defer to the Board's interpretation in *Richmond*, finding a materiality element in the statute. The answer to both is, we do not.

I.

Patel came to the United States from India. He entered the country without inspection. Consequently, the Department of Homeland Security issued a notice to appear to Patel charging him as removable for being present in the United States without inspection. *See* 8 U.S.C. § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled ... is inadmissible.").

Patel conceded removability, but he sought discretionary relief from removal by applying for adjustment of status under 8 U.S.C. § 1255(i). Section 1255 permits an alien who entered without inspection to obtain relief from removal if, among other things, the alien is the beneficiary of a labor certification. *See*

§ 1255(i)(1)(B)(ii). Patel was a valid beneficiary, because he had an approved I-140 Immigrant Petition for Alien Worker.[1]

The Attorney General may adjust an alien's status to lawful permanent resident if the alien meets certain requirements. *See* § 1255(i); *see also* 8 C.F.R. § 1245.10(b) (listing the eligibility requirements for an alien who entered without inspection and is seeking adjustment of status based on a labor certification). The parties agree that Patel meets all the statutory criteria for adjustment of status except one: the applicant must show "clearly and beyond doubt" that he is not inadmissible. *See* 8 U.S.C. § 1229a(c)(2) (in a removal proceeding, an alien applying for admission "has the burden of establishing ... that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible").

Patel's admissibility is in doubt because he falsely represented that he was a U.S. citizen when he applied for a Georgia driver's license in 2008. When applying for the license, Patel checked the box indicating that he is a U.S. citizen. This incident arguably renders Patel inadmissible pursuant to § 1182(a)(6)(c)(ii)(I), which says:

> Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit

---

[1] His wife, Jyotsnaben Patel, and son, Nishantkumar Patel, are also parties to this appeal. They too are subject to removal for entering the country without inspection. They are seeking adjustment of status as derivative beneficiaries of Patel's labor certification. As Patel is the lead respondent, and the outcome of all of their petitions for relief depends on his case, we focus solely on Patel for the convenience of the reader.

> under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.

The Board of Immigration Appeals interpreted this section to require three elements: (1) a false representation of citizenship; (2) that is material to a purpose or benefit under the law; (3) with the subjective intent of obtaining the purpose or benefit. *Richmond*, 26 I. & N. Dec. at 786-87.

There was no dispute that Patel made a false representation of citizenship. Nor was there any dispute that a driver's license is a benefit under state law. Patel challenged the applicability of the statute on two grounds: he lacked the requisite subjective intent, and the false representation was not material.

At the removal hearing, Patel argued that he did not have the requisite subjective intent: he simply made a mistake. To prove that it was a mistake, Patel claimed that he provided his alien registration number and his employment authorization card to the DMV with his driver's license application, suggesting that it would make no sense to document his non-citizen status if his goal was to pose as a citizen.

Patel also argued that a false representation of citizenship was not material to obtaining a driver's license. He asserted that an alien is eligible to receive a driver's license in Georgia. As proof, Patel observed that he had previously received a license from Georgia.

The Immigration Judge ("IJ") rejected Patel's arguments. The IJ determined that Patel was not credible. He was evasive when testifying and would not explain to the Court exactly what the mistake was. Furthermore, contrary to his testimony, Patel did not write

his alien registration number on the application. Where the application asks about citizenship, it directs the applicant to provide his alien registration number if he is not a citizen. Patel marked that he was a citizen and did not write down his alien registration number. The application also does not reflect that Patel provided his employment authorization card: in the section on the form where the Georgia official is to list the documents accepted, the only document mentioned is the old Georgia driver's license. In short, the evidence contradicted Patel's testimony, which the IJ already suspected was not candid, so the IJ did not believe Patel's claim that he made a mistake. The IJ found that Patel willfully and purposefully indicated that he was a U.S. citizen.

The IJ also held that Patel failed to meet his burden of proving that he was otherwise eligible for a driver's license. The fact that Patel had previously obtained a license in Georgia is inconclusive. Patel might have misrepresented his citizenship on his past application too. Alternatively, the IJ continued, even if Patel obtained his prior license without claiming citizenship, the rules governing who qualifies for a license in Georgia could have changed in the interim. Patel simply did not provide enough evidence to show that he was otherwise eligible for the license.[2]

Because Patel failed to show that he was not inadmissible, the IJ denied his application for adjustment of status and ordered the removal of the Patels.

---

[2] To prove his theory, Patel asked the IJ to take judicial notice of Georgia law. The IJ refused. We pause to note that, if asked, federal courts must take judicial notice of state law. *See Lamar v. Micou*, 114 U.S. 218, 223, 5 S. Ct. 857, 859 (1885) ("The law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.").

The Board affirmed. It found no clear error in the factual finding that Patel was not credible and made the false representation for the purpose of obtaining a license—i.e., with subjective intent. The Board also agreed that Patel did not produce enough evidence to prove that he was otherwise eligible for a license—i.e., to prove that the false representation was immaterial.

One board member dissented. She observed that Georgia law extended driver's licenses to those with lawful status. *See* Ga. Comp. R. & Regs. 375-3-1.02(6) ("Each customer must provide documentation of his or her citizenship *or lawful status* in the United States." (emphasis added)). And an alien with "a pending application for lawful permanent residence" has lawful status for the purpose of a driver's license application. 6 C.F.R. § 37.3. Since Patel had a pending application for lawful permanent residence when he applied for the Georgia license, he did not need citizenship to obtain the license. Thus, the dissenting board member reasoned, the false representation was immaterial.

Patel appeals the Board's decision.

II.

Typically, on appeals from a Board decision, we review legal conclusions *de novo*, and we review factual findings under the substantial evidence test. *Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399, 403 (11th Cir. 2016). When the Board expressly adopts the IJ's findings or reasoning, we also review the IJ's decision. *Id.* Both parties propose we follow the typical standard.

But Congress has stripped our jurisdiction to hear certain appeals of immigration cases. And even when the parties agree, we must consider jurisdictional issues *sua sponte*. *Gonzalez v. Thaler*, 565 U.S. 134, 141,

132 S. Ct. 641, 648 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.").

Congress enumerated several "[m]atters not subject to judicial review" in 8 U.S.C. § 1252(a)(2).[3] As it pertains to this case, we do not have "jurisdiction to review ... any judgment regarding the granting of relief under section ... 1255 of this title." § 1252(a)(2)(B). However, even when this jurisdictional bar applies, we still have power to review constitutional claims or questions of law. *See* § 1252(a)(2)(D). In short, we cannot review appeals from judgments under § 1255 unless the party raises a constitutional claim or a question of law.

