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 PETITIONERS


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## QUESTION PRESENTED

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

## PARTIES TO THE PROCEEDING

The petitioners are Pankajkumar S. Patel and Jyotsnaben P. Patel.[*] Respondent Merrick B. Garland is the Attorney General of the United States.

[*] Nishantkumar Patel sought relief in front of the court of appeals, but is not a petitioner here.

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**OTHER AUTHORITIES**

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## BRIEF FOR PETITIONERS

## INTRODUCTION

"For more than a century, Congress has afforded the Attorney General (or other executive officials) discretion to allow otherwise removable aliens to remain in the country." *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1478 (2021). These forms of discretionary relief vary and have changed over time, but they all share a common bipartite structure. First, Congress established threshold eligibility requirements defining who may be considered for relief. Second, Congress entrusted the Executive with the ultimate judgment whether to grant relief to eligible applicants. *See INS* v. *St. Cyr*, 533 U.S. 289, 307-308 (2001) (the "actual granting of [discretionary] relief" is "'in all cases a matter of grace'"). The Executive can only exercise its second-step discretion to grant relief to noncitizens who satisfy first-step eligibility requirements.

In 1996, Congress enacted 8 U.S.C. § 1252(a)(2)(B)(i), which bars judicial review of "any judgment regarding the granting of relief" specified in five provisions of the immigration law, each of which sets forth a form of discretionary relief. The question presented is whether subsection (B)(i) bars judicial review of agency determinations that a noncitizen is ineligible for relief because he or she does not satisfy a first-step, non-discretionary eligibility requirement. It does not. By its plain language, subsection (B)(i) bars review only of the second-step judgment whether to grant relief in the exercise of discretion: the Executive's "judgment regarding the granting of relief." It does not bar review of first-step decisions, devoid of discretion, that a noncitizen is ineligible even to be considered for such relief.

Subsection (B)(i) thus preserves judicial review of the question whether the agency properly evaluated Petitioner Pankajkumar Patel's eligibility for adjustment of status to lawful permanent resident (also known as a "green card"). After living and working in the United States for fifteen years, Mr. Patel applied to adjust his status to become a lawful permanent resident based on an approved immigrant visa petition filed by his employer. The agency determined that he failed to satisfy an eligibility requirement for that relief—admissibility to the United States—because, when completing a Georgia driver's license renewal application, he checked a box stating that he was a U.S. citizen. Although Mr. Patel testified that he checked that box inadvertently, the agency relied on the checkmark to find Mr. Patel inadmissible for "falsely represent[ing] … himself … to be a citizen of the United States" for a "benefit under … State law." 8 U.S.C. § 1182(a)(6)(C)(ii)(I). Because admissibility is a threshold eligibility requirement for adjustment of status, Mr.

Patel was barred from becoming a lawful permanent resident even before the Executive could exercise its discretion whether to grant him relief.

The Eleventh Circuit had jurisdiction to consider Mr. Patel's substantial-evidence challenge to the agency's determination that he was statutorily inadmissible and therefore ineligible to adjust his status. Mr. Patel's admissibility is a non-discretionary eligibility decision that precedes the Executive's "judgment regarding the granting of relief," so by its own terms subsection (B)(i) does not apply.

The Eleventh Circuit erred in holding otherwise. In its view, subsection (B)(i) bars review not only of ultimate judgments whether to grant relief, but also of first-step determinations about who is eligible for relief. That reading collapses the long-standing background distinction between first-step eligibility and second-step discretion against which Congress legislated. It is also inconsistent with Congress's other uses of "judgment" in the Immigration and Nationality Act as a term of art associated with exercises of discretion, as well as subsection (B)'s title, "Denials of discretionary relief." Moreover, subsection (B)(i)'s use of the full phrase "judgment regarding the granting of relief" makes plain that Congress meant to preserve jurisdiction to review precursor eligibility determinations—otherwise the limiting words "regarding the granting of relief" would have no effect. The strong presumption of judicial review over agency action fortifies the plain language of subsection (B)(i) and reinforces the preservation of Article III oversight of Congress's eligibility criteria for discretionary immigration relief.

Statutory context also supports Petitioners' interpretation. Subsection (B)(i)'s companion provision,

subsection (B)(ii), bars review of "any other decision or action … the authority for which is specified … to be in the discretion of the Attorney General or the Secretary of Homeland Security." Subsection (B)(ii)'s reference to "other" decisions specified to be in the Executive's discretion means that the "judgments" covered by subsection (B)(i) are also discretionary ones and so specified by the statute. *Kucana* v. *Holder*, 558 U.S. 233, 246-247 (2010) ("The proximity of clauses (i) and (ii), and the words linking them—"any other decision"—suggests that Congress had in mind decisions of the same genre, *i.e.*, those made discretionary by legislation."). Moreover, the narrow language Congress used in subsection 1252(a)(2)(B) contrasts sharply with expansive jurisdiction-stripping provisions contemporaneously enacted and directly adjacent. *See* 8 U.S.C. § 1252(a)(2)(A)(i) (no jurisdiction to review "any individual determination or to entertain any other cause or claim arising from" particular removal orders).

At the very least, subsection (B)(i) cannot reasonably be read to block Article III courts from reviewing precursor eligibility determinations that—like the one Mr. Patel challenges here—do not themselves involve the exercise of agency discretion specified by statute. Courts across the country—and the government itself—have rejected the en banc Eleventh Circuit's contrary position that subsection (B)(i) bars review of such claims. Because everyone—including the Eleventh Circuit and the government, *see* Pet. App. 31a (majority), 67a-68a (Martin, J., dissenting); U.S. Cert. Br. 18—agrees that Mr. Patel's challenge is to a *non-discretionary* eligibility determination, subsection (B)(i) simply does not apply.

The Eleventh Circuit's decision should be reversed.

## OPINIONS BELOW

The Eleventh Circuit panel's opinion (Pet. App. 79a-101a) is reported at 917 F.3d 1319. The en banc Eleventh Circuit's opinion (Pet. App. 1a-47a) is reported at 971 F.3d 1258.

The Immigration Judge's order (Pet. App. 111a-119a) is unreported. The decision of the Board of Immigration Appeals (Pet. App. 103a-108a) is unreported but available at 2017 WL 1045537.

## JURISDICTION

The en banc Eleventh Circuit issued its judgment on August 19, 2020. The petition for a writ of certiorari was timely filed on January 15, 2021, and granted as to the first question presented on June 28, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The following provisions of the Immigration and Nationality Act are reproduced in the appendix to this brief: 8 U.S.C. §§ 1182(a)(6)(C) and 1252(a)(2). *See* App. 1a-5a.

## STATEMENT

### A. Statutory Framework

**1.** The Immigration and Nationality Act ("INA") renders certain noncitizens removable from the United States for being inadmissible, 8 U.S.C. § 1182, or deportable, *id.* § 1227. *See Barton* v. *Barr*, 140 S. Ct. 1442, 1446 (2020).

Because these grounds of removability "have historically been defined broadly," *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001), and given the "'drastic'" consequences

that follow from removal, *Padilla* v. *Kentucky*, 559 U.S. 356, 360 (2010), Congress has authorized Executive Branch officials to grant relief from removal to certain classes of noncitizens. The granting of such relief generally prevents a removal order from issuing. *See, e.g.*, *Foti* v. *INS*, 375 U.S. 217, 223 (1963) (when relief "is granted, no deportation order is rendered at all, even if the alien is in fact found to be deportable").

Congress has made most forms of immigration relief discretionary. Although discretionary relief takes various forms, they typically share the same basic structure. First, Congress prescribes threshold eligibility requirements that define which noncitizens are eligible for each form of discretionary relief. Second, Congress entrusts the Executive with the ultimate decision whether to grant such relief to eligible noncitizens as a matter of discretion. *See Jay* v. *Boyd*, 351 U.S. 345, 353-354 (1956) (distinguishing an "applicant's eligibility" for relief from the discretionary decision of who "should receive the ultimate relief"); *Foti*, 375 U.S. at 228-229 & n.15 (discussing "eligibility requirements" for relief as distinct from the second-step decision to grant or deny relief "as a discretionary matter"); *St. Cyr*, 533 U.S. at 307-308 ("Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other."); *see also* 8 U.S.C. § 1229a(c)(4)(A) (applicants for relief from removal bear the burden of establishing (i) that they "satisf[y] the applicable eligibility requirements," and (ii) "with respect to any form of relief that is granted in the exercise of discretion, that [they] merit[] a favorable exercise of discretion"). The Executive's decision at the final step—whether to grant relief—is indisputably discretionary. *See St. Cyr*, 533 U.S. at 307-308; *Trejo* v.

*Garland*, 3 F.4th 760, 772-773 (5th Cir. 2021); *see also*, *e.g.*, *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1478 (2021) (whether to grant cancellation of removal is ultimately "discretion[ary]"); *id.* at 1497 (Kavanaugh, J., dissenting) (noting that threshold eligibility does not mean "noncitizens will actually *receive* cancellation" because "[c]ancellation of removal is discretionary").

The discretionary relief at issue in this case—adjustment of status to lawful permanent resident, 8 U.S.C. § 1255—reflects this two-step structure.

First, Congress set forth detailed eligibility requirements defining the noncitizens eligible to adjust their status to lawful permanent resident (also known as a "green card"). To be eligible, a noncitizen generally must: (1) have been "inspected and admitted or paroled into the United States" (with certain defined exceptions); (2) be "admissible to the United States for permanent residence"; and (3) have "an immigrant visa … immediately available" when the adjustment application is filed. 8 U.S.C. § 1255(a). Noncitizens are generally ineligible if, among other things, they were admitted in selected visa categories (*e.g.*, status of alien crewmen), worked without authorization, or are deportable under specified grounds. *Id.* § 1255(c).

Congress also altered these general eligibility requirements for specified classes of noncitizens, including certain noncitizens who "entered the United States without inspection." *Id.* § 1255(i). To be eligible for adjustment under Section 1255(i), noncitizens who entered without inspection generally must: (1) be the beneficiary of a visa petition or labor certification filed on or before April 30, 2001; (2) be physically present in the United States for a specified period; and (3) pay $1,000. *Id.* § 1255(i)(1). Like other applicants for ad-

justment of status, noncitizens are eligible under Section 1255(i) only if they have "an immigrant visa … immediately available" and are "admissible to the United States for permanent residence." *Id.* § 1255(i)(2).

Second, if a noncitizen satisfies the applicable eligibility requirements, the Attorney General "may" grant adjustment of status "in his discretion." *Id.* § 1255(a), (i)(2). Because the final-step decision whether to grant relief is discretionary, "mere eligibility for th[e] privilege [of adjustment of status] will not automatically result in a grant of the application." *Matter of Arai*, 13 I. & N. Dec. 494, 495 (BIA 1970); *see* 7 USCIS Policy Manual, pt. A, ch. 10, B.1 (A noncitizen who has satisfied "eligibility requirements contained in the law is not automatically entitled to adjustment of status. The applicant still has the burden of proving that he or she warrants a favorable exercise of discretion.").[1] To decide whether to exercise discretion favorably, the agency weighs "favorable factors such as family ties, hardship, [and] length of residence in the United States" against any adverse factors. *Arai*, 13 I. & N. Dec. at 495-496; *see also* 7 USCIS Policy Manual, pt. A, ch. 10, B.1.

**2.** Congress has given the courts of appeals jurisdiction to review final orders of removal. 8 U.S.C. § 1252(a). This review encompasses decisions on which the removal order's validity depends, including decisions on relief from removal. *See Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1691 (2020) ("review of a final order of removal 'includes all matters on which the validity of the final order is contingent'" (quoting *INS* v. *Chadha*, 462 U.S. 919, 938 (1983))); *see also* 8 U.S.C. § 1252(b)(9).

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[1] https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10 (visited Aug. 31, 2021).

Historically, courts have exercised jurisdiction to review all decisions on discretionary relief—including both first-step determinations on "eligibility requirements" and the second-step decision to deny relief "as a discretionary matter." *Foti*, 375 U.S. at 228-229 & n.15 (denial of relief "as a discretionary matter is reviewable … for arbitrariness and abuse of discretion"); *see also, e.g.*, *Yepes-Prado* v. *INS*, 10 F.3d 1363, 1367-1370 (9th Cir. 1993) (vacating discretionary denial for abuse of discretion because noncitizen's extramarital sexual conduct "was wholly irrelevant to any determination as to [the noncitizen's] character"); *Diaz-Resendez* v. *INS*, 960 F.2d 493, 496 (5th Cir. 1992) (vacating discretionary denial because agency "did not properly weigh serious positive equities"); *Drobny* v. *INS*, 947 F.2d 241, 246 (7th Cir. 1991) (vacating discretionary denial because agency failed to inquire into noncitizen's paternity).

In 1996, Congress altered the judiciary's authority to review discretionary decisions in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. The first relevant IIRIRA provision to take effect was a transitional rule, applicable to noncitizens in proceedings before IIRIRA's effective date, which barred "appeal[s] of any discretionary decision under" five specified INA provisions. *See* IIRIRA § 309(c)(4)(E), 110 Stat. at 3009-626.[2]

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[2] The five provisions were: waivers of certain criminal grounds of inadmissibility under 8 U.S.C. § 1182(h); waivers of inadmissibility for fraud or material misrepresentation under 8 U.S.C. § 1182(i); adjustment of status under 8 U.S.C. § 1255; and two forms of relief repealed by IIRIRA—relief under former INA Section 212(c), 8 U.S.C. § 1182(c) (1994), and suspension of deportation under former INA Section 244, 8 U.S.C. § 1254 (1994).

Courts interpreted IIRIRA's transitional rule to bar review of the second-step discretionary decision whether to grant relief, but to preserve review over non-discretionary first-step eligibility decisions. *See, e.g.*, *Billeke-Tolosa* v. *Ashcroft*, 385 F.3d 708, 711 (6th Cir. 2004); *Gonzales-Torres* v. *INS*, 213 F.3d 899, 901 (5th Cir. 2000).

The permanent IIRIRA rule, codified in relevant part at 8 U.S.C. § 1252(a)(2)(B), took effect on April 1, 1997. Subsection 1252(a)(2)(B)(i), at issue here, removed jurisdiction to review "any judgment regarding the granting of relief" under five specified INA provisions, three of which had been listed in the transitional rule. The provisions governing these five forms of relief use the same basic structure discussed above: they establish first-step threshold eligibility requirements, while specifying that the second-step decision to grant relief is discretionary. *See* 8 U.S.C. §§ 1182(h) (Attorney General "may, in his discretion," grant inadmissibility waiver); 1182(i) ("[t]he Attorney General may, in his discretion," grant inadmissibility waiver); 1255(a) (noncitizen's status "may be adjusted by the Attorney General, in his discretion"); 1229b(a), (b) (the Attorney General "may cancel removal"); 1229c(a), (b) (the Attorney General "may permit" voluntary departure).

The following subsection, 8 U.S.C. § 1252(a)(2)(B)(ii), removed jurisdiction to review "any other decision or action of the Attorney General … the authority for which is specified under this subchapter to be in the discretion of the Attorney General …, other than the granting of relief under section 1158(a) [asylum]."

Courts of appeals interpreted the permanent rule, as they had the transitional rule, to preserve review of first-step non-discretionary determinations regarding

an applicant's eligibility for relief. *See, e.g.*, *Mendez-Moranchel* v. *Ashcroft*, 338 F.3d 176, 178 (3d Cir. 2003); *Montero-Martinez* v. *Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002).

In the REAL ID Act of 2005, reacting to this Court's decision in *St. Cyr*, Congress amended section 1252(a)(2) to add a new subparagraph providing in relevant part that "[n]othing in subparagraph (B) … shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals[.]" 8 U.S.C. § 1252(a)(2)(D); *see St. Cyr*, 533 U.S. at 300 (suggesting that a contrary rule that "would entirely preclude review of a pure question of law by any court" would raise constitutional concerns). At the same time, Congress added language to subsection 1252(a)(2)(B) to clarify that it applies outside of removal proceedings, including to habeas proceedings. *See* Pub. L. No. 109-13, § 101(f), 119 Stat. 231, 305 (2005) (adding that Section 1252(a)(2)(B) applies "regardless of whether the judgment, decision, or action is made in removal proceedings"); *id.* § 106(a)(1)(A)(ii), 119 Stat. at 310 (Section 1252(a)(2)(B) applies "[n]otwithstanding any other provision of law" "(statutory or nonstatutory), including [28 U.S.C. § 2241], or any other habeas corpus provision"). Congress, however, preserved the operative language of subsection (B)(i) (*i.e.*, "any judgment regarding the granting of relief"), and courts of appeals continued to interpret that subsection to preserve review of non-discretionary eligibility determinations. *See, e.g.*, *Mamigonian* v. *Biggs*, 710 F.3d 936, 945 (9th Cir. 2013) (analyzing 2005 amendment).

### B. Agency Proceedings

Petitioner Pankajkumar Patel is a citizen of India who has lived in the United States for nearly thirty years. After entering the country without inspection in 1992, Mr. Patel moved to Georgia, where he lives with his wife, Petitioner Jyotsnaben Patel. They have three sons—one U.S. citizen and two lawful permanent residents. Administrative Record ("AR") 221-223, 245.

In August 2007, Mr. Patel applied for adjustment of status under 8 U.S.C. § 1255(i), with his wife and two elder sons included as derivative applicants. *See* AR61, 74-75.[3] Because Mr. Patel was not in removal proceedings at the time, United States Citizenship and Immigration Services, a component of the Department of Homeland Security ("DHS"), "ha[d] jurisdiction to adjudicate [the] application." 8 C.F.R. § 245.2(a)(1). The application was based on a labor certification filed on Mr. Patel's behalf by his employer in April 2001, AR431, and an approved visa petition (Form I-140), such that an "immigrant visa" was "immediately available" to him, 8 U.S.C. § 1225(i)(2)(B). DHS issued Mr. Patel an employment authorization document ("EAD") while his adjustment of status application was pending. *See* AR48-50, 52.

In December 2008, Mr. Patel sought to renew his Georgia driver's license. AR237-238. Mr. Patel had applied for and received a Georgia driver's license on several prior occasions, AR237-238, and was eligible for

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[3] Mr. Patel's elder sons, Nikhil and Nishantkumar, were later granted lawful permanent residence as spouses of U.S. citizens. *See In re Nishantkumar Patel*, 2017 WL 4418375, at *2 (BIA July 11, 2017) (reopening Nishantkumar's removal proceedings for this purpose).

a driver's license as a noncitizen with a pending application for adjustment of status and a valid EAD.[4] When filling out the renewal application, Mr. Patel answered the question "Are you a U.S. Citizen?" by checking "yes." AR235-236. Mr. Patel has consistently stated that this was an inadvertent mistake.

DHS denied Mr. Patel's application for adjustment of status based on this errant checkmark, finding that Mr. Patel had falsely represented himself to be a U.S. citizen for the purpose of obtaining a Georgia driver's license. This misrepresentation, DHS asserted, made him inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii)(I), and therefore statutorily ineligible for adjustment of status. AR73-75; *see* 8 U.S.C. § 1255(i)(2)(A).

DHS then placed Mr. Patel in removal proceedings. Although it had denied the adjustment application because Mr. Patel was supposedly inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii)(I), DHS did not charge that inadmissibility ground as a basis for removal. Instead, DHS charged Mr. Patel as inadmissible (and thus removable) only for being present in the United States without having been admitted or paroled. *See* 8 U.S.C. § 1182(a)(6)(A)(i); Pet. App. 3a.

As a defense to removal, Mr. Patel renewed his application to adjust status under 8 U.S.C. § 1255(i). *See* 8 C.F.R. § 245.2(a)(5)(ii) (noncitizens generally "retain[]

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[4] Before 2006, Georgia issued driver's licenses of equal duration to citizens and noncitizens. *See* Ga. Code Ann. § 40-5-32 (1998); *see also* Ga. Code Ann. § 40-5-21.1 (2005) (amending the law effective July 1, 2006, to provide for licenses of shorter duration to noncitizens who establish lawful presence in the United States). At the time of his driver's license renewal application in 2008, Mr. Patel's EAD was sufficient to establish his lawful presence for purposes of a Georgia driver's license. *See* Pet. 10 & n.4.

the right to renew" an application for adjustment of status "in [removal] proceedings"). DHS then raised Mr. Patel's alleged inadmissibility for making a false citizenship claim under 8 U.S.C. § 1182(a)(6)(C)(ii)(I), arguing that Mr. Patel's inadmissibility under that ground rendered him statutorily ineligible for adjustment of status.

At his removal hearing, Mr. Patel testified that he had checked the "U.S. citizen" box on his Georgia driver's license application by mistake, and argued that he therefore lacked the intent required to trigger inadmissibility under § 1182(a)(6)(C)(ii)(I). AR235-236; *see Matter of Richmond*, 26 I. & N. Dec. 779, 784 (BIA 2016) (inadmissibility triggered only when the misrepresentation is made "with the subjective intent to obtain a purpose or benefit").[5]

The Immigration Judge ("IJ") rejected Mr. Patel's testimony. Pet. App. 115a. While the IJ criticized Mr. Patel's testimony in various respects, a key reason for the IJ's disbelief was his incorrect assumption that Mr. Patel could not have obtained a Georgia driver's license "had [he] disclosed that he was neither a citizen [n]or a lawful permanent resident o[f] the United States," implying that Mr. Patel must have lied about his citizenship to qualify for a license. *Id.* 116a. The IJ thus concluded that Mr. Patel was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii)(I) and therefore statutorily ineligible for adjustment of status. Having determined that Mr.

[5] Mr. Patel argued in the alternative that his misstatement did not trigger subsection 1182(a)(6)(C)(ii)(I) because it was immaterial to his driver's license application. The Eleventh Circuit, however, held that subsection 1182(a)(6)(C)(ii)(I) includes no materiality element, Pet. App. 47a, and this Court declined to review that question when it granted certiorari.

Patel did not meet a threshold eligibility requirement for adjustment, the IJ never discussed whether Mr. Patel warranted a favorable exercise of discretion at the second step.

A divided panel of the Board of Immigration Appeals ("BIA") affirmed. Pet. App. 103a-108a. As relevant here, the majority upheld the IJ's finding that Mr. Patel intentionally checked the "U.S. citizen" box. *Id.* 106a-107a. The majority also agreed with the IJ that the "'implication of the questions set forth in the driver's license application is that [Mr. Patel] needed to show that he was either a citizen or a lawfully *admitted* alien in order to obtain the driver's license.'" *Id.* 108a (emphasis added). The Board therefore affirmed the IJ's decision that Mr. Patel was statutorily ineligible for adjustment of status and, as a result, did not discuss whether Mr. Patel merited a favorable exercise of discretion. One Board member dissented, pointing out that pertinent Georgia law did not require citizenship or lawful admission for a Georgia driver's license, but merely "lawful *presence* in the United States," which Mr. Patel satisfied through his "valid employment authorization document *and* a pending adjustment of status application." *Id.* 109a-110a (Wendtland, Board Member, dissenting) (first emphasis added).

### C. Eleventh Circuit Proceedings

Mr. Patel petitioned the Eleventh Circuit for review of the BIA's decision, contending (in relevant part) that the agency's finding that he knowingly checked the "U.S. citizen" box on the driver's license application was not supported by substantial evidence. Although the government agreed that the Eleventh Circuit had jurisdiction to review that issue, the panel

ruled *sua sponte* that 8 U.S.C. § 1252(a)(2)(B)(i) deprived it of jurisdiction. Pet. App. 84a-90a.

The Eleventh Circuit then *sua sponte* ordered the case reheard en banc. By a 9-5 vote, the en banc majority agreed with the panel that subsection 1252(a)(2)(B)(i) barred review even of threshold eligibility questions, and that it therefore lacked jurisdiction to resolve Mr. Patel's substantial-evidence challenge to the agency's finding that he intentionally misstated his citizenship. Pet. App. 1a-77a. The majority acknowledged that it was overruling "numerous cases" holding that courts "retain jurisdiction to review non-discretionary decisions underlying [types of discretionary] … relief" specified under subsection 1252(a)(2)(B)(i). *Id.* 3a. The majority also recognized that its jurisdictional ruling conflicted with the holdings of most other circuits. *Id.* 32a-33a nn.22-23, 41a-42a n.30.

Judge Martin dissented, joined by four other judges. Judge Martin wrote that the majority's reading of subsection 1252(a)(2)(B)(i) "[i]gnor[ed] the guideposts of the strong presumption of judicial review and the narrow interpretation of deportation statutes." Pet. App. 54a. She concluded that, given those interpretive canons, "[t]he best interpretation of § 1252(a)(2)(B) is that it excludes review of decisions that involve the exercise of discretion"—an approach that "has been adopted by almost every circuit court." *Id.* 65a. And, citing *Kucana*, she stressed that "when a statute is reasonably susceptible to different interpretations, we must adopt the interpretation permitting federal court review." *Id.* 53a. Judge Martin would have held that the Eleventh Circuit had jurisdiction "to review the IJ's finding that Mr. Patel's false claim of citizenship was made with subjective intent." *Id.* 77a.

Mr. Patel petitioned for certiorari, and the government agreed that subsection (B)(i) does not bar review of Mr. Patel's challenge to the IJ's intent finding. U.S. Cert. Br. 12. This Court granted certiorari on that question.

## SUMMARY OF ARGUMENT

Best interpreted, Section 1252(a)(2)(B)(i) bars judicial review of the Executive's second-step "judgment regarding the granting of relief" for the five forms of discretionary relief enumerated in subsection (B)(i). It does not bar review of first-step decisions about whether a noncitizen is *eligible* for such an exercise of discretion.

That result flows directly from the plain language of subsection (B)(i), which bars review only of the "judgment regarding the granting of relief under" five enumerated INA provisions. The INA uses the word "judgment" to reference either a discretionary determination or a formal order of a court. While the former meaning is the more natural reading in this context, either definition is cabined by the limiting language that immediately follows: "regarding the granting of relief." This language—which refers to the providing of any redress or benefit—necessarily refers to the Executive's second-step decision whether an eligible applicant deserves relief in the exercise of discretion. A first-step ruling on eligibility does not "grant[] … relief" to a noncitizen, because the Executive retains full authority to deny any benefit at the second step. Only Petitioners' interpretation gives full meaning to the statutory phrase "regarding the granting of relief," which the Eleventh Circuit's interpretation renders superfluous.

Petitioners' reading of subsection (B)(i) is supported not only by the statutory text, but also by the settled understanding that rulings on discretionary relief are divided into two distinct steps: (1) a determination whether the noncitizen is *eligible* for relief, and (2) the adjudicator's judgment whether to *grant* that relief as a discretionary matter. Had Congress wanted to expand subsection (B)(i)'s scope beyond the ultimate decision whether to exercise discretion to grant relief, it knew how to do so and in fact did so in the subsection immediately preceding subsection (B)(i). *See* 8 U.S.C. § 1252(a)(2)(A)(i) (stripping review of "any individual determination" related to a specified kind of removal proceeding).

Moreover, reading subsection (B)(i) to bar review of only the ultimate discretionary decision whether to grant relief makes sense for several other reasons. It is consistent with this Court's interpretation of subsection 1252(a)(2)(B) in *Kucana* v. *Holder*, 558 U.S. 233 (2010). It creates an easily administrable rule for determining jurisdiction. And it aligns with the presumption favoring judicial review of agency actions.

At the very least, subsection (B)(i) cannot bar review of eligibility determinations that are not themselves specified as discretionary under the statute. While this alternative reading is not the best fit with the statute's full phrase "judgment regarding the granting of relief," it is at least consistent with the use of "judgment" elsewhere in the INA, which refers to a discretionary determination.

By contrast, the Eleventh Circuit's interpretation—*i.e.*, that subsection (B)(i)'s reference to "any judgment" means "any decision" related to the five enumerated INA provisions—is unsupportable. The

Eleventh Circuit's approach reads the words "regarding the granting of relief" out of the statute and places undue weight on the words "any" and "regarding"—in violation of this Court's guidance in cases like *National Ass'n of Manufacturers* v. *Department of Defense*, 138 S. Ct. 617, 629 (2018) and *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 840 (2018) (plurality opinion). The Eleventh Circuit's reading also flips the presumption of reviewability on its head by requiring Congress to use specific language in order to *preserve* jurisdiction to review agency rulings. Finally, the Eleventh Circuit's approach would allow arbitrary charging decisions to shield agency decision-making from judicial review, contrary to this Court's guidance that subsection 1252(a)(2)(B) should not be read to give the Executive a "free hand to shelter its own decisions from appellate court review." *Kucana*, 558 U.S. at 252.

The Eleventh Circuit's decision should be reversed.

## ARGUMENT

### I. THE STATUTORY TEXT AND STRUCTURE—AND APPLICABLE CANONS OF CONSTRUCTION—MAKE CLEAR THAT SUBSECTION 1252(a)(2)(B)(i) DOES NOT BAR JUDICIAL REVIEW OF NON-DISCRETIONARY ELIGIBILITY DECISIONS

#### A. The Phrase "Judgment Regarding the Granting of Relief" In Subsection 1252(a)(2)(B)(i) Refers Only To The Ultimate Judgment Whether To Grant Discretionary Relief, Not To Precursor Eligibility Determinations

Statutory interpretation necessarily "begins … with a careful examination of the statutory text." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017). Subsection (B)(i) bars review of "judg-

ment[s] regarding the granting of relief" under five statutory provisions specifying discretionary relief from removal. This phrase most naturally describes the Executive's second-step judgment whether to grant relief as a discretionary matter—not first-step determinations of a noncitizen's *eligibility* for such relief.

**1.** The word "judgment" most naturally describes decisions that involve the weighing or balancing of factors by the decisionmaker, often involving matters within the decisionmaker's unique power or authority. *See*, *e.g.*, *Webster's Third New International Dictionary* (1993) (defining "judgment" as "the mental or intellectual process of forming an opinion or evaluation by discerning and comparing" or "an opinion or estimate so formed"); *American Heritage Dictionary of the English Language* (1992) ("An opinion or estimate formed after consideration or deliberation, especially a formal or authoritative decision.").

That word aptly describes the Executive's discretionary second-step decision whether to grant relief. For all forms of discretionary relief, the "actual granting of relief [is] 'not a matter of right under any circumstances, but rather is in all cases a matter of grace.'" *INS* v. *St. Cyr*, 533 U.S. 289, 308 (2001) (quoting *Jay* v. *Boyd*, 351 U.S. 345, 353-354 (1956)). That second-step decision, by its nature, requires the Executive to form an "authoritative" "opinion" on a noncitizen's worthiness for relief by "comparing" positive and negative factors on a case-by-case basis. *See Matter of Arai*, 13 I. & N. Dec. 494, 495 (BIA 1970) (second-step discretion "must of necessity be resolved on an individual basis" by weighing positive factors against adverse ones); *Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998) ("there is no inflexible standard for determining who should be granted discretionary relief, and each case

must be judged on its own merits" by "balanc[ing]" positive and negative factors). "Judgment" in subsection 1252(a)(2)(B)(i) thus naturally "refers to the adjudicator's independent evaluation" as to "who among the eligible persons should be granted discretionary relief." *Trejo* v. *Garland*, 3 F.4th 760, 767 (5th Cir. 2021) (citation omitted).

Consider the eligibility requirements for adjustment of status, the relief sought by Mr. Patel. Congress requires a noncitizen seeking such relief to "make[] an application for such adjustment." 8 U.S.C. § 1255(a)(1). A decision whether a noncitizen filed the requisite application is not naturally described as a "judgment." The same is true of the requirement that a noncitizen pay a $1,000 fee, *id.* § 1255(i)(1), or that a labor certification on the noncitizen's behalf be filed on or before April 30, 2001, *id.* § 1255(i)(1)(B)(ii). So too with the eligibility requirement at issue here: that the applicant be "admissible to the United States for permanent residence." *Id.* § 1255(i)(2)(A). To be sure, the agency must decide whether these eligibility criteria are satisfied. But such decisions are not subjective "opinions or estimates," and they lack the inherent "discerning and comparing" function that characterizes a "judgment."

Alternatively, the word "judgment" could be read to mean a "formal order," as it does elsewhere in the INA. *See Montero-Martinez* v. *Ashcroft*, 277 F.3d 1137, 1141 n.5 (9th Cir. 2002) (collecting citations).[6] While

[6] *See also*, *e.g.*, "Judgment," *Black's Law Dictionary* (6th ed. 1990) (including, *inter alia*, "[t]he final decision of the court resolving the dispute and determining the rights and obligations of the parties"); "Judgment," *Oxford English Dictionary* (2d ed. 1989) ("the sentence of a court of justice; a judicial decision or order in court"); "Judgment," *Webster's Third New International Diction-*

this is not the most natural fit—because Congress used "judgment" in this sense to refer to the formal order of a *court*, not an administrative body, *id.*—this alternative meaning of "judgment" also supports Petitioners' interpretation. A court's ultimate "judgment" is separate from its underlying reasoning, as when a Member of this Court "concurs in the judgment." Indeed, this Court has explained that "the judgment is typically a routine order directing that the decision of this Court be carried into effect." *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425, 428 (1978); *see also* Shapiro et al., *Supreme Court Practice* 15-27 to 15-28 (11th ed. 2019) ("Ordinarily, the Clerk forwards to the lower federal court a copy of the opinion or order of the Supreme Court together with a certified copy of its judgment."). Because the final decision on discretionary relief is the second-step decision to grant or deny relief in the exercise of discretion—not preliminary decisions on statutory eligibility—that sense of "judgment" supports reading (B)(i) to bar review only of that final-step discretionary decision to grant or deny relief. *See* Pet. App. 24a, 27a (Eleventh Circuit majority suggesting that interpreting judgment to "mean[] the final decision of a court" supports reading subsection (B)(i) to apply only to ultimate decision whether to grant relief).

Regardless of which of these definitions of "judgment" is adopted, the words that follow "judgment" confirm that subsection (B)(i)'s jurisdiction-stripping reach is limited to the Executive's second-step discretionary decision whether to grant relief. Subsection (B)(i) strips jurisdiction not over "any judgment," but over "any judgment *regarding the granting of relief*"

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*ary* (1993) ("a formal utterance or pronouncing of an authoritative opinion after judging").

under the five specified provisions. 8 U.S.C. § 1252(a)(2)(B)(i) (emphasis added). The natural meaning of that language is that it bars review of the Executive's discretionary judgment whether to "grant[] … relief"—not of threshold eligibility rulings that are gateways to that discretionary judgment. *See, e.g.*, *Mendez* v. *Holder*, 566 F.3d 316, 319-322 (2d Cir. 2009) (per curiam) (panel noting that, but for circuit precedent, it would have adopted this approach).

Congress's use of the words "granting" and "relief" reinforces that conclusion. This Court has explained that the "familiar meaning" of the phrase "grant relief" is "'redress or benefit' provided by a court." *See United States* v. *Denedo*, 556 U.S. 904, 909-910 (2009); *accord Fry* v. *Napoleon Cmty. Sch.*, 137 S. Ct. 743, 753 ("The ordinary meaning of 'relief' in the context of a lawsuit is the 'redress[] or benefit' that attends a favorable judgment[.]"). Only the Executive's second-step exercise of discretion has the capacity to provide a noncitizen with the "redress or benefit" of avoiding removal. First-step eligibility rulings, in contrast, provide no real redress or benefit, because the Executive retains authority to deny the relief sought regardless of eligibility.

Indeed, even taking the word "grant" in isolation favors Petitioners' interpretation, as it means "[t]o consent to the fulfillment of," or "[t]o accord as a favor, prerogative, or privilege." *American Heritage Dictionary of the English Language* (1992). That aptly describes the Executive's final-step decision to grant (or withhold) relief in the exercise of discretion. *St. Cyr*, 533 U.S. at 307-308; *see Matter of Arai*, 13 I. & N. Dec. at 495 (the Executive's discretionary power to grant adjustment means "mere eligibility for that privilege will not automatically result in a grant of the application"). The word "grant" thus often implies the power

to give "something that … could be withheld." *Webster's Third New International Dictionary* (1993). But when the agency concludes that a noncitizen is statutorily ineligible for relief, it is not refusing to "consent" to an award of relief, nor is it deciding to withhold "a favor, prerogative, or privilege." Instead, it is deciding that it lacks the authority even *to consider* such a grant. Indeed, this Court itself used the exact phrase "granting of relief" to describe final-step exercises of discretion, as distinguished from first-step eligibility decisions. *St. Cyr*, 533 U.S. at 307-308 ("Eligibility that was 'governed by specific statutory standards' provided 'a right to a ruling on an applicant's eligibility,' even though *the actual granting of relief* was 'not a matter of right under any circumstances[.]'" (emphasis added)); *see also infra* pp. 28-29 (discussing use of the phrase in subsection (B)(ii)).

Finally, reading subsection (B)(i) to apply only to the ultimate decision whether to grant relief gives meaning to every word in the provision. In contrast, the Eleventh Circuit's interpretation—which bars review of all precursor eligibility determinations, *see infra* pp. 36-37—renders the words "regarding the granting of relief" entirely superfluous. *See Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (quotation marks omitted)). Under the Eleventh Circuit's view, subsection (B)(i) would have the same meaning if that language were struck, and the provision read: "no court shall have jurisdiction to review any judgment ~~regarding the granting of relief~~ under" the five enumerated forms of discretionary relief. Petitioners' interpretation, on the other hand, gives meaning to the entire phrase by making clear that subsection (B)(i) covers only the ultimate judgment "regarding the granting of relief"—namely

the second-step judgment whether to grant relief to an eligible applicant as a matter of discretion. *See iTech U.S., Inc.* v. *Renaud*, 5 F.4th 59, 65 & n.4 (D.C. Cir. 2021) (describing the phrase "regarding the granting of relief" as "limiting" language).

In sum, "judgment regarding the granting of relief" naturally refers to the Executive's discretionary "judgment" whether to "grant[] … relief"—not to first-step decisions on whether a noncitizen is *eligible* for relief. *See St. Cyr*, 533 U.S. at 307-308 (explaining that the second-step decision of "*the actual granting of relief* [i]s 'not a matter of right under any circumstances'" (emphasis added)).[7]

**2.** Subsection (B)(i)'s meaning is also informed by the greater context in which it is "embedded," which illuminates the particular clause "consider[ed] in connection with … the whole statute." *Kucana*, 558 U.S. at 244 (quoting *Dada* v. *Mukasey*, 554 U.S. 1, 16 (2008)); *see also* Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2121 (2016) ("Courts should seek the *best reading* of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons.").

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[7] The phrase "regarding the granting of relief" could also be given meaning by reading it to bar judicial review only of *grants* of relief, while preserving review of *denials* of relief. Pet. App. 86a n.4 (panel majority opinion suggesting this interpretation); *see also* 8 Gordon et al., *Immigration Law and Procedure* § 104.13[6][e][i] (July 2021 update) ("Congress's choice of words, particularly in contrast to the language chosen in other subsections of [the same statute] supports" the view that subsection (B)(i) "does not limit review when a petitioner is denied relief."). That interpretation would also warrant reversal here, because Petitioners challenge a denial of relief, not a grant.

In particular, the conclusion that subsection (B)(i) applies only to the second-step decision whether to grant relief is reinforced when subsection (B)(i) is viewed alongside its neighboring subsection, (B)(ii). Subsection (B)(ii) refers to "*other* decision[s] or action[s]" that are "specified" by statute "to be in the discretion of the Attorney General or the Secretary of Homeland Security." (Emphasis added). That phrasing indicates that subsection (B)(i), like subsection (B)(ii), also covers decisions or actions that are specified by statute to be discretionary. *See Kucana*, 558 U.S. at 251 ("The proximity of clause (i) and the clause (ii) catchall, and the words linking them—'any other decision'—suggests that Congress had in mind decisions of the same genre, *i.e.* those made discretionary by legislation."). This condition—that the covered decisions are specified by statute to be discretionary—applies to the second-step decision whether to grant discretionary relief. *See supra* p. 10 (noting that all five provisions covered by subsection (B)(i) state that Executive "may" grant relief). It does not, however, describe objective first-step eligibility criteria.

Congress's use of "judgment" in subsection (B)(i), as contrasted with the broader words "decision or action" in subsection (B)(ii), is also significant. Had Congress meant to bar review of threshold eligibility criteria for the five specified forms of relief in subsection (B)(i), it could have replicated subsection (B)(ii)'s use of "decision or action" (while omitting (B)(ii)'s requirement that such decisions or actions be "discretion[ary]"). Instead, Congress used a narrower term—"judgment regarding the granting of relief." Congress's use of that language in subsection (B)(i), rather than the broader words it used elsewhere, most natu-

rally describes final-step determinations whether noncitizens are worthy of relief.

Congress's uses of "judgment" in other parts of the INA match Petitioners' interpretation. In several provisions, Congress used the word to refer to other decisions uniquely within the discretion of the Executive Branch. *See Montero-Martinez*, 277 F.3d at 1141 n.5. For example, Congress has provided that:

- The Attorney General may "detail [certain employees] for duty in foreign countries" "whenever in his judgment such action may be necessary," 8 U.S.C. § 1103(a)(7);
- A "supervisor" is defined as an individual with the authority to make certain hiring and firing decisions if "the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment," Immigration Act of 1990, Pub. L. No. 101-649, § 124(d)(5), 104 Stat. 4978, 4997 (8 U.S.C. § 1153 note); and
- A noncitizen may be removed to "any country which the [noncitizen] shall designate if such designation does not, in the judgment of the Attorney General … impair the obligation of the United States under any treaty," 8 U.S.C. § 1537(b)(2)(A).

This Court "does not lightly assume that Congress silently attaches different meanings to the same term in the same … statute[]." *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). The Court should therefore interpret "judgment" in (B)(i) consistent with Congress's other uses of the word in the INA. (As indicated above, this canon would also potentially support interpreting judgment to mean a "formal order," which also supports Petitioners' interpretation. *See supra* pp. 21-22.)

Petitioners' interpretation also best respects the longstanding "distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *St. Cyr*, 533 U.S. at 307-308; *see supra* pp. 6-8. It is no coincidence that each of the five provisions covered by subsection (B)(i) is a form of discretionary immigration relief deploying this traditional two-part structure. First, the agency determines whether the applicant is *eligible* for relief. Second, if the applicant is eligible, the agency decides whether to *grant* the relief in the exercise of discretion. Because Congress made a deliberate choice to strip the courts of jurisdiction only over judgments "regarding the granting of relief," subsection (B)(i) does not bar review of first-step eligibility determinations.

Notably, subsection (B)(ii) likewise uses the phrase "the granting of relief" to refer only to the ultimate decision whether to grant relief in the exercise of discretion. Subsection (B)(ii) removes jurisdiction over "any decision or action … the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security," but then exempts from its jurisdiction-stripping reach "*the granting of relief* under section 1158(a) of this title," which governs asylum. 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added).

This language shows that "the granting of relief" under the INA's asylum provisions would—but for the exception—be considered a decision or action "the authority for which is specified under this subchapter to be in the discretion of the" Executive, and thus not otherwise subject to judicial review. *See* 8 U.S.C. § 1252(a)(2)(B)(ii); *see also* H.R. Rep. No. 104-828 at 219 (1996) (Conf. Rep) (explaining that the asylum exception to (B)(ii) covers "a discretionary judgment whether to grant asylum"); *Ku-*

*cana*, 558 U.S. at 246-247 n.13 (observing that "[a]bsent the exception, asylum applicants might fall within § 1252(a)(2)(B)(ii)'s jurisdictional bar"). But it is only the *second-step* decision whether to grant asylum *in the exercise of discretion* that is statutorily specified to be in the Attorney General's discretion. *See Department of Homeland Sec.* v. *Thuraissigiam*, 140 S. Ct. 1959, 1965 n.4 (2020) ("[E]ven if an applicant qualifies [for asylum], an actual grant of asylum is discretionary[.]").[8] First-step eligibility determinations for asylum—such as whether the applicant meets the definition of a "refugee," 8 U.S.C. § 1158(b)(1)(A)—are not discretionary. *See, e.g.*, *Portillo Flores* v. *Garland*, 3 F.4th 615, 626 (4th Cir. 2021) (en banc) (applying substantial-evidence review, not abuse-of-discretion review, to "BIA's factual determinations on asylum eligibility").[9]

Indeed, had Congress intended to expand subsection (B)(i)'s jurisdictional bar beyond the ultimate

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[8] There is one arguable exception: 8 U.S.C. § 1158(a)(2)(D) provides that a noncitizen's failure to file a timely asylum application, or the fact that the noncitizen has already filed an unsuccessful application, can be excused if the noncitizen demonstrates "changed" or "extraordinary" circumstances "to the satisfaction of the Attorney General." But Section 1252(a)(2) is not needed to strip jurisdiction over such determinations because 8 U.S.C. § 1158(c)(3) independently does so.

[9] Congress had good reason to preserve review for the second-step discretionary decision in asylum cases. By definition, a discretionary denial of asylum means that the agency has decided to return a noncitizen to a country where she suffered past persecution and/or has a well-founded fear of future persecution. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 427-428 (1987). These unique harms, and asylum's role in fulfilling the United States' international obligations to protect refugees, *id.* at 436-440, explain why Congress retained judicial oversight of the second-step judgment regarding the granting of asylum as a matter of discretion.

judgment whether to grant relief in the exercise of discretion, it knew how to do so. Along with Section 1252(a)(2)(B), IIRIRA added a provision just one subsection earlier that stripped jurisdiction to "review … *any individual determination* or to entertain *any other cause or claim* arising from or relating to the implementation or operation of an order of removal pursuant to [8 U.S.C. §] 1225(b)(1)." Pub. L. No. 104-208, § 306(a), 110 Stat. 3009, 3009-607 (1996) (codified at 8 U.S.C. § 1252(a)(2)(A)(i)) (emphases added).[10] Other parts of the INA contain similarly broad language stripping jurisdiction over "any action or decision"—or "a decision or action"—made by the Attorney General in specific circumstances. 8 U.S.C. §§ 1226(e), 1182(a)(9)(B)(v). And subsection 1252(a)(2)(B) itself uses the words "any judgment, decision, or action" when clarifying the kinds of rulings that fall under (B)(i) and (ii), suggesting that Congress believed the words "judgment" and "decision" had different meanings. In other words, "[i]f Congress wanted the jurisdictional bar [in (B)(i)] to encompass" a broader swath of decisions, "Congress could easily have said so." *Kucana*, 558 U.S. at 248.

**3.** Beyond the statutory text and structure, there are three more reasons to read subsection (B)(i)'s jurisdictional bar to apply only to the ultimate decision whether to grant relief as a matter of discretion.

*First*, that interpretation aligns with this Court's ruling in *Kucana*. In interpreting subsection (B)(ii),

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[10] Subsection 1225(b)(1) establishes procedures for "expedited removal," which applies only to noncitizens who entered without inspection and, *inter alia*, cannot show continuous physical presence in the United States for two years or more. *See Thuraissigiam*, 140 S. Ct. at 1964-1965.

*Kucana* noted, first, that both subsections (i) and (ii) "convey that Congress barred court review of *discretionary decisions*" only when Congress itself set out the Executive's *discretionary authority* in the statute, 558 U.S. at 247 (emphasis added), and, second, that the Executive's ultimate decision whether to grant relief is itself discretionary, *id.* at 247-248 ("[D]ecisions Congress enumerated" in subsection (B)(i) were "'substantive decisions … made by the Executive in the immigration context as a matter of grace.'" (ellipsis in original)). Interpreting subsection (B)(i) to strip jurisdiction over only that second-step discretionary decision is consistent with reading both subsections (B)(i) and (ii) to encompass only discretionary rulings specified in the statute. *See Trejo*, 3 F.4th at 773 ("[T]he adjudicator's discretion enter[s] the picture[] when"—after "determin[ing] that the alien may be legally considered for [discretionary relief]"—"he or she is called upon to decide whether to *actually grant* [relief] to a qualifying alien. Th[at] is the decision that is shielded from judicial review by [subsection (B)(i)]." (citing, *inter alia*, *Kucana*, 558 U.S. at 247)).

*Second*, Petitioners' interpretation of subsection (B)(i) is also both easily administrable for courts and easily understandable by litigants: All decisions regarding the noncitizen's eligibility for the five types of relief covered by subsection (B)(i) are reviewable; the agency's ultimate discretionary judgment whether to grant that relief to an eligible noncitizen is not.

*Third*, two settled principles of statutory interpretation support interpreting subsection (B)(i) to apply only to review of discretionary determinations whether to grant relief to an eligible applicant. As this Court noted in *Kucana*, there is a strong "presumption favoring judicial review of administrative action," which this

Court has "consistently applied … to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." 558 U.S. at 251; *see Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1069-1070 (2020) (applying this presumption in interpreting subsection 1252(a)(2)(D)). This canon applies with particular force when a jurisdiction-stripping provision is "'susceptible to divergent interpretation,'" *Kucana*, 558 U.S. at 251, as the underlying circuit split here exemplifies. *See* Pet. 14-17; *see also supra* pp. 15-16. Because "Congress legislates with knowledge of [this Court's] basic rules of statutory construction," the Court has found it "most unlikely that Congress intended to foreclose all forms of meaningful judicial review" when it has not said so explicitly. *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (finding jurisdiction to review administrative action in the context of 8 U.S.C. § 1160(e)). As in *Kucana* and *Guerrero-Lasprilla*, this Court should adopt Petitioners' "reasonabl[e] interpret[ation]" of the statute because it best upholds the principle that "'executive determinations generally are subject to judicial review.'" *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quoting *Kucana*, 558 U.S. at 251).

In addition, there is a "longstanding principle of construing any lingering ambiguities in deportation statutes" in the noncitizen's favor. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Subsection 1252(a)(2)(B)(i) is at least ambiguous on the point, as even the Eleventh Circuit majority recognized. *See* Pet. App. 25a-27a; *see also id.* 53a, 58a (Martin, J., dissenting) (arguing that the presumption requires reading subsection (B)(i) narrowly). This canon reflects the fact that "[d]eportation is always a harsh measure." *Cardoza-Fonseca*, 480 U.S. at 449; *accord Lee* v. *United*

*States*, 137 S. Ct. 1958, 1968 (2017) ("Deportation is always 'a particularly severe penalty.'"). It forces noncitizens to leave behind the family and professional responsibilities that tie them to the United States and thus "may result in the loss 'of all that makes life worth living.'" *Knauer* v. *United States*, 328 U.S. 654, 659 (1946). Given the consequences that noncitizens like Mr. and Mrs. Patel face if they are deprived of judicial review of a flawed agency decision that controls whether the Executive can even proceed to exercise discretion over their application, it is at the very least reasonable to read Congress's reference to "any judgment regarding the granting of relief" to preserve review over threshold eligibility determinations.

### B. At A Minimum, Subsection 1252(a)(2)(B)(i) Preserves Review Of First-Step Eligibility Decisions That Do Not Involve The Exercise Of Discretion Specified In The Statute

As discussed above, subsection (B)(i) is best read to bar review only of the second-step decision whether to grant discretionary relief—not of gateway eligibility decisions about whether that discretion can be exercised at all. But if the Court concludes that subsection (B)(i) extends beyond the final-step decision whether to grant relief, its reach is at the very least limited to *discretionary* eligibility criteria specified in the statute. This alternative interpretation is the one advanced by the government below. *See* Pet. App. 30a-31a (describing the parties' distinct positions).

The government's interpretation is better than the Eleventh Circuit's. It gives proper meaning to Congress's use of the word "judgment," *see supra* pp. 20-21, it better accords with the strong presumption favoring judicial review, *supra* p. 32, and it aligns with *Kucana*'s

statement that subsections (B)(i) and (ii), when read together, "convey that Congress barred court review of *discretionary decisions*," *supra* p. 31; *see Kucana*, 558 U.S. at 247 (emphasis added).

But the government's interpretation also shares some defects that plague the Eleventh Circuit's interpretation. By suggesting that subsection (B)(i) bars review of some first-step eligibility decisions, the government's interpretation ignores the limiting effect of the phrase "regarding the granting of relief"—a phrase that is rendered pure surplusage under its approach. And like the Eleventh Circuit's interpretation, it muddles the "traditional[] … distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *St. Cyr*, 533 U.S. at 307.

In any event, while the government's position below is conceptually distinct from Petitioners', it is unclear whether the two approaches differ in practice. A practical difference in subsection (B)(i)'s application arises only if some first-step eligibility decisions are, in fact, made discretionary by statute. But whether there are any such eligibility decisions is an open question actively percolating in the lower courts. *See Trejo*, 3 F.4th at 769 (quoting the *Patel* majority's observation that even "qualitative standards such as 'good moral character' or 'exceptional and extremely unusual hardship' are not in themselves discretionary decisions" (alteration omitted)); *id.* at 769-770 (noting the Sixth Circuit's holding that "whether an alien has demonstrated that sufficient hardship would result from his or her removal is … not a discretionary decision" (citing *Singh* v. *Rosen*, 984 F.3d 1142 (6th Cir. 2021)); *Mendez*, 566 F.3d at 322 ("Were we operating on a clean slate, we would be inclined to hold that the question of whether

an alien has established 'exceptional and extremely unusual hardship' is a determination that we have jurisdiction to review, just as we can review decisions dealing with the other eligibility requirements for cancellation of removal.").

Regardless, Petitioners prevail under the government's alternative interpretation because the admissibility requirement at issue is undisputedly non-discretionary: Petitioners, the Eleventh Circuit, and the government all agree that Petitioners' appeal involves a non-discretionary eligibility ruling. *See* U.S. C.A. Answering En Banc Br. 24-25 (agency's ruling was reviewable because decisions on admissibility have not been made discretionary by statute); Pet. App. 31a (majority holding that "[a]ll eligibility decisions are non-discretionary"); *id.* 67a-68a (Martin, J., dissenting) (explaining that Mr. Patel's claim is reviewable because "[n]o discretion is required" to resolve whether a noncitizen has satisfied the eligibility requirements for adjustment of status). Thus, if the Court adopts the government's interpretation, the Court need not decide which (if any) threshold eligibility determinations are specified as discretionary in the statute. It is enough to recognize that admissibility decisions, like the one at issue here, are not discretionary.

* * *

The better reading of subsection (B)(i) is that it strips jurisdiction only over the second-step judgment whether to grant relief as a matter of discretion. *See supra* pp. 20-33. However, a reading of subsection (B)(i) that bars review of eligibility rulings specified by statute as *discretionary*—while preserving review of *non-discretionary* rulings like the one at issue here—has more to commend it than the Eleventh Circuit's reading. Under either approach, the Court should reverse.

## II. THE ELEVENTH CIRCUIT'S CONTRARY REASONING IS UNPERSUASIVE

### A. Subsection (B)(i)'s Text Does Not Support The Eleventh Circuit's Ruling

The Eleventh Circuit's primary justification for its ruling was that, although "judgment" is open to several interpretations, defining the term to mean "any decision" was a "better fit." Pet. App. 27a. The en banc majority principally justified this conclusion simply by noting that "the statutory language is not limited to a final judgment of removal, but rather 'any judgment' regarding the five enumerated categories of relief." *Id.* The Eleventh Circuit appears to have assumed that, had Congress wanted to preserve Article III jurisdiction over Mr. Patel's challenge, Congress would have used certain (unspecified) magic words.

Not only does this approach flip the presumption of reviewability on its head, *see infra* pp. 44-45, but it also focuses solely on the words "any judgment" while ignoring the words "regarding the granting of relief." That interpretation violates the longstanding rule that "'a statute ought, upon the whole, to be so construed that … no clause' is rendered 'superfluous, void, or insignificant.'" *Young* v. *United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015); *see also supra* pp. 24-25.

Moreover, it cannot be correct that anything short of a reference to "a final judgment of removal" (Pet. App. 27a) necessarily compels a finding of no jurisdiction to review precursor eligibility determinations. To begin, applications for discretionary relief are sometimes decided by DHS outside of removal proceedings. *See infra* n.14. In that context, the denial of relief is procedurally untethered from any order of removal. *See* 8 U.S.C. § 1229a(a)(3) (removal proceedings are

generally "the sole and exclusive procedure" for deciding removability). And even when discretionary relief is denied in removal proceedings, the second-step decision to deny relief is not itself a "judgment of removal." It is thus far more natural to describe that final discretionary step, as Congress did in subsection (B)(i), as a "judgment regarding the granting of relief."

The Eleventh Circuit majority also glossed over natural meanings of "judgment" distinct from the interpretation it adopted. Those meanings include "an opinion or estimate … formed" through "the mental or intellectual process of … discerning and comparing," *see supra* p. 20—a meaning which aptly describes the second-step decision to grant or deny discretionary relief. Moreover, as the Eleventh Circuit majority itself admitted, the word "judgment" can refer simply to the agency's final act as distinct from the eligibility findings that preceded it. *See supra* p. 22; Pet. App. 25a-27a. And, indeed, the Eleventh Circuit's logic could be employed in the opposite direction to reach the opposite result: If Congress meant to strip jurisdiction over any issue relating to the five provisions covered by subsection (B)(i), it could simply have written "any decision on any issue" (or, as in subsection 1252(a)(2)(A)(i), "any individual determination"). *See supra* p. 30.

The Eleventh Circuit additionally relied on *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1173 n.2 (2020), for the proposition that the phrases "any" and "regarding" favored a "more expansive meaning" of the word "judgment." Pet. App. 27a. But whether such words broaden a statute's reach "necessarily depends on the statutory context." *National Ass'n of Mfrs.* v. *Department of Defense*, 138 S. Ct. 617, 629 (2018). Here, "the word 'any' … does not bear the heavy weight" the Eleventh Circuit gave it. *Id.*; *see Kucana*, 558 U.S. at 247 n.14 (re-

jecting a similar argument that the word "any" broadened the scope of subsection (B)(ii) given other narrowing language in the statute). Because "judgment regarding the granting of relief" most naturally refers to the ultimate decision whether to grant discretionary relief, "the word 'any' cannot expand" the statute's reach to cover other decisions. *National Ass'n of Mfrs.*, 138 S. Ct. at 629; *see also* Scalia & Garner, *Reading Law* 44-45 (2012) (explaining that in the statutory term "any damage," "the crucial word is not *any*, but *damage*"). To hold otherwise would be to "rewrite the statute." *National Ass'n of Mfrs.*, 138 S. Ct. at 629 (citation omitted).[11] Likewise, far from expanding subsection (B)(i), the 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." *See iTech U.S.* v. *Renaud*, 5 F.4th 59, 65 & n.4 (D.C. Cir. 2021).

Indeed, the kind of reasoning that the Eleventh Circuit applied was disapproved in *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 840 (2018) (plurality opinion). There, the plurality rejected an "expansive interpretation" of the phrase "arising from" that would have foreclosed judicial review, explaining that such "'uncritical literalism' [would] lead[] to results that 'no sensible person could have intended.'" *Id.* (quoting *Gobeille* v. *Liberty Mut. Ins. Co.*, 577 U.S. 312, 319 (2016)). This Court should reject the Eleventh Circuit's disregard of the wording Congress actually employed and instead

[11] Moreover, *Babb* concerned the scope of an employee's right to be "free from any discrimination based on age" under the Age Discrimination in Employment Act and considered the word "any" as a synonym for "[s]ome, regardless of quantity or number," a definition that does not support the Eleventh Circuit's interpretation. 140 S. Ct. at 1173 & n.2.

construe the statute in line with prior guidance on how to interpret words like "any" and "regarding."[12]

### B. The Broader Statutory Structure Does Not Support The Eleventh Circuit's Ruling

The Eleventh Circuit's attempts to justify its ruling by relying on the INA's broader statutory context fare no better than its textual arguments.

*First*, the Eleventh Circuit argued that its reading of subsection (B)(i) was "the only one that appropriately reads § 1252(a)(2)(B)(i) & (ii) harmoniously," because it avoided superfluity. Pet. App. 44a. That is incorrect. Subsection (B)(ii) cannot be duplicative of subsection (B)(i); by its plain terms it applies to decisions "other" than those covered by subsection (B)(i). 8 U.S.C. § 1252(a)(2)(B)(ii) ("[N]o court shall have jurisdiction to review … any *other* decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the [Executive's] discretion." (emphasis added)). For example, subsection (B)(ii) bars review of the At-

[12] The Eleventh Circuit majority also plucked a sentence from this Court's decision in *Nasrallah* v. *Barr* that, under § 1252(a)(2)(B), "a noncitizen may not bring a factual challenge to orders denying discretionary relief." 140 S. Ct. at 1694; *see also* Pet. App. 23a. Nothing in that statement, however, clashes with Petitioners' position that first-step eligibility determinations (as opposed to second-step orders regarding discretionary relief) remain reviewable. In any event, the Court stated that its decision in *Nasrallah* would "ha[ve] no effect on judicial review of … discretionary determinations" covered by section 1252(a)(2)(B). That assurance cannot be reconciled with the Eleventh Circuit's interpretation, which upended the near-universal consensus of the courts of appeals that subsection (B)(i) at least preserves review of non-discretionary first-step eligibility determinations. *See supra* p. 16.

torney General's "discretion[ary]" decision to admit an inadmissible noncitizen who possesses an immigrant visa under 8 U.S.C. § 1182(k)—a provision that is *not* covered by subsection (B)(i). *See, e.g.*, *Mushtaq* v. *Mukasey*, 306 F. App'x 882, 884 (5th Cir. 2009).

In any event, *Kucana* makes clear that subsections (B)(i) and (ii) can be "[r]ead harmoniously." 558 U.S. at 247. As the Court explained, subsection (B)(i) enumerates a specific set of "administrative judgments that are insulated from judicial review," while subsection (B)(ii) functions as a general "catchall" for "other" types of "discretionary decisions." *Id.* at 426-427. This drafting choice of "set[ting] out a series of specific items ending with a general term," *id.* at 247 (quoting *Hall Street Assocs., LLC* v. *Mattel, Inc.*, 552 U.S. 576, 586 (2008)), is commonplace. When used, it means that the "general term is confined to covering subjects comparable to the specifics it follows." *Id.* The use of a general term does not, as Eleventh Circuit suggested, make the specifics redundant.

*Second*, the Eleventh Circuit also contended that it is "logical[]" to interpret subsection (B)(i) to bar judicial review of all issues related to discretionary relief except for legal or constitutional challenges that are reviewable under subsection 1252(a)(2)(D). Pet. App. 29a. Nothing in the provisions' text or drafting history supports the Eleventh Circuit's conclusion that subsection (B)(i) was drafted with subsection (D) in mind. To the contrary, subsection (B)(i) was enacted years before subsection (D), which was only added in 2005 in response to this Court's suggestion that such a provision was constitutionally required. *See supra* p. 11; *see also Guerrero-Lasprilla*, 140 S. Ct. at 1071-1072 ("[The] statutory history strongly suggests that Congress added" subsection (D) "in view of *St. Cyr*'s guidance."); *Trejo*, 3 F.4th at

767 (noting that "Congress enacted §1252(a)(2)(D) in response to" *St. Cyr*). And because subsection (D)'s plain language expressly *expands* jurisdiction over some kinds of claims on petitions for review, it is unlikely that Congress intended it to implicitly *limit* jurisdiction over others.

Moreover, the Eleventh Circuit's reasoning ignores that subsection (D) only preserves review of constitutional or legal questions "raised upon a petition for review filed with an appropriate court of appeals," whereas some denials of discretionary relief are reviewable *only* in district court. *See, e.g.*, *Mamigonian* v. *Biggs*, 710 F.3d 936, 945 (9th Cir. 2013) (explaining why this is true of certain decisions on adjustment of status). At least some courts have held that subsection (D)'s reference to "a petition for review filed with an appropriate court of appeals" means that its jurisdiction-restoring power does not apply to actions brought in district court. *See, e.g.*, *Lee* v. *USCIS*, 592 F.3d 612, 620 (4th Cir. 2010). The Eleventh Circuit's view would thus apparently foreclose *all* review in district court cases, even of legal issues—an outcome the Eleventh Circuit did not attempt to justify.

If anything, subsection (D) *supports* the view that subsection (B)(i) covers at most determinations specified as discretionary in the statute, not non-discretionary eligibility findings like the one at issue here. By the time that Congress enacted the REAL ID Act in 2005, most circuits had already adopted that interpretation of subsection (B)(i).[13] Had Congress

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[13] *See Sepulveda* v. *Gonzales*, 407 F.3d 59, 63 (2d Cir. 2005); *Santana-Albarran* v. *Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Ortiz-Cornejo* v. *Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005); *Subhan* v. *Ashcroft*, 383 F.3d 591, 594 (7th Cir. 2004); *Mendez-*

wanted to modify that reading of the statute, it could have amended subsection (B)(i) at the same time to clearly bar review of non-discretionary decisions. *See Kucana*, 558 U.S. at 251 (placing interpretive weight on the fact that the REAL ID Act did not amend language of (B)(ii) to modify existing case law interpreting it narrowly); *Mamigonian*, 710 F.3d at 945-946 (noting that if Congress had intended to abrogate the courts' interpretation of subsection 1252(a)(2)(B), "it would have done so explicitly by changing the language of the statute"). Indeed, Congress modified another portion of subsection 1252(a)(2)(B) in the REAL ID Act to provide that the bar on judicial review applies to habeas proceedings and "regardless of whether the judgment, decision, or action is made in removal proceedings." *See* Pub. L. No. 109-13, § 101(f), 119 Stat. 231, 305 (2005); *id.* § 106(a)(1)(A)(ii), 119 Stat. at 310.[14] Congress could have similarly amended the phrase "any judgment regarding the granting of relief" had it wanted to do so. Because congressional intent may be "inferred from contemporaneous judicial construction … and the congressional acquiescence in it," subsections

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*Moranchel* v. *Ashcroft*, 338 F.3d 176, 178 (3d Cir. 2003); *Mireles-Valdez* v. *Ashcroft*, 349 F.3d 213, 215-217 (5th Cir. 2003); *Gonzales-Oropeza* v. *U.S. Att'y Gen.*, 321 F.3d 1331, 1332-1333 (11th Cir. 2003); *Montero-Martinez*, 277 F.3d at 1144.

[14] Except for cancellation of removal, the relief covered by subsection (B)(i) can, in some cases, be granted outside removal proceedings through affirmative applications filed with DHS. *See, e.g.*, 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1) (providing that DHS has jurisdiction over adjustment-of-status applications except, in most cases, when the applicant is in removal proceedings), *id.* § 240.25(a) (authorizing DHS officials to grant prehearing voluntary departure). Congress accordingly amended Section 1252(a)(2)(B) to provide that its jurisdiction-stripping effect applies to those proceedings as well.

1252(a)(2)(B) and (D) read together refute the Eleventh Circuit's position. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984); *see also Guerrero-Lasprilla*, 140 S. Ct. at 1072 ("We normally assume that Congress is 'aware of relevant judicial precedent' when it enacts a new statute.").

This point also answers the Eleventh Circuit's suggestion that other courts erroneously relied on precedent interpreting the differently worded transitional rules. *See* Pet. App. 33a & n.23. Had Congress in 2005 wanted to constrict review under subsection (B)(i), it could have changed its wording as part of other amendments to subsection 1252(a)(2)(B). And the Eleventh Circuit itself failed to explain Congress's original addition of "regarding the granting of relief" in the permanent rules, a phrase that narrows the scope of "any judgment" rather than making it "a broader term that encompasses both discretionary and non-discretionary determinations." Pet. App. 34a.

### C. The Eleventh Circuit's Position Violates Applicable Canons Of Construction

Besides lacking solid grounding in the statutory text or context, the Eleventh Circuit's interpretation cannot be squared with basic principles of statutory construction.

*First*, as discussed above, the Eleventh Circuit's ruling violates the background presumption in favor of judicial review and the principle that ambiguities in deportation statutes should be construed in the noncitizen's favor. *See supra* pp. 32-33. The Eleventh Circuit's only response was that a noncitizen could still obtain judicial review of constitutional and legal challenges under subsection (D). Pet. App. 29a-30a. That miss-

es the point. The presumption of reviewability is a tool used to interpret specific statutory language—here, the text of subsection (B)(i)—when there are multiple potential readings. *See, e.g.*, *Kucana*, 558 U.S. at 251. It cannot be overcome by the fact that a *different* statutory provision, enacted nearly a decade later, protects a *different* type of challenge to agency rulings.

Indeed, if the Eleventh Circuit were right, there would have been no reason for this Court to rely on the presumption of reviewability in interpreting whether subsection (B)(ii)'s jurisdiction-stripping language applied to decisions made discretionary by regulation. *See Kucana*, 558 U.S. at 251. The Eleventh Circuit's logic appears to be that if any types of claims are reviewable (even if they are reviewable only under a separate subsection of the statute), the presumption does not apply. But if that were so, it would have been improper for *Kucana* to invoke the presumption; it should have simply rested on the fact that subsection (D) preserved review for constitutional and legal challenges. That it did not do so is an implicit rejection of the Eleventh Circuit's approach.

*Second*, the Eleventh Circuit's interpretation leads to a troubling result: It would arbitrarily allow the government's charging decisions to shield agency decision-making from court review where (as here) a threshold eligibility requirement for discretionary relief is also a ground for removal. *See Kucana*, 558 U.S. at 237 (absent clear statement, statute should not be read "to place in executive hands authority to remove cases from the Judiciary's domain"). Because eligibility for some forms of relief covered by subsection (B)(i) requires an applicant to be admissible, and because inadmissibility is also a ground for removal, "in some cases, a noncitizen could be both removable and ineligible for

discretionary relief based on the same facts." Pet. App. 74a-75a (Martin, J., dissenting).

This means that when (1) there are two or more grounds why a noncitizen might be removable, and (2) only one of those grounds also renders the noncitizen ineligible for discretionary relief, the Eleventh Circuit's rule allows the Executive to control the availability of judicial review by deciding not to charge the latter ground as a basis for removal. Directly charging the noncitizen as removable on that basis would make the IJ's determination on that charge judicially reviewable, *see* 8 U.S.C. § 1252(b)(9) (providing for "[j]udicial review of all questions of law and fact … arising from any action taken or proceeding brought to remove a [noncitizen] from the United States"), but waiting to raise it to disqualify the noncitizen from discretionary relief insulates that same decision from judicial review.

This is not a mere hypothetical. In this very case, DHS could have charged Mr. Patel as removable under 8 U.S.C. § 1182(a)(6)(C)(ii) for misrepresenting himself as a U.S. citizen. DHS, however, did not do so, for reasons the record does not reveal. *See* AR192 (IJ: "Why didn't the government charge it?" DHS attorney: "I don't know, your Honor."). Had DHS charged Mr. Patel as removable under that ground, the BIA's decision on that question would have been reviewable under subsection 1252(b)(9), as all judges of the Eleventh Circuit agreed. *See* Pet. App. 37a n.26 (majority), 75a (Martin, J., dissenting). Instead, the government charged Mr. Patel as removable solely because he was in the United States without being admitted or paroled under 8 U.S.C. § 1182(a)(6)(A)(i)—a removal ground that is not a bar to seeking adjustment of status under subsection 1255(i). *See Mortera-Cruz* v. *Gonzales*, 409 F.3d 246, 252 (5th Cir. 2005) (explaining why inadmissi-

bility under this ground does not bar adjustment under 8 U.S.C. § 1255(i)).

Under the Eleventh Circuit's approach, DHS's decision to raise Mr. Patel's alleged inadmissibility under 8 U.S.C. 1182(a)(6)(C)(ii) solely to disqualify him from discretionary relief rendered the agency's decision on that question unreviewable. Pet. App. 3a, 5a (majority), 75a-76a (Martin, J., dissenting). Because the IJ and the BIA decided this issue in the context of Mr. Patel's application for discretionary relief, the Eleventh Circuit concluded that review of that inadmissibility decision was barred by subsection (B)(i). That was not, contrary to the Eleventh Circuit's blithe comment, a mere "quirk" of its ruling (Pet. App. 37a n.26), but a manifestation of its error, as it allows arbitrary charging decisions to determine federal jurisdiction.

This Court has properly disapproved of interpretations of the INA that allow Executive branch officials to shield their own decisions from review. *See Kucana*, 558 U.S. at 252 (IIRIRA should not be read to give the Executive a "free hand to shelter its own decisions from [deferential] appellate court review"); *cf. Judulang* v. *Holder*, 565 U.S. 42, 57-58 (2011) (explaining that it would be "arbitrar[y]" to allow the "outcome" of an immigration proceeding to "rest on the happenstance of an immigration official's charging decision"). It should do likewise here.

## CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted.

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# APPENDIX

## RELEVANT STATUTORY PROVISIONS

### 8 U.S.C. § 1182(a)(6)(C)

Section 212(a) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1182(a), provides in relevant part:

* * *

**(6)** Illegal entrants and immigration violators

* * *

**(C)** Misrepresentation

**(i)** In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

**(ii)** Falsely claiming citizenship

**(I)** In general

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.

**(II)** Exception

In the case of an alien making a representation described in sub-

clause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

**(iii)** Waiver Authorized

For provision authorizing waiver of clause (i), see subsection (i).

* * *

## 8 U.S.C. § 1252(a)(2)

Section 242 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1252, provides in relevant part:

**(a)** Applicable provisions

* * *

**(2)** Matters not subject to judicial review

* * *

**(A)** Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

**(i)** except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

**(ii)** except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

**(iii)** the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

**(iv)** except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

**(B)** Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

> **(i)** any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> **(ii)** any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

**(C)** Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or

1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

**(D)** Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *