No. 20-979

In the Supreme Court of the United States

PANKAJKUMAR S. PATEL, ET AL., PETITIONERS

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT
SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether 8 U.S.C. 1252(a)(2)(B)(i) preserves the jurisdiction of federal courts to review a non-discretionary determination that a noncitizen is ineligible for certain types of discretionary relief from removal.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-77a) is reported at 971 F.3d 1258. The opinion of the panel of the court of appeals (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. By order of March 19, 2020, the Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days after the date of the judgment of the lower court or the denial of a timely filed rehearing petition. The petition for a writ of certiorari was filed on January 15, 2021, and granted on June 28, 2021, limited to the first

question presented. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. 1252(a)(2)(B) provides as follows:

> **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.

Other relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-17a.

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General has the discretion to grant relief from removal to a removable noncitizen who is physically present in the United States by adjusting his or her status to that of someone lawfully admitted for permanent residence. 8 U.S.C.

1255; see 8 C.F.R. 1245.1 and 1245.2; see also 8 C.F.R. 245.10.[1] Section 1255 provides various means by which a noncitizen may become eligible for such 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 on that basis, a noncitizen who entered the United States without inspection must, among other things, (1) be the beneficiary of an application for a labor certification that was filed on or before April 30, 2001; (2) be otherwise admissible to the United States for permanent residence; and (3) have an immigrant visa immediately available to him at the time his application is filed. 8 U.S.C. 1255(i)(1)(B)(ii) and (2). If the noncitizen satisfies those requirements, the Attorney General "may"—but is not required to—exercise his discretion to adjust the status of the noncitizen. 8 U.S.C. 1255(i)(2). A noncitizen seeking adjustment of status in removal proceedings, or any other discretionary form of relief from removal, bears the burden of establishing both 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 various grounds that generally render 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 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

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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)).

is inadmissible." 8 U.S.C. 1182(a)(6)(C)(ii)(I); see 8 U.S.C. 1182(a)(6)(C)(ii)(II) (setting forth narrow exception not applicable here).

b. The INA 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. 8 U.S.C. 1252(a)(1) and (b)(1). "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); see 8 U.S.C. 1252(a)(5) (noting that a petition for review is the "sole and exclusive means" of obtaining "judicial review of an order of removal").

Despite that general authorization of judicial review, Congress has also enacted various provisions that shield from review discrete determinations made by the Executive in the immigration context. Many of those limits are contained in 8 U.S.C. 1252(a)(2), which is entitled "Matters not subject to judicial review." (Emphasis omitted). Section 1252(a)(2) was originally added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306(a)(2), 110 Stat. 3009-607 to 3009-608, but it has since been amended. This case involves Section 1252(a)(2)(B), which provides as follows:

> **Denials of discretionary relief**
>
> Notwithstanding any other provision of law * * * , 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 [8 U.S.C.] 1182(h), 1182(i), 1229b, 1229c, or 1255 * * * , 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 [8 U.S.C.] 1158(a)[.]

8 U.S.C. 1252(a)(2)(B). As relevant here, the cross reference to 8 U.S.C. 1255 deprives courts of jurisdiction to review "any judgment regarding" the Attorney General's decision whether to grant adjustment of status. 8 U.S.C. 1252(a)(2)(B)(i).

As indicated by Section 1252(a)(2)(B)'s lead-in language, the limitation on judicial review contained in that provision is subject to an exception that preserves judicial review over particular issues "as provided in subparagraph (D)." 8 U.S.C. 1252(a)(2)(B). That exception and its accompanying subparagraph were added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106(a)(1)(A)(iii), 119 Stat. 310. Section 1252(a)(2)(D) provides as follows:

> Nothing 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 in accordance with this section.

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; 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. Patel's wife, Jyotsnaben P. Patel (also a petitioner in this Court), and his son, Nishantkumar Patel, sought adjustment of status as derivative beneficiaries of Patel's labor certification. Pet. App. 81a n.1, 104a; A.R. 302-308; see Pet. ii.

In December 2008, while his application for adjustment of status was pending, Patel sought to renew his Georgia driver's license. Pet. App. 113a; A.R. 66-67. The form for the renewal application asked, "Are you a U.S. citizen? If not, what is your Alien Registration Number or I-94 Number?" A.R. 66. In response, Patel checked "yes." *Ibid.*; 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 him with making a false statement or

writing under Ga. Code Ann. § 16-10-20 (2007), though the charge was ultimately dismissed. A.R. 69-71.

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

b. In 2012, DHS commenced removal proceedings against both petitioners and their son, 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. Pet. App. 111a-112a; A.R. 224, 1237. Patel also renewed his application for adjustment of status to that of a lawful permanent resident. Pet. App. 112a; see *id.* at 11a-12a.

During the removal proceedings before the immigration judge (IJ), Patel offered inconsistent testimony about his false claim of citizenship. On direct examination, he insisted that he "might have made a mistake" on the application, and that "[he] didn't have an intention" falsely to represent his citizenship to obtain a license "because [his] work permit was in process." A.R. 235; see Pet. App. 113a. He also initially testified that he had provided his alien registration number both by writing it on the driver's license application and by presenting an employment authorization card that included 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 "show[n] them [his employ-

ment authorization] card, and then it was all done." A.R. 243; see Pet. App. 114a. He further claimed that, beyond the employment authorization card, he had submitted "nothing else" with his application. A.R. 239. On cross-examination, however, he acknowledged that he had also submitted his existing driver's license. Pet. App. 113a-114a; A.R. 240. He was then confronted with the fact that the application reflected that, as proof of identity, he submitted *only* his then-current driver's license—not his employment authorization document—at which point he offered no further explanation. A.R. 240-241, 243-244.

After hearing the evidence, the IJ denied Patel's renewed application for adjustment of status, ordered that both petitioners be removed to India, and granted their son permission for voluntary departure within 60 days. Pet. App. 117a-118a; A.R. 162-169. The IJ observed that "[t]here [wa]s no dispute" that Patel falsely claimed he was a United States citizen on his driver's license renewal application, and the IJ rejected as "simply not plausible" his explanation that his false claim had merely been "a mistake." Pet. App. 113a, 115a. The IJ found Patel to be not credible, describing his testimony as "not candid," "somewhat evasive," and both internally inconsistent and inconsistent with the record evidence. *Id.* at 113a; see *id.* at 113a-114a. The IJ concluded that Patel had failed to carry his burden to show he was not inadmissible under Section 1182(a)(6)(C)(ii) for falsely representing himself as a United States citizen, and accordingly deemed him and his family ineligible for adjustment of status under Section 1255(i). Pet. App. 117a-118a.

c. The Board of Immigration Appeals (Board) upheld the IJ's decision and dismissed petitioners' appeal.

Pet. App. 103a-108a. As relevant here, the Board identified no clear error in the IJ's finding that Patel had "not been a credible witness" and had "'willfully and purposefully indicated that he was a United States citizen'" on the driver's license application. *Id.* at 106a-107a (citation omitted). One Board member dissented on grounds that are not within the scope of the question presented in this Court. *Id.* at 109a-110a.

