No. 20-979

IN THE
Supreme Court of the United States

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

v.

MERRICK GARLAND, ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who have an interest in ensuring the continued availability and vitality of judicial review in the immigration context. *Amici* teach and write about immigration law as well as statutory interpretation and the relationship between the federal courts and administrative agencies. *Amici* come together in this case because of their shared concern that the decision below failed to give proper weight to the interpretive canons that guide statutory analysis, including this Court's strong presumption in favor of judicial review and the immigration rule of lenity. The decision below is inconsistent with basic tenets of statutory construction as well as fundamental separation of powers values. If upheld, the decision risks setting a dangerous precedent for agency control over judicial review of administrative action. *Amici* all agree that, for the reasons set forth in this brief, the decision below should be reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Canons of statutory construction embody foundational principles of American jurisprudence. These presumptions telegraph bedrock legal values and

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners, Respondent, and the Court-appointed *Amicus* have each consented in writing to the filing of this brief.

provide clear guidance for Congressional legislation. The case at bar concerns two such canons—the presumption of judicial review of administrative decisions and the immigration rule of lenity. The former embodies "the very essence of civil liberty," namely "the right of every individual to claim the protection of the law." The latter ensures that noncitizens—vulnerable in the extreme and often subject to the harshest of legal penalties, like deportation—get the benefit of the doubt if Congress leaves any interpretive room in the immigration laws it passes. Both canons are fundamental to statutory interpretation. Neither can be ignored by federal courts or overridden by Congress without unambiguous instructions to that effect.

Here, the *en banc* Eleventh Circuit read 8 U.S.C. § 1252(a)(2)(B)(i) as divesting federal courts of jurisdiction to review nondiscretionary agency determinations underpinning a noncitizen's eligibility to seek discretionary relief. In so holding, the Eleventh Circuit disagreed with nearly all its sister circuits, its own well-established precedent and longstanding canons of statutory construction. This decision is patently incorrect. *Amici* write to underscore three points.

First, when confronted with an ambiguity within a statute, courts must initially turn to certain central canons of statutory construction, which undergird all statutory interpretation. These core canons provide clear rules for Congress to legislate by. If Congress wants to avoid the applicability of a canon, it must do so explicitly.

Second, this Court has consistently applied a strong presumption in favor of judicial review of agency decisions. Accordingly, if a provision is left

open to the interpretation that judicial review is permitted, the provision should be reviewable.

Third, the immigration rule of lenity provides that statutory ambiguities be resolved in favor of noncitizens. Immigration proceedings often carry harsh punishments, and noncitizens are particularly vulnerable to adverse legislation because they cannot participate in the political process. Accordingly, when a statute is ambiguous, this Court has repeatedly applied the rule of lenity to avoid the harsh penalty of deportation.

In sum, this Court's case law combined with the ambiguity present in § 1252(a)(2)(B)(i) demands that the presumption in favor of judicial review and the immigration rule of lenity be applied here. Proper application of either canon leads to only one conclusion: that § 1252(a)(2)(B)(i) preserves the jurisdiction of federal courts to review nondiscretionary determinations concerning a noncitizens eligibility for discretionary relief.

ARGUMENT

I. WELL-SETTLED INTERPRETIVE CANONS ARE THE STARTING POINT FOR RESOLVING STATUTORY AMBIGUITY

Congress should "be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley v. United States*, 490 U.S. 545, 556 (1989). These clear rules are generated by "weighty and constant values"—constitutional or otherwise—embodied in well-buttressed interpretive canons. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Courts apply these "traditional tools of statutory

construction" to ascertain Congressional intent whenever a statute is susceptible to different interpretations. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). To avoid these canons and the "clear statements" they create, Congress must state its intention explicitly. *Solimino*, 501 U.S. at 108.

Here, the circuit split underlying the Petition demonstrates that the statute is "susceptible to divergent interpretation[s]." Pet'rs' Br. at 32 (quoting *Kucana v. Holder*, 558 U.S. 233, 251 (2010)). *Amici* agree with Petitioners that "[t]he better reading of [§ 1252(a)(2)(B)(i)] is that it strips jurisdiction only over the second-step judgment whether to grant relief as a matter of discretion." Pet'rs' Br. 35. *Amici* submit this brief to elaborate on two key canons that the Eleventh Circuit virtually ignored—the strong presumption of judicial review over administrative agency decisions and the immigration rule of lenity. The first ensures that federal courts can examine agency conclusions absent explicit instructions otherwise from Congress. The second requires that ambiguous immigration statutes be construed in favor of the noncitizen, who is often vulnerable to harsh penalties and adverse legislation.

Had the Eleventh Circuit applied either canon of interpretation, it would have found jurisdiction over Petitioners' case. Instead, it discarded both, ultimately refusing to review a finding of fact contradicted by the record at the price of denying Petitioners a chance to overturn a drastic penalty (removal from the country). The Eleventh Circuit erred in so doing, as these canons cannot be so easily avoided.

II. THERE IS A STRONG PRESUMPTION IN FAVOR OF JUDICIAL REVIEW OF AGENCY DECISIONS

The "'strong presumption' favoring judicial review of administrative action" is a guiding canon of statutory interpretation. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (citing *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986)). Accordingly, "[i]f a provision can reasonably be read to permit judicial review, it should be." *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2150 (2016) (Alito, J., concurring in part and dissenting in part). This Court has repeatedly reaffirmed and applied this presumption. *See e.g.*, *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) ("We have 'consistently applied' the presumption of reviewability to immigration statutes." (citation omitted)). "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining*, 135 S. Ct. at 1651. Only upon "a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (citation omitted), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). And because the "'presumption favoring interpretations of statutes [to] allow judicial review of administrative action' is 'well-settled,'" courts "assume[] that 'Congress legislates with knowledge of' the presumption." *Kucana*, 558 U.S. at 251-52 (first alteration in original) (citations omitted). Where a statute invites competing interpretations, courts should "adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review."

Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434 (1995).

Section 1252(a)(2)(B)(i) can reasonably be read to permit review of nondiscretionary eligibility issues. *See* Pet'rs' Br. 35. Accordingly, these principles of statutory construction require that any ambiguity within § 1252(a)(2)(B)(i) be construed to permit judicial review, not to preclude federal courts from examining administrative action. The Eleventh Circuit erred in failing to apply this principle at the outset of its analysis.

A. The Court Has Long Recognized the Presumption of Judicial Review as an Important Feature of the Separation of Powers

The "longstanding" presumption in favor of judicial review of administrative actions, *see Guerrero-Lasprilla*, 140 S. Ct. at 1069, pre-dates the Administrative Procedure Act ("APA") and has been applied by this Court "[f]rom the beginning." *Bowen*, 476 U.S. at 670. As Professor Louis Jaffe recognized, "judicial review is the rule" as it is a "traditional power" of the courts and a "basic right" of those impacted by executive action. Louis L. Jaffe, Judicial Control of Administrative Action 346 (1965). Congress may restrict judicial review, but any attempt to do so "must be made specifically manifest." *Id*. This well-settled presumption is rooted in the separation of powers established by the Founders. *See* The Federalist No. 78 (Alexander Hamilton) (referring to the judiciary as "an essential safeguard" against "unjust and partial laws" and "a check upon the legislative body in passing them").

The Court's decision in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), is an early advertisement for favoring judicial review over insulated administrative action. *See* Jaffe, Judicial Control of Administrative Action at 339. In *McAnnulty*, the Court considered whether the Postmaster General could prohibit the complainants from using the postal service to conduct business. 187 U.S. at 108. The Postmaster General sought to bar them from the mails after determining they sent fraudulent advertisements. *Id*. at 98–99. The Court reasoned that, even though Congress had delegated decision-making authority to the Postmaster General, "that [did] not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved." *Id*. at 108. If the judiciary did not have the power to grant relief in a proper proceeding, the Court explained, "the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer." *Id*. at 110. Therefore, the Court ruled that "[t]he acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Id*. at 108.

The Court's subsequent decisions fortified the "strong presumption" of judicial review in cases involving administrative action. *See, e.g.*, *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which facts were adjudicated was conducted regularly."); *Stark v. Wickard*, 321 U.S. 288, 310 (1944) ("The responsibility of determining the limits of statutory grants of authority . . . is a judicial

function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.").

Passage of the APA further "reinforced" this strong presumption. *Abbott Labs.*, 387 U.S. at 140. The Court has declared that the APA itself "embodies the basic presumption of judicial review" *id.*, because the law provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, *is entitled to judicial review thereof*." 5 U.S.C. § 702 (2018) (emphasis added).

The modern presumption of judicial review under the APA took shape in *Abbott Laboratories*. There, the Court addressed whether the Federal Food, Drug, and Cosmetic Act ("FDCA") prohibited pre-enforcement review of an order promulgated by the Commissioner of Food and Drugs that required pharmaceutical companies to disclose the "established name" of a drug whenever a trade name was used in labeling or advertising. *Abbott Labs.*, 387 U.S. at 138–39. The government argued that pre-enforcement review was unavailable for this type of action because the FDCA included "a specific procedure for such review" of certain regulations not at issue in the case and that unenumerated regulations "were necessarily meant to be excluded" from judicial review. *Id.* at 141. The Court disagreed, observing that "a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is *persuasive* reason to believe that such was the purpose of Congress." *Id.* at 140 (emphasis added) (citations omitted). The Court also explained that the APA's "'generous review provisions' must be given a 'hospitable' interpretation" and

that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id*. at 140–41 (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); *Rusk v. Cort*, 369 U.S. 367, 379–80 (1962)). The Court declared that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others" because "the right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Labs.*, 387 U.S. at 141 (quoting Jaffe, Judicial Control of Administrative Action at 357).

Since the Court's decision in *Abbott Laboratories*, "courts have explained that where Congress has not expressly precluded judicial review of agency action, the reviewing court should presume that Congress did not intend to preclude such review." Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and its Consequences*, 45 Vand. L. Rev. 743, 746 (1992). A unanimous Court solidified this principle in *Bowen*, a non-APA case, noting that the presumption of judicial review of administrative action "has been invoked time and again" and that the party seeking to overcome the presumption carries a "heavy burden." 476 U.S. at 670–73.

B. The Court Routinely Applies the Presumption of Judicial Review to Immigration Matters

The presumption of judicial review has been "consistently applied" to immigration statutes. *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quoting *Kucana*, 558 U.S. at 251); *see* Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. Mem.

L. Rev. 295, 308–11 (1999) ("Many of these cases involving narrow construction of laws that appeared to preclude judicial review have been in the immigration law context."). This practice dates from at least 1915—in *Gegiow v. Uhl*, 239 U.S. 3 (1915), the Court ruled that an immigration officer improperly refused admission to noncitizens after he determined they would likely become public charges. *Id.* at 10. The Court explained that "courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act." *Id.* at 9.

Several more recent decisions from this Court further support the applicability of the presumption of judicial review to immigration matters. In *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 491 (1991), the Court considered a provision in the Immigration and Nationality Act ("INA") barring judicial review of "a determination respecting an application" for the Special Agricultural Workers ("SAW") program. The statute provided that denials of SAW status were subject to judicial review only in connection with the review of an order of exclusion or deportation. *Id.* at 486. The respondents in the case, the Haitian Refugee Center and unsuccessful SAW applicants, filed a class action alleging that the application review process was conducted arbitrarily and in a manner that led to procedural due process violations. *Id.* at 483. Thus, the respondents did not seek a substantive declaration regarding their SAW status but only sought to "have their case files reopened and their applications reconsidered." *Id.* at 495.

The Court in *McNary* declared that "the reference to 'a determination respecting an application'

describes a single act rather than a group of decisions or a practice or procedure employed in making decisions." *Id*. at 492. The Court then held that the "determination" at issue in the jurisdiction-stripping provision did not refer to "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id*. This was due to the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *Id*. at 496 (citing *Bowen*, 476 U.S. at 670).

Shortly after *McNary*, the Court again rejected a statutory interpretation "that would have amounted to 'the practical equivalent of a total denial of judicial review.'" *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993) (quoting *McNary*, 498 U.S. at 497). In *Catholic Social Services*, the Court considered an Immigration and Naturalization Service ("INS") interpretation of regulations governing a program allowing certain noncitizens to apply for temporary resident status based on their continuous presence in the United States. *Id*. at 46. The INS policy would have "effectively exclude[d] an applicant from access even to the limited administrative and judicial review procedures" established by the Immigration Reform and Control Act. *Id*. at 63. The relevant statutory provisions at issue in *Catholic Social Services* were "virtually identical" to those at issue in *McNary*. *Id*. at 56 ("There, as here, the critical language was 'a determination respecting an application for adjustment of status'"). The Court invoked the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action" and declared that the statute lacked the "clear and convincing evidence" necessary to rebut the presumption. *Id*. at 63–

64 (citations omitted); *see also INS v. St. Cyr*, 533 U.S. 289, 298 (2001) ("For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent . . . .").

The Court continued this tradition in *Kucana*. There, the Court considered whether a provision of the INA and its implementing regulation stripped jurisdiction to review denials of motions to reopen removal proceedings. 558 U.S. at 237. The statute at issue provided that "no court shall have jurisdiction to review any action of the Attorney General 'the authority for which is *specified under this subchapter* to be in the discretion of the Attorney General." *Id.* (quoting 8 U.S.C. § 1252(a)(2)(B)(ii)) (emphasis in original). The implementing regulations provided that "[t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board [of Immigration Appeals]." 8 C.F.R. § 1003.2(a).

Declaring the motion to reopen "an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings," the Court in *Kucana* observed that "any lingering doubt" about the proper interpretation of the statute "would be dispelled by a familiar principle of statutory construction: the presumption favoring judicial review of administrative action." *Kucana*, 558 U.S. at 242, 251. Given a complete lack of "'clear and convincing evidence' to dislodge the presumption," the Court held that denials of motions to reopen removal proceedings were subject to judicial review. *Id.* at 252.

Finally, in *Guerrero-Lasprilla*, the Court again considered reopening of removal proceedings. The

relevant statute provided that where noncitizens were removable for having committed certain crimes, "a court of appeals may consider only 'constitutional claims or questions of law.'" 140 S. Ct. at 1068 (quoting 8 U.S.C. § 1252(a)(2)(D)). The dispute centered on whether "the statutory phrase 'questions of law' include[d] the application of a legal standard to undisputed or established facts." *Id.* The Court rejected the government's argument that Congress intended to exclude this type of dispute from judicial review, declaring that it saw "no reason to make an exception" to the "well-settled" presumption of reviewability in the immigration context. *Id.* at 1069–70 (quoting *McNary*, 498 U.S. at 496). The Court further noted that "even the Government [did] not dispute the soundness of the presumption or its applicability" to the case. *Id.* at 1070.

C. The Court Should Apply the Presumption of Judicial Review in this Case

The Court is—and courts below are—entitled to review certain agency decisions made under the INA, an immigration statute. *See* 8 U.S.C. § 1252(b)(9); Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 Fla. St. U. L. Rev. 363, 412 (2007) ("[T]he careful application of canons by courts in immigration cases is part of the legitimate, appropriate, and historical use of canons by courts generally."). Here, Congress has not explicitly precluded this Court from reviewing determinations relating to eligibility for discretionary relief under 8 U.S.C. § 1255(i). *See* Pet'rs' Br. 41–42. Further, protecting judicial review promotes predictability and can "guide Congress by sending signals about how statutes will be

interpreted." Slocum, 34 Fla. St. U. L. Rev. at 382. Concluding that reviewability exists here signals to Congress that the presumption of review will be applied to similar and related provisions. Moreover, the provision at issue here, § 1252(a)(2)(B)(i), immediately precedes § 1252(a)(2)(B)(ii), a provision the Court interpreted in *Kucana* as requiring judicial review for decisions rendered discretionary by regulation.

III. THE RULE OF LENITY REQUIRES THAT ANY AMBIGUITY REGARDING THE AVAILABILITY OF JUDICIAL REVIEW SHOULD BE RESOLVED IN FAVOR OF THE NONCITIZEN

A. This Court Has Consistently Affirmed the Longstanding Principle That any Ambiguity in Immigration Statutes Should Be Resolved in Favor of the Noncitizen

This Court has consistently applied a rule of lenity to immigration statutes, recognizing a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]." *Cardoza-Fonseca*, 480 U.S. at 449.[2] Applying the rule of lenity to immigration statutes recognizes that immigration proceedings are "intimately related to the criminal process" and that "[o]ur law has enmeshed

[2] *See also St. Cyr*, 533 U.S. at 320 (quoting *Cardoza-Fonseca*, 480 U.S. at 449); *Dada v. Mukasey*, 554 U.S. 1, 19–20 (2008) (applying the same principle to hold that noncitizens have a right to move to reopen immigration cases even after accepting voluntary departure).

criminal convictions and the penalty of deportation for nearly a century." *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010).

The immigration rule of lenity dates to this Court's decision in *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948). In *Fong Haw Tan*, the Court considered an immigration statute providing that a noncitizen sentenced "more than once" to imprisonment for one year or longer for a crime involving moral turpitude shall be deported. *Id* at 7. The Court considered whether a noncitizen simultaneously convicted on two counts of murder was sentenced "more than once" for purposes of the deportation statute. *See id.* at 8. The Court applied the rule of lenity to "resolve the doubts in favor of [the] construction [preventing deportation] because deportation is a drastic measure and at times the equivalent of banishment [or] exile." *Id.* at 10. Because "the stakes are considerable for the individual [subject to deportation]," the Court refused to "assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Id.*

Since *Fong Haw Tan*, this Court has applied the immigration rule of lenity to construe ambiguous provisions in favor of noncitizens. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 449; *Dada*, 554 U.S. at 19 (citing favorably to the immigration rule of lenity in interpreting a statute in favor of a noncitizen); *INS v. Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the [noncitizen].").

The immigration rule of lenity applies to a wide variety of immigration provisions. This Court has deployed the rule with respect to deportation provisions,

asylum provisions, provisions providing relief from deportation, and adjustment of status provisions, among others. *See Fong Haw Tan*, 333 U.S. at 10 (applying the rule of lenity to a statutory provision rendering noncitizens deportable); *Cardoza-Fonseca*, 480 U.S. at 449 (discussing the rule of lenity in connection with an asylum provision); *Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977) (noting that the immigration rule of lenity is "especially pertinent" when applied to a statutory provision granting relief from deportation); *Marino v. INS*, 537 F.2d 686, 691 n.5 (2d Cir. 1976) (noting that the immigration rule of lenity "is fully applicable" where the case is "focused specifically on the question of eligibility for adjustment of status"); *see also Squires v. INS*, 689 F.2d 1276, 1280 (6th Cir. 1982) (noting that the immigration rule of lenity "has been widely invoked in deportation cases, and it requires the courts to interpret all aspects of the immigration laws . . . liberally in favor of the [noncitizen]").

Precedent thus dictates that any lingering ambiguities be resolved in favor of the noncitizen. Here, the operative language in § 1252(a)(2)(B)(i)—"any judgment regarding the granting of relief"—can reasonably be read to preserve judicial review over threshold eligibility questions. A contrary reading would have drastically negative consequences for Petitioners as well as other noncitizens who would have no recourse to challenge misguided agency decisions affecting whether discretionary relief could even be considered.

B. Ambiguities Should Be Resolved in Favor of the Noncitizen Because Deportation Is a Particularly Drastic Remedy and Because Noncitizens Are Particularly Vulnerable to Adverse Legislation

The immigration rule of lenity recognizes that deportation, like criminal punishment, is a harsh remedy that is "at times the equivalent of banishment [or] exile." *Fong Haw Tan*, 333 U.S. at 10; *see St. Cyr*, 533 U.S. at 322 ("Preserving the client's right to remain in the United States may be more important . . . than any potential jail sentence . . . ." (citation omitted)); *Lee v. United States*, 137 S. Ct. 1958, 1968 (2017) ("There is no reason to doubt the paramount importance [the defendant] placed on avoiding deportation. Deportation is always 'a particularly severe penalty.'" (citation omitted)); *Cardoza-Fonseca*, 480 U.S. at 449 ("Deportation is always a harsh measure . . . .").[3] As this Court has recognized, it is "a presupposition of our law to resolve doubts against the imposition of a harsher punishment," even in the immigration context. *See Bonetti v. Rogers*, 356 U.S. 691, 699 (quoting *Bell v.*

[3] *See also Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (noting that deportation "may result . . . in loss of both property and life; or of all that makes life worth living"); *Fong v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) (noting that "it needs no citation of authorities to support the proposition that deportation is punishment" and that "to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel").

United States, 349 U.S. 81, 83 (1955))(resolving an ambiguous immigration provision in favor of the noncitizen); Pet'rs' Br. 32 (noting that the statute at issue here is ambiguous). The rule of lenity is "rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979); *see Jordan v. De George*, 341 U.S. 223, 231 (noting the "grave nature of deportation" and acknowledging that a statute must convey a "sufficiently definite warning as to the proscribed conduct"). The Court echoed similar fair warning concerns in *Fong Haw Tan*. 333 U.S. at 10 (giving deportation statute "narrowest" meaning to avoid imputing to Congress an interpretation that would unduly limit a noncitizen's freedom).

Beyond deportation's severity, the immigration rule of lenity also recognizes the vulnerable status of noncitizens. As the Court has recognized, Congress may be tempted to use its "unmatched powers . . . as a means of retribution against unpopular groups or individuals." *St. Cyr*, 533 U.S. at 315 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)). The immigration rule of lenity thus provides an important mechanism for protecting noncitizens from adverse legislation—particularly where the legislation in question is susceptible to divergent interpretations.

Here, deportation would undoubtedly be a severe punishment on Petitioners. Pankajkumar Patel and his wife, Jyotsnaben Patel, both of whom are Petitioners in this case, are subject to deportation as a result of the Eleventh Circuit's refusal to review certain nondiscretionary factual determinations relating to Pankajkumar's eligibility for relief from removal.

Pankajkumar has lived in the United States for nearly thirty years and holds an approved I-140 visa petition filed by his employer which entitles him to apply for an adjustment of status. Application of the immigration rule of lenity is thus especially important here where the lives of two individuals and their entire family will be uprooted for what might have been a simple mistake.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to reverse the judgment of dismissal entered by the court of appeals.

Respectfully submitted,

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