Accordingly, as Patel appeals from the denial of his claim for adjustment of status under § 1255, we review

---

[3] The statute provides, in relevant part:

(2) Matters not subject to judicial review

...

(B) Denials of discretionary relief

...

[N]o court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General ... the authority for which is specified under [8 U.S.C. §§ 1151-1381] to be in the discretion of the Attorney General[.]

the legal conclusions below *de novo*, but we cannot review the factual findings.[4]

---

[4] On closer inspection, the jurisdictional issue is more complicated. Section 1252(a)(2)(B)(i) precludes review of "any judgment regarding the *granting* of relief." (emphasis added). Arguably, judgments *denying* relief do not come within the statute. This reading of the text is even more plausible when considered alongside other provisions limiting judicial review of immigration cases. In those provisions, Congress precluded review of decisions to "grant or deny" a waiver. *See, e.g.*, § 1182(h); *see also Nken v. Holder*, 556 U.S. 418, 430, 129 S. Ct. 1749, 1759 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quotation omitted)). Additionally, if § 1252(a)(2)(B)(i) is interpreted to apply to judgments both granting and denying relief, it likely renders superfluous two other jurisdiction stripping provisions referenced in the section. *Compare* § 1252(a)(2)(B)(i) (precluding review of "any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255"), *with* § 1182(h) ("No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection."), *and* § 1182(i)(2) ("No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1)."). We are also mindful that there is a strong presumption in favor of interpreting statutes to allow judicial review of administrative actions; consequently, jurisdiction stripping is construed narrowly. *See Kucana v. Holder*, 558 U.S. 233, 251-52, 130 S. Ct. 827, 839 (2010).

On the other hand, the title of the subsection says "[d]enials of discretionary relief." § 1252(a)(2)(B). While section headings cannot displace the text of the statute, they can help resolve ambiguities in the text's meaning. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47, 128 S. Ct. 2326, 2336 (2008). This principle begs the question of whether the text "any judgment regarding the granting of relief" is ambiguous, or whether the title—which singles out denials of relief—would displace conflicting text. The text is arguably ambiguous, because it mentions judgments *regarding* the granting of relief. At any rate, it would

III.

The issue in this case is whether Patel is inadmissible pursuant to § 1182(a)(6)(C)(ii)(I) for falsely representing himself to be a U.S. citizen on his driver's license application. The Board has read two elements into the statute: subjective intent—the alien must make the false representation with the intent of obtaining a purpose or benefit under the law—and materiality—the false representation must be material to the

---

be an odd turn of reasoning to say that a subsection purportedly about denials is really limited to grants.

Furthermore, one could argue that denials of relief under § 1255 are excluded by the catchall provision in § 1252(a)(2)(B)(ii). But this interpretation runs into the same problem of rendering § 1182(h) and § 1182(i) superfluous. Plus, when interpreting statutes, we favor the specific over the general, and because § 1252(a)(2)(B)(i) specifically deals with appeals from § 1255, we probably should not interpret the catchall provision to deal with the same thing. *See In re Read*, 692 F.3d 1185, 1191 (11th Cir. 2012) ("General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208, 52 S. Ct. 322, 323 (1932)).

For these reasons, we think the application of § 1252(a)(2)(B) to denials of relief under § 1255 is at least unclear. If it does not apply, we would be free to review factual findings under the typical substantial evidence test. Ultimately, however, we are bound to follow our precedents. To our knowledge, none of our precedents have grappled with the arguments raised here. But we have routinely read § 1252(a)(2)(B)(i) to apply to appeals of grants and denials. *See, e.g., Jimenez-Galicia v. U.S. Att'y Gen.*, 690 F.3d 1207, 1209 (11th Cir. 2012) ("The INA prevents judicial review of the Board's discretionary judgments that grant or deny petitions for cancellation of removal."). And we cannot get around the prior panel precedent rule just because the prior panel did not consider this argument; there is no exception for that. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1302-03 (11th Cir. 2001).

purpose or benefit sought. *Richmond*, 26 I. & N. Dec. at 786-87. Patel claims that he does not meet either requirement. We address each claim in turn.

A.

Patel contends that he did not have the requisite subjective intent when the made the false representation of citizenship. He says that he made a mistake—he did not intend to make the false representation, he meant to check the box indicating that he was a non-citizen. This argument assumes that the false representation must have been made knowingly. We doubt that there is a knowing requirement.[5] Because the par-

---

[5] The question is, what exactly does subjective intent require? It could mean that the alien must intend to make a false representation of citizenship—i.e., a knowing requirement—or it could mean that the alien must make a false representation, wittingly or unwittingly, with the intent of obtaining a purpose or benefit under the law. In other words, does the statute cover those who even accidentally make a false representation of citizenship in the course of pursuing a purpose or benefit under the law?

We seriously doubt that § 1182(a)(6)(C)(ii)(I) requires the false claim to be knowing. For starters, the text does not mention a "knowing" or "willful" false representation of citizenship. *See Valadez-Munoz v. Holder*, 623 F.3d 1304, 1309 n.7 (9th Cir. 2010) ("It should be noted that the criminal statute requires the representation to be both false and willful, while [§ 1182(a)(6)(C)(ii)(I)] only requires falsity."). And, again, the immediately preceding subsection does include a knowing requirement. § 1182(a)(6)(C)(i) ("Any alien who, by fraud or *willfully* misrepresenting a material fact, seeks to procure ... [an immigration benefit] is inadmissible." (emphasis added)).

In addition, if we interpreted the statute to include a knowing requirement, it would render superfluous the exception in the immediately following subsection. The exception provides that an alien who falsely claims citizenship for a public benefit "shall not be considered to be inadmissible" if, among other things, the alien "reasonably believed at the time of making such representation

ties did not address this question, however, we will assume that there is and that Patel's claim, if true, would have entitled him to relief below.

