No. 20-979

In the Supreme Court of the United States

PANKAJKUMAR S. PATEL, ET AL., PETITIONERS

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1252(a)(2)(B)(i) precludes judicial review of non-discretionary determinations underlying the determination of the Board of Immigration Appeals that petitioner is inadmissible to the United States for permanent residence and therefore ineligible for adjustment of status under 8 U.S.C. 1255(i).

2. Whether a finding of inadmissibility under 8 U.S.C. 1182(a)(6)(C)(ii), for falsely representing oneself as a United States citizen "for any purpose or benefit" under federal or state law, requires a finding that the misrepresentation was material to the purpose or benefit.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (11th Cir.):

Patel v. *United States Attorney General*, No. 17-10636 (Aug. 19, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-77a) is reported at 971 F.3d 1258. The opinion of the court of appeals panel (Pet. App. 79a-102a) is reported at 917 F.3d 1319. The decisions of the Board of Immigration Appeals (Pet. App. 103a-110a) and the immigration judge (Pet. App. 111a-119a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2020. On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on January 15, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General has the discretion to adjust the status of a removable noncitizen[1] who meets certain statutory criteria to that of a noncitizen lawfully admitted for permanent residence. 8 U.S.C. 1255; see 8 C.F.R. 1245.1 and 1245.2. Section 1255 provides various means by which a noncitizen may become eligible for an adjustment of status, including by virtue of an application for a labor certification filed with the Secretary of Labor. See 8 U.S.C. 1255(i). To be statutorily eligible for adjustment of status under Section 1255(i) based on such an application, a noncitizen who entered the United States without inspection must, among other things, (1) be the beneficiary of an application for labor certification that was filed on or before April 30, 2001; (2) be admissible to the United States for permanent residence; and (3) have an immigrant visa immediately available to him at the time of his application. 8 U.S.C. 1255(i)(1)(B) and (2)(B). A noncitizen seeking an adjustment of status, or any other discretionary form of relief from removal, bears the burden of establishing that he "satisfies the applicable eligibility requirements" and that he "merits a favorable exercise of discretion." 8 U.S.C. 1229a(c)(4)(A)(i)-(ii); see 8 C.F.R. 1240.8(d).

The INA sets forth grounds that generally make a noncitizen "ineligible to be admitted to the United States," 8 U.S.C. 1182(a), and therefore ineligible for adjustment of status under Section 1255(i). As relevant here, a noncitizen "who falsely represents, or has falsely

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter * * * or any other Federal or State law is inadmissible." 8 U.S.C. 1182(a)(6)(C)(ii)(I).[2]

b. The INA generally provides that a noncitizen aggrieved by a final order of removal may seek judicial review of that order by filing a petition for review in the appropriate court of appeals within 30 days of the final order of removal. 8 U.S.C. 1252(a)(1) and (b)(1); see 8 U.S.C. 1252(a)(5) (noting that such a petition is the "sole and exclusive means" of obtaining judicial review of a removal order). "Judicial review of all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien from the United States" is "available only in judicial review of a final order" under Section 1252. 8 U.S.C. 1252(b)(9).

Although Congress has generally authorized judicial review of final orders of removal, it has also insulated certain discretionary determinations of the Attorney General from such review. See 8 U.S.C. 1252(a)(2) (entitled "Matters not subject to judicial review"). In particular, Section 1252(a)(2)(B)—entitled "Denials of discretionary relief"—provides as follows:

> Notwithstanding any other provision of law * * * , and except as provided in subparagraph (D) * * * , no court shall have jurisdiction to review—

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[2] Section 1182(a)(6)(C)(ii) provides a narrow exception to inadmissibility, not applicable here, for a noncitizen who has "permanently resided in the United States prior to attaining the age of 16"; whose natural or adoptive parents are, or were, each a citizen by birth or naturalization; and who "reasonably believed at the time of making such representation that he or she was a citizen." 8 U.S.C. 1182(a)(6)(C)(ii)(II).

> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of [Title 8], 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 [Title 8].

8 U.S.C. 1252(a)(2)(B).

Section 1252(a)(2)(B)(i)'s cross-reference to 8 U.S.C. 1255 generally deprives courts of appeals of jurisdiction to review "any judgment" regarding the Attorney General's decision to grant or deny adjustment of status. Section 1252(a)(2)(D) provides that "[n]othing in subparagraph (B) or (C), or in any other provision of [the INA] (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." 8 U.S.C. 1252(a)(2)(D).

2. a. Petitioner Pankajkumar S. Patel (Patel) is a native and citizen of India, who entered the United States unlawfully in February 1992. Pet. App. 103a-104a, 111a-112a; Administrative Record (A.R.) 1237. In August 2007, after an immigrant visa became immediately available to him, Patel applied for adjustment of status under Section 1255(i) based on a timely filed application for a labor certification. Pet. App. 112a; A.R. 1633; see also A.R. 1273, 1319-1326. In his adjustment-of-status application, he listed his wife, petitioner Jyotsnaben P. Patel, and his son, Nishantkumar Patel,

as derivative beneficiaries. Pet. App. 81a n.1, 104a; A.R. 302-308; see Pet. ii.

In December 2008, while his adjustment-of-status application was pending, Patel sought to renew his Georgia driver's license. Pet. App. 113a; A.R. 66-67. At the time, the State of Georgia issued two different types of driver's licenses, with different periods of validity, depending on the applicant's citizenship status. A noncitizen was eligible to obtain a "temporary" license valid only for the time he was legally authorized to remain in the United States or, if the documents reflecting such authorization did not include an expiration date, for one year. Pet. App. 89a n.6; Ga. Code Ann. § 40-5-21.1(a) (2006); Ga. Comp. R. & Regs. 375-3-2-.01(1)(b) (2007); see *Castillo-Solis* v. *State*, 740 S.E.2d 583, 585, 588 (Ga. 2013). United States citizens, by contrast, received non-temporary licenses valid for either five or ten years. Pet. App. 89a n.6; Ga. Code Ann. § 40-5-32(a)(1) (2007); Ga. Comp. R. & Regs. 375-3-2-.01(1)(a) (2007).

On Patel's driver's license renewal application, in response to the question "Are you a U.S. citizen? If not, what is your Alien Registration Number or I-94 Number," Patel checked "yes." A.R. 66; see Pet. App. 113a. According to a copy of the renewal application in the administrative record, he submitted his then-current Georgia driver's license along with his application. A.R. 67. On the basis of the application, he was issued a new license. A.R. 75, 239.

A few months later, Patel was interviewed by agents from the Georgia Department of Driver Services "in connection with the issuance of a Georgia Driver's License." A.R. 75. In the interview, he admitted that he had checked the box stating that he was a United States citizen, that he did so without influence or assistance

from anyone else, and that he knew when he did so that he was not a United States citizen. *Ibid.* Georgia authorities charged Patel with making a false statement or writing under Ga. Code Ann. § 16-10-20 (2007). A.R. 69-70. But the charge was ultimately dismissed. A.R. 71.

In August 2010, the Department of Homeland Security (DHS) denied Patel's adjustment-of-status application, determining that his false representation of United States citizenship rendered him inadmissible under 8 U.S.C. 1182(a)(6)(C)(ii). A.R. 73-75; see Pet. App. 112a. DHS subsequently denied Patel's motion to reopen his application. A.R. 640-641.

b. In 2012, DHS commenced removal proceedings against petitioners, charging them as removable under 8 U.S.C. 1182(a)(6)(A)(i) for being present in the United States without admission or parole. Pet. App. 111a-112a; A.R. 1811. Through counsel, petitioners each conceded removability, and Patel renewed his application for adjustment of status on his and his family's behalf. Pet. App. 111a-112a; A.R. 224, 1237, 1811-1812.

During the removal proceedings, Patel offered inconsistent testimony about his false claim to citizenship on his driver's license application. On direct examination, Patel insisted that he "might have made a mistake" on the application, and that "[he] didn't have an intention" to falsely represent his citizenship to obtain a license "because [his] work permit was in process." Pet. App. 113a; A.R. 235, 237. He claimed that he had submitted his employment authorization card and "nothing else" with his driver's license application. Pet. App. 113a; A.R. 237, 239. On cross-examination, however, Patel acknowledged that he had also submitted his then-current driver's license. Pet. App. 113a; A.R. 240.

Patel also initially testified that he had provided his alien registration number both in writing on the driver's license application and by presenting his employment authorization card (which contained the number). Pet. App. 113a; A.R. 240. But when presented with a copy of his driver's license application, which did not include his alien registration number, Patel stated that he had just "showed them [his employment authorization] card, and then it was all done." A.R. 243. He could not explain why the application did not reflect that he had shown his card and alien registration number. Pet. App. 113a-114a; A.R. 244.

At the conclusion of the removal proceedings, the immigration judge (IJ) denied Patel's renewed application to adjust his and his family's status, and ordered petitioners removed. Pet. App. 111a-119a; A.R. 162-169. The IJ observed that "[t]here [wa]s no dispute" that Patel had falsely claimed he was a United States citizen on his driver's license renewal application, and the IJ rejected as "not plausible" his explanation that his false claim had been "a mistake." Pet. App. 113a, 115a; A.R. 163, 166. The IJ found Patel to be not credible, describing his testimony as "not candid," "somewhat evasive," and both internally inconsistent and inconsistent with his renewal application. Pet. App. 113a-114a; A.R. 164-165. The IJ also determined that Patel failed to establish that he would have been eligible for a Georgia driver's license, regardless of his false claim. Pet. App. 115a-117a; A.R. 166-167. The IJ thus found Patel inadmissible under Section 1182(a)(6)(C)(ii) for falsely representing himself as a citizen to obtain a benefit under state law. A.R. 167-168. On that basis, the IJ concluded that Patel and his family were ineligible for adjustment of status under Section 1255(i). A.R. 168.