3. a. Petitioners sought review of the final orders of removal in the court of appeals. A panel of the court unanimously denied the petition. Pet. App. 79a-102a. Petitioners contended that the agency erred in finding that Patel knowingly made a false representation of citizenship to obtain a driver's license. Consistent with its longstanding position, see Gov't Reh'g Br. at 7-10, *Montero-Martinez* v. *Ashcroft*, 2001 WL 37115663, No. 99-70596 (9th Cir. Nov. 30, 2001), the government did not dispute the court's jurisdiction over that question. But the panel nevertheless concluded *sua sponte* that it lacked jurisdiction. Pet. App. 84a-86a, 88a-90a. In particular, the court interpreted Section 1252(a)(2)(B) and (D) to limit its jurisdiction to review denials of adjustment of status under Section 1255 to constitutional questions and questions of law, thereby excluding review of petitioners' challenge to the agency's underlying factual findings. *Id.* at 85a-86a, 89a-90a.

b. The court of appeals vacated the panel's decision and ordered rehearing en banc. Pet. App. 9a. By a vote of 9 to 5, the en banc court held that it lacked jurisdiction to review petitioners' factual challenge to the agency's denial of the application for adjustment of status. *Id.* at 1a-77a.

The majority of the en banc court of appeals held that Section 1252(a)(2)(B)(i) bars all judicial review of

the denial of adjustment of status—or any of the other forms of relief enumerated in that provision—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 term "any judgment" is best read to mean "[a]ny decision" regarding the 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 interpreted Section 1252(a)(2)(D) as "restor[ing]" courts' jurisdiction "to review constitutional claims or questions of law," it concluded that factual determinations still remain "'beyond the power of judicial review.'" *Id.* at 28a-29a (citation omitted).

The en banc court of appeals rejected petitioners' contention that Section 1252(a)(2)(B)(i) precludes judicial review only of the Attorney General's ultimate, discretionary decision whether to grant relief. It also rejected the government's longstanding view that the provision additionally bars review of any discretionary determinations underlying the ultimate decision, while permitting review of non-discretionary determinations (*i.e.*, determinations of fact and law). Pet. App. 24a, 30a-45a. The court recognized that, in so holding, it was departing from both its own precedent and that of numerous other courts of appeals. See *id.* at 3a, 32a-33a & nn.22-23.

Judge Martin, joined by four other members of the court, dissented. Pet. App. 48a-77a. Although she believed the phrase "any judgment regarding the granting of relief" was ambiguous standing alone, *id.* at 58a, she contended that "us[ing] the word 'judgment' to mean 'findings of fact' * * * does not reflect the most

natural understanding of the term," *id.* at 60a; see *id.* at 55a, 58a-65a. Considering the relevant language in the context of the statutory scheme as a whole and against the backdrop of the presumptions of judicial review and in favor of noncitizens, Judge Martin agreed with the government that the "best interpretation" is that Section 1252(a)(2)(B)(i) "excludes review" only of those "decisions that involve the exercise of discretion." *Id.* at 65a; see *id.* at 52a-55a, 65a-72a. She observed that this category "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 does not include "findings of fact that require no discretionary evaluation from the factfinder." *Id.* at 65a. She noted that her view has been "widely accepted" by other courts of appeals, *id.* at 50a, observing that "all but one" of the "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; see *id.* at 57a-58a (citing decisions by the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits); but see *id.* at 58a n.5 (noting the Fourth Circuit as the only other outlier).

SUMMARY OF THE ARGUMENT

In 8 U.S.C. 1252(a)(2)(B)(i), Congress has precluded judicial review of "any judgment regarding the granting of relief" under certain enumerated provisions of the INA, including the one governing adjustment of status, 8 U.S.C. 1255. The government has long taken the position that Section 1252(a)(2)(B)(i) bars review of discretionary determinations, but not of underlying nondiscretionary determinations—*i.e.*, determinations of law and fact. That interpretation finds support in the

statutory text, context, and history, as well as in this Court's precedents and considerations of congressional policy.

A. The text of Section 1252(a)(2)(B)(i) is most naturally read as limited to discretionary determinations. In the sense in which it is used here, the word "judgment" is commonly defined as a decision that requires subjective or evaluative decision-making and results from the exercise of discernment. That definition supports the conclusion that the bar on judicial review in Section 1252(a)(2)(B)(i) applies to discretionary determinations, but not to the non-discretionary determinations that contribute to reaching a discretionary judgment.

The decision below emphasized that Section 1252(a)(2)(B)(i) refers to "any" judgment "regarding" the granting of discretionary relief—modifiers that the court of appeals understood to suggest breadth. But neither of those words is capable of expanding the meaning of "judgment": although the statute covers "any" judgment "regarding" the granting of relief, it does not cover non-judgments. The phrase "regarding the granting of relief" does, however, rebut petitioners' contention that the provision's limitation of review applies only to the ultimate decision to grant or deny relief.

B. Statutory context confirms the government's longstanding interpretation. Other provisions of the INA repeatedly use the term "judgment" to specify determinations of a discretionary nature. Section 1252(a)(2)(B)(i)'s use of that term should be accorded a consistent meaning.

Contextual cues in Section 1252(a)(2) itself are to the same effect. The heading of Section 1252(a)(2)(B) is

"Denials of discretionary relief." 8 U.S.C. 1252(a)(2)(B) (emphasis omitted). Similarly, 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 [his] discretion." 8 U.S.C. 1252(a)(2)(B)(ii) (emphasis added). The use of the word "other" indicates that clause (i) is similarly limited to discretionary decisions. In addition, other portions of Section 1252(a)(2) establish comprehensive bars to review using expansive, all-encompassing language. Had Congress intended clause (i) to preclude all review of decisions regarding discretionary relief, it presumably would have used one of those formulations.

The court of appeals' interpretation also produces a structural anomaly. Under its approach, the fact-finding at issue here would have been judicially reviewable had the false-statement ground of inadmissibility arisen at the removal stage of the proceedings, as it would have if DHS had charged a different or additional ground of removability at the outset. There is no reason to conclude that Congress intended the reviewability of the same issue to turn on the stage of the proceedings at which the factual finding is made.

C. The statutory history underlying Section 1252(a)(2)(B)(i) further supports interpreting that provision as limited to discretionary determinations.

The court of appeals contended that its interpretation was consistent with the historical scope of habeas review, which purportedly excluded factual determinations. But that claim rests on a misunderstanding of the historical record. Prior to the enactment of Section 1252(a)(2)(B)(i), courts regularly reviewed factual determinations underlying denials of discretionary relief

and orders of removal, albeit under a deferential standard of review.

The circumstances surrounding the most recent amendments to the relevant provisions of Section 1252 confirm the government's interpretation. As initially enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Section 1252(a)(2) did not include any provision analogous to the later carve-out in subparagraph (D), which preserves judicial review of legal and constitutional claims. In *Immigration & Naturalization Service* v. *St. Cyr*, 533 U.S. 289 (2001), this Court construed other INA bars on judicial review to permit habeas review of questions of law underlying the denial of discretionary relief, reasoning that a contrary interpretation would raise serious constitutional concerns under the Suspension Clause. After *St. Cyr*, nearly all of the courts of appeals interpreted Section 1252(a)(2)(B)(i) as permitting review of non-discretionary determinations (including questions of law).

In 2005, Congress responded to *St. Cyr* by enacting the REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, 119 Stat. 302, which added subparagraph (D) to Section 1252(a)(2). The REAL ID Act ratified the prevailing interpretation of Section 1252(a)(2)(B)(i). At the very least, nothing in the Act displaced that prevailing view. Following passage of the REAL ID Act, the majority of the courts of appeals have continued to endorse the government's view as to the meaning of Section 1252(a)(2)(B)(i).

D. Other tools of statutory construction confirm the government's longstanding reading of Section 1252(a)(2)(B)(i). This Court has held that when a

statutory provision is reasonably susceptible to an interpretation preserving judicial review, courts should presume that Congress did not intend to foreclose review entirely. The government's interpretation also accords with the policies underlying IIRIRA, which was designed to shield the Executive's exercises of discretion from judicial intrusion. Moreover, distinguishing between discretionary and non-discretionary determinations offers an administrable line for judges, as evidenced by the widespread application of that standard in the courts of appeals over nearly two decades.

ARGUMENT

SECTION 1252(a)(2)(B)(i) DOES NOT BAR JUDICIAL REVIEW OF NON-DISCRETIONARY DETERMINATIONS

Petitioners seek review of the agency's determination that Patel is inadmissible, and therefore ineligible for adjustment of status, because he knowingly made a false claim of citizenship in order to obtain a state-law benefit. See 8 U.S.C. 1182(a)(6)(C)(ii)(I). The parties agree, as did the majority and dissenting judges below, that the agency's decision rested on a non-discretionary determination—in particular, an objective finding of historical fact. See Pet. App. 35a; *id.* at 49a (Martin, J., dissenting). Section 1252(a)(2)(B)(i) does not bar review of that underlying finding of fact. The statutory text, context, and history, as well as this Court's precedents and considerations of congressional policy, indicate that Section 1252(a)(2)(B)(i) bars review only of discretionary judgments, not of non-discretionary findings of the kind at issue here.

A. The Text Of Section 1252(a)(2)(B)(i) Is Best Read To Permit Review Of Non-Discretionary Determinations

"As in any case of statutory construction," the proper analysis "begins with 'the language of the statute.'" *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (citation omitted). Section 1252(a)(2)(B)(i) provides, in relevant part, that "no court shall have jurisdiction to review * * * any *judgment regarding* the granting of relief under section * * * 1255 of this title." 8 U.S.C. 1252(a)(2)(B)(i) (emphasis added).

1. Although Section 1252 and other provisions of the INA refer to a "judgment" by the Attorney General or the Secretary, the INA does not define that term, which carries more than one "ordinary, contemporary, common meaning." *Artis* v. *District of Columbia*, 138 S. Ct. 594, 603 n.8 (2018) (citation omitted). Congress's textual choices in Section 1252(a)(2)(B)(i) reflect its use of the term "judgment" to refer to decisions involving subjective or evaluative decision-making.

In common usage, "judgment" is defined in two relevant ways. It may be "a formal utterance or pronouncing of an authoritative opinion after judging," or it could be "the mental or intellectual process of forming an opinion or evaluation by discerning and comparing" and, relatedly, "an opinion or estimate so formed." *Webster's Third New International Dictionary* 1223 (1993) (*Webster's*). The same dichotomy between something that is formal and authoritative (like the "final judgment" of a court) or something that reflects the working of the decision-maker's own mental processes, is also manifest in other dictionaries' definitions of "judgment." Thus, *Black's Law Dictionary* refers both to such things as "[t]he official and authentic decision of a court of justice," on one hand, and to "[a]n opinion or

estimate" or "[t]he formation of an opinion or notion concerning some thing by exercising the mind upon it," on the other. *Black's Law Dictionary* 841 (6th ed. 1990) (citations omitted). And *The Oxford English Dictionary* refers to "[t]he pronouncing of a deliberate opinion upon a person or thing, or the opinion pronounced," and to "[t]he formation of an opinion or notion concerning something by exercising the mind upon it; an opinion, estimate." 8 *The Oxford English Dictionary* 294 (2d ed. 1989).[2]

The court of appeals reviewed such dictionary definitions of "judgment" and concluded that they fall into one of two camps: either "the final decision of a court" or "any decision." Pet. App. 27a. The court further concluded that Section 1252 uses the term in the second, broader sense. *Ibid.* But the court's understanding of the second group of definitions is overly simplistic and eliminates the connotation of the relevant definitions. Those definitions do not suggest that "judgment" encompasses "any decision." Rather, they refer to decisions that are the product of a particular decisionmaker's exercise of discernment, which is why the recurring synonyms in the preceding paragraph are more subjective: "opinion," "estimate," and "notion."

In light of those definitions of judgment, the court of appeals' contention that "judgment" includes objective "findings of fact" reflects a "highly eccentric use of the word." Pet. App. 59a (Martin, J., dissenting); see *id.* at 60a (noting that "a recitation of * * * fact * * * would not naturally be described as a 'judgment'"). The court

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[2] Despite its citation of the second edition, Pet. App. 26a-27a, the court of appeals quoted an online version of *The Oxford English Dictionary*, which accounts for minor differences between its quotation and the one above.

of appeals offered no direct authority for its interpretation, which is inconsistent with the term's associations with subjective and evaluative decision-making. See *id.* at 59a (noting that the majority's dictionary review ignored definitions indicating that "a judgment can also be the exercise of discretion").

The court of appeals emphasized that the provision at issue precludes review of "any" judgment "regarding" the granting of relief. 8 U.S.C. 1252(a)(2)(B)(i). In its view, "any doubt" about the scope of the provision "should be resolved in favor of a more expansive meaning given the[se] modifying phrases." Pet. App. 27a. That contention begs the question whether a factual finding is a "judgment" in the first place. Cf. *Rimini St., Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873, 878 (2019) (rejecting the contention that a reference to "'full costs'" includes any "expenses beyond the costs specified," as the term "'[f]ull'" denotes "quantity or amount" and simply "means the complete measure of the noun it modifies"). The government agrees that Section 1252(a)(2)(B)(i) bars the review of "any judgment regarding" the granting or denying of relief. But the addition of "any" and "regarding" cannot expand the scope of the phrase to include non-judgments.

In short, Section 1252(a)(2)(B)(i)'s reference to "judgment[s]" shields certain discretionary determinations from judicial intrusion. But nothing in the provision bars review of non-discretionary determinations, including those that go into forming a discretionary judgment.

2. Petitioners recognize the discretionary nature of a judgment. But their contention that "courts are precluded only from reviewing the ultimate grant of discretionary relief," Pet. App. 31a; see also Pet. 22, and can

therefore review any subsidiary determinations, is similarly flawed. Had Congress intended the narrow result for which petitioners advocate, it could easily have specified that only "final" or "ultimate" judgments are exempt from judicial review, rather than using the term "judgment" without elaboration. Compare 8 U.S.C. 1252(a)(2)(B)(i), with 8 U.S.C. 1101(a)(48)(A) (referring to "a *formal* judgment of guilt") (emphasis added); see *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000) ("[H]ad Congress intended the provision to be broadly available, it could simply have said so, as it did in * * * other sections of the Code.").

Section 1252(a)(2)(B)(i)'s use of the term "regarding" further undermines petitioners' position. Such terms "in a legal context generally ha[ve] 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) (discussing "respecting"); see *id.* at 1759 (quoting definitions equating "respecting" and "regarding"); *Webster's* 1911 (defining "regarding" as "with respect to : CONCERNING"). Here, the "subject" of the preposition, *Lamar, Archer, & Cofrin, LLP*, 138 S. Ct. at 1760, is the "granting of relief," 8 U.S.C. 1252(a)(2)(B)(i). Thus, although "regarding" does not expand the provision's scope to cover non-judgments, it does expand it beyond ultimate grants or denials of relief. Again, had Congress intended the narrow meaning petitioners advocate, it had far more straightforward options for achieving that goal. For example, Congress could have precluded review over "any judgment granting or denying relief." The statutory reference to judgments "regarding" the granting of relief signifies a

broader bar that covers underlying determinations (that are still judgments) as well as the ultimate decisions to grant or deny relief under one of the enumerated provisions.

B. The Statutory Structure And Context Confirm The Government's Longstanding Interpretation

"Statutory construction * * * is a holistic endeavor," *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988), and "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Sturgeon* v. *Frost*, 577 U.S. 424, 438 (2016) (citation omitted). Here, several aspects of the statutory structure and context confirm that Section 1252(a)(2)(B)(i) precludes review of discretionary determinations but not of underlying non-discretionary findings of fact.

1. The use of the term "judgment" in other provisions of the INA is most consistent with the government's interpretation. See *United Sav. Ass'n*, 484 U.S. at 371 ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme" when "the same terminology is used elsewhere in a context that makes its meaning clear."). When, as here, the INA uses the term "judgment" to specify a determination or decision of the relevant official (as opposed to the final order of a court), it consistently 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 * * * or otherwise adversely affect the foreign policy of the United States").[3]

Notably, the court of appeals failed to identify any other instance in which the INA employs "judgment" to describe findings of fact or uses the term in a manner consistent with that court's interpretation of Section 1252(a)(2)(B)(i). See Pet. App. 61a (Martin, J., dissenting). Because courts "presum[e] that a given term is used to mean the same thing throughout a statute," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), the word "judgment" in Section 1252(a)(2)(B)(i) should be construed in line with the provisions above to refer only to discretionary decisions.

2. Section 1252(a)(2) itself also contains clear indications that "judgment" extends only to discretionary determinations. Conspicuously, Section 1252(a)(2)(B) is entitled "Denials of discretionary relief." 8 U.S.C.

[3] Some of these provisions underscore the point by using the phrase "*discretionary* judgment," *e.g.*, 8 U.S.C. 1226(e) (emphasis added), but the provisions that use the unmodified term "judgment" likewise refer to discretionary determinations.

1252(a)(2)(B) (emphasis omitted).[4] "Although section headings cannot limit the plain meaning of a statutory text, 'they supply cues' as to what Congress intended." *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (citation omitted). The heading of Section 1252(a)(2)(B) reflects its central focus on what this Court has already described as "the theme" of IIRIRA: "protecting the Executive's *discretion* from the courts." *Reno* v. *American-Arab Anti-Discrimination Comm. (AADC)*, 525 U.S. 471, 486 (1999) (emphasis added). Extending the review bar to cover *non*-discretionary determinations goes beyond what is needed to achieve the purpose Congress specified in the heading.

Moreover, Congress's focus on discretionary decisions is evident in the adjoining clause. While Section 1252(a)(2)(B)(i) precludes judicial review of "any judgment regarding the granting of relief" under five enumerated provisions, Section 1252(a)(2)(B)(ii) further precludes 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). As the Court explained in *Kucana* v. *Holder*, 558 U.S. 233 (2010), "[t]he 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." *Id.* at 246-247. "Read[ing]" the two provisions "harmoniously," clauses (i) and (ii) work together to "bar[ ] court review

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[4] The heading of Section 1252(a)(2)(B) was supplied by Congress in the enacted text of IIRIRA, not by a subsequent codifier. See IIRIRA § 306(a)(2), 110 Stat. 3009-607.

of discretionary decisions." *Id.* at 247. Specifically, clause (i) encompasses discretionary judgments pertaining to the enumerated forms of relief, while clause (ii) is a "catchall" for other decisions or actions that the INA has elsewhere specified are discretionary. *Id.* at 246-247.

Kucana's understanding of Section 1252(a)(2)(B) is consistent with this Court's recognition in other contexts that a catchall that includes the word "other"—as clause (ii) does—may shed important light on the meaning of the preceding list items. In particular, the presence of "other" indicates that the catchall clause and the list items share the same defining feature. See, *e.g.*, *United States* v. *Standard Brewery, Inc.*, 251 U.S. 210, 218 (1920) (construing a statute that covered "'beer, wine, or other intoxicating malt or vinous liquors'" and finding "it clear that the framers of the statute intentionally used the phrase 'other intoxicating' as relating to and defining the immediately preceding designation of beer and wine"). Here, the catchall clause's reference to "other" "discretion[ary]" "decision[s] or action[s]," 8 U.S.C. 1252(a)(2)(B)(ii), confirms that clause (i) is also limited to discretionary determinations.

Construing clause (i) as encompassing *more* than just discretionary determinations would improperly sever the link between the two clauses and fail to give full effect to the statute's use of the term "other." If clause (i) were read as precluding review of both discretionary and non-discretionary determinations, then it would make little sense for clause (ii) to refer to "any *other* decision or action of the [Executive] the authority for which is specified * * * to be in [its] discretion." 8 U.S.C. 1252(a)(2)(B)(ii) (emphasis added); see *United States* v. *United Verde Copper Co.*, 196 U.S. 207, 213

(1905) (rejecting argument "that the word 'other' should be * * * eliminated from the statute"). The far more natural interpretation is that clause (i) covers a certain set of discretionary determinations that Congress viewed as particularly salient, while clause (ii) covers other decisions of the same basic character.

Nor does this interpretation render clause (i) superfluous in light of the catchall clause, as the court of appeals suggested. See Pet. App. 44a. By including both clauses, Congress itself identified certain critical discretionary decisions that it was most concerned should be immune from judicial review, and it further incorporated other decisions that Congress has elsewhere specified are discretionary. See *Paroline* v. *United States*, 572 U.S. 434, 447-448 (2014) (rejecting argument that the catchall clause rendered the list items superfluous in the statute at issue). Delineating a category by enumerating salient members of that category and then adding a residual clause is common in statutory drafting. See, *e.g.*, *Taylor* v. *United States*, 136 S. Ct. 2074, 2079 (2016) (addressing a similar statutory structure); *Paroline*, 572 U.S. at 446 (same). In short, the "inclusion of both clauses" in Section 1252(a)(2)(B) "constitutes a fairly customary or traditional way of ensuring that all the relevant provisions are covered." *Montero-Martinez* v. *Ashcroft*, 277 F.3d 1137, 1143 n.7 (9th Cir. 2002).

3. Expanding the contextual frame slightly, the subparagraphs that surround Section 1252(a)(2)(B) indicate that Congress knew how to preclude review of all aspects of a decision when that was its intent, thereby confirming that Congress did not do so in subparagraph (B). See *Kucana*, 558 U.S. at 248 ("If Congress wanted the jurisdictional bar to encompass decisions specified as

discretionary by regulation * * * , Congress could easily have said so. In other provisions enacted simultaneously * * * , Congress expressed precisely that meaning."). The preceding 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)(i). And the following subparagraph precludes 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). Both of those provisions flatly bar all claims arising from the specified decisions, subject to certain limited exceptions. See, *e.g.*, *Trejo* v. *Garland*, 3 F.4th 760, 768 n.4 (5th Cir. 2021) ("Unlike with § 1252(a)(2)(B), there is no indication § 1252(a)(2)(C) was intended to 'preclude[ ] review only of discretionary decisions.'") (citation omitted; brackets in original); *Pena* v. *Lynch*, 815 F.3d 452, 455 (9th Cir. 2016) (discussing Section 1252(a)(2)(A)). The narrower language in Section 1252(a)(2)(B)(i) suggests a conscious decision not to bar categorically all review of the enumerated forms of relief.

4. The court of appeals' interpretation also produces a structural anomaly. Removal proceedings often consist of two stages. First, the IJ determines whether the noncitizen is removable, on the ground that he is either deportable or (as here) inadmissible. See 8 U.S.C. 1182, 1227; see also 8 U.S.C. 1229a(a)(1). If the noncitizen is deemed removable, he may then apply for various forms of discretionary relief, including, as relevant here, adjustment of status. See 8 U.S.C. 1255 (adjustment of status); see also, *e.g.*, 8 U.S.C. 1229b (cancellation of removal), 1229c (voluntary departure).

A particular legal or factual question may arise at either the removal or relief stage of the proceedings. In order to be eligible for adjustment of status under the provision at issue here, for example, a noncitizen must show that he "is admissible to the United States for permanent residence." 8 U.S.C. 1255(i)(2)(A). A determination about inadmissibility could therefore serve as the basis for either removal or a denial of discretionary relief. In this particular case, the government charged Patel as removable for being a noncitizen present in the United States without being admitted or paroled. See A.R. 1811. When Patel sought adjustment of status, the agency denied relief on the ground that he was inadmissible for falsely claiming to be a United States citizen to obtain a state-law benefit. See Pet. App. 104a-105a. Had that ground of inadmissibility served as a basis for the removal charge, and assuming no other jurisdictional bar, Patel could have sought judicial review of the agency's decision as to his subjective intent in making the allegedly false statement, see 8 U.S.C. 1252(a)(1), 1252(b)(9)—exactly the same factual question that the court of appeals' interpretation shields from review when it serves as a predicate for a judgment denying discretionary relief.

The court of appeals acknowledged that discrepancy, calling it a "potential quirk" but offering no justification for it, apart from the observation that removal and relief proceedings are different in various other respects. See Pet. App. 37a n.26. But it is unlikely that Congress intended that judicial reviewability of the same underlying factual determination would turn on the stage of the proceedings at which the IJ happens to make that factual determination. To the contrary, Congress specified that the preclusion of review in Section

1252(a)(2)(B) applies "[n]otwithstanding any other provision of law" and "regardless of whether the judgment * * * is made in removal proceedings" at all. 8 U.S.C. 1252(a)(2)(B). Under the government's reading of Section 1252(a)(2)(B)(i), the factual question at issue here would have been reviewable regardless of the stage of proceedings at which it arose.

C. The Statutory History Reinforces The Reviewability Of Non-Discretionary Determinations

The statutory history of Section 1252(a)(2)(B) supports interpreting that provision to permit judicial review of non-discretionary determinations. The counterarguments of the court of appeals and petitioners are not borne out by the historical record.

1. The court of appeals contended that its interpretation barring review of factual determinations was consistent with historical practice preceding Section 1252(a)(2)(B)'s enactment. In particular, the majority emphasized this Court's observation in *Immigration & Naturalization Service* v. *St. Cyr*, 533 U.S. 289 (2001), that, in habeas suits, "courts generally did not review *factual determinations* made by the Executive." Pet. App. 29a (quoting *St. Cyr*, 533 U.S. at 306).

That argument misapprehends the historical practice. *St. Cyr* itself acknowledged that courts could review "the question whether there was some evidence to support the [removal] order." 533 U.S. at 306. And in the period preceding the enactment of Section 1252(a)(2)(B), courts regularly reviewed the agency's factual findings underlying removal orders and discretionary denials of relief, albeit under a deferential standard of review. See, *e.g.*, *De Brown* v. *Department of Justice*, 18 F.3d 774, 777 (9th Cir. 1994); *Silva-Palacios* v. *Attorney Gen.*, 423 F.2d 725, 725 (5th Cir.) (per

curiam), cert. denied, 400 U.S. 835 (1970); see also 8 Charles Gordon et al., *Immigration Law and Procedure* § 104.09[2][a][iii] & n.33 (Matthew Bender, rev. ed. 2021) (collecting cases). That approach is consistent with the government's interpretation, which similarly permits review of non-discretionary factual determinations under a deferential standard of review. See 8 U.S.C. 1252(b)(4)(B) (providing that "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary").

In the court of appeals, petitioners similarly relied on the pre-IIRIRA landscape, contending that their narrow interpretation accords with the "longstanding" distinction between "threshold eligibility requirements" "'governed by specific statutory standards'" and "the ultimate discretionary judgment." Pet. C.A. En Banc Br. 15 (quoting *Jay* v. *Boyd*, 351 U.S. 345, 353 (1956)). But *Jay* did not address the scope of judicial review, and there is no indication that Congress, when it enacted Section 1252(a)(2)(B) as part of IIRIRA, intended to replicate the distinction articulated in *Jay* by barring review of final judgments while permitting review of all underlying determinations, whether discretionary or not. Indeed, petitioners acknowledged below that "prerequisite eligibility requirements" are shielded from review under Section 1252(a)(2)(B)(ii) when they are expressly specified to be in the discretion of the Executive. Pet. C.A. En Banc Br. 29; see *id.* at 15. As a result, even petitioners' interpretation of Section 1252(a)(2)(B) fails to track *Jay*'s distinction between threshold and ultimate determinations.

2. In 1996, Congress enacted Section 1252(a)(2)(B)(i) as part of IIRIRA. See § 306(a)(2), 110 Stat. 3009-607.

In addition to its permanent provisions governing judicial review, IIRIRA included transitional rules that were applicable to certain pending cases. See § 309, 110 Stat. 3009-626; see generally *AADC*, 525 U.S. at 477 & n.5. The court of appeals erred in inferring that those transitional rules supported its interpretation.

The court below noted that IIRIRA's transitional rules precluded review of "discretionary decision[s]" made under certain provisions. IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626. The court viewed that phrase as significant, inferring that Congress intentionally employed a "broader term" by referring to "judgment[s]" in the permanent rule reflected in 8 U.S.C. 1252(a)(2)(B)(i). Pet. App. 34a. That inference was misplaced. As explained above, see pp. 17-18, *supra*, the court was mistaken about the most natural reading of the term "judgment," which is narrower than the court believed. Moreover, the transitional rules lacked the contextual cues—such as any provision analogous to Section 1252(a)(2)(B)(ii)—that help confirm that the term in the permanent provision is limited to discretionary determinations. The permanent rules' preclusion of review for "any judgment regarding the granting of" certain forms of discretionary relief or "any other decision or action * * * specified * * * to be in [Executive] discretion," 8 U.S.C. 1252(a)(2)(B), is not materially distinguishable, with respect to the character of the covered decisions, from the transitional rules' reference to "discretionary decision[s]," IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626. In any event, absent contemporaneous explanation of the reason for the different phrasing, the purported difference in meaning between "discretionary decision" and "judgment" is too nebulous to draw a meaningful inference about congressional intent. Cf.

Department of Commerce v. *United States House of Representatives*, 525 U.S. 316, 343 (1999) (opinion of O'Connor, J.) ("[I]t is hard to imagine that * * * Congress would have decided to reverse course on such an important issue by enacting only a subtle change in phraseology.").

3. Far from supporting the court of appeals' view, the circumstances surrounding the most recent amendments to the relevant provisions of Section 1252 further confirm the government's interpretation. As enacted in IIRIRA in 1996, Section 1252(a)(2) did not include any provision analogous to current subparagraph (D), which expressly excepts constitutional claims and questions of law from various judicial-review bars, including the one imposed by subparagraph (B). See 8 U.S.C. 1252(a)(2)(D). In its 2001 decision in *St. Cyr*, this Court construed certain other limitations on judicial review contained in the INA (Section 1252(a)(2)(B)(i) was not at issue) to permit habeas review of questions of law underlying a denial of discretionary relief from removal. 533 U.S. at 314. In reaching that conclusion, the Court applied the constitutional-avoidance canon, noting that "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *Id.* at 299-300 (citation omitted). In light of the historical availability of judicial review for "pure question[s] of law," the Court concluded that a construction "that would entirely preclude review" of such questions "by any court would give rise to substantial constitutional questions." *Id.* at 300; see *id.* at 301-305, 307-308. For that reason and others, the Court adopted a narrow reading of the review bars at issue there. See *id.* at 305,

310-314. As Justice Scalia noted in dissent, the Court's decision had the effect of routing various challenges brought by noncitizens to their removal orders to the district courts, despite Congress's apparent intent to consolidate all review in the courts of appeals. See *id.* at 328, 334-335 (Scalia, J., dissenting).

After *St. Cyr*—and before the addition of Section 1252(a)(2)(D) in 2005, discussed *infra*—virtually every court of appeals to address the scope of Section 1252(a)(2)(B)(i) held that it barred review of discretionary, but not non-discretionary, determinations. As particularly relevant here, many of the cases specifically found that factual determinations fell outside the review bar. See *Succar* v. *Ashcroft*, 394 F.3d 8, 19 (1st Cir. 2005); *Sepulveda* v. *Gonzales*, 407 F.3d 59, 64 (2d Cir. 2005) (Sotomayor, J.); *Mendez-Moranchel* v. *Ashcroft*, 338 F.3d 176, 178 (3d Cir. 2003); *Garcia-Melendez* v. *Ashcroft*, 351 F.3d 657, 661 (5th Cir. 2003) (factual determinations reviewable); *Santana-Albarran* v. *Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005) (same); *Ortiz-Cornejo* v. *Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005) (same); *Molina-Estrada* v. *Immigration & Naturalization Serv.*, 293 F.3d 1089, 1093 (9th Cir. 2002); *Gonzalez-Oropeza* v. *U.S. Attorney Gen.*, 321 F.3d 1331, 1332-1333 (11th Cir. 2003) (per curiam). The lone exception was the Seventh Circuit, where the precedent was mixed. Compare *Iddir* v. *Immigration & Naturalization Serv.*, 301 F.3d 492, 497 (2002), with *Dave* v. *Ashcroft*, 363 F.3d 649, 653 (2004). The remaining circuits did not address the question in the years immediately after *St. Cyr*.

That significant body of decisions correctly recognized that text, structure, and precedent supported an interpretation of Section 1252(a)(2)(B)(i) that was

limited to discretionary determinations. See, *e.g.*, *Sepulveda*, 407 F.3d at 62-63; *Montero-Martinez*, 277 F.3d at 1141-1144. But the constitutional concerns expressed in *St. Cyr* also formed an important backdrop during that period. See, *e.g.*, *Iddir*, 301 F.3d at 496 (citing *St. Cyr*); see also *Montero-Martinez*, 277 F.3d at 1138 n.** (noting, on panel rehearing, that the government "confessed error in the position it had previously taken in the case in light of *St. Cyr*"). In the absence of any outlet for reviewing constitutional claims and questions of law, an interpretation of Section 1252(a)(2)(B)(i) that categorically barred all review for denials of the enumerated forms of relief would have implicated the same constitutional concerns that had justified application of the avoidance canon in *St. Cyr*. But the narrower interpretation of Section 1252(a)(2)(B)(i) that prevailed in nearly all the courts of appeals avoided those concerns without fostering habeas challenges in district courts and thereby fracturing IIRIRA's streamlined process for judicial review of removal proceedings.

4. In 2005, in the wake of the virtually unanimous consensus in the courts of appeals that Section 1252(a)(2)(B)(i) permitted review of non-discretionary determinations, Congress responded to *St. Cyr* in the REAL ID Act, Pub. L. No. 109-13, Div. B, 119 Stat. 302-323. See *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1071 (2020). As relevant here, the REAL ID Act amended the INA to include Section 1252(a)(2)(D), which provides that nothing in Section 1252(a)(2)(B) or various other provisions "shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review." 8 U.S.C. 1252(a)(2)(D). At the same time, Congress also amended Section 1252(a)(2)(B) to preclude challenges

under 28 U.S.C. 2241 "or any other habeas corpus provision * * * except as provided in subparagraph (D)." REAL ID Act § 106(a)(1)(A)(ii), 119 Stat. 310.

Those provisions of the REAL ID Act ratified the prevailing interpretation of Section 1252(a)(2)(B)(i). This Court "normally assume[s] that Congress is 'aware of relevant judicial precedent' when it enacts a new statute." *Guerrero-Lasprilla*, 140 S. Ct. at 1072 (quoting *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010)). The virtual unanimity among the nine circuits that had addressed the question at the time the REAL ID Act was enacted is sufficient to warrant that assumption. See, *e.g.*, *Guerrero-Lasprilla*, 140 S. Ct. at 1072 (finding congressional ratification on the basis of decisions by four courts of appeals construing the scope of habeas review after *St. Cyr*); *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 535-536 (2015) (finding ratification on the basis of decisions by nine courts of appeals); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975) (same for six courts of appeals). As with the Court's observations about 1988 amendments to the Fair Housing Act, Congress's decision in 2005 to amend the INA "while still adhering to the operative language" in Section 1252(a)(2)(B)(i) provides "convincing support for the conclusion that Congress accepted and ratified" the virtually unanimous holdings of the nine courts of appeals that had addressed the issue. *Texas Dep't of Hous. & Cmty. Affairs*, 576 U.S. at 536.

The nature of the changes effected by the REAL ID Act also supports a finding of ratification. Congress's amendments to the INA in the REAL ID Act were not irrelevant or "isolated," *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001), but instead involved substantial

changes to the scope of judicial review available under Section 1252(a)(2)(B). In particular, Congress amended the lead-in language of that provision to preclude habeas review and preserve review of constitutional claims and questions of law under subparagraph (D). See REAL ID Act § 106(a)(1)(A), 119 Stat. 310. Congress's specific focus on Section 1252(a)(2)(B) itself suggests that it would have expressly modified the text of clause (i) had it disagreed with the heavily prevailing interpretation. See *Sandoval*, 532 U.S. at 292. But it did not do so.

Moreover, this Court has already recognized that the REAL ID Act's legislative history "indicates that Congress was well aware of the state of the law in the courts of appeals in light of *St. Cyr*." *Guerrero-Lasprilla*, 140 S. Ct. at 1072 (citing H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 174 (2005)). And a report from the House Judiciary Committee for a predecessor bill emphasized that, "[f]or non-criminal lawful permanent resident aliens, review would be only in the circuit court and would be available for *all non-discretionary determinations*." H.R. Rep. No. 724, 108th Cong., 2d Sess. Pt. 5, at 190 (2004) (emphasis added). Other statements in the legislative history are to similar effect. Compare *ibid.* (commenting that IIRIRA "sought to *eliminate* judicial review of immigration orders for most criminals") (emphasis added), with *ibid.* (IIRIRA "*limited* the judicial review of discretionary relief issues for all aliens, on the basis that the law committed such matters to the judgment of the Attorney General") (emphasis added).

Since the passage of the REAL ID Act, the courts of appeals have continued to favor the government's position overwhelmingly, confirming that the Act

ratified Section 1252(a)(2)(B)(i)'s settled meaning. Most courts have either expressly adhered to their prior interpretation or not revisited that interpretation. See *Mamigonian* v. *Biggs*, 710 F.3d 936, 944 n.5 (9th Cir. 2013) (observing that "[n]one of the cases [adopting the majority position] has been explicitly overruled post-REAL ID Act"); see also, *e.g.*, *id.* at 945 (concluding that "the REAL ID Act does not evince Congress's intent to abrogate *Montero-Martinez*"); *Melendez* v. *McAleenan*, 928 F.3d 425, 426 (5th Cir.), cert. denied, 140 S. Ct. 561 (2019); *De La Vega* v. *Gonzales*, 436 F.3d 141, 144 (2d Cir. 2006). Although the Seventh Circuit's precedents remain mixed, that court has also generally embraced the majority view. See, *e.g.*, *Reyes-Sanchez* v. *Holder*, 646 F.3d 493, 496 (2011); *Hashish* v. *Gonzales*, 442 F.3d 572, 574, cert. denied, 549 U.S. 995 (2006); but see *Cevilla* v. *Gonzales*, 446 F.3d 658, 661 (2006). And the Tenth Circuit similarly held as a matter of first impression that Section 1252(a)(2)(B)(i) is limited to discretionary determinations. See *Sabido Valdivia* v. *Gonzales*, 423 F.3d 1144, 1148-1149 (2005). The circuits that have taken a contrary position—including the decision below—remain outliers. See Pet. App. 25a; *Roland* v. *United States Citizenship & Immigration Servs.*, 850 F.3d 625, 630 (4th Cir. 2017).

The decision below erred in relying on subparagraph (D) to justify a narrow reading of Section 1252(a)(2)(B)(i). See Pet. App. 29a, 37a. Citing the historical discussion in *St. Cyr*, the court contended that habeas review traditionally "was a mechanism to review '*questions of law* that arose in the context of discretionary relief,'" and observed that subparagraph (D) "ensures that courts maintain jurisdiction to review 'questions of law,'" even

despite a broad reading of Section 1252(a)(2)(B)(i). *Id.* at 29a (quoting *St. Cyr*, 533 U.S. at 307).

That reasoning ignores the prior body of law that Congress ratified when it enacted the REAL ID Act. There is nothing in the statutory or legislative history indicating that Congress intended to alter the meaning of the term "judgment" when it passed the REAL ID Act. Accordingly, to the extent a narrow reading of Section 1252(a)(2)(B)(i) was justified in part to avoid constitutional concerns under *St. Cyr* before the addition of subparagraph (D), that reading remained correct even after the REAL ID Act expressly obviated those concerns. Subparagraph (D) confirmed—as courts of appeals had already held—that nothing in subparagraph (B) "shall be construed as precluding review of constitutional claims or questions of law," but Congress did not change the reference to "judgment" in subparagraph (B) or eliminate its other express references to discretion in the heading and the catchall clause. 8 U.S.C. 1252(a)(2)(B) and (D).

Nor is it persuasive to infer that the addition of subparagraph (D) would have been superfluous if subparagraph (B) already permitted review of non-discretionary determinations, including legal and constitutional issues. Subparagraph (D) was designed to ensure a constitutionally adequate floor for judicial review in the courts of appeals across a variety of provisions, to prevent noncitizens from bringing habeas challenges in district court on the basis of *St. Cyr*. See Pet. App. 72a-73a (Martin, J., dissenting) (describing the provision's legislative background); see 8 U.S.C. 1252(a)(2)(D) (covering review bars in "subparagraph (B) or (C), or in any other provision of this chapter (other than this section)"). That general purpose sheds minimal light on

Section 1252(a)(2)(B)(i) in particular. Cf. *Guerrero-Lasprilla*, 140 S. Ct. at 1073 (responding to a similar argument by observing that subparagraph (D) "applies to more of the statute than the immediately preceding subparagraph"). And in any event, Congress may simply have wished to remove any possible ambiguity that Section 1252(a)(2)(B)(i) did not preclude judicial review of constitutional claims and questions of law. See *Facebook, Inc.* v. *Duguid*, 141 S. Ct. 1163, 1172 n.7 (2021) ("Congress may have 'employed a belt and suspenders approach' in writing the statute.") (citation omitted). Consistent with that interpretation, the precise phrasing of subparagraph (D)—stating that nothing in the listed provisions "*shall be construed* as precluding review," 8 U.S.C. 1252(a)(2)(D) (emphasis added)—is framed as a directive about the proper interpretation of those provisions, rather than a modification of their scope.

D. Other Considerations Support The Government's Interpretation

Other sources of statutory meaning similarly indicate that Section 1252(a)(2)(B)(i) excludes non-discretionary determinations. In particular, that interpretation is consistent both with this Court's precedents in related areas and with the policy goals underlying the relevant statutory enactments.

1. This Court has emphasized that "when a statutory provision 'is reasonably susceptible to divergent interpretation, [the Court] adopt[s] the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.'" *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quoting *Kucana*, 558 U.S. at 251). The Court has "consistently applied that interpretive guide to

legislation regarding immigration," and particularly to questions concerning the preservation of federal-court jurisdiction. *Kucana*, 558 U.S. at 252; see *St. Cyr*, 533 U.S. at 298. Here, the court of appeals' interpretation of Section 1252(a)(2)(B)(i) "foreclose[s] judicial review of the Board's determinations" to a greater extent than does the government's interpretation. *Guerrero-Lasprilla*, 140 S. Ct. at 1070. Thus, to the extent there is "[a]ny lingering doubt" about which interpretation is correct, it "would be dispelled" by the presumption in favor of judicial review. *Kucana*, 558 U.S. at 251.

The court of appeals found the presumption inapplicable because its interpretation "preserve[s] review of 'questions of law.'" Pet. App. 30a (quoting *St. Cyr*, 533 U.S. at 307); see *id.* at 29a-30a. Although *St. Cyr* itself was concerned with questions of law, see 533 U.S. at 298 (noting that the challenge at issue "raise[d] a pure question of law"), the court below cited nothing to support its apparent view that the presumption is generally limited to such questions. Rather, this Court has observed that "when a Government official's determination of a fact or circumstance * * * is dispositive of a court controversy, federal courts generally do not hold the determination unreviewable," but instead apply the presumption. *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 424 (1995).

In any event, the court of appeals ignored that Section 1252(a)(2)(B)(i) bars review not just in the courts of appeals (where subparagraph (D)'s carve-out applies), but also in the district courts (where it does not). See 8 U.S.C. 1252(a)(2)(B) (barring review "regardless of whether the judgment, decision, or action is made in removal proceedings"); 8 U.S.C. 1252(a)(2)(D) (permitting review "upon a petition for review" of a final order of

removal "filed with an appropriate court of appeals"); see 8 U.S.C. 1252(a)(5). Noncitizens frequently challenge denials of discretionary relief outside the context of removal proceedings. See, *e.g.*, *Sanchez* v. *Mayorkas*, 141 S. Ct. 1809, 1812 (2021) (reviewing challenge initiated in district court to DHS's denial of an application for adjustment of status under 8 U.S.C. 1255). But, under the court of appeals' interpretation, Section 1252(a)(2)(B)(i) categorically bars review of such denials, including questions of law. The court offered no way to square that outcome with the presumption of judicial review. Under the government's interpretation, in contrast, district-court review would (absent some other bar) be available for non-discretionary determinations, including questions of both law and fact, that are made in the course of denying discretionary relief outside of removal proceedings.

The court of appeals suggested (Pet. App. 23a) that the government's interpretation is inconsistent with this Court's observation in *Nasrallah* v. *Barr*, 140 S. Ct. 1683 (2020), that Section 1252(a)(2)(B) "states that a noncitizen may not bring a factual challenge to orders denying discretionary relief, including cancellation of removal, voluntary departure, adjustment of status, certain inadmissibility waivers, and other determinations 'made discretionary by statute,'" *id.* at 1694 (quoting *Kucana*, 558 U.S. at 248). But *Nasrallah* dealt with the scope of subparagraph (C), and commented on the meaning of subparagraph (B) only in response to a counterargument, making the point dictum. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (declining to follow "dictum contained in a rebuttal to a counterargument"). The *Nasrallah* Court itself acknowledged that its decision had "no effect on judicial

review of those discretionary determinations." 140 S. Ct. at 1694. And in other cases, this Court has described subparagraph (B) in a manner consistent with the government's interpretation, emphasizing that it "bars court review of discretionary decisions." *Kucana*, 558 U.S. at 247.

2. The government's interpretation also accords with the policies underlying the relevant statutory enactments. The principal aim of Section 1252(a)(2)(B)(i) was to protect the Executive's discretion from judicial intrusion. See *AADC*, 525 U.S. at 486 (recognizing that "protecting the Executive's discretion from the courts" "can fairly be said to be the theme of [IIRIRA]"). The government's interpretation achieves that goal—and insulates no more of the Executive's decision-making process from judicial review than necessary—by protecting discretionary, but not non-discretionary, determinations underlying a decision to grant or deny relief.

The court of appeals' interpretation overshoots the mark, protecting objective determinations that do not reflect any discretionary judgment by the Attorney General or the Secretary. There is no more reason to shield straight-forward factual findings from review in the context of a determination about discretionary relief from removal than in the context of a determination about removability. See pp. 26-27, *supra*. In either instance, the non-discretionary finding is something "about which the Attorney General simply might be wrong." Pet. App. 72a (Martin, J., dissenting). In contrast, petitioners' interpretation undershoots the mark, permitting courts to oversee every aspect of the Executive's decision-making process except the ultimate grant or denial of relief. That amounts to a "run-around of [courts'] limitations," because "[e]nabling review of

each individual determination underpinning the final decision effectively allows for review of the grant of relief." *Id.* at 45a (majority opinion).

The court of appeals took the position that no eligibility criteria—no matter how subjective—are really discretionary at all, because "[t]he Attorney General and immigration judges have no discretion to grant relief unless the statutory criteria are met." Pet. App. 39a. That argument is misplaced. Factual findings are reviewable not because the Executive could grant relief in their absence, but rather because they do not involve the exercise of discretionary "judgment." 8 U.S.C. 1252(a)(2)(B)(i). The statute's plain text focuses the inquiry on the judgment the Executive makes, rather than on whether the Executive is required to address a particular issue before granting relief.[5]

Finally, the court of appeals contended that undertaking an inquiry into whether a particular determination is discretionary or non-discretionary is impracticable and produces divergent results. See Pet. App. 39a

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[5] The court of appeals also appeared to misunderstand the government's interpretation. The court suggested that the government's position would bar review of fact-findings that contribute to the application of a discretionary criterion of eligibility. See Pet. App. 37a n.25 ("[I]t 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."). To the contrary, the government's position is that all non-discretionary determinations are reviewable. Thus, if the agency makes an objective, factual error when assessing a discretionary criterion of eligibility (such as "good moral character"), a court may correct the factual mistake. But the court cannot overturn the agency's discretionary weighing of the facts in determining whether the criterion is satisfied.

n.27. That contention lacks merit. As the courts of appeals have recognized, "an inquiry is discretionary where it is a 'subjective question' that depends on the value judgment 'of the person or entity examining the issue.'" *Romero-Torres* v. *Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003) (citation omitted). Certain statutory criteria also include language expressly entrusting a determination to the Attorney General's discretion. See, *e.g.*, 8 U.S.C. 1255(e)(3) (sham-marriage bar "shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the *satisfaction of the Attorney General* that the marriage was entered into in good faith") (emphasis added). A non-discretionary determination, on the other hand, is one that involves fact-finding or turns on an "objective legal standard." *Castro* v. *Holder*, 727 F.3d 125, 129 (1st Cir. 2013); see, *e.g.*, *Sabido Valdivia*, 423 F.3d at 1149 (concluding that a particular issue was non-discretionary because "[t]his is not a question for which we can say that there is 'no algorithm' on which review can be based, or one that involves a 'judgment call' by the agency") (citation omitted). The court of appeals' identification of isolated disagreements about the proper characterization of discrete questions, see Pet. App. 39a n.27, does not change the fact that "[t]here is a clear difference between straightforward factual findings and discretionary judgments," which the "circuits have been ably distinguishing * * * for decades." *Id.* at 70a-71a (Martin, J., dissenting).

CONCLUSION

The decision of the court of appeals dismissing the petition for review for lack of jurisdiction should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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AUGUST 2021

APPENDIX

1. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(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.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

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, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive

means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

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, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph,

the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue

of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order

in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory

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[1] See References in Text note below.

or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section

1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States

District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and 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 hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

2. 8 U.S.C. 1255(i) provides:

Adjustment of status of nonimmigrant to that of person admitted for permanent residence

(i) Adjustment in status of certain aliens physically present in United States

(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. The Attorney General may accept such application only if the alien remits with such application a sum equalling $1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986 at any date, who—

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986;

(ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section.

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence 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.

(3)(A) The portion of each application fee (not to exceed $200) that the Attorney General determines is required to process an application under this section and is remitted to the Attorney General pursuant to paragraphs (1) and (2) of this subsection shall be disposed of by the Attorney General as provided in subsections (m), (n), and (*o*) of section 1356 of this title.

(B) Any remaining portion of such fees remitted under such paragraphs shall be deposited by the Attorney General into the Breached Bond/Detention Fund established under section 1356(r) of this title, except that in the case of fees attributable to applications for a beneficiary with respect to whom a petition for classification, or an application for labor certification, described in paragraph (1)(B) was filed after January 14, 1998, one-half of such remaining portion shall be deposited by the Attorney General into the Immigration Examinations Fee Account established under section 1356(m) of this title.