At bottom, Patel maintains that the evidence, if properly considered, shows that he made a mistake. He repeats his assertion that he provided the DMV official with his immigration documents. If true, it must have been a mistake to check the citizen box, since it would make no sense for someone posing as a citizen to provide proof of their immigrant status. Of course, the Board and the IJ decided his assertion was not true. Patel also argues that because he secured a driver's license in the past, he knew he could get a license without posing as a citizen, and there was no reason to lie.[6]

---

that he or she was a citizen." 8 U.S.C. § 1182(a)(6)(C)(ii)(II). If the provision at issue in this case contains a knowing requirement, the exception Congress explicitly included is entirely unnecessary. *See Richmond v. Holder*, 714 F.3d 725, 729 n.3 (2d Cir. 2013) ("The negative pregnant of this exception is clear: for aliens ... who fail to meet those requirements, false citizenship claims need not be knowing to run afoul of [the statute]."). Basic principles of statutory interpretation counsel strongly against that result. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (It is "one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (alteration omitted) (quotation omitted)).

Furthermore, the Board did not decide this issue, so there is no issue of *Chevron* deference. *Richmond*, 26 I. & N. Dec. at 783 ("[W]e need not reach the parties' arguments relating to whether a false claim must be made knowingly[.]").

[6] Not quite. Georgia law dictates that a non-citizen with lawful status can only receive a temporary license, while a citizen is eligible for an eight-year license. *Compare* O.C.G.A. § 40-5-21.1(a), *with* Ga. Comp. R. & Regs. 375-3-2.01(1)(a). Thus, the opportunity to get a longer-term license is a possible reason to falsely claim citizenship.

But we do not have jurisdiction to review these arguments. "Whether [Patel's] false claim was made with a subjective intent is a question of fact to be determined by the Immigration Judge." *Richmond*, 26 I. & N. Dec. at 784. And we do not review factual findings from denials of relief under § 1255. *See* § 1252(a)(2). Patel's claim is nothing more than a request for us to reweigh the evidence. This is a standard factual dispute, and we cannot review it.

B.

Patel's second claim is that he does not satisfy the materiality element of § 1182(a)(6)(C)(ii)(I), because a Georgia driver's license is available to non-citizens. While the Board interprets the statute to include a materiality element, we have never applied the Board's construction of the statute in a published opinion.[7] Thus, the initial inquiry is whether to defer to the Board's interpretation.

When an agency has authority to interpret a statute, we defer to its interpretation if the statute is ambiguous and the interpretation is reasonable. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44, 104 S. Ct. 2778, 2781-82 (1984). This deference extends to precedential, three-member Board decisions interpreting immigration law. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S. Ct. 1439, 1445 (1999) (according *Chevron* deference to a Board decision interpreting the Immigration and Nationality

---

[7] In fact, we have never interpreted any part of § 1182(a)(6)(C)(ii)(I) in a published decision. Nor have we interpreted in a published decision 8 U.S.C. § 1227(a)(3)(D)(i), which uses the exact same language to make an alien deportable for falsely claiming citizenship.

Act); *see also Quinchia v. U.S. Att'y Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008) (holding that while *Chevron* deference applies to precedential, three-member Board decisions, it does not apply to single-judge Board decisions that do not rely on precedent). *Richmond* is a precedential, three-member Board decision.

1.

First, we determine whether the statute is ambiguous. If the statute is unambiguous, we simply apply its plain meaning, and there is no room for deference. *See SEC v. Levin*, 849 F.3d 995, 1003 (11th Cir. 2017). A statute is ambiguous "if it is susceptible to more than one reasonable interpretation." *In re BFW Liquidation, LLC*, 899 F.3d 1178, 1188 (11th Cir. 2018) (quotation omitted). "In determining whether a statute is plain or ambiguous, we consider the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (quotation omitted).[8]

---

[8] Because we are interpreting an immigration law where relief from removal hangs in the balance, there is another tool of statutory construction we would normally consider—the rule of lenity. *See INS v. St. Cyr*, 533 U.S. 289, 320, 121 S. Ct. 2271, 2290 (2001) (referencing "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" (quotation omitted)). But the rule of lenity is a rule of last resort. *See Moskal v. United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 465 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute." (quotation omitted)). Thus, we do not employ the rule of lenity until we determine that the statute is ambiguous through the usual tools of construction. For this reason, it seems clear that—regardless of whether the rule of lenity applies at step two of the *Chevron* inquiry, *see* Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Defer-*

The plain meaning of the text is clear—there is no materiality element. The statute reads, "Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under ... Federal or State law is inadmissible." § 1182(a)(6)(C)(ii)(I). The text makes clear that the false representation must be made *for* a purpose or benefit under the law. What does it mean to do something for a purpose or benefit? In this context, the word "for" is a function used to indicate purpose, an intended goal, or the object of an activity. *For*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/for (last visited Feb. 4, 2019). Applied to the statute, the alien must make the false representation with the goal of obtaining a purpose or benefit under the law.

It does not follow that the false representation must be material to the purpose or benefit sought. Aliens can make a false representation with the goal of obtaining a benefit, even if the false representation does not help them achieve that goal. To illustrate, consider the example of an ethically challenged student who cheats on his test. The honor code prohibits using unauthorized materials for the purpose of cheating, but the student steals an answer key from the teacher's desk, memorizes the answers, and reproduces them on the test exactly as they were recorded on the answer key. Unfortunately for the student, the answer key was for a different test, and he fails miserably. Is there

---

ence, 17 Geo. Immigr. L.J. 515, 576-82 (2003), or if it only applies after the court determines the agency's decision is unreasonable, *see* David S. Rubenstein, *Putting the Immigration Rule of Lenity in its Proper Place: A Tool of Last Resort After* Chevron, 59 Admin. L. Rev. 479, 504-19 (2007)—it has no place at step one, where we decide if the statute is ambiguous in the first place.

any doubt the student is guilty of cheating? He used unauthorized material for the purpose of cheating. Just because the answer key was immaterial, and did not help the student achieve his goal, the student's purpose was still to cheat. Similarly, if an alien makes a false representation of citizenship to obtain a benefit under the law, but citizenship turns out to be completely unrelated to obtaining the benefit, the alien's purpose was still to obtain the benefit.

If Congress intended to make materiality an element of the statute, it easily could have done so. For example, the statute could have said "for any relevant purpose or benefit," or "for any material purpose or benefit." In fact, Congress did include a materiality element in the immediately preceding subsection, which says: "Any alien who, by fraud or willfully misrepresenting a *material* fact, seeks to procure ... [an immigration benefit] is inadmissible." 8 U.S.C. § 1182(a)(6)(C)(i) (emphasis added). We presume that Congress is deliberate when it includes a term in one section of a statute but omits it in another. *Ela v. Destefano*, 869 F.3d 1198, 1202 (11th Cir. 2017) ("It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Duncan v. Walker*, 533 U.S. 167, 173, 121 S. Ct. 2120, 2125 (2001))). Thus, unless there is persuasive evidence to the contrary, we assume that Congress intended to include a materiality element in § 1182(a)(6)(C)(i) but not in § 1182(a)(6)(C)(ii)(I).