c. The Board of Immigration Appeals (Board) upheld the IJ's decision and dismissed petitioners' appeal. Pet. App. 103a-110a. The Board found no clear error in the IJ's finding that Patel had "willfully and purposefully indicated that he was a United States citizen" on the driver's license application. *Id.* at 107a (citation omitted). And the Board rejected petitioners' argument that the false claim was immaterial because United States citizenship was not required to obtain a driver's license under Georgia law. *Id.* at 107a-108a. The Board observed that the "clear implication" of the question inquiring about citizenship or lawful status was that an applicant must be either a United States citizen or a lawfully admitted noncitizen to obtain a driver's license. *Id.* at 108a (citation omitted). And it determined that petitioners, who bore the burden of establishing Patel's admissibility, had failed to refute that implication. *Ibid.*

One Board Member dissented. Pet. App. 109a-110a. She stated that she would have reversed the IJ's decision on the ground that, even assuming Patel had falsely claimed citizenship with the intent to obtain a state-law benefit, he was not inadmissible because his claim did not "actually affect or matter to the purpose or benefit sought." *Id.* at 109a (quoting *In re Richmond*, 26 I. & N. Dec. 779, 787 (B.I.A. 2016)). Under her reading of Georgia regulations, Patel's employment authorization and pending adjustment-of-status application made him eligible for a driver's license regardless of his citizenship status. *Id.* at 109a-110a.

3. a. Petitioners sought review of the final orders of removal by the court of appeals, contending that the agency erred in finding that Patel intended to make a false representation to obtain the license and in determining that the false representation was material to his

license application. A panel of the court of appeals unanimously denied the petition for review. Pet. App. 79a-102a.

With respect to the first question presented in this Court, the court of appeals panel concluded *sua sponte* that it lacked jurisdiction under Section 1252(a)(2)(B)(i) to review the agency's finding that Patel intended to make a false representation of citizenship to obtain a state-law benefit. Pet. App. 85a-86a, 88a-90a. While expressing some doubt that Section 1182(a)(6)(C)(ii) requires such an intent to render a noncitizen inadmissible, the court assumed that, had Patel shown a lack of such intent, petitioners would have been entitled to relief before the Board. *Id.* at 88a-89a. The court interpreted Section 1252(a)(2)(B) and (D), however, to limit its jurisdiction to review denials of adjustment of status under Section 1255 to constitutional questions or questions of law. *Id.* at 85a. The court thus held that it lacked jurisdiction to consider petitioners' challenge to the agency's factual finding. *Id.* at 89a-90a.

With respect to the second question presented, the panel held that the "plain meaning" of the inadmissibility criteria in Section 1182(a)(6)(C)(ii) requires that the noncitizen "make the false representation with the goal of obtaining a purpose or benefit under the law," but not that the false representation "be material to the purpose or benefit sought." Pet. App. 92a; see *id.* at 90a-101a. The court found support for that view in the express materiality requirement contained "in the immediately preceding subsection." *Id.* at 93a; see 8 U.S.C. 1182(a)(6)(C)(i) (rendering inadmissible "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure * * * a visa, other documentation,

or admission into the United States"). And it found further support in this Court's decision in *Kungys* v. *United States*, 485 U.S. 759 (1988), which declined to read a materiality requirement into a similarly worded bar on naturalization for individuals who have "given false testimony for the purpose of obtaining any benefits under [immigration law]." Pet. App. 94a (quoting 8 U.S.C. 1101(f)(6)) (brackets in original). Because the court determined that Section 1182(a)(6)(C)(ii) is unambiguous, it declined to defer to the Board's contrary conclusion in *In re Richmond*. *Id.* at 99a-101a.

b. The court of appeals vacated the panel's decision and ordered the case to be reheard en banc to resolve the jurisdictional question. Pet. App. 9a. By a vote of 9 to 5, the en banc court agreed with the panel that it lacked jurisdiction over petitioners' factual challenge to the agency's denial of their adjustment-of-status application. *Id.* at 1a-77a. The court reinstated the panel's resolution of the materiality question without analysis. *Id.* at 47a.

