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

REPLY BRIEF FOR PETITIONERS

MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

JUSTIN M. BAXENBERG
JOSS A. BERTEAUD
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington DC 20006

MARGARET T. ARTZ
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

IRA J. KURZBAN
Counsel of Record
HELENA TETZELI
JOHN P. PRATT
EDWARD F. RAMOS
KEVIN A. GREGG
ELIZABETH MONTANO
KURZBAN KURZBAN
TETZELI & PRATT P.A.
131 Madeira Avenue
Coral Gables, FL 33134
(305) 444-0060
ira@kktplaw.com

THOMAS G. SPRANKLING
WILMER CUTLER PICKERING
HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

The focus of 8 U.S.C. § 1252(a)(2)(B)(i) is "any judgment regarding the granting of relief." Yet neither the government nor the Court-appointed amicus gives any meaning to the words "regarding the granting of relief." Amicus's and the government's chief response is to pluck the word "regarding" out of its context and argue that it generally has an expanding effect. They do not deny, however, that this approach still treats the entire phrase "regarding the granting of relief" as surplusage.

By contrast, Petitioners have explained what the phrase means: It limits the category of "judgments" that are made unreviewable. In other words, the statute does not apply to "any judgment" full stop, but only to any judgment "regarding the granting of relief"—*i.e.*, the determination whether to actually "grant[] … relief" to an eligible noncitizen.

Thus, the natural reading of subsection (B)(i) is, as this Court has already recognized, that it bars review of "decisions … made discretionary by legislation," *Kucana* v. *Holder*, 558 U.S. 233, 246-247 (2010). The phrase "regarding the granting of relief" identifies the specific type of discretionary decisions at issue—those that make the final call whether to grant one of the five enumerated forms of relief. This reading of subsection (B)(i) does real work, because such final-step rulings were judicially reviewable (and often reversed) before IIRIRA's enactment. *See* Pet. Br. 9.

Amicus also considers "judgment" in isolation. But amicus cannot settle on a single definition for that word, venturing "a 'decision'" (Br. 23); a "judicial decision or order in court" (Br. 24); a ruling that "subsumes all subsidiary determinations" (Br. 25); and, conversely, a ruling that "is distinct from the underlying reasons"

(Br. 26). These competing definitions show that, as the Eleventh Circuit acknowledged (Pet. App. 26a-27a), "judgment" has multiple meanings. And in light of the broader context of section 1252(a)(2) and the presumption of reviewability, "any judgment regarding the granting of relief" refers to the ultimate Executive judgment about a noncitizen's worthiness of relief—not to the broader set of threshold eligibility decisions.

Finally, amicus tries to import language from subsection 1252(a)(2)(D), which preserves judicial review over questions of law and constitutional claims. But that provision was enacted nine years after subsection (B)(i), and therefore says little about subsection (B)(i)'s scope. And because subsection (D) applies only to petitions for review filed in the courts of appeals, amicus's interpretation would strip review over even questions of law in challenges to denials of relief outside removal proceedings, which are filed in district court. Amicus addresses this major flaw in the Eleventh Circuit's approach in a single footnote that concedes the problem without offering any solution. Amicus Br. 25 n.25.

ARGUMENT

SUBSECTION 1252(a)(2)(B)(i) IS BEST READ TO BAR REVIEW ONLY OF THE ULTIMATE JUDGMENT WHETHER TO GRANT RELIEF TO AN ELIGIBLE NONCITIZEN

A. The Text Of Subsection (B)(i) Supports Petitioners' Interpretation

Subsection (B)(i) bars judicial review of "any judgment regarding the granting of relief under" five enumerated provisions that authorize the Executive to grant discretionary relief to noncitizens who satisfy specified eligibility criteria. 8 U.S.C. § 1252(a)(2)(B)(i).

As Petitioners have explained, while the word "judgment" in isolation has several potential meanings, in context it is best read to refer to the discretionary determination whether to ultimately grant such relief. Pet. Br. 20-22; *cf.* U.S. Br. 16-18 (agreeing that "judgment" refers to a discretionary decision). And whatever "judgment" might mean standing alone, the phrase "regarding the granting of relief" limits the jurisdictional bar to the Executive's decision whether to grant relief. Pet. Br. 22-24. Any other interpretation reads the words "regarding the granting of relief" out of the statute. Pet. Br. 25.

Neither amicus nor the government explains the meaning of "regarding the granting of relief" in a way that gives that phrase meaning. Moreover, neither disputes that the words "granting of relief" must refer to the second-step decision whether to grant discretionary relief, given how subsection 1252(a)(2)(B)(ii) uses that very language to refer to the second-step decision whether to grant asylum in the exercise of discretion. *See* Pet. Br. 28-29; *see also* Amicus Br. 28 n.29. The textual arguments that they do make are unavailing.

1. "Any Judgment"

Amicus offers a series of arguments based on taking the word "judgment" out of context. None has merit.

First, amicus argues that dictionaries "universally define[]" the word "judgment" to mean a "'decision' or 'determination.'" Amicus Br. 23 & n.18. Even the Eleventh Circuit held the opposite, recognizing that there are "numerous definitions for judgment." Pet. App. 25a-27a. Indeed, all of amicus's dictionaries published before IIRIRA's enactment include a definition

supporting Petitioners' view that judgment means a discretionary determination.[1]

Moreover, although amicus tries to present "judgment" as having only one meaning, amicus's brief employs varying definitions. *See supra* p. 1. One such definition actually supports Petitioners' position: "a 'judgment' is more properly understood as the 'decision' while the reasons for that decision are 'more properly denominated' as the 'opinion.'" Amicus Br. 26; *see also* Pet. Br. 22 ("A court's ultimate 'judgment' is separate from its underlying reasoning," and "that sense of 'judgment' supports reading (B)(i) to bar review only of that final-step discretionary decision to grant or deny relief.").

The many potential meanings of "judgment" also answer the government's assertion (at 19) that Congress "'could simply have'" used the phrase "final judgment" or "ultimate judgment." It was precisely to foreclose one of amicus's proposed meanings—that the word "judgment" alone might encompass *all* subsidiary decisions—that Congress added the phrase "regarding the granting of relief" to clarify which discretionary decisions were unreviewable. *See* Pet. Br. 22-25. The

---

[1] *See Webster's New International Dictionary of the English Language Unabridged* 1343 (2d ed. 1956) ("The mental act of judging; the operation of the mind, involving comparison and discrimination, by which knowledge of values and relations is mentally formulated."); *Black's Law Dictionary* 841 (6th ed. 1990) ("The formation of an opinion or notion concerning something by exercising the mind on it."); *Oxford English Dictionary* (2d ed. 1989) ("The formation of an opinion or notion concerning something by exercising the mind upon it."), https://www.oed.com/oed2/00124510; *Webster's Third New International Dictionary of the English Language Unabridged* 1223 (3d ed. 1967) ("an opinion … formed" by "discerning and comparing").

government's lone statutory example in support of its argument involves "a formal judgment of guilt"—a very different concept unrelated to the discretionary decisions that subsection (B)(i) targets. U.S. Br. 19 (citing 8 U.S.C. § 1101(a)(48)(A)).

Second, amicus argues that, because subsection 1252(a)(2)(B)(ii) refers to "other decision[s] or action[s]," that must mean that a "judgment" is a "decision." Amicus Br. 22. Petitioners agree that a "judgment" is a kind of "decision," namely, a discretionary decision. The contrast between "judgment" in subsection (B)(i) and "decision or action" in subsection (B)(ii) shows that Congress understood these words' different connotations, and intentionally used the narrower word "judgment" in subsection (B)(i). As Petitioners explained (Br. 30), the very first sentence of subsection 1252(a)(2)(B) uses the phrase "any … judgment, decision, or action" when clarifying the kinds of rulings potentially subject to subsections (B)(i) and (B)(ii), strongly suggesting that each word has a different meaning. Yet again, amicus has no response.

Nor does it help amicus that *Kucana* described "judgment" as a kind of "decision." 558 U.S. at 246-247 (cited at Amicus Br. 24). *Kucana* described both subsections (B)(i) and (B)(ii) as covering a particular class of decision: "decisions … made *discretionary* by legislation." *Id.* (emphasis added). Amicus also incorrectly ventures (at 24 n.22, and again at 43-45) that reading subsections (B)(i) and (B)(ii) as covering discretionary decisions renders them superfluous. Not so; subsection (B)(i) covers one specific category of discretionary decisions (those "regarding the granting of relief" under five enumerated provisions), while subsection (B)(ii) is a "catchall" that covers "'*other*'" decisions or actions specified by statute as discretionary. *Kucana*, 558 U.S.

at 246-247 (emphasis added); Pet. Br. 39-40 (discretionary relief under 8 U.S.C. § 1182(k) covered by subsection (B)(ii), not (B)(i)). Moreover, subsection (B)(i) provides specific examples that, under the principle of *noscitur a sociis*, inform subsection (B)(ii)'s meaning—just as an instruction not to purchase "any book by Agatha Christie, Dashiell Hammett, or any other famous crime novelist" guides the listener more than merely prohibiting the purchase of "any books by famous crime novelists." This Court in *Kucana* relied on precisely that type of inference in interpreting subsection (B)(ii)'s scope. *See* 558 U.S. at 247 & n.14.[2]

Third, amicus argues (at 24) that the "common thread" uniting the five forms of relief enumerated in subsection (B)(i) is that immigration judges can grant or deny them in removal proceedings. But as amicus concedes (at 25 n.25), applications for relief covered by subsection (B)(i) are routinely decided by USCIS *outside* of removal proceedings. The more natural "common thread" linking them is the one this Court already identified: "[e]ach of the statutory provisions referenced in clause (i) … contains language indicating that the decision is … *discretion*[*ary*]." *Kucana*, 558 U.S. at 246 (emphasis added).