As evidence, Patel says that we must read the statute in context. Section 1182(a)(6)(C)(ii)(I) supplements its immediate predecessor by expanding the

range of benefits to which it applies—i.e., any purpose or benefit under state or federal law, rather than any immigration benefit. From this, Patel infers that Congress' only concern was with aliens falsely claiming citizenship to get benefits restricted to U.S. citizens. But that is not what the statute says. It does not say for any purpose or benefit under the law "restricted to U.S. citizens" or "available only to U.S. citizens." Patel asks us to add elements that are not in the text.

The context actually suggests that declining to graft a materiality requirement onto the statute is consistent with the statute's purpose. Tellingly, Congress made § 1182(a)(6)(C)(i) waivable, but not § 1182(a)(6)(C)(ii)(I). *See* 8 U.S.C. § 1182(a)(6)(C)(iii). This difference suggests that Congress thought falsely claiming citizenship to get a public benefit is more serious than misrepresenting some other fact to get an immigration benefit. Refusing to impose a materiality requirement is consistent with treating false claims of citizenship more seriously. Furthermore, materiality is an important limitation for § 1182(a)(6)(C)(i). There, the misrepresentation could be about *any* fact, which would be very broad without a materiality requirement. In contrast, § 1182(a)(6)(C)(ii)(I) only applies to false claims about *citizenship*. This limitation substantially narrows the provision's applicability on its own.

Further bolstering our reading of the statute, the Supreme Court reached the same conclusion when interpreting another statute with very similar text. *See Kungys v. United States*, 485 U.S. 759, 108 S. Ct. 1537 (1988). The statute at issue in *Kungys* provides that a person is not of "good moral character" (and thus is ineligible for naturalization) if he "has given false testimony for the purpose of obtaining any benefits under [immigration law]." 8 U.S.C. § 1101(f)(6). For our pur-

poses, the text is strikingly similar—it applies to someone who gives false testimony for a benefit under immigration law. Neither the statute in *Kungys* nor the one in this case mentions materiality. The Supreme Court held that the statute "does not distinguish between material and immaterial misrepresentations." *Kungys*, 485 U.S. at 779, 108 S. Ct. at 1551. "Literally read," the Court explained, it applies to a person "if he has told even the most immaterial of lies with the subjective intent of obtaining immigration or naturalization benefits. We think it means precisely what it says." *Id.* at 779-80, 108 S. Ct. at 1551.

Patel maintains that the statute in *Kungys* is different because it had a limited scope that avoided harsh results. True, § 1182(a)(6)(C)(ii)(I) is broader in some ways—it applies to oral and written statements, whether or not under oath, for any purpose or benefit under the law. *See Kungys*, 485 U.S. at 780, 108 S. Ct. at 1551 (explaining that statute only applied to "oral statements made under oath" for the purpose "of obtaining immigration benefits"). But § 1182(a)(6)(C)(ii)(I) is also narrower in another important respect: it only applies to false claims of citizenship. More to the point, the differences between the statute in *Kungys* and the one in this case make perfect sense. The statute in *Kungys* is about identifying moral character—thus, lying under oath for any reason is relevant. Here, if the goal is to deter aliens from falsely claiming citizenship to get public benefits, it would be counterproductive to limit the statute to oral statements made under oath, since sworn testimony of citizenship status often is not required to get public benefits (such as a driver's license).

2.

Patel's main argument for inserting a materiality element into the statute is that without it the statute will produce draconian results. Namely, he posits that without a materiality element an alien could become permanently inadmissible simply for checking the wrong box on an application. At first glance, it appears that Patel's example—mistakenly checking the wrong box—is really about whether the false claim to citizenship must be knowing.[9] Viewed in that light, it is tempting to dismiss Patel's example as unrelated to the issue here: materiality. But in at least some cases, a materiality element would prevent the draconian result Patel puts forward. To see why, imagine that the statute requires materiality, and a non-citizen is seeking a public benefit that is available to citizens and non-citizens alike. The non-citizen mistakenly checks the wrong box—falsely claiming citizenship for a public benefit. If the statute requires materiality, pointing out the immateriality of citizenship to the benefit sought would be an effective defense. Nevertheless, we are not persuaded by this argument to write a materiality element into the statute.

As a preliminary matter, even if we agree that the statute allows for harsh or unfair consequences, that does not give us license to ignore the plain meaning of the text. We will look beyond the unambiguous plain meaning of the text only if the plain meaning produces absurd results. *Silva-Hernandez v. U.S. Bureau of Citizenship & Immigration Servs.*, 701 F.3d 356, 363 (11th Cir. 2012) ("This Court's one recognized exception to the plain meaning rule is absurdity of results."). This is a narrow exception—the results must be "truly ab-

[9] *See supra* note 5.

surd."[10] *Silva-Hernandez*, 701 F.3d at 363. "Otherwise, clearly expressed legislative decisions would be subject to the policy predilections of judges." *Id.* (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1188 (11th Cir. 1997)). Our job when interpreting statutes is to faithfully effectuate legislative intent, and we assume that Congress would not intend truly absurd results. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470, 109 S. Ct. 2558, 2575 (1989) (Kennedy, J., concurring) ("When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way.").

If a result is consistent with the statute's purpose, it is not the place of judges to declare the result absurd and craft a different outcome. *Cf. Silva-Hernandez*, 701 F.3d at 364 ("Not only is the plain meaning of the statute not absurd, it arguably furthers the legislative intent[.]"); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120, 108 S. Ct. 1666, 1674 (1988) (four votes) (refusing to follow an interpretation that leads to "absurd or futile results ... plainly at variance with the policy of the legislation as a whole" (alteration in original) (quotation omitted)).

---

[10] To illustrate, here are a few classic examples of absurd results: a statute criminalizing the obstruction of mail could not have been intended to punish a police officer who lawfully arrested a postal worker for homicide; an antiquated rule prohibiting drawing blood in the streets could not have been meant to apply to a doctor performing emergency surgery; and a law banning prison escapes could not have been intended to punish an inmate for fleeing from a burning prison. John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2402 (2003).

