No. 20-979

In The Supreme Court of the United States

PANKAJKUMAR S. PATEL and JYOTSNABEN P. PATEL,

Petitioners,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

ROMY LERNER
Counsel of Record
REBECCA SHARPLESS
IMMIGRATION CLINIC
UNIVERSITY OF MIAMI
SCHOOL OF LAW
1311 Miller Drive, E273
Coral Gables, FL 33146
(305) 284-6092
rlerner@law.miami.edu

MAUREEN SWEENEY
IMMIGRATION CLINIC
CHACÓN CENTER FOR
IMMIGRANT JUSTICE
UNIVERSITY OF MARYLAND
CAREY SCHOOL OF LAW
500 W. Baltimore St., 353
Baltimore, MD 21201

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICUS CURIAE

The American Immigration Lawyers Association ("AILA") is a national nonprofit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS") and before the Executive Office for Immigration Review, as well as before the United States district courts, courts of appeal, and this Court.[1]

SUMMARY OF THE ARGUMENT

The jurisdictional bar at 8 U.S.C. § 1252(a)(2)(B)(i) must be read to preserve judicial review of all threshold statutory eligibility determinations for the enumerated forms of immigration relief. The provision provides that no court has jurisdiction to review "any

[1] Amicus states that no counsel for a party authored any part of this brief and no person or entity other than counsel for Amicus made a monetary contribution to the preparation or submission of this brief. Petitioners, Respondents and court-appointed Amicus have consented to the filing of this brief pursuant to Rule 37.3(a).

judgment regarding the granting of" certain discretionary forms of relief. Amicus agrees with Petitioners that the phrase "judgment regarding the granting of relief" refers to the ultimate discretionary decision to grant or deny an application and not to decisions about whether an applicant has met the requirements to be considered for relief, such as whether an applicant for cancellation of removal for nonpermanent residents ("nonLPR cancellation") has established physical presence, good moral character, or hardship, or whether an applicant for cancellation of removal under the Violence Against Women Act ("VAWA cancellation") has been battered. Federal courts, therefore, retain jurisdiction to consider both factual and legal questions regarding statutory eligibility for relief. In this case, the Eleventh Circuit erred by expansively interpreting the phrase "judgment regarding the granting of relief" to include decisions about statutory eligibility, erroneously extending the bar to those determinations.

The personal accounts below—many of them about the clients of AILA members—illustrate the important factual and legal questions that arise in considering whether a noncitizen is eligible to be considered for discretionary relief. Upholding the Eleventh Circuit's ruling in this case would mean that many noncitizens with strong claims, including survivors of domestic abuse, individuals whose deportation would cause hardship to U.S. citizen family members, and those making significant contributions to society, will have no recourse when the immigration

agency erroneously concludes that they fail to meet the statutory requirements for relief.

Even more troubling is the far-reaching impact of the Eleventh Circuit's rule on the many cases heard only in district courts. The Eleventh Circuit stated that review of legal and constitutional questions would remain under the jurisdictional clause at 8 U.S.C. § 1252(a)(2)(D). But this assertion is incorrect. Subsection (D) only restores jurisdiction in cases before the courts of appeals on a petition for review, not in cases filed in district court. As a result, *all* agency errors—legal, factual, and constitutional—would go uncorrected in district courts under the Eleventh Circuit's interpretation. As the accounts in Part III demonstrate, judicial review of agency denials of adjustment of status often occurs in the district courts, rather than in the courts of appeals pursuant to petitions for review. The Eleventh Circuit's rule would permit U.S. Citizenship and Immigration Services ("USCIS") officers, who are not judges and often not even lawyers, to apply legally erroneous statutory interpretations to applications for lawful permanent residence—with no possibility of review. Just this last term, in *Sanchez v. Mayorkas*, this Court considered the legality of USCIS's interpretation of the definition of "admission" in the context of review of an adjustment of status application that originated in district court.[2] Under the Eleventh Circuit's interpretation of subsection (B)(i), this Court would have not been able to review the legal

[2] *Sanchez v. Mayorkas*, 141 S. Ct. 1809, 1812 (2021).

question at issue because it related to relief enumerated in the jurisdictional bar.

Congress did not intend for the courts to abdicate their critical role in correcting the factual and legal errors concerning relief eligibility made by immigration agencies. Amicus urges the Court to reverse the decision of the Eleventh Circuit and find that all threshold eligibility determinations relating to the enumerated forms of relief in subsection (B)(i) are subject to judicial review.

ARGUMENT

I. NOTHING IN 8 U.S.C. § 1252(A)(2)(B)(i) BARS REVIEW OF THRESHOLD ELIGIBILITY DETERMINATIONS FOR THE ENUMERATED DISCRETIONARY RELIEF.

Federal courts have jurisdiction to review any question—legal or factual—regarding whether a person is statutorily eligible to apply for the discretionary relief enumerated in subsection (B)(i), including adjustment of status and cancellation of removal.[3] Section 1252(a)(2)(B)(i) bars review of "any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title"—all discretionary immigration remedies. Amicus agrees with Petitioners that the plain language of the statute, the context provided by the jurisdictional provisions

[3] 8 U.S.C. § 1255; 8 U.S.C. § 1229b.

around it, the longstanding rule that Congress must speak clearly if it intends to repeal jurisdiction, and the principle that courts construe ambiguities in deportation statutes in favor of the noncitizen all weigh in favor of interpreting subsection (B)(i) to apply only to the ultimate discretionary "judgment" to grant or deny an application. There is no distinction between legal determinations about eligibility and related factual determinations, except that different standards of review apply to legal and factual findings.[4] Properly interpreted, subsection (B)(i) does not bar review over any questions relating to threshold eligibility, be they factual or legal.[5]

As noted by the Eleventh Circuit in the decision below, subsection (D) restores jurisdiction in the appellate courts over legal and constitutional questions that are otherwise barred.[6] But this provision does not apply to preserve review of such questions in district court proceedings, an important subset of cases in which applicants seek review of agency action. As a

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[4] Legal questions are reviewed de novo. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1199 (2021). Courts generally review facts found by immigration agencies under the substantial evidence test. 8 U.S.C. § 1252(b)(4)(B).