The majority of the en banc court of appeals agreed with the panel that Section 1252(a)(2)(B)(i) bars all judicial review of the denial of adjustment of status—or any of the other enumerated forms of relief—with the exception of constitutional claims and questions of law raised under Section 1252(a)(2)(D). Pet. App. 3a. The court reasoned that the statutory phrase "any judgment" is best read to mean "[a]ny decision" regarding the statutorily enumerated categories of relief, and that "any doubt" about its meaning "should be resolved in favor of a more expansive meaning given the modifying phrases 'any' and 'regarding'" in the statute. *Id.* at 27a. Although the court reasoned that Section 1252(a)(2)(D)

"restores" the court's jurisdiction "to review constitutional claims or questions of law," it concluded that factual determinations by the Board remains "'beyond the power of judicial review.'" *Id.* at 28a-29a (citation omitted).

The en banc court of appeals rejected the government's contention that Section 1252(a)(2)(B)(i) precludes judicial review of only discretionary determinations underlying the enumerated categories of relief and petitioners' distinct contention that it bars review of only the Attorney General's ultimate decision whether to exercise discretion to grant relief, not whether a noncitizen meets the statutory eligibility criteria for such relief. Pet. App. 30a-45a. The court acknowledged that it was departing from its own precedent and that of numerous other courts of appeals. See *id.* at 32a & n.22 (citing decisions from the First, Second, Third, Fifth, Ninth, and Tenth Circuits).

c. Judge Martin, joined by four other judges, dissented from the jurisdictional holding. Pet. App. 48a-77a. Judge Martin reasoned that the phrase "any judgment regarding the granting of relief" is ambiguous standing alone. *Id.* at 58a-65a. Considered in the context of the statutory scheme as a whole and against the backdrop of the presumption of judicial review, however, she concluded that the "best interpretation" is that it "excludes review of decisions that involve the exercise of discretion." *Id.* at 65a; see *id.* at 52a-55a, 65a-72a. While that "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," it does not preclude judicial review of "findings of fact that require no discretionary evaluation from the factfinder." *Id.* at 65a.

Judge Martin observed that her view has been "widely accepted" by other circuits. Pet. App. 50a. Indeed, she noted, "all but one of [the Eleventh Circuit's] sister circuits who have considered this issue [have] conclude[d] that § 1252(a)(2)(B) does not eliminate review of factual or legal determinations related to eligibility for discretionary relief." *Id.* at 57a-58a (citing cases from the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits); but see *id.* at 58a n.5 (noting that the Fourth Circuit "has reached a similar conclusion to that of the majority").

ARGUMENT

Petitioners contend (Pet. 14-26) that the court of appeals erred in holding that 8 U.S.C. 1252(a)(2)(B)(i) bars judicial review of all factual findings related to a noncitizen's eligibility for relief in the form of adjustment of status under 8 U.S.C. 1255. The government agrees. In its view, Section 1252(a)(2)(B)(i) precludes judicial review of only discretionary determinations related to the granting of relief under Section 1255. The court of appeals' contrary conclusion implicates an acknowledged and entrenched circuit split on the scope of Section 1252(a)(2)(B)(i). And this case presents a suitable vehicle for resolving that disagreement. The petition for a writ of certiorari should therefore be granted with respect to the first question presented.

For purposes of the second question presented, petitioners contend (Pet. 26-32) that the court of appeals erred in holding that a false representation of United States citizenship need not be material to the benefit sought to render a noncitizen inadmissible under 8 U.S.C. 1182(a)(6)(C)(ii). But the court of appeals' resolution of that question is correct. Contrary to petitioners' contention, it does not squarely conflict with any

decision of another court of appeals. And, in any event, this case would present an unsuitable vehicle to consider the question, principally because, even if materiality were required, petitioners could not establish that Patel's false claim of United States citizenship was immaterial to the state-law benefit (a Georgia driver's license) that he sought and received. Further review of the second question presented is therefore unwarranted.

1. The Court should grant the petition for a writ of certiorari with respect to the first question presented, concerning the scope of the bar on judicial review in Section 1252(a)(2)(B)(i).

a. Section 1252(a)(2)(B)(i) provides that "[n]otwithstanding any other provision of law * * * , no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1255." 8 U.S.C. 1252(a)(2)(B)(i). The court of appeals interpreted that restriction to extend to all determinations made in conjunction with an application for adjustment of status under Section 1255, except insofar as Section 1252(a)(2)(D) permits review of constitutional claims and questions of law. Pet. App. 25a-28a. The court acknowledged that "the purpose of [Section 1252(a)(2)(B)(i)] appears to be to place discretionary rulings beyond the power of judicial review." *Id.* at 29a (citation omitted). But the court believed that "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." *Ibid.* (citation omitted).

The court of appeals' interpretation of Section 1252(a)(2)(B)(i) is incorrect, and it is contrary to the government's longstanding position that the provision allows judicial review of determinations related to the

granting of relief under Section 1255 when those determinations are not discretionary in nature—such as a factual determination about whether a noncitizen intended to make a false representation of citizenship to obtain a state-law benefit. See Gov't C.A. En Banc Br. 21-29. For three principal reasons, Section 1252(a)(2)(B)(i) is best interpreted to reach only discretionary judgments.

First, the phrase "any judgment regarding the granting of relief under section * * * 1255," 8 U.S.C. 1252(a)(2)(B)(i), is naturally read to include only judgments of a discretionary nature. The term "judgment," when used in the INA to specify a determination or decision of the relevant official (as opposed to the order of a court), refers to a determination of a discretionary nature. See 8 U.S.C. 1103(a)(7) (authorizing the Secretary of Homeland Security to "detail employees of the Service for duty in foreign countries" "whenever in his judgment such action may be necessary to accomplish the purposes of this chapter"); 8 U.S.C. 1226(e) (providing that "[t]he Attorney General's discretionary judgment regarding the application of th[at] section shall not be subject to review"); 8 U.S.C. 1252(b)(4)(D) (deeming "the Attorney General's discretionary judgment whether to grant relief under section 1158(a)" "conclusive unless manifestly contrary to the law and an abuse of discretion"); 8 U.S.C. 1537(b)(2)(A) (permitting the removal of noncitizens to "any country which the alien shall designate if such designation does not, in the judgment of the Attorney General * * * impair the obligation of the United States under any treaty").

Second, the structure of Section 1252(a)(2)(B) indicates that Congress used "judgment" in the same sense in Section 1252(a)(2)(B)(i). Section 1252(a)(2)(B) is

entitled "Denials of discretionary relief." 8 U.S.C. 1252(a)(2)(B); see *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) ("Although section headings cannot limit the plain meaning of a statutory text, 'they supply cues' as to what Congress intended.") (citation omitted). Moreover, while Section 1252(a)(2)(B)(i) precludes judicial review of "any judgment regarding the granting of relief" under five enumerated provisions granting the Attorney General discretionary authority, Section 1252(a)(2)(B)(ii) precludes judicial review of "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." 8 U.S.C. 1252(a)(2)(B)(i)-(ii) (emphasis added). "Read harmoniously, both clauses convey that Congress barred court review of discretionary decisions[.]" *Kucana* v. *Holder*, 558 U.S. 233, 247 (2010).

Third, Congress used very different language in other INA provisions to express an intent to bar all review of a particular type of order. Most conspicuously, the adjacent subparagraph provides that "no court shall have jurisdiction to review * * * *any individual determination or to entertain any cause or claim arising from or relating to the implementation or operation of*" an expedited order of removal. 8 U.S.C. 1252(a)(2)(A) (emphasis added). Similarly, Congress has precluded judicial review of "*any final order of removal* against an alien who is removable by reason of having committed" certain enumerated criminal offenses. 8 U.S.C. 1252(a)(2)(C) (emphasis added). Congress would likely have used similarly broad language if it intended that Section 1252(a)(2)(B)(i) foreclose all review of Board orders denying adjustment of status.

Reading Section 1252(a)(2)(B)(i) more narrowly, as precluding judicial review of only discretionary judgments regarding the enumerated forms of relief, is also consistent with this Court's observation that "when a statutory provision 'is reasonably susceptible to divergent interpretation,'" the Court often invokes the basic principle that "executive determinations generally are subject to judicial review." *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1069 (2020) (citation omitted). That presumption in favor of judicial review of administrative action reinforces the government's longstanding interpretation of Section 1252(a)(2)(B)(i).

Finally, the court of appeals erred in relying on Section 1252(a)(2)(D)'s express preservation of judicial review over constitutional claims and questions of law in support of an inference that Section 1252(a)(2)(B) precludes review of every other question. Section 1252(a)(2)(D) was added to the statute nearly a decade after the enactment of Section 1252(a)(2)(B) to address concerns raised in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), about the reviewability of removal orders. See *Guerrero-Lasprilla*, 140 S. Ct. at 1071. In particular, the provision was designed to provide at least the same level of review "traditionally available in a habeas proceeding" in Section 1252's consolidated review proceedings of a final order of removal, to avoid any Suspension Clause concerns. *Ibid.*; see generally *St. Cyr*, *supra*. Nothing about Congress's effort to ensure that no provision in the INA "which limits or eliminates judicial review" is "construed" to dip below the constitutional floor, 8 U.S.C. 1252(a)(2)(D), suggests that the specific provision at issue here should be read to preclude other constitutionally permissible review. See Pet. App. 73a (Martin, J., dissenting).

b. As the court of appeals itself recognized, its interpretation of Section 1252(a)(2)(B)(i) conflicts with that of nearly every other circuit. See Pet. App. 32a (observing that, in determining "jurisdictional boundaries" under Section 1252(a)(2)(B), the Eleventh Circuit "and other Circuits" have "often" distinguished between "'discretionary' or 'nondiscretionary' determinations"); see *id.* at 57a-58a (Martin, J., dissenting) (collecting conflicting decisions).

Like the Eleventh Circuit, the Fourth Circuit has interpreted Section 1252(a)(2)(B)(i) to bar judicial review of any challenge to a denial of one of the enumerated forms of relief. In *Lee* v. *USCIS*, 592 F.3d 612 (4th Cir. 2010), the court held that Section 1252(a)(2)(B)(i) precluded a noncitizen's challenge to the denial of adjustment of status under Section 1255(i) on the ground that the applicant was not the beneficiary of a labor certification filed before April 30, 2001. *Id.* at 620-621. The court reasoned that the agency's denial of his application on the basis of "a faulty eligibility determination * * * cannot be divorced from the denial itself." *Id.* at 620; see 8 U.S.C. 1255(i)(1)(B)(ii); see also *Roland* v. *USCIS*, 850 F.3d 625, 630 (4th Cir. 2017) (quoting *Lee* with approval).

By contrast, the First, Second, Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits have repeatedly held, both before and after the 2005 addition of Section 1252(a)(2)(D), that Section 1252(a)(2)(B)(i) bars judicial review of only discretionary determinations related to the enumerated forms of relief. See, *e.g.*, *Succar* v. *Ashcroft*, 394 F.3d 8, 19 (1st Cir. 2005); *Sepulveda* v. *Gonzales*, 407 F.3d 59, 62-63 (2d Cir. 2005); *Mendez-Moranchel* v. *Ashcroft*, 338 F.3d 176, 178 (3d Cir. 2003); *Melendez* v. *McAleenan*, 928 F.3d 425, 426 (5th Cir.),

cert. denied, 140 S. Ct. 561 (2019); *Santana-Albarran* v. *Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Ortiz-Cornejo* v. *Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005); *Mamigonian* v. *Biggs*, 710 F.3d 936, 943-944 (9th Cir. 2013); *Sabido Valdivia* v. *Gonzales*, 423 F.3d 1144, 1148-1149 (10th Cir. 2005). The Seventh Circuit has also predominantly adhered to the majority view. See *Iddir* v. *INS*, 301 F.3d 492, 496-498 (2002) ("[W]e find section 1252(a)(2)(B)(i), by its use of the terms 'judgment' and 'decision or action', only bars review of actual discretionary decisions to grant or deny relief under the enumerated sections, including section 1255."); see also, *e.g.*, *Reyes-Sanchez* v. *Holder*, 646 F.3d 493, 496 (7th Cir. 2011); *Hashish* v. *Gonzales*, 442 F.3d 572, 574 (7th Cir.), cert. denied, 549 U.S. 995 (2006); *Cuellar Lopez* v. *Gonzales*, 427 F.3d 492, 495 (7th Cir. 2005); *Morales-Morales* v. *Ashcroft*, 384 F.3d 418, 421-423 (7th Cir. 2004); but see *Cevilla* v. *Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006).

c. This case presents a suitable vehicle for resolving the widespread, entrenched conflict among the courts of appeals about the meaning of Section 1252(a)(2)(B)(i). In the published decision below, the question was given careful consideration by the en banc court in light of the views of the other circuits. The majority and the dissenting opinions each acknowledge and grapple with the reasoning of the other circuits and each other. There is no dispute that petitioners' challenge to the agency's subjective-intent finding concerns a non-discretionary determination regarding Patel's eligibility for relief, and therefore the question presented is dispositive of the courts' jurisdiction to consider that challenge. And because the question goes to the jurisdiction of the court of appeals (and this Court), the government's

continued defense on the merits of the agency's case-specific factual finding will not serve as an independent ground on which to affirm to the judgment without resolving the first question presented. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

2. The Court should deny the petition for a writ of certiorari with respect to the second question presented, concerning whether a noncitizen's false representation of United States citizenship must be material to the benefit sought to render the noncitizen inadmissible under 8 U.S.C. 1182(a)(6)(C)(ii).

a. Section 1182(a)(6)(C)(ii)(I) provides that "[a]ny 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 this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible." Nothing in the text of that provision requires that the false representation of citizenship be material to the purpose or benefit sought to trigger inadmissibility. As a general matter, "this Court may not narrow a provision's reach by inserting words Congress chose to omit." *Lomax* v. *Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020). Because the statute "[n]owhere * * * say[s] that a material fact must be the subject of the false statement or so much as mention[s] materiality," *United States* v. *Wells*, 519 U.S. 482, 490 (1997), the plain text strongly suggests there is no such requirement.

In *Wells*, this Court held that a criminal prohibition on "'knowingly mak[ing] any false statement or report . . . for the purpose of influencing in any way the action'" of a federally insured bank applied to false statements made with the intent "to influence the institution," whether or not material to the relevant decision.

519 U.S. at 490, 499 (citation omitted; brackets in original). And in *Kungys* v. *United States*, 485 U.S. 759 (1988), the Court interpreted a similarly worded bar on naturalization for an individual who "has given false testimony for the purpose of obtaining" immigration benefits to require a subjective intent to obtain the benefit, but not materiality. *Id.* at 779 (citation omitted). "Literally read," the Court explained, that language includes false testimony of "even the most immaterial of lies," if offered "with the subjective intent of obtaining immigration or naturalization benefits." *Id.* at 779-780. Similarly, the most natural reading of Section 1182(a)(6)(C)(ii) is that "it means precisely what it says" and does not incorporate an unwritten materiality requirement. *Id.* at 780.

The statutory context confirms that conclusion. The immediately preceding provision, Section 1182(a)(6)(C)(i), renders inadmissible any noncitizen "who, by fraud or willfully misrepresenting a *material* fact, seeks to procure" certain immigration benefits. 8 U.S.C. 1182(a)(6)(C)(i) (emphasis added). "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." *Dean* v. *United States*, 556 U.S. 568, 573 (2009) (brackets and citation omitted). As the court of appeals explained, that distinction makes sense. While Section 1182(a)(6)(C)(i) applies to the misrepresentations of "*any* fact, which would be very broad without a materiality requirement," Section 1182(a)(6)(C)(ii) applies exclusively to misrepresentations about a particularly solemn fact: one's U.S.-citizenship status. Pet. App. 94a. For that reason, it was sensible for Congress—when it

was delineating conduct that would render someone inadmissible—to include all false representations of U.S. citizenship made "with the goal of obtaining a purpose or benefit under the law," whether or not they were material to that purpose or benefit. *Id.* at 92a.

Petitioners contend (Pet. 29-32) that the Court should infer a materiality requirement in Section 1182(a)(6)(C)(ii) based on the common-law meaning of "false representation." Pet. 29 (citation omitted). Petitioners observe that this Court has interpreted the federal mail-, wire-, and bank-fraud statutes to incorporate a materiality requirement even though they do not expressly include such a requirement. See Pet. 29-30 (citing *Neder* v. *United States*, 527 U.S. 1 (1999)). And petitioners contend that lower courts have incorporated a materiality element into a provision of the Fair Debt Collection Practices Act (FDCPA) that prohibits collecting debts by "false, deceptive, or misleading representation." Pet. 30 (quoting 15 U.S.C. 1692e).

But even accepting petitioners' interpretation of the common law, there are several reasons to doubt that Congress's regulation of noncitizens for purposes of admissibility was meant to incorporate common-law rules for obtaining money and property by fraud. Section 1182(a)(6)(C)(ii)'s text is meaningfully distinct from the text of the provisions that implicitly incorporate common-law fraud principles. Compare 8 U.S.C. 1182(a)(6)(C)(ii)(I) (describing "[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States"), with, *e.g.*, 18 U.S.C. 1341 (prohibiting "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or

promises"), and 11 U.S.C. 523(a) (preventing bankruptcy discharge of debts for money or property "obtained by * * * false pretenses, a false representation, or actual fraud"). The provisions appear in meaningfully different contexts and serve meaningfully different purposes. See, *e.g.*, *Bryan* v. *Credit Control, LLC*, 954 F.3d 576, 582 (2d Cir. 2020) (inferring a materiality requirement as a "natural 'corollary' to the least sophisticated consumer test" under the FDCPA).

Finally, the Board's decision in *In re Richmond*, 26 I. & N. Dec. 779 (2016), does not warrant a different result. In that decision, the Board interpreted Section 1182(a)(6)(C)(ii) to be limited to false claims of U.S. citizenship that are "made with the subjective intent of achieving a purpose or obtaining a benefit" under state or federal law *and* "actually affect or matter to the purpose or benefit sought." *Id.* at 786-787. The Board's interpretation of the immigration laws adopted in a precedential decision would ordinarily warrant judicial deference. See *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 57 (2014) (plurality opinion). But as the government explained below, because Congress "sp[oke] clearly to the question at issue" here, "the statute's plain meaning controls." *Ibid.*; see Gov't C.A. Supp. Br. 1-2 (Oct. 11, 2018).

b. Petitioners contend (Pet. 27-29) that the court of appeals' resolution of the second question presented conflicts with decisions from the Second, Third, and Sixth Circuits. None of those decisions, however, adopts a definitive construction of Section 1182(a)(6)(C)(ii), and thus none conflicts with the decision below in a manner that would warrant this Court's review.

In *Castro* v. *Attorney General of the United States*, 671 F.3d 356 (2012), for example, the Third Circuit expressly declined to "lay down an exhaustive interpretation

of the circumstances to which [Section] 1182(a)(6)(C)(ii) might apply." *Id.* at 371. Instead, the court held "only that the statute did not apply to the facts" before it, where citizenship status was both "irrelevant to the loan application, *and* no evidence suggested that the [noncitizen] believed that claiming to be a U.S. citizen would raise the probability that his application would be approved." *Ibid.* (emphasis added).

The Sixth Circuit took a similar approach in *Hassan* v. *Holder*, 604 F.3d 915 (2010), concerning the similarly worded Section 1227(a)(3)(D)(i). The noncitizen in that case had falsely claimed citizenship in an application for a loan. *Id.* at 928. Because Section 1227(a)(3)(D)(i) governs removability, the government bore the burden of showing that the noncitizen made the false statement "for any purpose or benefit under [the INA] . . . or any Federal or State law." *Id.* at 928 (quoting 8 U.S.C. 1227(a)(3)(D)(i)). But the government had "simply offered no evidence of the 'purpose or benefit.'" *Ibid.* And similar to *Castro*, the court of appeals found that Section 1227(a)(3)(D)(i) did not apply where the only evidence in the record suggested that the noncitizen's immigration status "would have no effect on the loan" *and* his "past conduct suggest[ed] that he did not subjectively believe that" it would. *Id.* at 928-929; see *id.* at 929 (reasoning that the noncitizen "might still be removable notwithstanding the lack of effect if his 'purpose' was to affect his application (even though his immigration status was irrelevant)").

The Second Circuit's decision in *Richmond* v. *Holder*, 714 F.3d 725 (2013), is of a piece. There, the court observed that *Castro* and *Hassan* both "left open" whether Section 1182(a)(6)(C)(ii) applied only where the noncitizen's false claim to citizenship "would *actually*

affect" his ability to serve the purpose or obtain a benefit under state or federal law or applied whenever the noncitizen "*intends* his or her citizenship" to have such an effect. *Id.* at 730. And the Second Circuit likewise declined to generate "'a set of standards' to use in applying the statute * * * from scratch." *Id.* at 731 (citation omitted). Instead, it remanded the case to the Board to consider the question in the first instance. *Ibid.*; see *Richmond* v. *Sessions*, 697 Fed. Appx. 106, 106-107 (2d Cir. 2017) (affirming the Board's decision on remand in an unpublished decision without passing on the question).

Here, unlike in *Castro* and *Hassan*, the IJ found, and the Board affirmed, the subjective intent that was missing in those cases. See Pet. App. 115a (finding that Patel "willfully and purposefully indicated that he was a United States citizen * * * to obtain the driver's license based on [that] claim of citizenship"). And while unlike the Second Circuit in *Richmond*, the court below did adopt a definitive holding that Section 1182(a)(6)(C)(ii) does not require a showing that the false claim was material to the purpose or benefit for which it was offered, it did so only after considering the Board's interpretation of the provision in *Richmond*, *supra*, and determining that it was inconsistent with the plain meaning of the statutory text. See Pet. App. 99a-101a. Even if the Eleventh Circuit's adoption of a controlling interpretation of Section 1182(a)(6)(C)(ii) could be described as conflicting with the Second, Third, and Sixth Circuits' previous decisions to not yet do so, it is not the sort of circuit conflict that warrants this Court's review. See Sup. Ct. R. 10(a).

c. Finally, even if the second question presented warranted this Court's review, this case would be an unsuitable vehicle to address it. As an initial matter, if the Court agrees with the parties that the first question presented is worthy of its review and resolution, it should not complicate the case with "an alternative basis for reversing the judgment below." Pet. 27.

In any event, this case would be a poor vehicle for resolving the second question because petitioners would not be entitled to relief. Although the court of appeals panel determined that materiality was not a requirement of Section 1182(a)(6)(C)(ii), the IJ and the Board resolved petitioners' application for adjustment of status on the understanding that materiality was required. The Board upheld the IJ's determination and found that Patel was inadmissible, and therefore ineligible for adjustment of status, because petitioners failed to show that the citizenship question on the Georgia driver's license application "was not relevant to whether the application was approved." Pet. App. 108a. And although petitioners challenged the Board's resolution of materiality below, they "acknowledge[d] that Georgia would have granted [Patel] a license of shorter duration had he disclosed his actual immigration status." Pet. C.A. En Banc Br. 58 n.10; see p. 5, *supra* (describing Georgia law). It is therefore unlikely that petitioners would ultimately prevail on the issue of materiality, even if this Court were to adopt their interpretation of Section 1182(a)(6)(C)(ii).

CONCLUSION

The petition for a writ of certiorari should be granted limited to the first question presented. Because the court of appeals adopted an interpretation of 8 U.S.C.

1252(a)(2)(B)(i) that is inconsistent with both the petitioners' view and the government's longstanding interpretation of that provision, if the Court grants plenary review of the first question presented, the Court may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals.

Respectfully submitted.

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