While there is a narrow exception for absurd results, saying that a result is draconian is not the same as saying it is absurd.[11] Of course, draconian results may help show absurdity. *See Commercial Office Prods. Co.*, 486 U.S. at 120, 108 S. Ct. at 1674 (four votes) (relying on a "severe consequence, in conjunction with [a] pointless delay," to find that an interpretation led to absurd results). But to be clear, there is no standalone exception for draconian results. Such an exception would be a prescription for judicial legislating—with courts altering the plain text of statutes each time a case uncovers what one judge considers to be an injustice.

The result here is not absurd. Congress enacted the provision to crack down on aliens falsely claiming citizenship to get jobs and public benefits. *See Castro v. Att'y Gen.*, 671 F.3d 356, 368-69 (3d Cir. 2012) (reviewing legislative history). Applying the statute even when citizenship is immaterial advances the legislation's purpose because it deters aliens from falsely claiming citizenship. Admittedly, the statute is written broadly. We think Congress intended to do so. It is consistent with Congress' choice to not make the provision waivable. *See* § 1182(a)(6)(C)(iii).

Congress made one limited exception to inadmissibility for falsely claiming citizenship. The statute provides that a person who falsely claims citizenship for a public benefit is not inadmissible if: each parent is or was a citizen, the person permanently resided in the US before turning 16, and the person "reasonably be-

---

[11] While the Supreme Court in *Kungys* made efforts to show that a "literal reading of the statute does not produce draconian results," it did not say that the plain meaning should be ignored if the statute had. *Kungys*, 485 U.S. at 780-81, 108 S. Ct. at 1551-52.

lieved ... that he or she was a citizen." § 1182(a)(6)(C)(ii)(II). The exception suggests that Congress thought about the consequences of the provision and carved out what it considered a harsh or unfair result. By extension, other consequences do not warrant an exception. When Congress has made an exception for those who, in limited circumstances, falsely claim citizenship by mistake, it is hard to see how applying the statute to those who are outside those circumstances is absurd. It seems to be precisely what Congress intended.

3.

We turn briefly to the Board's opinion in *Richmond*. The Board's analysis is flawed and unclear.[12] However, because we conclude that the statute is unambiguous on materiality, we need not determine whether the Board's interpretation is reasonable. Rather, we consider the Board's textual arguments to inform our analysis of the plain meaning.

The Board derives the materiality element, not from the "for any purpose or benefit" language, but from the language "under this chapter ... or any other Federal or State law." § 1182(a)(6)(C)(ii)(I); *see Richmond*, 26 I. & N. Dec. at 784. As best we can tell, the opinion figures that since the statute defines the scope of the purpose or benefit with reference to other federal or state law, citizenship must be material to the purpose or benefit sought. *See id.* at 784, 786-87. If you

---

[12] For a discussion of the problems with the Board's reasoning, *see Teye v. U.S. Att'y Gen.*, 740 F. App'x 944, 948-51 (11th Cir. 2018) (O'Scannlain, J., concurring).

think that argument is unclear, so do we.[13] At any rate, Patel's case demonstrates the fallacy of that reasoning. The parties agree that a driver's license is a benefit under the law. Even if citizenship is immaterial to getting a license, it does not change the fact that a license is still a benefit under the law. Put differently, the text does not require that the purpose or benefit sought be one restricted or available only to citizens.

The other reason the Board gave for finding a materiality element was to ensure that the statute is not "read so broadly that it fails to exclude anything." *Id.* at 784. The purpose or benefit language must do some work. We agree. But it does not follow that without a materiality element, the language is superfluous. The statute would still require that the purpose or benefit arise under the law. To state an obvious example—though we do not suggest that this is the outer limit of the statute's reach—if someone falsely claims to be a citizen in casual conversation with a friend, perhaps because they are embarrassed about their citizenship status or are worried they will be judged, that is not for a purpose or benefit under the law. Since the parties agree that a driver's license is a benefit under the law, we do not need to decide the contours of the purpose or benefit requirement. *See, e.g.*, *Castro*, 671 F.3d at 370 (finding that minimizing the risk of detection is not nec-

---

[13] Here is what the Board said: Because of the word "under," the statute "is dependent on the statutory provisions of the Act or any other Federal or State law. Therefore, we interpret the phrase ... to mean that a false claim must be made to achieve a purpose or benefit that is governed by one of these laws. We also ... find that the presence of a 'purpose or benefit' ... must be determined objectively ... [T]hat is, the United States citizenship must actually affect or matter to the purpose or benefit sought." *Id.* at 784, 787.

essarily a benefit under the law for the statute's purposes). It suffices to note that the requirement can provide a meaningful limit without a materiality element.

* * *

In sum, the statute renders inadmissible an alien who (1) falsely claims to be a citizen (2) with the intent of obtaining a purpose or benefit (3) that arises under federal or state law.[14] It does not require that citizenship be material to the purpose or benefit sought. For this reason, Patel's argument that he does not qualify under the statute because his false representation was not material is, well, immaterial.

IV.

Patel's petition for review is denied.

PETITION DENIED.

---

[14] While our rephrasing of the statute omits the language "under this chapter (including section 1324a of this title)," we do not mean it should be overlooked. This language is important. *See Diaz-Jimenez v. Sessions*, 902 F.3d 955, 958-59 (9th Cir. 2018) (noting that the reference to § 1324a makes it clear that seeking private employment qualifies as a purpose or benefit under the statute). Our reduction of this part of the statute throughout the opinion to "under the law" is a stylistic convenience.

NEWSOM, Circuit Judge, concurring:

I concur in the judgment, and I join in the Court's opinion except for footnotes 4 and 5, which seem to me unnecessary to the resolution of the case.

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF IMMIGRATION APPEALS

Files: A073 652 334 Atlanta, GA
A072 565 851; A073 546 027

IN RE: JYOTSNABEN P PATEL
PANKAJKUMAR SOMABHAI PATEL
NISHANTKUMAR PATEL

January 17, 2017

CHARGE:
Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (all respondents)

APPLICATION:
Adjustment of status

IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENTS:
R. Scott Oswald, Esquire

The respondents, natives and citizens of India, have appealed from the decision of the Immigration Judge dated May 9, 2013. In that decision, the Immigration Judge made an adverse credibility finding against the

lead respondent (072 565 851) (I.J. at 4).[1] The Immigration Judge then determined that the lead respondent has not established that he is clearly and beyond doubt admissible for adjustment of status under section 212(a)(6)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(C)(ii), and is, therefore, ineligible for adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1255(i) (I.J. at 2-7). As the remaining respondents are derivative beneficiaries of the lead respondent's application for adjustment of status, they have also been rendered ineligible for adjustment of status.[2] *See Matter of Naulu*, 19 I&N Dec. 351, 353 (BIA 1986).