[5] Courts have sometimes characterized certain eligibility determinations, such as hardship and part of the good moral character determination, as "discretionary." But even if threshold eligibility determinations are properly viewed as discretionary, they are reviewable under 8 U.S.C. § 1252(a)(2)(B)(i).

[6] *Patel v. U.S. Att'y Gen.*, 971 F.3d 1258, 1272 (11th Cir. 2020), *cert. granted sub nom. Patel v. Garland*, No. 20-979, 2021 WL 2637834 (U.S. June 28, 2021).

result, it is particularly important that this Court interpret subsection (B)(i) to maintain review of all eligibility questions. Otherwise, even legal and constitutional questions relating to eligibility for the enumerated remedies will be unreviewable in district court.

Amicus focuses on two types of immigration relief—nonLPR cancellation and adjustment of status to lawful permanent residence—to illustrate the range of critical threshold eligibility questions that arise and the crucial role that federal courts play in correcting agency errors.

II. COURTS OF APPEALS HAVE JURISDICTION TO REVIEW ELIGIBILITY FOR CANCELLATION OF REMOVAL.

NonLPR cancellation of removal is a frequent and vital defense to deportation for survivors of domestic abuse and noncitizens with long residence and close family ties in the United States. In the most common type of nonLPR cancellation, often known as 10-year cancellation, an immigration judge "*may* cancel removal of" and confer lawful permanent residence on, a removable noncitizen who proves: 1) physical presence in the United States for a continuous period of not less than 10 years preceding the date they were served with a notice to appear in removal proceedings; 2) "good moral character" during that period; 3) no convictions for certain enumerated offenses; and 4) "exceptional and extremely unusual hardship" to a U.S.

citizen or lawful permanent resident spouse, parent or child upon removal.[7]

Noncitizens who can demonstrate they have been "battered or subjected to extreme cruelty" by a U.S. citizen or lawful permanent resident spouse or parent or are the parent of a battered child may apply for VAWA cancellation, another type of nonLPR cancellation, pursuant to 8 U.S.C. § 1229b(b)(2). Section 1229b(b)(2) retains the good moral character requirement, but applicants need only show three years of physical presence before the date of application and "extreme" hardship to themselves, their child, or their parent. 8 U.S.C. §§ 1229b(b)(2)(A)(i)-(iii) and (v).

Only if the applicant meets these eligibility requirements for 10-year or VAWA cancellation can an immigration judge make the separate "judgment" of whether to exercise discretion and grant cancellation. The accounts detailed below, of immigrant survivors of abuse and non-citizens with strong roots in the United States, demonstrate the importance of federal appellate court review of all questions of statutory eligibility.

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[7] 8 U.S.C § 1229b(b)(1) (emphasis added). *See also* 8 U.S.C. § 1229b(d)(1) (providing that the ten-year period of continuous presence ends with service of the notice to appear); 8 U.S.C. §1101(f) (defining "good moral character").

A. Eligibility Determinations Under VAWA Cancellation of Removal Are Reviewable.

The Eleventh Circuit's erroneous interpretation of subsection (B)(i) would block review of key questions relating to eligibility for VAWA cancellation for a "battered spouse or child."[8] Congress passed VAWA as a sweeping response to what it dubbed a "national tragedy" of violence inflicted on women.[9] Since then, Congress has expanded VAWA protections by reauthorizing and amending the law three times.[10] Congress designed the legislation to empower and protect a broad class of survivors, including immigrants battered by U.S. citizen or lawful permanent resident spouses.[11] Congress recognized that abusers often use immigration status as a tool of abuse and that immigrant survivors may not be willing to seek help because of the threat or fear of deportation.[12] The Eleventh Circuit's interpretation of subsection (B)(i) would leave VAWA cancellation applicants without

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[8] 8 U.S.C. § 1229b(b)(2).

[9] S. Rep. No. 102-197, at 39 (1991).

[10] *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54; Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960; Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

[11] *See* 140 Cong. Rec. E1364-65 (daily ed. Jun. 29, 1994) (statement of Rep. Nancy Pelosi).

[12] *See* H. R. Rep. No. 103-395, at 26 (1993) ("Many immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.").

recourse to judicial review of fundamental questions in their cases—a result at odds with Congressional intent to provide expansive protections for immigrant survivors of abuse. Congress did not intend for the Board of Immigration Appeals ("BIA") to have the final word on whether VAWA applicants have experienced a "battery" or "extreme cruelty" or would suffer "extreme hardship."

Maria Lopez-Birrueta's case illustrates how a court of appeals is authorized to step in to correct an agency mistake regarding eligibility for VAWA cancellation.[13] Ms. Lopez-Birrueta came to the United States from Mexico in 1994, at the age of 14. Shortly after her arrival, when she was still 14, she met Gill Campos, a 36-year-old lawful permanent resident. Campos started a sexual relationship with her. Ms. Lopez-Birrueta had her first child with Campos when she was 16 and her second when she was 18. Campos abused both Ms. Lopez-Birrueta and their children. He "repeatedly threatened [her], insulted her, prohibited her from talking with others, acted aggressively toward her, and threatened to alert immigration officials if [she] disobeyed his orders."[14] Campos "was violent toward his children, yelled at them, and often took them for rides in his car when he was drunk."[15] Several times a week, he struck his young children with sticks, leaving them with red welts. The immigration judge

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[13] The facts of Ms. Lopez-Birrueta's case are detailed in *Lopez-Birrueta v. Holder*, 633 F.3d 1211 (9th Cir. 2011).