---

[2] Although subsection (B)(i) does not strip review of first-step eligibility determinations, review of such a determination may be barred if it satisfies subsection (B)(ii)'s requirement—highlighted by *Kucana* as applying to both subsections—that the determination be "specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." The government rightly asks this Court not to "bar review of factfindings that contribute to the application of a discretionary criterion of eligibility," U.S. Br. 41 n.5; the unreviewable criteria are expressly limited to those specified by statute as discretionary.

Fourth, amicus argues (at 25-27) that "any judgment" must encompass all determinations leading up to the decision whether to grant relief. Had Congress wanted to convey amicus's meaning, it could have simply said "any decision under" the five provisions, full stop, or barred review of the "final order of removal" as it did in subsection 1252(a)(2)(C). *See INS* v. *Chadha*, 462 U.S. 919, 938 (1983) (explaining that the term "final order" "'includes all matters on which … the final order is contingent'"). Indeed, the Administrative Procedure Act refers to an agency's final disposition of a matter other than rulemaking as an "order," not a judgment. 5 U.S.C. § 551(6). Amicus identifies no other statute, much less another provision of the immigration law, that refers to an agency action subsuming all prior or interlocutory actions as a "judgment." To the contrary, amicus relies heavily on a statute that uses the "final order" phrasing to describe the ruling that subsumes all underlying issues. *See* 8 U.S.C. § 1252(b)(9) ("Judicial review of all questions of law and fact … shall be available only in judicial review of a *final order* under this section." (emphasis added)); *see also* Amicus Br. 12, 32, 50, 52 (citing subsection (b)(9)).

Moreover, whether the word "any" broadens a statute's reach "necessarily depends on the statutory context." *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 629 (2018). Here, the phrase "any judgment" is limited by the next five words "regarding the granting of relief"—language that narrows the class of covered "judgments" to the second-step determinations whether to grant relief. *See infra* pp. 9-11.

Fifth, amicus urges (at 40-41, 47) that, had Congress intended "judgment" to mean a discretionary decision, it would have written the word "discretionary" or "subjective" into subsection (B)(i). But "judgment"

can mean a discretionary determination—even standing alone. Pet. Br. 20-21. Indeed, several INA provisions use the term that way. Pet. Br. 27 (citing 8 U.S.C. §§ 1103(a)(7), 1153 note, 1537(b)(2)(A)). Regardless, inserting the word "discretionary" would do nothing to change the statutory meaning, because subsection (B)(i) covers only "judgment[s] regarding the *granting of relief*"—decisions already made discretionary under each of the five cross-referenced provisions.[3]

Sixth, relying on yet another definition of "judgment," amicus argues that the word can reasonably encompass factual rulings. Amicus Br. 41-42 (defining "judgment" as "forming an opinion or evaluation by discerning and comparing"). Even if that were true, the phrase "regarding the granting of relief" would limit subsection (B)(i)'s reach to factual determinations underlying the final discretionary step—not fact-finding that resolves first-step eligibility decisions. But in any event, amicus's premise is wrong: An agency's conclusion about historical facts, which can be assessed based on record evidence, is distinct from the discretionary weighing of facts when deciding a noncitizen's worthiness for relief, which is purely subjective. Amicus's own authority proves this point—in *Gall* v. *Unit-*

[3] Amicus cites (at 47-48) several INA provisions that use the phrase "discretionary judgment" (or, in the case of the transitional rules, "discretionary decision"). But in such provisions, the word "discretionary" resolves possible ambiguity in the provision's scope or changes the provision's meaning entirely. For example, the transitional rules' bar on judicial review would, without the word "discretionary," have reached all "decision[s] under" the five forms of relief—a radical expansion of the provision. By contrast, subsection (B)(i) needs no such clarification because the "judgment[s]" it concerns—second-step decisions "regarding the granting of relief"—are themselves discretionary.

ed States, 552 U.S. 38 (2007), this Court reversed the court of appeals not because it made a factual error, but because it did not give "deference to the District Court's reasoned and reasonable decision that the [18 U.S.C.] § 3553(a) factors, on the whole, justified the sentence," *id.* at 59-60; *see also id.* (explaining that the district court "reasonably attached great weight to Gall's self-motivated rehabilitation" while the court of appeals did not).[4]

2. "Regarding The Granting Of Relief"

The government and amicus both focus on the word "regarding," which they contend expands the scope of subsection (B)(i) to cover decisions beyond the second-step decision whether to grant relief. *See* U.S. Br. 18-20; Amicus Br. 27-28, 30-31. But arguing that "regarding" has "a broadening effect" (Amicus Br. 28) merely raises the question what is being broadened. Certainly not the word "judgment," since the phrase "any judgment regarding the granting of relief" necessarily refers to a narrower set than "any judgment"—just as "movies regarding World War II starring John Wayne" is a narrower set than "movies starring John Wayne." Reading "regarding" to limit the noun it modifies ("judgment") thus sits more "[]comfortably with

[4] Amicus's other two cases fare no better. *Anderson* v. *City of Bessemer* properly recognizes that a lower court's ruling can be reversed where (as here) that tribunal has made a clear factual error. 470 U.S. 564, 573 (1985). The quoted language from *Department of Commerce* v. *New York*, moreover, summarizes the "arbitrary and capricious" review standard, which involves considering whether the agency followed the proper procedures and provided sufficient explanation for its ultimate decision—not review of the agency's fact-finding, 139 S. Ct. 2551, 2569 (2019).

common usage." *Abuelhawa* v. *United States*, 556 U.S. 816, 820 (2009).

Moreover, Congress used "regarding" in precisely this manner in another INA provision: "No court may set aside any action or decision by the Attorney General under this section *regarding* the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e) (emphasis added). "Regarding" plainly does not expand the provision to cover anything *related* to "detention or release"; rather, it serves the more limited purpose of identifying the particular "action[s] or decision[s]" the provision covers. *See Demore* v. *Kim*, 538 U.S. 510, 516-517 (2003) (holding that subsection 1226(e) does not bar review of a noncitizen's "challenge[to] the statutory framework that permits his detention without bail" because it is not a "'decision' that the Attorney General has made regarding his detention or release"). Congress used "regarding" in subsection (B)(i) similarly: to identify a particular subset of decisions that are rendered unreviewable. Indeed, had Congress not intended "regarding the granting of relief" to narrow the scope of "judgment," it could have omitted the phrase entirely and simply written that subsection (B)(i) covers "any judgment under" the five enumerated provisions.[5]

Words like "regarding" or "any" may also signal that the statute encompasses the myriad value-laden judgments adjudicators must make when deciding whether to exercise Executive grace. *See, e.g.*, *Matter*

---

[5] Contrary to amicus's passing suggestion (at 31), Petitioners did not "ignore[]" the word "regarding." *See, e.g.*, Pet. Br. 38 ("[T]he word 'regarding' is part of 'limiting language' that narrows the provision's reach to a particular class of 'judgments,' namely those regarding the second-step "granting of relief.").

of Arai, 13 I. & N. Dec. 494, 495 (BIA 1970) (describing factors to be weighed in adjustment-of-status cases). Before IIRIRA, appellate courts often scrutinized second-step judgment calls short of the *ultimate* judgment whether to grant relief, remanding to the agency for a new discretionary decision. This pre-IIRIRA practice may explain why Congress barred review of "*any* judgment *regarding*" the granting of relief: to prevent courts from policing the "factors the [agency] weighed in casting the balance against" a noncitizen's request for the favorable exercise of discretion. *See Kahn* v. *INS*, 36 F.3d 1412, 1416 (9th Cir. 1994) (per curiam).[6]

---

[6] *See also, e.g.*, *Drobny* v. *INS*, 947 F.2d 241, 246 (7th Cir. 1991) (holding that agency wrongly deemed noncitizen's girlfriend's pregnancy "irrelevant" to noncitizen's worthiness for relief); *Akinyemi* v. *INS*, 969 F.2d 285, 289 (7th Cir. 1992) (vacating discretionary denial because agency improperly "declined to consider rehabilitation"); *Yepes-Prado* v. *INS*, 10 F.3d 1363, 1368-1370 (9th Cir. 1993) (holding that having a child out of wedlock weighed in the noncitizen's favor, not against him as the agency had held); *Kahn*, 36 F.3d at 1414 (holding that, contrary to the agency, noncitizen's cohabitation with unmarried partner merited "substantial" weight in favor of relief); *Diaz-Resendez* v. *INS*, 960 F.2d 493, 497-498 (5th Cir. 1992) (rejecting agency's holding that noncitizen's failure to verbally express remorse for past crimes weighed against relief); *Espinoza* v. *INS*, 991 F.2d 1294, 1300-1301 (7th Cir. 1993) (holding that agency wrongly concluded that noncitizen's decision to participate in a college degree program, rather than attend a drug treatment program, weighed against relief); *Guillen-Garcia* v. *INS*, 999 F.2d 199, 204-205 (7th Cir. 1993) (vacating and remanding because, although the agency's discretionary analysis was "comprehensive" and "correct[]" in many respects, the agency erred in relying solely on the noncitizen's "refusal to admit guilt" to deny relief in the exercise of discretion); *Georgiu* v. *INS*, 90 F.3d 374, 378 (9th Cir. 1996) (per curiam) (faulting agency for failing to consider various factors, stating that "it appears to us that a failure to grant a waiver of deportation would constitute an

Amicus's remaining arguments are similarly unavailing. While conceding (at 31) that an eligibility determination is not the "granting of relief," amicus urges (at 28-29) that eligibility determinations are at least *related* to the ultimate decision whether to grant relief. Setting aside the transmutation of "regarding" into "relating to," amicus nowhere explains why Congress would bar judicial review of all decisions under the five covered provisions in such a roundabout manner and through such a shapeless phrase. *See California Div. of Labor Standards Enf't* v. *Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J. concurring) (rejecting a broad reading of "'relate to'" because "as many a curbstone philosopher has observed, everything is related to everything else"). Had Congress intended that result, it could have simply barred "any decision under" those statutes. And had Congress wished to target eligibility determinations in particular, it could have said so expressly. *See* 8 U.S.C. § 1187(h)(3)(C)(iv) (barring "jurisdiction to review an eligibility determination" in the context of the visa waiver program).

Finally, amicus contends (at 30) that the government's approach to interpreting subsection 1252(a)(2)(B)(i) would be a difficult test for the lower courts to administer. Petitioners agree; indeed, that is a reason to adopt Petitioners' approach instead. Pet. Br. 31.

---

abuse of discretion," but vacating and remanding for a new discretionary decision).

B. Section 1252(a)(2)'s Broader Statutory Context And History Support Petitioners' Reading

1. Beyond the plain statutory text, the broader context and history likewise support reading subsection 1252(a)(2)(B)(i) to bar jurisdiction to review only the ultimate decision whether to grant relief. Pet. Br. 25-30, 39-43. This is so for at least three reasons.

First, as this Court stated in *Kucana*, reading subsections (B)(i) and (B)(ii) together suggests that both provisions sweep in only "'decisions … made discretionary by legislation.'" Pet. Br. 25-26. *Second*, subsections 1252(a)(2)(A) and the introductory language of 1252(a)(2)(B)—as well as 8 U.S.C. §§ 1226(e) and 1182(a)(9)(B)(v)—show that if Congress wanted to expand subsection (B)(i)'s jurisdictional bar beyond the ultimate decision whether to grant relief, it knew how to say so. Pet. Br. 29-30. *Third*, Congress's use of "regarding the granting of relief" in subsection (B)(i) echoes the longstanding immigration-law distinction between first-step eligibility decisions and the second-step decision whether to grant relief. *See* Pet. Br. 28-29; *see also id.* 6-7, 23-24.

Once again, amicus's responses lack merit. Amicus tellingly does not dispute that courts have distinguished for decades between first-step eligibility rulings and second-step decisions whether to grant discretionary relief, nor that the phrase "the granting of relief" maps neatly onto the second-step decision. Instead, amicus argues (at 36) that IIRIRA's passage rendered all prior statutory history irrelevant. *Kucana* shows otherwise: this Court relied on pre-IIRIRA practice to determine the scope of subsection (B)(ii). *See* 558 U.S. at 249-251 (explaining that, where

Congress did not expressly overrule existing practice, "we take it that Congress left the matter where it was pre-IIRIRA"). And the lone case amicus cites is entirely inapposite, as it involved section 1252's application to lawsuits filed before IIRIRA's enactment—not the scope of section 1252(a)(2)'s jurisdiction-stripping provisions. *See Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 473 (1999).[7]

Amicus subsequently reverses course and argues that this Court should exclusively consider case law before the INA was enacted in 1952. Amicus Br. 36-38; *see also id.* 4-5. Amicus does not explain why pre-INA law from the late 1800s to mid-1900s should inform the interpretation of IIRIRA, which amended the INA. And again, amicus's argument conflicts with *Kucana*, which reviewed the doctrine in place immediately preceding IIRIRA's passage to determine what Congress changed and what it left in place. *See* 558 U.S. at 249-250.

Finally, amicus (at 46) resists considering the language of subsections 1252(a)(2)(A) and (C) in assessing the scope of subsection (B)(i), supposedly because the former provisions are "tailored to … target" different types of removal-proceeding rulings. Amicus ignores

---

[7] Congress's decision to leave the pre-existing regime in place where it did not expressly overrule it also answers the government's argument (at 28-29) that there is no indication Congress intended the traditional two-step decision-making process to apply to subsection 1252(a)(2)(B)(i). In any event, subsection (B)(i)'s use of the phrase "granting of relief" provides a clear textual link to the second-step decision whether to grant relief, as distinct from the first-step question whether a noncitizen is eligible for that relief. *See* Pet. Br. 22-24; *see also INS* v. *St. Cyr*, 533 U.S. 289, 307-308 (2001) (distinguishing between "[e]ligibility" decisions and "the actual granting of relief").

the commonsense rule that Congress's use of "'explicit language' in one provision 'cautions against inferring' the same limitation in another provision." *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436, 442 (2016); *see also Kucana*, 558 U.S. at 248 (similar).

2. Amicus also argues (at 32-35) that Congress's failure to expressly state in subsection (B)(i) that questions of fact are reviewable necessarily means that they are not. That argument—much like the Eleventh Circuit's reasoning—flips the presumption of reviewability on its head by requiring Congress to use specific magic words to preserve review. *See* Pet. Br. 36; *see also infra* pp. 19-20.

In any event, none of the provisions that amicus relies upon establishes that Congress intended to bar review of questions of fact. For example, 8 U.S.C. § 1252(b)(9)—which provides that "all questions of law and fact" arising from removal proceedings should be aired in a single appeal—shows only that Congress knew how to refer to "questions of fact" and could have specifically used that phrase in subsection (B)(i) had it wanted to adopt amicus's interpretation. And amicus's suggestion (at 32) that all questions that arise in removal proceedings fit neatly into questions of "law" or "fact" ignores the third category expressly contemplated in subsection 1252(a)(2)(B)'s title: "discretionary" rulings. *Cf.* Amicus Br. 32 n.31 (arguing that the title is relevant to determining subsection (B)(i)'s meaning). Before subsection (B)(i), courts routinely reviewed the agency's second-stage discretionary judgment whether to grant relief. *See Foti* v. *INS*, 375 U.S. 217, 228-229 & n.15 (1963) (denial of relief "as a discretionary matter is reviewable … for arbitrariness and abuse of discretion"); *see also* Pet. Br. 9 (collecting cases reversing

second-step discretionary decisions to deny relief); *supra* n.6. Subsection (B)(i) ended judicial review of such discretionary judgments, but it did not affect reviewability of eligibility determinations.

Amicus also relies (at 32) on 8 U.S.C. § 1252(a)(2)(D), which clarifies that judicial review is available for constitutional or legal challenges to the denial of discretionary relief. But that provision was enacted *nine years* after subsection (B)(i) and thus did not work in parallel with the phrase "judgment regarding the granting of relief." Pet. Br. 40. Instead, as even amicus acknowledges (at 33), subsection (D) was added by the REAL ID Act of 2005 to confirm, in reaction to *St. Cyr*, that legal and constitutional challenges remained available.

Moreover, amicus is incorrect (at 34) that reading subsection (D) solely as restoring jurisdiction over legal and constitutional challenges renders the provision "unnecessary and superfluous." Subsection (D) preserved review of legal questions not only in cases governed by subsection (B), but also in cases governed by subsection (C), which was the provision at issue in *St. Cyr* and bars judicial review of "[o]rders against criminal aliens." Prior to *St. Cyr*, the government took the position that subsection (C) barred all review of legal questions in removal cases involving noncitizens with various criminal convictions; subsection (D) implemented *St. Cyr's* holding by permitting review of legal questions in such cases. (Subsection (C) is not relevant to this case, as Mr. Patel has no conviction that would trigger it.)

In addition, subsection (D) is also necessary to preserve review over legal and constitutional questions that arise as part of the second-step decision whether

to grant relief—questions that could otherwise be thought unreviewable under subsection (B)(i). For example, subsection (D) allows a noncitizen to challenge whether the agency has exercised its discretion in conformity with the INA or binding regulations or case law, and also preserves review of constitutional claims in the event that, for example, the agency bases second-step discretionary decisions on impermissible considerations such as race, gender, or religion.

Amicus's reliance on subsection (D) highlights a serious problem to which amicus offers no answer: the Eleventh Circuit's approach would preclude *all* judicial review—even of legal or constitutional questions—for denials of discretionary relief that can only be challenged in district court. *See* Pet. Br. 41; *see also* NILA Amicus Br. 18-34. Subsection 1252(a)(2)(D) would not preserve judicial review of constitutional or legal questions in such cases, because subsection (D) applies only to legal issues "raised upon a petition for review *filed with an appropriate court of appeals*." (Emphasis added.) Amicus addresses this significant flaw in a single footnote that does not deny the problem, but asserts without basis that subsection (B)(i) "is naturally read to address the mine-run case where an immigration judge denies discretionary relief." Br. 25 n.25. Far from citing any statutory language or regulatory practice confining subsection (B)(i) to denials of relief by immigration judges, amicus quotes Congress's language reinforcing that the jurisdictional bar applies "regardless of whether the judgment, decision, or action is made in removal proceedings." 8 U.S.C. § 1252(a)(2)(B). Under amicus's interpretation, subsection (B)(i) necessarily bars review of legal or constitutional challenges to USCIS denials of relief that, because they do not arise from removal proceedings, are not subject to "a petition

for review filed with an appropriate court of appeals." *See* Pet. Br. 41. Nor does amicus justify the assertion that such USCIS rulings are not the "mine run"; most adjustment-of-status applications are affirmative requests filed with USCIS, such as those filed by noncitizens in lawful status. *See* NILA Amicus Br. 3-4, 21-22 (identifying such cases arising from non-removal USCIS proceedings).[8] Amicus neither denies nor justifies this troubling consequence of the Eleventh Circuit's position.

Finally, amicus (at 35-36) cites *Nasrallah* v. *Barr*, 140 S. Ct. 1683 (2020), and *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062 (2020), but both cases focused on the proper interpretation of subsection 1252(a)(2)(C), not subsection (B)(i). *Guerrero-Lasprilla* does not even mention subsection 1252(a)(2)(B). And *Nasrallah*'s statement that "a noncitizen may not bring a factual challenge to orders denying discretionary relief" is consistent with Petitioners' position that first-step eligibility determinations (as opposed to second-step orders/judgments regarding the granting of relief) remain reviewable. *See* Pet. Br. 39 n.12. In any event, this Court is "'not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated.'" *Kirtsaeng* v. *Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013).

---

[8] USCIS adjudicated over 118,000 applications for adjustment of status in a three-month period between January and March 2021. *See* https://www.uscis.gov/sites/default/files/document/reports/I485_performancedata_fy2021_qtr2.pdf (visited Nov. 18, 2021). In contrast, immigration courts adjudicated fewer than 20,000 adjustment of status applications in a nearly four-year period between January 2017 and September 2020. *See* TRAC Reports, Inc., https://trac.syr.edu/immigration/reports/631/ (visited Nov. 18, 2021).

C. The Canons Of Construction Support Petitioners' Reading

Amicus does not deny that, to sustain the Eleventh Circuit's holding, the Eleventh Circuit's interpretation of subsection 1252(a)(2)(B)(i) must be the only reasonable one. Otherwise, the presumption of reviewability and the principle of construing ambiguities in removal statutes in favor of noncitizens support preserving review. *See* Pet. Br. 31-33; 43-44; *see also* Law Prof. Amicus Br. 5-19. Moreover, the principle that a statute should not be read "to place in executive hands authority to remove cases from the Judiciary's domain" absent a clear statement further weighs against amicus's interpretation, which would arbitrarily allow the government to shield agency decision-making from judicial review whenever a threshold eligibility requirement for discretionary relief is also a ground for removal. Pet. Br. 44-46; *see also* American Immigration Council Amicus Br. 14-30; U.S. Br. 25-27.

Amicus's primary response is that the Eleventh Circuit's interpretation is indeed the only permissible reading. Amicus Br. 48-50, 52-54. That simply is not so. The Eleventh Circuit itself conceded that the word "judgment" is susceptible to multiple meanings, and amicus likewise advances several different definitions of the word. *See supra* pp. 1-2.

Amicus argues (Br. 49-50) that the presumption of reviewability and the principle favoring noncitizens do not apply because subsection (D) preserves review of at least legal and constitutional claims. Amicus again ignores the fact that, under the Eleventh Circuit's holding, USCIS denials of discretionary immigration benefits that can only be challenged in district court are *completely unreviewable*—even for constitutional and

legal error. *See supra* pp. 17-18. Moreover, amicus's argument cannot be squared with *Kucana*, which considered the presumption of reviewability in interpreting subsection (B)(ii), notwithstanding the existence of subsection (D). Pet. Br. 41-42. Finally, the only case amicus cites is easily distinguishable, as it involved a statute where Congress contemporaneously enacted a limitation on who could bring a specific type of claim. *See Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984). By contrast, subsection (D) was enacted nearly a decade after subsection (B)(i) and—if amicus's interpretation is correct—would bar *anyone* from bringing factual challenges in the court of appeals and *any kind of challenge* in district court. Nothing suggests that Congress intended such a problematic result.

D. Amicus's Reliance On Legislative History And Policy Considerations Is Unavailing

Amicus ultimately falls back on legislative history and questionable policy assertions. Of course, such considerations are improper where (as here) the text, structure, and context point in a different direction.

Regardless, amicus's arguments are not persuasive. The lone piece of legislative history that amicus musters (at 34-35)—the House Conference Report that presaged the 2005 REAL ID Act—confirms merely that subsection 1252(a)(2)(D) sought to preserve review of legal and constitutional claims, as opposed to factual challenges. *See* H.R. Rep. No. 109-72, at 175 (2005). The report says nothing about how subsection 1252(a)(2)(B)(i) should be construed—nor could it have persuasively done so, as it postdated subsection (B)(i) by nine years and five Congresses. *See Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) ("[T]he views of a subsequent Congress

form a hazardous basis for inferring the intent of an earlier one." (internal quotation marks omitted)).

Amicus also contends (at 38-39) that factual claims are more difficult and take longer to review than legal ones. Even assuming that proposition's accuracy, Congress addressed it through differing standards of review: de novo for legal claims, and substantial evidence for findings of fact. *See*, *e.g.*, *Biestek* v. *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (agency fact finding is upheld so long as there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). Indeed, the INA expressly permits courts to review the "administrative findings of fact" that undergird an order of removal. *See* 8 U.S.C. § 1252(b)(4)(B). And although amicus asserts (at 38, 39 & n.36) that subsection (b)(4)(B) imposes a "more deferential formulation" than traditional substantial evidence review, the courts of appeals have concluded otherwise. *See Limani* v. *Mukasey*, 538 F.3d 25, 30 (1st Cir. 2008) (citing subsection (b)(4)(B) and noting that "[w]e review the BIA's withholding of removal determinations under the deferential substantial evidence standard"); *see also*, *e.g.*, *Sall* v. *Gonzales*, 437 F.3d 229, 232 (2d Cir. 2006) (per curiam) (similar), *Garcia-Torres* v. *Holder*, 660 F.3d 333, 335 (8th Cir. 2011) (similar), *Etemadi* v. *Garland*, 12 F.4th 1013, 1020-1021 (9th Cir. 2021) (similar).[9]

[9] Amicus cherry-picks (at 38) a sentence from this Court's ruling in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), but that case both predated subsection (b)(4)(B) and expressly applied substantial evidence review, 502 U.S. at 481 ("The BIA's determination that Elias-Zacarias was not eligible for asylum must be upheld if 'supported by reasonable, substantial, and probative evidence on the record considered as a whole.'").

Finally, public policy clearly favors Petitioners' interpretation. Amicus's position would cut off existing access to judicial review for thousands of vulnerable noncitizens, ranging from victims of domestic abuse to those who fear violence if returned to their home countries. *See* AILA Amicus Br. 8-13, 19-20; Former EOIR Officials Amicus Br. 9. As several dozen former BIA members and IJs explain, immigration courts are severely overburdened and there is a significant danger that, absent judicial review, an IJ's errors on straightforward questions of fact "will go unseen and uncorrected." Former EOIR Officials Amicus Br. 9-16; *see also id.* 13-14 (cataloguing examples where "pressures on the immigration adjudication system have already produced significantly flawed results"). And once again, amicus's position would also foreclose all challenges to USCIS denials of discretionary immigration benefits—even for constitutional and legal questions—by people who seek to adjust to lawful permanent resident status and have never been in removal proceedings. *See* NILA Amicus Br. 5-11, 18-34. This includes people seeking to adjust status who have never once violated our immigration laws, such as a noncitizen student who marries a U.S. citizen, or a noncitizen on a temporary work visa whose employer sponsors her for a green card. NILA Amicus Br. 3-4, 21-22.

These potentially catastrophic results, which amicus nowhere seeks to justify, provide just one more reason—beyond the plain statutory text, structure, and context—to interpret subsection (B)(i) to bar review only of the ultimate second-step decision whether to grant relief in the exercise of discretion. Properly interpreted, the statute allowed Mr. Patel to pursue his appeal, and the Eleventh Circuit should have decided it on the merits.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted.

MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

JUSTIN M. BAXENBERG
JOSS A. BERTEAUD
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington DC 20006

MARGARET T. ARTZ
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

IRA J. KURZBAN
Counsel of Record
HELENA TETZELI
JOHN P. PRATT
EDWARD F. RAMOS
KEVIN A. GREGG
ELIZABETH MONTANO
KURZBAN KURZBAN
TETZELI & PRATT P.A.
131 Madeira Avenue
Coral Gables, FL 33134
(305) 444-0060
ira@kktplaw.com

THOMAS G. SPRANKLING
WILMER CUTLER PICKERING
HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306

NOVEMBER 2021