On appeal the respondents challenge the Immigration Judge's adverse credibility finding, and they renew their argument that the lead respondent is not inadmissible under section 212(a)(6)(C)(ii) of the Act (Tr. at 94). The respondents concede that the lead respondent falsely represented himself to be a citizen of the United States when he marked the box on an application for a noncommercial Georgia driver's license indicating that

---

[1] The lead respondent's wife (073 652 334) is indicated as the lead respondent in the caption because these cases were consolidated after the initiation of removal proceedings against each respondent separately (Tr. at 4-6).

[2] The Immigration Judge denied the applications for voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b), for the lead respondent and his wife, but granted the application of their son (073 546 027) (I.J. at 7). The Immigration Judge's grant of voluntary departure to 073 546 027 will not be reinstated because, after having received the requisite advisals, *see Mauer of Gamero*, 25 I&N Dec. 164, 165-68 (BIA 2010), the rider respondent has not provided timely proof that the voluntary departure bond was posted within 30 days of filing the Notice of Appeal. *See* 8 C.F.R. § 1240.26(c)(3)(ii). In any event, the record reflects that the respondents were not really interested in voluntary departure (Tr. at 107).

he is a United States citizen (Tr. at 93, 102). But the respondents assert that the lead respondent did not do so "for any purpose or benefit under ... any other Federal or State law ...." *See* section 212(a)(6)(C)(ii) of the Act. Rather, the respondents argue that, because the lead respondent was "otherwise eligible" to receive a noncommercial Georgia driver's license as the recipient of a valid employment authorization document, no "purpose or benefit" can be ascribed to the lead respondent's false representation of United States citizenship (Tr. at 94). We are not convinced. Accordingly, the respondents' appeal will be dismissed.[3]

Under section 240(c)(2)(A) of the Act, the respondents, not the Department of Homeland Security, have the burden of establishing that the lead respondent is "clearly and beyond doubt entitled to be admitted and is not inadmissible" under section 212(a)(6)(C)(ii) of the Act. *See, e.g., Richardson v. Reno*, 162 F.3d 1338, 1346 n. 23 (11th Cir. 1998), *cert. granted and vacated on other grounds* 526 U.S. 1142 (1999); *see also* 8 C.F.R. § 1240.8(b). The respondents must establish "clearly and beyond doubt" that the lead respondent did not make the false representation of United States citizenship in order to obtain a noncommercial Georgia driv-

---

[3] During the pendency of the appeal, attorney Eli A. Echols entered his appearance on behalf of the respondent Nishantkumar Patel (073 546 027), and he submitted a motion for administrative closure or remand on his behalf on November 7, 2016. The motion is based on the respondent's marriage to a United States citizen. However. the motion is not supported by any application for relief or evidence beyond proof of the marriage and the citizenship status of the respondent's spouse. Accordingly, the motion will be denied. *See generally Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012); *see also* section 240(c)(7)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(B); 8 C.F.R. § 1003.2(c)(4). A copy of this decision will be sent to attorney Eli A. Echols.

er's license, which, the respondents do not dispute, constitutes a "benefit" provided under Georgia state law (Tr. at 9-10).

We review the Immigration Judge's factual findings for clear error only, and on the record before us, we see no clear error in the Immigration Judge's factual finding that the lead respondent: (1) has not been a credible witness; and (2) falsely represented himself to be a citizen of the United States for the purpose of obtaining a noncommercial Georgia driver's license.[4] *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 495 (1950) (stating that a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence); *Matter of Richmond*, 26 I&N Dec. 779, 784 (BIA 2016) ("Whether the respondent's false claim was made with a subjective intent is a question of fact to be determined by the immigration Judge.").

The Immigration Judge found that the lead respondent is not a credible witness. In making the adverse credibility finding, the Immigration Judge permissibly identified: (1) the respondent's discrepant testimony to the documents he submitted to the State of Georgia in support of the noncommercial driver's license application (I.J. at 3; Tr. at 54-55, 57-58, 61-62; Exh. H-6);

---

[4] We are not bound by our prior unpublished decisions (Respondent's Br. at Tab J). *See Matter of Zangwill*, 18 I&N Dec. 22, 27 (BIA 1982), *overruled on other grounds*, *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). We further note that, to the extent the documents appended to the respondents' appeal brief are intended as evidence—not legal authority—that has not been submitted to the Immigration Judge, we are not allowed to consider this evidence and make independent fact-findings based thereupon. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984).

(2) the respondent's inaccurate testimony that he provided his alien registration number on the noncommercial driver's license application (I.J. at 4; Tr. at 58, 61; Exh H-6); and (3) the respondent's false representation of his manner of entry into the United States on a previously submitted application for asylum (I.J. at 4; Tr. at 82, 87; Exhs. H-7, H-8). Accordingly, the adverse credibility finding is not clearly erroneous. *See U.S. Commodity Futures Trading Com'n v. Hunter Wise Commodities, LLC*, 749 F.3d 967, 974 (11th Cir. 2014).

Next, the Immigration Judge found that the lead respondent "willfully and purposefully indicated that he was a United States citizen" (I.J. at 5). The Immigration Judge rejected the lead respondent's explanation that he "made a mistake" as implausible and, accordingly, gave the explanation "'little credence" (I.J. at 5; Tr. at 53-55). As the lead respondent's testimony constitutes the most probative evidence of his subjective intent in making the false representation of United States citizenship—and especially in view of the adverse credibility finding—we do not see clear error in this finding of fact.

On appeal the respondents renew the argument that United States citizenship is not required in order to obtain a noncommercial driver's license in Georgia, and thus, that there was no objective necessity for the lead respondent's false representation of United States citizenship (Tr. at 53-54).[5] *See Matter of Richmond, supra*, at 784 (recognizing that "the presence of a 'pur-

[5] We also note that the lead respondent was seeking renewal of a previously issued noncommercial driver's license (Tr. at 55). However, the respondents have not submitted the applications for the previously issued noncommercial driver's licenses to show whether the lead respondent did or did not falsely represent himself to be a United States citizen in those prior instances.

pose or benefit' under section 212(a)(6)(C)(ii)(I) must be determined objectively"). However, the lead respondent did not testify credibly, and he did not testify directly to the objective necessity of proving United States citizenship to obtain a noncommercial Georgia driver's license.