[14] *Id.* at 1213.

[15] *Id.*

found Ms. Lopez-Birrueta credible regarding the abuse but held that the children had not been "battered" or subject to "extreme cruelty" because the violence was not sufficiently "heightened."[16] The BIA affirmed the judge's decision, and Ms. Lopez-Birrueta filed a petition for review with the Ninth Circuit. The court analyzed the regulatory definition of "battery" to reject the agency's requirement of "heightened" violence and reviewed whether the agency's finding was supported by substantial evidence.[17] The court ruled that the facts "compelled" the conclusion that the abuse qualified as a "battery," making Ms. Lopez-Birrueta eligible for VAWA cancellation as the parent of a battered child.[18]

Other VAWA applicants have not been as fortunate. Graciela Perales-Cumpean had her VAWA case incorrectly dismissed from the circuit court for lack of jurisdiction under subsection (B)(i).[19] Ms. Perales-Cumpean came to the United States from Mexico in June 1990. In April 1997, she married Derwood Shaffer, a U.S. citizen. Thereafter, Shaffer began drinking heavily. He also began forcing himself sexually on

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[16] *Id*. at 1216.

[17] *Id*.

[18] *Id*.

[19] The facts of Ms. Perales-Cumpean's case are detailed in *Perales-Cumpean v. Gonzales*, 429 F.3d 977 (10th Cir. 2005); Oral Decision of the Immigration Judge, *In the Matter of Graciela Perales-Cumpean* (Utah Imm. Ct. Nov. 3, 1999) (on file with counsel), and Brief of the Respondent to Board of Immigration Appeals, *In the Matter of Graciela Perales-Cumpean* (Utah Imm. Ct. Nov. 3, 1999) (on file with counsel).

Ms. Perales-Cumpean. When she resisted, he yelled at her and accused her of sleeping with other men. He called her "prostitute" and "bitch" in front of friends.[20] Ms. Perales-Cumpean moved out of the marital home and started attending counseling to cope with her experiences of abuse. She later started her own cleaning business.

In December 1997, immigration officials started the process to deport Ms. Perales-Cumpean, and she filed for VAWA cancellation. In court, Ms. Perales-Cumpean's upstairs neighbor testified that Shaffer was jealous, frequently degraded Ms. Perales-Cumpean in front of others, and forbade her from having contact with male friends. When Ms. Perales-Cumpean was asked whether her husband ever forced her to have sex against her will, she stated that it happened a few times. After the immigration judge defined "rape," Ms. Perales-Cumpean stated that her husband raped her "two or three times a week."[21]

The immigration judge denied Ms. Perales-Cumpean's case, finding that the verbal humiliation was not extreme cruelty and that Ms. Perales-Cumpean "came up with another story" about the marital rape, making her not credible.[22] Ms. Perales-Cumpean appealed to the BIA, which upheld the decision. She sought review before the Tenth Circuit,

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[20] Oral Decision of the Immigration Judge, *supra* note 19, at 3.

[21] Brief of the Respondent to Board of Immigration Appeals, *supra* note 19, at 12 (citing to Trial Transcript at 45).

[22] Oral Decision of the Immigration Judge, *supra* note 19, at 7.

but the court incorrectly interpreted the scope of subsection (B)(i) to prohibit review of whether she met the eligibility requirement of abuse.[23]

Elina Erazo Alvarez was also denied judicial review of her VAWA cancellation case.[24] A Honduran citizen, Ms. Erazo Alvarez fled to the United States to escape repeated sexual abuse by her step-grandfather. Once here, she lived with her father, who abused her by whipping her regularly with a belt. When she left his home, he continued to threaten her. Immigration officials put her in removal proceedings, and she applied for VAWA cancellation. The immigration judge found that she was not eligible for relief because she had not established that she had been battered or subjected to extreme cruelty. In so ruling, the judge stated that Ms. Erazo Alvarez was not a credible witness and disregarded affidavits from three witnesses corroborating the abuse because they were not notarized. Ms. Erazo Alvarez filed a motion to reopen and reconsider with the judge as well as an appeal to the BIA. The judge denied the motions, and the BIA upheld the judge's decision. Ms. Erazo Alvarez filed a petition for review with the Fourth Circuit, which issued a summary order dismissing for lack of jurisdiction, citing to subsection (B)(i).[25] As a result, no

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[23] *Perales-Cumpean*, 429 F.3d at 981-82.

[24] The facts of Ms. Erazo Alvarez's case are detailed in *Erazo Alvarez v. Garland*, 850 F. App'x 846 (4th Cir. 2021) and Brief of Appellant, *Erazo Alvarez v. Garland*, 850 F. App'x 846 (4th Cir. 2021) (No. 20-1818) (on file with counsel).

[25] *Erazo Alvarez*, 850 F. App'x at 847.

federal court has been able to review Ms. Erazo-Alvarez's challenge to the agency's finding that she failed to establish she was subject to extreme cruelty or battery. Other courts have refused to review similar questions. *See*, *e.g.*, *Hamilton v. Holder*, 680 F.3d 1024 (8th Cir. 2012) (no jurisdiction to review agency's denial of VAWA cancellation case of Kenyan woman raped by her husband).

As the above cases illustrate, it is crucial for federal courts to retain review over threshold eligibility determinations for VAWA cancellation of removal.

B. Courts Have Jurisdiction Over Physical Presence and Good Moral Character Questions.

Courts also have jurisdiction to review questions regarding physical presence and good moral character, both eligibility requirements for 10-year and VAWA cancellation of removal. *See* 8 U.S.C. §§ 1229b(b)(1)(A)-(B); 8 U.S.C. §§ 1229b(b)(2)(A)(ii)-(iii). In deciding whether an applicant has satisfied these requirements, the immigration judge must often make factual determinations based on the evidence. For example, a judge might determine the date a person entered the United States for purpose of continuous physical presence; or whether an applicant gambles illegally and the extent of their gambling income, for the purpose of the statutory bars to showing good moral character. *See* 8 U.S.C. § 1101(f)(4).

When courts reverse the BIA's rulings on whether an applicant qualifies to apply for nonLPR cancellation of removal, they illustrate the importance of judicial review as a backstop against agency errors. For example, Floritulia Peralta Gandarilla, an applicant for 10-year cancellation, entered the United States in January 1988.[26] She raised her two children—U.S. citizens ages 8 and 15—on her own, with no child support from their fathers. The father of Richard, her oldest child, was abusive. One of the reasons Ms. Peralta Gandarilla feared deportation was that Richard's father had returned to Mexico, and she worried that he might harm her or her children. At Ms. Peralta Gandarilla's removal hearing, an issue arose regarding whether she had been physically present in the United States for 10 years prior to February 27, 1998, the date that immigration officials served her with a notice to appear. The notice to appear correctly alleged that she had entered the United States in January 1988, and Ms. Peralta Gandarilla testified to this date of entry at the hearing. She also filed with the court a letter from her employer stating "that payroll records indicated that she was a permanent employee and started work in California on February 18, 1988."[27] And she submitted evidence that she had filed taxes in 1988 and that her son Richard was born in the United States

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[26] The facts of Ms. Peralta Gandarilla's case are detailed in *Peralta Gandarilla v. Gonzales*, 233 F. App'x 670 (9th Cir. 2007) and Petitioner's Opening Brief in Support of Appeal, *Peralta Gandarilla v. Gonzalez*, 233 F. App'x 670 (9th Cir. 2007) (No. 05-74351), 2005 WL 4586430.

[27] *Peralta Gandarilla*, 233 F. App'x at 671.

that same year. Nonetheless, the immigration judge denied Ms. Peralta Gandarilla's application on the ground that she had failed to establish the required physical presence, and the BIA upheld the determination. Ms. Peralta Gandarilla filed a petition for review with the Ninth Circuit. The court found it had jurisdiction over the eligibility determination relating to physical presence and reversed.[28] Had the court followed the Eleventh Circuit's interpretation of subsection (B)(i), Ms. Peralta Gandarilla would have had no recourse to challenge the erroneous agency finding.

Antonio Romano-Varian also successfully challenged the denial of his application for 10-year cancellation of removal for failure to show the requisite physical presence.[29] Mr. Romano-Varian came to the United States from Mexico on September 4, 1989 and never departed. He soon met Santa Canete, and they had three children, all born in New Jersey. On June 12, 2002, immigration officials served Mr. Romano-Varian with a notice to appear, and he applied for cancellation of removal. At the time of Mr. Romano-Varian's court hearing, his daughter Wendy was age 10, his daughter Denise was age 9, and his son Edwin was age 5. Wendy suffered from a speech disorder and was undergoing

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[28] *Id*.

[29] The facts of Mr. Romano-Varian's case are detailed in *Romano-Varian v. Att'y Gen.*, 155 F. App'x 620 (3d Cir. 2005) and Brief and Appendix Volume I on Behalf of Petitioner, *Romano-Varian v. Att'y Gen.*, 155 F. App'x 620 (3d Cir. 2005) (No. 04-3208), 2005 WL 4862528.

speech therapy. Edwin had been diagnosed with acute anxiety disorder and had significant oral health problems that could pose "great health risks" if left untreated.[30] Mr. Romano-Varian submitted a letter from his New Jersey employer, Pierson Industries, stating that he had been employed since September 1989, when he had entered the country. Mr. Romano-Varian and three additional witnesses testified about his physical presence in the United States. The immigration judge found Mr. Romano-Varian and his witnesses truthful but nonetheless denied relief, finding that Mr. Romano-Varian had not met his burden of establishing ten years of physical presence because his employer was not present in court and the employer's letter was not notarized. After the BIA affirmed the judge's decision, Mr. Romano-Varian filed a petition for review with the Third Circuit. The court reversed the BIA's finding on physical presence and remanded for a new hearing, stating that "[b]ased on the [immigration judge's] own view that Mr. Romano's witnesses testified truthfully, the letter from Mr. Romano's employer, and the common-sense assumption that Mr. Romano did not arrive in the United States on the day of his first child's conception" the judge's denial was neither reasonable nor supported by substantial evidence.[31] Other courts have also reversed the agency's physical presence findings. *See*, *e.g.*, *Meyers v. Sessions*, 904 F.3d 1101 (9th Cir. 2018);

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[30] Brief and Appendix Volume I on Behalf of Petitioner, *supra* note 29, at 5.

[31] *Romano-Varian*, 155 F. App'x at 624.

Ortega-Guillen v. Holder, 315 F. App'x 619 (9th Cir. 2009); *Diaz v. Mukasey*, 280 F. App'x 643 (9th Cir. 2008); *Luna v. Mukasey*, 279 F. App'x 487 (9th Cir. 2008); *Galaz v. Gonzales*, 176 F. App'x 822 (9th Cir. 2006).

Important questions relating to the "good moral character" requirement also require review.[32] Manuel Martinez came to the United States from his home country of Mexico in February 1987.[33] He left for a period of two and half months in 1988 and then returned on a temporary visa. Since his last entry in 1988, he has lived in the United States and worked to support his family. He was the sole caregiver to his two U.S.-born children, born in 1991 and 1993. At the time of the hearing, one of his children had a cleft palate, which required two surgeries, and would require more in the future. He filed his income tax returns every year since 1989, earned certificates for improving his computer and English skills, and volunteered in his community. Mr. Martinez had no criminal record. At his hearing, the U.S. Immigration and Customs Enforcement ("ICE") attorney acknowledged that there was "no issue with regard to the 10 years and the good moral character."[34] Despite ICE's concession and

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[32] 8 U.S.C. § 1229b(b)(1)(B).

[33] The facts of Mr. Martinez's case are detailed in *Martinez v. Ashcroft*, 114 F. App'x 313 (9th Cir. 2004) and Opening Brief of Petitioner, *Martinez v. Ashcroft*, 114 F. App'x 313 (9th Cir. 2004) (No. 02-73265), 2004 WL 1125458.

[34] Opening Brief of Petitioner, *supra* note 33, at 6-7 (internal citation omitted).

Mr. Martinez's stellar record, the immigration judge determined that Mr. Martinez lacked good moral character. The judge cited an alleged inconsistency in the record regarding Mr. Martinez's physical presence to find that he had not been truthful about having been in the country for the necessary ten years. The BIA upheld the judge's decision. But the Ninth Circuit reversed, finding that the negative credibility finding was not supported by substantial evidence.[35]

Martin Gonzalez-Maldonado also successfully challenged the finding that he was ineligible for cancellation as lacking good moral character.[36] Mr. Gonzalez-Maldonado came to the United States in 1989 at the age of 14. In 2001, he met with an attorney in California in an attempt to file for lawful status. His attorney helped him fill out an application for asylum and advised him to use his office's address in California, even though Mr. Gonzalez-Maldonado was living in New Mexico at the time. The asylum office denied his application and ICE started removal proceedings. Mr. Gonzalez-Maldonado sought cancellation of removal. The immigration judge said he was "favorably impressed" with Mr. Gonzalez-Maldonado, as he was a nationally recognized employee of the Marriott Corporation and had worked hard to support his family.[37] But the judge ruled that Mr. Gonzalez-Maldonado was ineligible for cancellation, finding that

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[35] *Martinez*, 114 F. App'x at 315.

[36] The facts of Mr. Gonzalez-Maldonado's case are detailed in *Gonzalez-Maldonado v. Gonzales*, 487 F.3d 975 (5th Cir. 2007).

[37] *Id*. at 978.

he had given false testimony about his address to the asylum officer.[38] The BIA affirmed the denial. Mr. Gonzalez-Maldonado filed a petition for review with the Fifth Circuit. The court reversed the agency's finding regarding good moral character, ruling that the evidence compelled the conclusion that Mr. Gonzalez-Maldonado had not provided false testimony regarding where he lived for the purpose of obtaining an immigration benefit but rather for the convenience of his lawyer.[39] The Eleventh Circuit's interpretation of subsection (B)(i), however, would erroneously prevent other cancellation applicants from obtaining judicial review to challenge a negative good moral character finding.

C. Courts Have Jurisdiction Over Hardship Questions.

Courts also retain jurisdiction under subsection (B)(i) to review the threshold finding that an applicant for nonLPR cancellation of removal failed to prove hardship. But many cancellation applicants have been erroneously denied review. Steven Mkanyia and Juliana Nyasinga, natives of Tanzania and Kenya respectively, were a married couple with three U.S. citizen daughters between 3 and 13.[40] Mr. Mkanyia

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[38] Under 8 U.S.C. § 1101(f)(6) a person is barred from showing good moral character if they give false testimony for the purpose of obtaining an immigration benefit.

[39] *Gonzalez-Maldonado*, 487 F.3d at 978-79.

[40] The facts of Mr. Mkanyia and Ms. Nyasinga's case are detailed in *Mkanyia v. Gonzales*, 140 F. App'x 422 (3d Cir. 2005)

entered the United States in 1988 on a visa, worked to support his family, and paid his taxes annually. Ms. Nyasinga entered the United States on a visa in 1986 and devoted herself to her children. At their 2002 merits hearing, the couple argued that their daughters would be forced to undergo female genital mutilation ("FGM"), a procedure Ms. Nyasinga herself suffered as a child in Kenya, if they were deported to their native countries. The immigration judge acknowledged documentary evidence that FGM was carried out in both countries. However, the judge determined the evidence was insufficient to demonstrate FGM would be performed on the children because Mr. Mkanyia and Ms. Nyasinga would not consent to it. The judge made this finding despite Ms. Nyasinga's testimony that the procedure was often carried out against the parents' wishes. Although the judge found the couple met three of the four eligibility requirements for cancellation of removal, the judge denied the application for failure to prove hardship. The BIA affirmed the decision. On petition for review, the Third Circuit refused to consider a challenge to factual findings relating to the hardship determination on the grounds that subsection (B)(i) stripped it of jurisdiction.[41]

In another case, the reviewing court "much prefer[red]" the decision of the immigration judge granting cancellation but determined it could not uphold

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and Brief and Appendix on Behalf of Petitioners-Appellants, *Mkanyia v. Gonzales*, 140 F. App'x 422 (3d Cir. 2005) (No. 04-2094), 2004 WL 5247586.

[41] *Mkanyia*, 140 F. App'x at 424.

the decision after the BIA reversed it, due to subsection (B)(i).[42] Gregorio Gurrola-Rosales was a Mexican citizen who entered the United States when he was 17 years old, obtained steady employment, and owned his own home.[43] The immigration judge found that Mr. Gurrola-Rosales' removal would work exceptional and extremely unusual hardship on his three-year-old U.S. citizen daughter, who had already undergone 14 surgeries for a potentially life-threatening medical condition that caused recurrent growths in her larynx and obstructed her breathing. The judge also found that the child was at risk for diabetes and that she could not safely return to Mexico with her father and would suffer psychological and physiological hardship if she were separated from him. The judge granted relief, but DHS appealed, and the BIA reversed, finding that Mr. Gurrola-Rosales had not met the hardship standard. The BIA disagreed with the judge's factual findings concerning the severity of the child's illness, the psychological harm she would endure if her father were deported, and the risk that she would develop diabetes. Mr. Gurrola-Rosales filed a petition for review with the Seventh Circuit. Although it dismissed the petition for lack of jurisdiction, the court indicated that it disagreed with the BIA's decision, stating that its "[f]inding that we

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[42] *Gurrola-Rosales v. Holder*, 351 F. App'x 98, 101 n.2 (7th Cir. 2009).

[43] The facts of Mr. Gurrola-Rosales' case are detailed in *Gurrola-Rosales v. Holder*, 351 F. App'x 98 (7th Cir. 2009) and Appellant's Opening Brief, *Gurrola-Rosales v. Holder*, 351 F. App'x 98 (7th Cir. 2009) (No. 09-1644) (on file with counsel).

lack jurisdiction to review the BIA's decision should not be confused with agreeing with that decision . . . [W]e much prefer the decision of Judge Brahos."[44]

Aura Chavez-Vasquez was denied review of her cancellation application in another case of serious medical hardship.[45] Ms. Chavez-Vasquez fled Guatemala in 1991 after masked men raped her and threatened to kill her. She had two children in the United States, Henry and Melvin. Henry was afflicted with asthma, prone to respiratory infections, and suffered from frequent high fevers and vomiting. Prior to Ms. Chavez-Vasquez's January 2006 cancellation hearing, she submitted medical records demonstrating that Henry required medical attention on 74 occasions between 2000 and 2005. But the judge found she had not satisfied the hardship requirement because she did not demonstrate that Henry's medical condition would go untreated in Guatemala, despite her submission of government reports describing poor health care resources in the country. Ms. Chavez-Vasquez appealed the decision to the BIA, challenging the conclusion that she had failed to show Henry could not obtain adequate medical care in Guatemala. After the BIA affirmed the IJ's decision, Ms. Chavez-Vasquez filed a petition for review with the Seventh Circuit. But the

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[44] *Gurrola-Rosales*, 351 F. App'x at 101, 101 n.2.

[45] The facts of Ms. Chavez-Vasquez's case are detailed in *Chavez-Vasquez v. Mukasey*, 548 F.3d 1115 (7th Cir. 2008).

court dismissed her case on the grounds that it lacked jurisdiction under subsection (B)(i).[46]

The cases of Mr. Mkanyia, Ms. Nyasinga, Mr. Gurrola-Rosales, and Ms. Chavez-Vasquez demonstrate how vital it is that review over eligibility requirements for discretionary relief be preserved.

III. UNDER THE ELEVENTH CIRCUIT'S ERRONEOUS INTERPRETATION, QUESTIONS OF LAW WOULD NOT BE REVIEWABLE IN DISTRICT COURTS.

The Eleventh Circuit's erroneous interpretation of subsection (B)(i) has especially devastating effects in the context of adjustment of status denials by USCIS, which are directly reviewable only in United States district courts.[47] District courts represent the only avenue of review for a substantial number of adjustment applications decided by USCIS officers, who are not judges and usually not attorneys. People who seek review of a USCIS denial of adjustment cannot file a petition for review with the court of appeals because a petition for review is only available to review a final

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[46] *Chavez-Vasquez*, 548 F.3d at 1119.

[47] USCIS is an agency of the U.S. Department of Homeland Security that adjudicates affirmative immigration applications. The immigration court is part of Executive Office for Immigration Review, U.S. Department of Justice, and is responsible for removal proceedings.

order of removal.[48] USCIS denials can only be directly reviewed via an original action in district court.[49]

Multiple categories of adjustment applicants have no choice but to file for adjustment with USCIS and seek review of a denial in district court. Anyone considered an "arriving alien," a status that can last for many years after an individual's physical arrival, can only file for adjustment with USCIS. 8 C.F.R. § 1.2. Immigration judges lack jurisdiction over their adjustment. 8 C.F.R. § 1245.2(a)(1)(ii). People in lawful temporary status (such as an H-1B or another employment-based visa) cannot be put in removal proceedings and therefore cannot have their cases decided by an immigration judge. Lastly, people whom the agency could—but elects not to—put into removal proceedings must file for adjustment with USCIS because they are not before an immigration judge.

The Eleventh Circuit's interpretation of subsection (B)(i) would deprive these applicants of *all* review, both factual and legal, contrary to the court's assertion that review of legal questions would still be available under its rule. In holding that subsection (B)(i) bars review of all determinations relating to adjustment of status and other forms of discretionary relief, the Eleventh Circuit recognized the importance of

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[48] *See* 8 U.S.C. § 1252(a)(5) (channeling review of final orders to the courts of appeals via a petition for review).

[49] District courts are empowered to review USCIS action by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and have federal question jurisdiction over such claims pursuant to 28 U.S.C. § 1331.

preserving review of legal questions and believed such review would survive under subsection (D). *Patel v. U.S. Att'y Gen.*, 971 F.3d at 1275 ("[R]eview [of questions of law] is preserved under our interpretation."). This provision states that nothing precludes "review of constitutional claims or questions of law" if they are "raised upon *a petition for review filed with an appropriate court of appeals*."[50] 8 U.S.C. § 1252(a)(2)(D) (emphasis added). But courts have held that the "petition for review" limitation means that questions of law raised in district court fall outside subsection (D). *See*, *e.g.*, *Lee v. U.S. Citizenship & Immigr. Servs.*, 592 F.3d 612, 620 (4th Cir. 2010). As a result, the provision does nothing to preserve review of legal questions in district court. In claiming that questions of law would remain reviewable, the Eleventh Circuit failed to account for the important legal questions that arise when district courts review USCIS adjustment denials.

A case decided by this Court last term illustrates that important questions of law would be barred by the Eleventh Circuit's interpretation of subsection (B)(i). *See Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021). In *Sanchez v. Mayorkas*, individuals in Temporary Protected Status ("TPS") filed suit in district court after USCIS denied their adjustment of status applications

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[50] Subsection (D) was added to Section 1252 after this Court's decision in *INS v. St. Cyr*, which noted the strong presumption in favor of judicial review of administrative action and constitutional concerns where such review is lacking. *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

on the ground that they had initially entered unlawfully and therefore had not made an "admission" as required by the adjustment statute. *Id*. at 1812 (citing 8 U.S.C. §§ 1101(a)(13)(A) and 1255(a)). The district court reversed the agency, holding that a provision that requires TPS holders to be considered in "lawful status" means that they should also be treated as "inspected and admitted" for adjustment purposes. *Id*. The Third Circuit disagreed, creating a circuit split. *Id*. This Court granted *certiorari* and ruled on the merits, agreeing with the Third Circuit that TPS did not create an "admission." *Id*. Had the Eleventh Circuit's interpretation of subsection (B)(i) been in force, the federal courts would not have been empowered to resolve the legal question at issue, because it arose from the denial of adjustment.

The case of Dr. Adil Mohammed Abuzeid demonstrates how a district court combined the Eleventh Circuit's interpretation of subsection (B)(i) with subsection (D) to cut off all judicial review of legal questions for someone whose adjustment application was denied by USCIS and who had no access to removal proceedings because he is in lawful status. Dr. Abuzeid is a trauma surgeon with nationality in the United Kingdom and Saudi Arabia who came to the United States on a J-1 exchange visa to complete his medical residency.[51] He is board-certified in general

[51] The facts of Dr. Abuzeid's case are detailed in *Abuzeid v. Wolf*, No. 1:18-cv-00382-TJK, 2020 WL 7629664 (D.D.C. Dec. 22, 2020), *appeal filed sub nom. Abuzeid v. Mayorkas*, No. 21-5003 (D.C. Cir. filed Jan. 12, 2021); Email from Brian Schmitt, Hake &

surgery and surgical critical care and serves as an Assistant Professor in trauma and surgical critical care at Augusta University Medical Center in Georgia, where he works 80-hour weeks in the emergency room doing surgery for patients with life-threatening injuries and illnesses. His patients come from communities in Georgia and South Carolina that have been designated by the government as medically underserved. Many lack health insurance and are referred from the Veterans Administration and other local hospitals that do not have the expertise to perform the required surgery. As a critical care physician, Dr. Abuzeid has also been on the front line of the pandemic for the last year and a half, managing COVID-19 patients in the hospital's intensive care units. He also trains general surgery residents, surgical critical care fellows, medical students, nurses and local paramedics. Dr. Abuzeid's spouse, a U.S. citizen born in Arkansas, is unable to work because of a chronic medical condition.

After his medical residency and before he applied for adjustment of status, Dr. Abuzeid spent time and worked in hospitals in his two countries of nationality, the United Kingdom and Saudi Arabia, for a total of 806 days, thus fulfilling the J-1 visa's requirement that an individual return to their country of nationality

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Schmitt, to Maureen Sweeney, Dir., Md. Carey Immigr. Clinic (Aug. 1, 2021, 2:01 PM EST) (on file with counsel); Email from Dr. Adel Abuzeid, to Maureen Sweeney, Dir., Md. Carey Immigr. Clinic & Brian Schmitt, Hake & Schmitt (Aug. 4, 2021, 2:14 PM EST) (on file with counsel).

"for an aggregate of at least two years" before they can become eligible for permanent residency. 8 U.S.C. § 1182(e). USCIS, however, has denied multiple adjustment applications by Dr. Abuzeid, interpreting the foreign residency requirement to require a *single* period of residence in the *single* country of nationality where the applicant had most recently resided. Dr. Abuzeid challenged the denials in district court, where the court held that it was unable to reach the legal question of eligibility, both because it implicated a "judgment" regarding a form of relief listed in subsection (B)(i) and because subsection (D) did not preserve review of legal questions in district court.[52] The case is currently stayed on appeal, pending the outcome of this case.[53] If Dr. Abuzeid is ultimately denied adjustment, he will have to leave the United States, taking his medical practice and expertise to benefit the citizens of some other country.

The case of *Commandant v. Rinehart* illustrates the fate of a recurring legal question in the hands of USCIS under the Eleventh Circuit decision in this case.[54] *Commandant* involves 15 adjustment

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[52] *Abuzeid*, No. 1:18-cv-00382-TJK, 2020 WL 7629664, at *4.

[53] Order Granting the Parties' Joint Motion to Hold Case in Abeyance, *Abuzeid v. Mayorkas*, No. 21-5003 (D.C. Cir. May 28, 2021) (on file with counsel).

[54] The facts of the case are detailed in *Commandant v. Rinehart*, No. 1:20-cv-23630, 2021 WL 422177 (S.D. Fla. Feb. 1, 2021), *appeal filed sub nom. Commandant v. District Director*, No. 21-10372 (11th Cir. filed Feb. 3, 2021) and Class Action Complaint for Declaratory and Injunctive Relief, *Commandant v.*

applicants who have been in the United States since at least 2010 and have been granted TPS, despite having been previously ordered deported. Plaintiff Carel Carius, a widower father of two U.S citizen children, and 14 other individuals from Haiti and Honduras all have U.S. citizen spouses or children and are beneficiaries of family-based immigrant petitions, a prerequisite to adjustment of status. The plaintiffs sought to adjust under longstanding USCIS policy recognizing that they meet the requirement of having been "inspected and admitted or paroled" under the adjustment statute because their travel outside the United States and return on advance parole gave them parole status.[55] USCIS denied their adjustment applications, relying on its new legal interpretation that plaintiffs were still subject to their prior removal orders and thus are not considered to have been paroled, despite their travel on advance parole. The plaintiffs argued that the denials were based on legal error and were contrary to longstanding USCIS policy. But the district court held that it was bound by the Eleventh Circuit's ruling in this case and had no jurisdiction under subsection (B)(i) to review the plaintiffs' legal claims. USCIS is now free to apply

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Rinehart, No. 1:20-cv-2360 (S.D. Fla. Aug. 31, 2020) (on file with counsel).

[55] *See* Legal Opinion from Paul W. Virtue, Acting Gen. Counsel, INS to Jim Puleo, Assoc. Comm'r, Examinations, INS, Temporary Protected Status and Eligibility for Adjustment of Status under Section 245, INS Gen. Counsel Op. No. 91-27, 1991 WL 1185138, at *2 (Mar. 4, 1991) (interpreting 8 U.S.C. § 1255(a) for individuals with TPS who travel on advance parole).

this legal interpretation with no judicial review, preventing similar TPS holders from obtaining permanent residence.

When district courts have taken jurisdiction—because they found that statutory eligibility determinations were not subject to the bar—they have been able to reverse USCIS denials and fix legal errors by agency officers. Prior to the Eleventh Circuit's decision in this case, Roneel Balroop benefited from judicial review when a district court in Florida reversed USCIS's determination that the Child Status Protection Act ("CSPA") did not apply to his adjustment application as a derivative beneficiary of his father's employment-based visa, which affected his eligibility because he had since turned 21.[56] Gloria del Carmen Duron successfully challenged the USCIS interpretation of the statutory phrase "seeking admission" to overcome the agency's legal conclusion that she was inadmissible (and ineligible to adjust) for failure to wait ten years after departure under an order of removal before seeking admission.[57]

The case of Ms. Brenda Karr Karr, which arose in the Eleventh Circuit, demonstrates how that court's interpretation of subsection (B)(i) would give the

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[56] The facts of Mr. Balroop's case are detailed in Order, *Balroop v. Gonzales*, No. 6:07-cv-1203-Orl-28KRS, 2008 WL 11435736 (M.D. Fla. April 15, 2008) (denying USCIS's motion to dismiss for lack of jurisdiction); and Order, *Balroop v. Gonzales*, No. 6:07-cv-1203-Orl-28KRS (M.D. Fla. September 2, 2008) (ordering USCIS to adjudicate the application under the CSPA) (on file with counsel).

[57] *Del Carmen Duron v. Nielson*, 491 F. Supp. 3d 256, 267 (S.D. Tex. 2020).

agency the power to cut off review of legal questions by choosing not to initiate removal proceedings after an adjustment application is denied.[58] Ms. Karr Karr contested a USCIS officer's legal determination that the statutory ten-year bar to adjustment for having been unlawfully present in the United States required her to have waited *outside* the country for the ten-year period.[59] After USCIS denied her adjustment application, Ms. Karr Karr's counsel urged the agency to begin removal proceedings against Ms. Karr Karr so that she could obtain a ruling on the legal question of her eligibility from the immigration court. But the government refused to begin removal proceedings for four years, until Ms. Karr Karr finally filed suit in the district court. In those proceedings, agency counsel now concedes that USCIS' interpretation was wrong and is not contesting her eligibility. The Eleventh Circuit's erroneous interpretation would allow DHS to continue to evade review of clear legal errors by USCIS officers by declining to initiate removal proceedings.[60]

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[58] The facts of Ms. Karr Karr's case are detailed in Original Complaint, *Karr Karr v. United States Citizenship & Immigration Services*, No. 1:19-cv-00125-WYD (D. Colo. Jan. 15, 2019) (on file with counsel); Order, *Karr Karr v. United States & Immigration Services*, No. 1:19-cv-000125-PAB (D. Colo. Nov. 27, 2019); Email from Roy Petty, Petty & Assocs., PLLC, to Maureen Sweeney, Dir., Md. Carey Immigr. Clinic (July 30, 2021, 2:52 PM EST) (on file with counsel).

[59] *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II).

[60] For other examples, see *Jimenez Verastegui v. Wolf*, 468 F. Supp. 3d 94, 95 (D.D.C. 2020), *appeal dismissed sub nom. Verastegui v. Wolf*, No. 20-5215, 2020 WL 8184637 (D.C. Cir. Dec. 11, 2020); Email from Roy Petty, Petty & Assocs., PLLC, to Maureen Sweeney, Dir., Md. Carey Immigr. Clinic (July 30, 2021,

For adjustment applicants whom the government cannot—or chooses not to—put in removal proceedings and for others whose applications cannot be heard in the immigration courts, the district court is the *only* forum for review of any legal error USCIS may make and the courts' only chance to correct erroneous legal interpretations by the agency. Because subsection (D) does not preserve review of legal errors in district court, such review is possible only because subsection (B)(i) does not bar jurisdiction over threshold eligibility determinations. The Eleventh Circuit's erroneous interpretation would strip district courts of jurisdiction to review such errors.

2:52 PM EST) (on file with counsel) (DHS delayed initiating removal proceedings against a couple thereby preventing review of adjustment applications denied based on a legal interpretation of a ground of inadmissibility); *Kim v. Gonzales*, No. CCB-05-485, 2006 WL 1892426, at *1 (D. Md. June 19, 2006) (noting that it is "regrettabl[e]" that plaintiffs "would have no further opportunity to challenge USCIS's decision and clarify their legal status unless and until the government initiates removal proceedings against them").

CONCLUSION

Amicus urges the Court to reverse the decision of the Eleventh Circuit and find that all threshold eligibility determinations relating to the enumerated forms of relief in 8 U.S.C. § 1252(a)(2)(B)(i) are subject to judicial review.

Respectfully submitted,

ROMY LERNER
Counsel of Record
REBECCA SHARPLESS
IMMIGRATION CLINIC
UNIVERSITY OF MIAMI
SCHOOL OF LAW
1311 Miller Drive, E273
Coral Gables, FL 33146

MAUREEN SWEENEY
IMMIGRATION CLINIC
CHACÓN CENTER FOR
IMMIGRANT JUSTICE
UNIVERSITY OF MARYLAND
CAREY SCHOOL OF LAW
500 W. Baltimore St., 353
Baltimore, MD 21201