Moreover, it is the respondents' burden to establish that the lead respondent is clearly and beyond doubt admissible for adjustment of status under section 212(a)(6)(C)(ii) of the Act. As recognized by the Immigration Judge, the "clear implication of the questions set forth in the driver's license application is that the respondent needed to show that he was either a citizen or a lawfully admitted alien in order to obtain the driver's license" (I.J. at 5). The respondent has presented no evidence to refute this or to otherwise show that the question on the application regarding citizenship or lawful status was not relevant to whether the application was approved. *See Richmond, supra,* at 787 (objective component means citizenship affects or matters to the purpose or benefit).

In conclusion, the respondents have not demonstrated that the lead respondent is admissible for adjustment of status under section 212(a)(6)(C)(ii) of the Act. Accordingly, the following orders will be entered.

ORDER: The respondents' appeal is dismissed.

FURTHER ORDER: The motion to administratively close or remand filed for the respondent Nishantkumar Patel (073 546 027) is denied.

signature
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF IMMIGRATION APPEALS

Files: A073 652 334 Atlanta, GA
A072 565 851; A073 546 027

IN RE: JYOTSNABEN P PATEL
PANKAJKUMAR SOMABHAI PATEL
NISHANTKUMAR PATEL

January 17, 2017

DISSENTING OPINION:
Linda S. Wendtland, Board Member

I respectfully dissent and would reverse the Immigration Judge's determination that the lead respondent Pankajkumar Patel (A072 565 851) failed to show that he was not inadmissible under section 212(a)(6)(C)(ii) of the Immigration and Nationality Act on the basis of a false claim to United States citizenship. Even assuming for purposes of this appeal that the lead respondent falsely claimed citizenship with the subjective intent of achieving a covered purpose or benefit, inadmissibility cannot arise because his lack of citizenship did not "actually affect or matter to the purpose or benefit sought." *Matter of Richmond*, 26 I&N Dec. 779, 787 (BIA 2016).

Specifically, the pertinent Georgia regulation required applicants for non-commercial driver's licenses to provide proof of citizenship or lawful presence in the United States, and it is undisputed that the respondent had a valid employment authorization document *and* a pending adjustment of status application at the time he

sought a driver's license in December 2008. Therefore, he was eligible for a driver's license under the true facts, and his citizenship claim did not "actually affect or matter to" his ability to attain that purpose or benefit. *Id.*; *see* Georgia Admin. Code § 375-3-1-.02(6); 6 C.F.R. § 37.3 (stating that, for purposes of Part 37, "Real ID Driver's Licenses and Identification Cards," a person in "lawful status" is, inter alia, an alien who has a pending application for lawful permanent residence); *see also Hassan v. Holder*, 604 F.3d 915, 928-29 (6th Cir. 2010).

Additionally, the majority opinion does not explain why the submitted evidence of a grant of deferred action under the Deferred Action for Childhood Arrivals program in the case of respondent Nishantkumar Patel (A073 546 027) does not suffice to warrant a grant of his motion for administrative closure.

signature

Linda S. Wendtland
Board Member

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT

File: A073-652-334

In the Matter of

JYOTSNABEN P PATEL, *Respondent*

IN REMOVAL PROCEEDINGS

May 9, 2013

CHARGES:
Section 212(a)(6)(A)(i) of the
Immigration and Nationality Act.

APPLICATIONS:
Adjustment of status under Section 245(i)
of the Immigration and Nationality Act.

ON BEHALF OF RESPONDENT:
R. SCOTT OSWALD
888 17th Street, Northwest, Suite 900
Washington, D.C. 20006-3307

ON BEHALF OF DHS: ABBY LYNN MEYER

ORAL DECISION OF THE IMMIGRATION JUDGE

This case came before the Court as the result of Notices to Appear that were issued by the Department of Homeland Security. The charging document alleges that the respondents are each natives and citizens of

India and that each is removable from then United States pursuant to Section 212 of the Immigration and Nationality Act. Each respondent has admitted the factual allegations in the Notice to Appear and has conceded removability. In light of the foregoing, the Court finds by clear and convincing evidence that the respondents are each removable from the United States as charged. The Court sustains the charge of removal and designates India in each case.

The respondents have filed an application for adjustment of status. The lead male respondent has an approved I-140 employment authorization document. The application was previously denied by the United States Immigration and Citizenship Service on the grounds that the respondent is ineligible to adjust his status in the United States because he failed to show that he is not inadmissible on the grounds of having falsely claimed to be a United States citizen. The respondents have sought a review of that denial in the Court. The Court has jurisdiction to review the matter.

The record for the Court's consideration includes eight exhibits. The Court has numbered them H-1 through H-8. There are other documents in the record that the Court has considered at various points. But for the purposes of streamlining the discussion and the focus in this case, the parties have agreed that the relevant documents for the Court to consider at this juncture are the exhibits just mentioned. In addition, the respondent testified in support of his application.

There is no dispute that the lead respondent is statutorily eligible for relief. He has the appropriate documents. The only issue is whether the respondent's visa is currently available. The respondent argues that it is. The Court need not address that issue at this time.

The Court notes that one of the requirements for adjustment of status is that the respondent must show that he is not otherwise inadmissible to the United States. That is the focus of this hearing today. And if the respondent is unable to show that he is admissible, then his application will be denied.

There is no dispute that the respondent filed for a driver's license in the state of Georgia in 2008. There is no dispute that he claimed on the application that he is a United States citizen. The respondent said that he made a mistake when he checked the box. What is unclear to the Court is what the mistake allegedly is. The respondent was not candid with the Court and was somewhat evasive when asked to explain the mistake. The attorney proffers reasons for the mistake, but it is clear from the respondent's own testimony that he is not forthcoming to the Court, as he claims that there was, in fact, a mistake. The respondent said that he did not mean to check the box.

During cross-examination, the respondent was asked more pointed questions about the application that he filed. The respondent stated, both on direct and on cross-examination, that he provided the officials with the state of Georgia a copy of his employment authorization card or document. The Government has submitted a document that was filed by the respondent, and it reflects that the respondent submitted only one document in support of his driver's license application. *See* H-6. In other words, this document indicates that the respondent submitted only an old Georgia driver's license, not his employment authorization card.

This is significant because the respondent's initial testimony is that he submitted only his employment authorization card. Indeed, the respondent's testimony

is inconsistent with the very document itself. In fact, respondent admitted only during cross-examination that he submitted more than just the one employment document. He agreed that he, in fact, submitted a Georgia driver's license. That is not what the respondent testified to on direct. The Court points this out because the respondent has not provided credible and consistent documents in this case. His testimony concerning the documents that he submitted to the driver's license authorities is inconsistent. His statement that he provided only the employment authorization letter was contradicted during cross-examination, when he admitted that he actually submitted a driver's license as well.

The respondent said that when he filled out the driver's license application, he provided his alien registration number. Again, the Government points to the exhibit at H-6. The respondent's statement that he provided his alien registration number is simply not credible. In fact, the document reflects that no alien registration number is set forth anywhere on the form. That is because the form asks whether respondent is a citizen and requires the alien registration number only if the respondent is not. In this case, the form reflects, and the respondent acknowledges, that he checked the box stating that he is a citizen. The fact is that the respondent's claim to be a citizen did not require him to put down his alien registration number. To the extent that the respondent claims that he made a mistake, he says that he did so and placed his alien registration number on the form instead. That is not true, and the respondent's testimony to that effect is not credible.

The Court finds that the respondent falsely claimed to be a United States citizen. The Court must also address the respondent's overall credibility in this case.

the respondent's burden to show that he was otherwise eligible. The misrepresentation in question relates to the application in 2008. The Court is well aware that the standards and requirements change. That is why the misrepresentation only appears in connection with this particular application.

There is no indication that respondent filed for previous driver's license applications by disclosing that he was a citizen or somehow providing information that was not accurate. The respondent did not show other applications that he may have filed to reflect that he was somehow eligible for a driver's license previously, but continued to be eligible even if he were no longer a citizen. The clear implication of the questions set forth in the driver's license application is that the respondent needed to show that he was either a citizen or a lawfully admitted alien in order to obtain the driver's license. That is the scope of the questions when it asks the respondent to state whether he is a citizen, or, if not, a resident. The respondent is neither. He was and is neither a citizen or a lawful permanent resident. The Court can discern no accurate answer that the respondent could have set forth on this application that would have allowed him to obtain a driver's license. It is clear that the form then asked the respondent to show one of two forms of status in the United States, and he had neither. The respondent has not shown that he is somehow or was somehow eligible to obtain a driver's license if he had disclosed that he was neither a citizen or a lawful permanent resident or the United States.

To the extent that the respondent suggests that it is the Government's burden to show that he was somehow still eligible to receive a driver's license based on his work authorization, the Court rejects this sugges-

tion. It is the respondent's burden to show eligibility for relief. The respondent has submitted evidence to the Court in the form of an unpublished decision, suggesting that the decision by the panel is somehow on all fours with this case. The particular case cited by the respondent involves a totally different set of facts. In that case, the Government bore the burden of showing that the respondent was removable from the United States for having falsely claimed to be a United States citizen. In that case, the Government bore the burden of proof and presumably did not meet its burden by making the required showing. In this case, the respondent bears the burden of proof. This case is not on all fours with the unpublished decision as cited by the respondent. In any event, the unpublished decision is not binding on the Court. The Court finds little credible evidence that the respondent was somehow eligible for a driver's license when he falsely represented himself to be a United States citizen.

The respondent has filed for relief, and he is required to show that he is not inadmissible. On the evidence, including the respondent's testimony, the Court finds that the respondent has not shown that he is not inadmissible for having falsely claimed to be a United States citizen. The respondent is not eligible for a waiver because he does not have any qualifying relatives. The Court will deny the application for adjustment of status for the lead respondent because he has not shown that he is not inadmissible.

The other respondents are derivatives in this case. Because the lead respondent's application is denied, the riders are also denied because they depend on the lead respondent's eligibility for their own individual forms of relief. In view of the foregoing, the Court would deny

the applications filed by each of the respondents in this case.

The respondents have requested voluntary departure. The Court will deny the applications for voluntary departure. The lead respondent has falsely claimed to be a United States citizen in this case. The Court has also looked at the applications for waivers in this case, and under the facts of this case, would not grant voluntary departure to the respondent's wife. The Court will grant voluntary departure to the respondent's son, Nikesh Kumar, only. The Court will impose a voluntary bond of $10,000, which must be paid within five business days.

The Court will enter the following order in this case.

ORDER

IT IS HEREBY ORDERED that the respondents' application for adjustment of status under Section 245(i) of the Immigration and Nationality Act be, and hereby is, denied.

IT IS FURTHER ORDERED that respondent, Jyotsnaben Patel, A 073 652 334, and respondent, Pankaj Kumar Patel, A 072 565 851, be removed from the United States based on the charge set forth in the Notice to Appear, and that they be deported to India.

IT IS FURTHER ORDERED that respondent, Nikesh Nishant Kumar Patel, A 073 546 027, be granted voluntary departure up to and including July 8, 2013, which is 60 days from today, upon the posting of a bond of $10,000 within five business days, with an alternate order of removal to India.

WARNING TO RESPONDENT NIKESH KUMAR PATEL, A 073 546 027

Failure to leave the United States as agreed means that you could be removed from this country, you may have to pay a civil penalty of between $1,000 and $5,000, and you will be ineligible for 10 years to come from receiving cancellation of removal, adjustment of status, change of status, voluntary departure, or relief under the registry provisions.

Respondent, Kumar, is also advised that if he reserves appeal and files an appeal, he must provide the Board of Immigration Appeals, within 30 days of filing an appeal, sufficient evidence of proof of having posted the voluntary departure bond. The respondent, A 073 546 027, is advised that if he does not provide the Board of Immigration Appeals sufficient proof of having posted the voluntary departure bond, that the Board will not reinstate the voluntary departure bond in its final order.

Respondent is also advised that the Court has set the civil monetary penalty in this case at the presumptive amount of $3,000.

Please see the next page for electronic signature

EARLE B WILSON
Immigration Judge

//s//

Immigration Judge EARLE B WILSON

wilsone on August 22, 2013 at 6:03 PM GMT

In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

(iii) Waiver Authorized

For provision authorizing waiver of clause (i), see subsection (i)

* * *

8 U.S.C. § 1252

Section 242 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1252, provides in relevant part:

(a) Applicable provisions

* * *

(2) Matters not subject to judicial review

* * *

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

> **(i)** any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> **(ii)** any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or

1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *