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IN THE SUPREME COURT OF THE UNITED STATES
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PANKAJKUMAR S. PATEL, ET AL.,)
Petitioners,)
v.) No. 20-979
MERRICK B. GARLAND,)
ATTORNEY GENERAL,)
Respondent.)
- - - - -

Washington, D.C.
Monday, December 6, 2021

The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 10:00 a.m.

1 APPEARANCES:
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3 behalf of the Petitioners.
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7 TAYLOR A.R. MEEHAN, ESQUIRE, Chicago, Illinois;
8 Court-appointed amicus curiae in support of the
9 judgment below.
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 20-979, Patel versus Garland.

Mr. Fleming.

ORAL ARGUMENT OF MARK C. FLEMING

ON BEHALF OF THE PETITIONERS

MR. FLEMING: Mr. Chief Justice, and may it please the Court:

As the government agrees, section 1252(a)(2)(B)(i) does not bar review of the agency's threshold determination that Mr. Patel is ineligible for adjustment of status. That understanding is consistent with the statutory text, context, and history, and it's also consistent with this Court's explanation in Kucana that the (B)(i) bar is limited to decisions made discretionary by legislation.

Congress could have written (B)(i) differently. It could have barred review of any individual determination, as it did in subsection (A)(1), or of the final order of removal, as it did in subsection (C).

But Congress didn't use those words.

1 It used "judgment" and specifically "any
2 judgment regarding the granting of relief." And
3 nobody has identified any instance in which the
4 INA uses "judgment" in the sweeping way
5 suggested by the Eleventh Circuit.

6 To the extent there's any doubt,
7 though, it is resolved by the strong presumption
8 of reviewability of agency action, and that's
9 especially so because the Eleventh Circuit's
10 position, undisputedly, bars all judicial
11 review, even for errors of law, of the numerous
12 adjustment-of-status decisions that are made
13 outside of removal proceedings by U.S.
14 Citizenship and Immigration Services. The
15 Court-appointed amicus does not deny that or
16 attempt to justify it.

17 That's enough to resolve this case.
18 The Court does not need to resolve the slight
19 difference between our reading and the
20 government's. We all agree it does not affect
21 Mr. Patel's situation. And to the -- to the
22 extent that this Court does reach it, we believe
23 our reading is preferable, both because it gives
24 full meaning to the phrase "regarding the
25 granting of relief" -- the government does not,

1 but rather treats it as though it weren't even
2 in the statute -- and also because our reading
3 is easily administrable.

4 Jurisdictional lines should be clear,
5 and our line is clear. Threshold decisions
6 regarding eligibility are not subject to (B)(i);
7 the discretionary decision to grant relief to an
8 eligible non-citizen is. And, again, if there's
9 any doubt, the strong presumption of
10 reviewability breaks the tie in our favor.

11 And I'd welcome the Court's questions.

12 JUSTICE THOMAS: Counsel, normally we
13 review judgments or orders and not reasoning.
14 It seems as though you're asking us to review
15 reasoning as opposed to the order itself.

16 MR. FLEMING: So, Justice Thomas, the
17 review in an immigration case is of a final
18 order of removal. And as this Court said in
19 Chadha, the final order of removal subsumes
20 everything that goes before.

21 The question for purposes of
22 interpreting the jurisdictional bar is what
23 Congress meant by the phrase "any judgment
24 regarding the granting of relief."

25 JUSTICE THOMAS: Well, that seems

1 pretty broad.

2 MR. FLEMING: Well, it -- Congress in
3 immediately neighboring sections used far
4 broader terms. In the preamble to (B), it says
5 "judgment, decision, or action," but then (B)(i)
6 only catches "judgment," whereas (B)(ii) uses
7 "decision or action," which are broader terms.
8 Subsection (A)(i) talks about "any individual
9 determination," which is much broader.

10 Had Congress wished to bar any
11 possible determination that goes into evaluating
12 an application for adjustment of status, it
13 could have said any individual determination,
14 any decision or action, or the final order of
15 removal, which is, in administrative law and
16 certainly in immigration law, the final decision
17 of the agency that includes everything that has
18 gone before.

19 JUSTICE THOMAS: So, if you wanted --

20 MR. FLEMING: Congress didn't do that.

21 JUSTICE THOMAS: -- to accomplish what
22 amicus argues, how would you have written it?

23 MR. FLEMING: "Any decision or action
24 under sections," and then the five types of
25 removal, which is the language that Congress

1 used in (B)(ii). It simply qualified it by
2 saying the decision or action has to be
3 specified by statute as in the Attorney
4 General's discretion, and that is -- and there
5 are other additional contextual clues, but I
6 think those are the main ones --

7 JUSTICE THOMAS: But I don't --

8 MR. FLEMING: -- Congress --

9 JUSTICE THOMAS: -- I don't see any
10 real difference between what you -- you suggest
11 would do the job versus what's already there.

12 MR. FLEMING: So there -- there are
13 two differences, Justice Thomas.

14 One is the word "judgment" in
15 administrative law and immigration law is used
16 in a narrow way to mean a discretionary
17 determination or discretionary decision.

18 No one in this case -- not the
19 Eleventh Circuit, not the amicus, not the
20 parties -- have come up with any use of
21 "judgment" in the INA that refers to factual
22 findings or refers to judgment in the broad
23 sense we would think of it under the Federal
24 Rules of Civil Procedure. It's just not used
25 that way in administrative law and certainly not

1 in -- in immigration law.

2 Moreover, we have additional
3 contextual cues. Most importantly, it's the
4 reasoning that this Court employed in *Kucana*
5 because (B)(ii) uses "any other decision or
6 action," which links (B)(i) and (B)(ii) together
7 in a way that this Court said shows that both
8 sections were directed to decisions made
9 discretionary by statute. There is no way to
10 reconcile the Eleventh Circuit's view with that
11 language in *Kucana*.

12 With respect to the five forms of
13 relief that are enumerated, what is it that is
14 specified as discretionary by legislation? It's
15 not the eligibility factors. It's not whether
16 someone like Mr. Patel is admissible to the
17 United States. That is a factual issue or an
18 issue of mixed law and fact that is frequently
19 reviewable and, in fact, is reviewed because it
20 is a basis for holding someone removable from
21 the country.

22 And if the government in this case had
23 charged Mr. Patel with being removable because
24 he misrepresented U.S. citizenship, it would
25 have been reviewable. That very issue would

1 have been reviewed on an appeal of the final
2 order of removal.

3 But, because it was not charged as a
4 removability ground but simply as a bar to
5 discretionary relief of adjustment of status,
6 under the Eleventh Circuit's view, that very
7 same issue was not removable. That, we think,
8 must be incorrect because Congress does not
9 typically allow the jurisdiction of the federal
10 courts to turn on the charging decisions of the
11 executive. This Court said that much in *Kucana*.

12 JUSTICE KAGAN: Mr. Fleming, just on
13 -- on this same line, I mean, are you saying
14 that "judgment regarding the granting of relief"
15 means what you say it means as a matter of just
16 ordinary meaning, or are you saying that it's a
17 term of art in the immigration statutes? And,
18 if so, which portion -- you know, is -- is it
19 the whole phrase "judgment regarding the
20 granting of relief"? Is it just the word
21 "judgment"? I mean, what -- what are you saying
22 we should read your way and why?

23 MR. FLEMING: Well, so I -- there --
24 there are a couple of answers to that, Justice
25 Kagan.

1 First of all, I think we would all
2 agree, and the Eleventh Circuit agreed,
3 "judgment" by itself, in isolation, can have
4 several meanings, and so one needs to look at it
5 in the context in which it is used.

6 "Regarding the granting of relief," we
7 believe, calls in the traditional distinction
8 which this Court has noted several times, going
9 back to Foti versus INS and St. Cyr, that
10 there's -- that these discretionary grants of
11 relief happen in two stages.

12 First, there's a determination whether
13 the non-citizen is eligible for relief, and
14 those are not discretionary. Those are issues
15 of fact, except to the extent Congress has
16 specified them as discretionary, in which case
17 they're not reviewable under (B)(ii).

18 But then, once someone is found to be
19 eligible, then the agency looks at whether to
20 grant relief, and the "granting of relief" --
21 this Court used that very phrase in St. Cyr --
22 refers to the second-stage decision --

23 JUSTICE KAGAN: And -- and --

24 MR. FLEMING: -- whether to grant
25 relief.

1 JUSTICE KAGAN: -- do you have places,
2 other places in the statute or in regulations
3 where that phrase means what you're saying it
4 means, which is, in other words, that it refers
5 only to the stage 2 discretionary determination
6 as opposed to the stage 1 eligibility
7 determination?

8 MR. FLEMING: I --

9 JUSTICE KAGAN: And, again, I'm
10 talking about this, you know, "judgment
11 regarding the granting of relief" or "the
12 granting of relief," whether that phrase is
13 specifically used to invoke the step 2
14 determination as opposed to the step 1
15 determination?

16 MR. FLEMING: So I think the best
17 example for that, Justice Kagan, is the asylum
18 carveout in (B)(ii), which does use the phrase
19 "the granting of relief," and it carves out of
20 the jurisdictional bar of (B)(ii) the granting
21 of relief under the asylum statute, and that
22 must refer to the second-stage discretionary
23 decision whether to grant asylum to someone who
24 is eligible for asylum.

25 Why? Because the eligibility

1 requirements for asylum are not specified as
2 discretionary. So it would not make sense to
3 carve them out of (B)(ii) because they don't
4 fall within (B)(ii) by their own terms.

5 The only thing that would otherwise
6 fall under (B)(ii) and, therefore, needs a
7 carveout is the second-stage discretionary
8 decision by the executive to grant asylum to
9 someone who is eligible for it, and that's why
10 "the granting of relief" is used in (B)(ii).

11 I think this -- this Court in St. Cyr
12 uses the words "the actual granting of relief"
13 on pages 307 and 308 of the opinion, which, of
14 course, is not statutory, but it does show how
15 the -- how that language has been used to
16 distinguish the second-stage granting of relief
17 in the exercise of discretion as opposed to
18 eligibility.

19 There's also a provision that
20 distinguishes the two with respect to the
21 non-citizens' burdens of proof, and that's
22 1229a, subparagraph (c)(4)(A), which talks about
23 how the non-citizen has the burden to prove
24 eligibility in the first place but then
25 separately also whether they're entitled to

1 relief in the exercise of discretion.

2 JUSTICE BARRETT: Mr. --

3 MR. FLEMING: And --

4 JUSTICE BARRETT: Sorry, you can
5 finish.

6 MR. FLEMING: I -- I was simply going
7 to conclude if I may that, at the very least,
8 even if -- even if the Court believes that
9 there's -- that there are reasonable
10 interpretations on both sides, we're talking
11 about a situation that's governed by the
12 presumption of reviewability.

13 And so, you know, we -- we think this
14 is -- we think that we're right in terms of the
15 best reading of the statute. But, at the very
16 least, under the presumption which this Court
17 just as recently as last year called well
18 settled and strong, that, we think, breaks the
19 tie in our favor.

20 JUSTICE BARRETT: Mr. Fleming, I'm
21 just wondering, you know, amicus says of both
22 your interpretation and the government's that if
23 you make all of the preliminary determinations
24 reviewable, that the jurisdictional bar doesn't
25 -- or that the bar to judicial review doesn't

1 have that much work to do.

2 How do you respond to that?

3 MR. FLEMING: So we think that's
4 incorrect, Justice Barrett, and that's because,
5 before IIRIRA, before 1996, the -- the courts
6 were reviewing the second-stage determination
7 whether to grant relief in the exercise of
8 discretion, and we cite a number of those cases
9 in Footnote 6 of our reply that, you know,
10 reversed the BIA or the immigration judge on an
11 exercise of discretion.

12 And that is what Congress through
13 (B)(i) was trying to get rid of, was trying to
14 say you can review, we believe, the -- the
15 eligibility factors.

16 But, once someone is found to be
17 eligible, if the -- if the agency says,
18 nonetheless, we are going to deny relief in the
19 exercise of discretion, that is not reviewable,
20 except, you know, for purposes of -- of
21 subsection (d), it restored the possibility of
22 review for errors of law or constitutional
23 errors.

24 JUSTICE ALITO: Well, then I don't
25 understand --

1 MR. FLEMING: But that is the work
2 that's being done.

3 JUSTICE ALITO: -- then I -- I -- I
4 don't understand where your argument is going
5 if the -- ultimately, what you want is
6 adjustment of status, right?

7 MR. FLEMING: Yes, Your Honor.

8 JUSTICE ALITO: And that's a
9 discretionary determination?

10 MR. FLEMING: Yes.

11 JUSTICE ALITO: And you want that
12 reviewed -- you want that overturned?

13 MR. FLEMING: Well --

14 JUSTICE ALITO: Isn't that right?

15 MR. FLEMING: -- at the moment, what
16 we want is the Eleventh Circuit to review our
17 argument that the agency made an error in
18 finding Mr. Patel ineligible.

19 JUSTICE ALITO: Yeah.

20 MR. FLEMING: And then, if that is
21 reversed, it would go back to the agency that
22 would then have to determine whether to grant
23 relief in -- in the exercise of discretion,
24 which is a determination that hasn't been made
25 yet.

1 JUSTICE SOTOMAYOR: Do you know how
2 many people apply for adjustment of status that
3 are found eligible but for whom the agency
4 exercises or the agent exercises discretion not
5 to grant adjustment of status?

6 MR. FLEMING: I'm afraid I don't have
7 those numbers, Justice Sotomayor. I'm not sure
8 they're reported in that level of detail. I
9 think you can find numbers as to the number that
10 are granted and denied, but I'm not sure of any
11 statistics. The government may be better able
12 to answer this question that -- that parsed it
13 out.

14 JUSTICE SOTOMAYOR: Could you tell me
15 what the state of the law was in 2005 with
16 respect to (B)(i)? How had the circuits ruled
17 up to that point?

18 MR. FLEMING: Before 2005, my
19 understanding is most of the circuits had said
20 that review was possible of factual
21 determinations to do with eligibility, which is
22 part of the acquiescence argument we make.

23 Again, we don't think that's
24 necessary, however, because, again, the focus
25 would have been on -- on 1996 and what it is

1 Congress was trying to accomplish then.

2 It's certainly true that Congress
3 could have changed things in 2005 if it wasn't
4 pleased with them.

5 CHIEF JUSTICE ROBERTS: Mr. Fleming, I
6 understand about the presumption of
7 reviewability, but this area, the exercise of
8 discretion by the Attorney General with respect
9 to immigration and refugee matters, there's --
10 there is a presumption also that the discretion
11 is broad and, to an unusual extent compared to
12 other areas, unreviewable.

13 Don't those two presumptions kind of
14 cancel each other out, and we're left with just
15 reading the statute as it -- as it's written?

16 MR. FLEMING: I -- I don't think so,
17 Mr. Chief Justice, because we're talking about a
18 situation where -- I mean, we're not saying that
19 the discretion -- the discretionary decision
20 whether to grant relief is reviewable. We
21 didn't even get to that stage in Mr. Patel's
22 case.

23 We're talking about the application of
24 statutory factors that Congress has created, one
25 of them being inadmissibility to the United

1 States, which is the one that's at issue here.
2 That's reviewable all the time because it is a
3 ground of removal.

4 And the mere fact that it was charged
5 in this case as a bar to adjustment of status
6 rather than as a ground of removal doesn't
7 change the leeway that the BIA has to adjudicate
8 it. It's still taking Congress's --

9 CHIEF JUSTICE ROBERTS: Well, I
10 wonder, I mean, I think that's an argument based
11 on the statute itself. I'm just suggesting that
12 presumptions don't seem to me to give too much
13 weight in this case because they do -- do cancel
14 out.

15 MR. FLEMING: Well --

16 CHIEF JUSTICE ROBERTS: You don't --
17 you don't dispute that there's a presumption in
18 -- in favor of discretion in the exercise of
19 admission, removal, that -- that the breadth of
20 discretion to the Executive Branch here is quite
21 broad.

22 MR. FLEMING: I -- I -- I -- I don't
23 know that I would agree with that, Mr. Chief
24 Justice, certainly not when it comes to applying
25 standards, factors, that are either factual or

1 legal that Congress has determined.

2 I mean, this Court applied the
3 presumption of reviewability in *Kucana*, just
4 last year in *Guerrero-Lasprilla*. Those were
5 interpreting these very same provisions, and
6 there was no suggestion that the presumption had
7 any less force in those cases or that it should
8 have any less force here because the presumption
9 implements the important separation-of-powers
10 consideration that we don't assume that Congress
11 is allowing the Executive Branch to have the
12 last word on whether it's complying with
13 congressional mandates --

14 CHIEF JUSTICE ROBERTS: Thank --

15 MR. FLEMING: -- unless there's very
16 clear language.

17 CHIEF JUSTICE ROBERTS: -- thank you,
18 counsel.

19 Justice Thomas, anything further?

20 JUSTICE THOMAS: Nothing for me,
21 Chief.

22 CHIEF JUSTICE ROBERTS: Justice
23 Breyer?

24 JUSTICE ALITO: Why isn't the most
25 relevant context here the review by a court of a

1 decision by a lower-level tribunal?

2 In that context, "judgment" has a
3 pretty clear meaning. There are judgments of
4 the district court defined by the federal rules
5 of procedure, civil and criminal. There are
6 judgments of the courts of appeals. There are
7 judgments of this Court.

8 Why isn't that the most relevant
9 context?

10 MR. FLEMING: Because that's not how
11 the word is used in the context of
12 administrative law. The APA, 5 U.S.C. 551(6),
13 calls the order the final disposition of -- of
14 an agency in a matter other than rulemaking.

15 This Court in INS versus Chadha said
16 the term "final orders" includes all matters on
17 which the validity of the final order is
18 contingent. The statute itself talks about
19 review of the final order.

20 Your Honor is quite right. If we were
21 talking about review of a district court, the
22 Federal Rules of Civil Procedure and the
23 judiciary code use "judgment" in that way.

24 In administrative law and especially
25 in immigration law, "judgment" is not used that

1 way.

2 JUSTICE ALITO: Well, what is your
3 strongest point to show that this APA definition
4 applies under the INA?

5 MR. FLEMING: Oh. Well, if one looks
6 at 1252(a)(1): Judicial review of a final order
7 of removal is governed only by Chapter 158 of
8 Title 28, except as provided.

9 And that's -- that's the general grant
10 of review in immigration cases, is review of a
11 final order of removal. And this Court -- and
12 -- and I -- I don't know of any other court that
13 has taken the view that --

14 JUSTICE ALITO: But that's not what's
15 being reviewed here.

16 MR. FLEMING: Yes, it is, a final
17 order of removal --

18 JUSTICE ALITO: Well, the adjustment
19 of status is the part that you -- that you're
20 contesting.

21 MR. FLEMING: Well, that's the --
22 that's the issue we have appealed because there
23 was a concession of removability, but the
24 immigration judge still entered a final order of
25 removal.

1 JUSTICE ALITO: In -- in this con- --
2 in this particular case, but the two things
3 don't always go together.

4 MR. FLEMING: They generally do
5 because, under the zipper clause, 1252(b)(9),
6 appeal of all issues that are -- that come up in
7 a removal proceeding are channeled into the
8 petition for review.

9 JUSTICE ALITO: They generally do.
10 They don't always.

11 MR. FLEMING: I -- the only situation
12 I can think of where adjustment of status would
13 come up without a removal order would be in a
14 situation where someone has, for instance, a --
15 is here lawfully, is not subject to being
16 removed, they're on a temporary visa, student
17 visa, employment visa, they marry a U.S.
18 citizen, and then they seek adjustment of status
19 by filing an application with U.S. CIS.

20 And if that's denied, normally you
21 would expect, again, under the presumption of
22 reviewability and also under the APA, that you
23 would file an action in district court to
24 challenge the legality of U.S. CIS's
25 determination.

1 This is a major flaw in the Eleventh
2 Circuit's approach because the Eleventh Circuit
3 would say you can't challenge that at all, even
4 for an issue of law, because, in their view,
5 that is a judgment that is barred by (B)(i).

6 And the -- the notion that Congress
7 would have prevented any form of judicial
8 review, even for legal error, in a vast quantity
9 of cases where adjustment of status is sought
10 from is simply not plausible and would require
11 much clearer language than we have here.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor, anything further?

14 JUSTICE SOTOMAYOR: No.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: Mr. Fleming, I think,
17 in response to Justice Alito's question, I'm --
18 I'm not sure why it matters to your position
19 very much what the word "judgment" means,
20 whether it means the final determination, the
21 official order, or something else.

22 I mean, I understand why it matters to
23 the government, but why does it matter to you?
24 As I understood your position, your position is
25 just that the entire phrase "judgment regarding

1 the granting of relief" refers to the step 2
2 determination rather than the step 1
3 determination, and whatever "judgment" means,
4 whether it refers to the official order or some
5 kind of discretionary decision-making along the
6 way or both, your position would still stand,
7 wouldn't it?

8 MR. FLEMING: I -- I think that's
9 right, Justice Kagan. I was just trying to give
10 Justice Alito's question a fulsome answer and
11 also to make sure that there was no confusion,
12 that -- that we didn't -- to make sure that the
13 Court recognizes that we don't think "judgment"
14 as used here subsumes everything. We don't
15 think that's a correct reading of how the word
16 is used in immigration law.

17 But it's certainly true that even if
18 "judgment" means the ultimate final order, the
19 -- the thing that is made not reviewable by
20 (B)(i) is the judgment regarding the granting of
21 relief. And we think that is the second-stage
22 determination whether to grant relief in the
23 exercise of discretion to someone who has been
24 found to be eligible for it.

25 JUSTICE KAGAN: As opposed to the step

1 1 eligibility determination?

2 MR. FLEMING: Step 1 eligibility
3 determinations are reviewable. There -- there
4 could be a situation. If Congress in the future
5 wanted to say this one -- we're specifying this
6 as being in the discretion of the Attorney
7 General, then it would be unreviewable under
8 (B)(ii). But (B)(i) has nothing to say about
9 that.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch, anything?

12 JUSTICE KAVANAUGH: In -- in the
13 removal context, where this arises, I just want
14 to make sure I understand the difference in the
15 two positions. Everything related to the
16 removal would be reviewable, and with respect to
17 the denial of discretionary relief, legal
18 questions and mixed questions, everyone in the
19 room, I think, agrees would be reviewable,
20 correct?

21 MR. FLEMING: I believe that's right,
22 yes.

23 JUSTICE KAVANAUGH: So only questions
24 of historical fact or questions of fact -- I
25 don't have to add the word "historical" -- is

1 the -- is the dispute here, review of those, is
2 that correct?

3 MR. FLEMING: Well, so as to -- as to
4 the --

5 JUSTICE KAVANAUGH: In the removal
6 context.

7 MR. FLEMING: So, as to the -- so not
8 talking about denials of discretionary --
9 denials of discretionary relief? I don't think
10 there's a dispute as to what is reviewable in
11 terms of removability. So, if someone has
12 actually contested removability -- and let's
13 leave out the cases of criminal --

14 JUSTICE KAVANAUGH: Right. On --

15 MR. FLEMING: -- criminal convictions.

16 JUSTICE KAVANAUGH: Sorry to
17 interrupt. On removability, I agree. On the
18 denial -- the denial of discretionary relief,
19 we're just talking about fact questions,
20 correct?

21 MR. FLEMING: Yes.

22 JUSTICE KAVANAUGH: That's the dispute
23 here?

24 MR. FLEMING: If any --

25 JUSTICE KAVANAUGH: It's solely about

1 fact questions, because everyone agrees, I
2 think, that legal questions and mixed questions
3 will get judicial review.

4 MR. FLEMING: Yes, that's right, and
5 only fact questions at the -- at the first --
6 what I'm calling the first stage with respect to
7 eligibility requirements --

8 JUSTICE KAVANAUGH: And on the fact --

9 MR. FLEMING: -- that's what the
10 definition is.

11 JUSTICE KAVANAUGH: -- questions, how
12 could an appellate court -- and this question
13 cuts both ways, so -- but how can an appellate
14 court look at a cold record and determine a
15 factual error when it relates to credibility,
16 for example, or something like that? Just give
17 me some examples where this will matter, I
18 guess.

19 MR. FLEMING: Well, there -- as the
20 amici, the American Immigration Lawyers
21 Association and the EOIR judges, point out, it
22 -- it's not uncommon. I mean, the standard is
23 still substantial evidence. So most cases do
24 fail on the merits.

25 But it is not uncommon for courts of

1 appeals to find serious problems with how the
2 agency determines credibility. Credibility is,
3 of course, a question of fact. This Court said
4 this in -- in Nasrallah. It's a factual issue
5 that is reviewable on appeal deferentially. We
6 don't dispute that.

7 But, you know, in this case, for
8 example, we think that the credibility
9 determination against Mr. Patel was sorely
10 informed by the judge's misunderstanding of what
11 was required in order to get a license in
12 Georgia. And, you know, we -- that is an issue
13 that we fully briefed to the Eleventh Circuit.
14 It didn't reach it because it believed it lacked
15 jurisdiction.

16 But I think this will matter in not
17 very many cases, but in the cases where it does
18 matter, that is a very desirable result because
19 we do not want the agency to be making such
20 serious decisions on the basis of anything less
21 than substantial evidence.

22 JUSTICE KAVANAUGH: Thank you.

23 MR. FLEMING: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 Thank you, counsel.

2 JUSTICE SOTOMAYOR: If I might, Chief?
3 I'm sorry.

4 CHIEF JUSTICE ROBERTS: Sure.

5 JUSTICE SOTOMAYOR: If they're going
6 to get review in the remove -- removability
7 context, why isn't that enough?

8 MR. FLEMING: Because -- because of
9 what happened in this case, Justice Sotomayor.
10 In this case, for reasons that the government
11 trial attorney could not explain when asked by
12 the immigration judge, the government did not
13 charge this inadmissibility issue, the
14 misrepresentation of citizenship, as a ground of
15 removability. That was only raised as a defense
16 to adjustment of status.

17 Had they charged it as a removability
18 ground, we wouldn't be here because it would
19 have gotten reviewed in that context. But it
20 was --

21 JUSTICE SOTOMAYOR: So why does that
22 matter? Meaning is it because no one now will
23 decide this issue?

24 MR. FLEMING: Unless this Court
25 reverses, no one other than the agency is going

1 to decide it. The agency will have been the
2 last word on an issue of inadmissibility, which
3 is an issue frequently reviewed by the courts as
4 either a fact question or a mixed question.

5 JUSTICE SOTOMAYOR: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 MR. FLEMING: Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Mr. Raynor.

10 ORAL ARGUMENT OF AUSTIN L. RAYNOR
11 ON BEHALF OF THE RESPONDENT IN SUPPORT

12 MR. RAYNOR: Mr. Chief Justice, and
13 may it please the Court:

14 Section 1252(a)(2)(B) precludes review
15 of any judgment regarding the granting of relief
16 under five enumerated provisions, as well as any
17 other decision or action of the Secretary or the
18 Attorney General, the authority for which is
19 specified to be in their discretion. By its
20 terms, that provision bars review of
21 discretionary determinations, not
22 non-discretionary determinations like the
23 question of fact at issue here.

24 Petitioners now largely agree with
25 that reading as a practical matter, conceding

1 that even discretionary eligibility criteria
2 will be reviewable under the second clause, if
3 not the first.

4 Amicus's principal counterargument is
5 that questions of fact are unreviewable because
6 they fall outside the scope of subparagraph (D),
7 which preserves review over questions of law.
8 That argument fails because this case involves a
9 scope of a different provision, subparagraph
10 (B)(i). This Court should reverse the judgment
11 below and remand for further proceedings.

12 JUSTICE THOMAS: Mr. Raynor, could you
13 tell me what -- how would the outcome -- or in
14 which cases would the outcome be different under
15 your analysis as opposed to Petitioners'
16 analysis or approach?

17 MR. RAYNOR: Justice Thomas, I think
18 the main difference is analytical at this point.
19 They concede, as my friend suggested this
20 morning and in Note 2 of their reply brief, that
21 eligibility criteria, if they're specified to be
22 in the Attorney General's discretion, will be
23 unreviewable under the second clause.

24 We would put those under the first
25 clause. We think the first clause, with its

1 phrase "judgment regarding the granting of
2 relief," is more naturally read to pick up those
3 discretionary eligibility criteria. But there
4 is an analytical difference.

5 JUSTICE THOMAS: One --

6 MR. RAYNOR: I don't want to put words
7 in my friend's mouth, but it may also be that
8 they think there's a higher level of
9 explicitness required for what counts as being
10 in the -- specified in the discretion of the
11 Attorney General.

12 JUSTICE THOMAS: One final question.
13 We agree that if you asked Mr. Patel whether he
14 checked the box in the -- for his app -- in his
15 application for a license in Georgia, we agree
16 that's just looking at the application and
17 determine a fact, right? You checked that
18 you're a citizen?

19 MR. RAYNOR: That's correct. Whether
20 he checked the incorrect box is a question of
21 historical fact.

22 JUSTICE THOMAS: Okay. Now, whether
23 or not he lied in checking the box, I want you
24 to tell me why that is also a fact --

25 MR. RAYNOR: It's a fact --

1 JUSTICE THOMAS: -- as opposed to a --
2 a determination that includes some discretion.

3 MR. RAYNOR: I don't think findings of
4 historical fact like that include any measure of
5 discretion. There's a right answer and a wrong
6 answer to this particular question, did he tell
7 a lie, or did he not tell a lie?

8 JUSTICE THOMAS: So how is that a
9 fact?

10 MR. RAYNOR: It's a fact because it's
11 something about the state of the world at the
12 time that he acted, and it can be determined
13 either correctly or incorrectly.

14 JUSTICE THOMAS: So it's exactly like
15 checking the box?

16 MR. RAYNOR: Yes. In our view,
17 questions of subjective intent at the time an
18 action was taken are the same as did he check
19 the box or did he not check the box.

20 JUSTICE BARRETT: But how can that be?
21 Because it seems like credibility
22 determinations -- and Justice Kavanaugh alluded
23 to this -- require -- in contrast to when you
24 look at them in a cold record, require some
25 element of judgment, right? Like looking at

1 him, listening to his testimony, and drawing a
2 conclusion, you know, which requires the
3 exercise of some discretion about whether or not
4 Mr. Patel was telling the truth.

5 It just seems hard for -- it's hard
6 for me to see why that's exactly the same as
7 checking the box or not.

8 MR. RAYNOR: I agree it may be a
9 little more complicated of a factual inquiry. I
10 don't think it's fair to say that it involves
11 discretion, though. If -- if the judge --
12 immigration judge were to determine I think the
13 evidence shows that this person lied, but I'm
14 going to exercise my discretion to find that he
15 told the truth, everyone would agree that that's
16 impermissible.

17 Questions of credibility are
18 traditionally treated as questions of fact. If
19 you look at Section 1229a, it specifies the
20 different criteria that a court should consider
21 in assessing credibility, and they're all
22 factual considerations, although I -- I
23 acknowledge that it's a slightly more
24 complicated one than the question did he check
25 the box or not.

1 JUSTICE SOTOMAYOR: Didn't you just
2 give the answer in part by saying, generally, a
3 judge doesn't say I just think he lied. A judge
4 gives reasons for why he thinks the person lies,
5 and those reasons are supported by the record or
6 not, correct?

7 MR. RAYNOR: Correct. Yes. But I
8 don't --

9 JUSTICE SOTOMAYOR: That's why we
10 think of them as facts, as every judgment
11 doesn't necessarily mean discretion.

12 MR. RAYNOR: Yes. Agreed. There are
13 multiple meanings to the word "judgment." Here,
14 the statute uses the term "judgment" to include
15 a discretionary component, and that's evident
16 not just from the dictionary definitions that
17 were contemporaneous with the time, although
18 those did include a discretionary component.
19 They define "judgment" as notion, estimate,
20 opinion.

21 But the statutory context also
22 indicates that the term "judgment" here includes
23 a discretionary component. The title says
24 Denials of Discretionary Relief. Even more
25 critically, the second clause refers to "any

1 other decision or action specified to be in the
2 discretion of the Attorney General or" -- "or
3 the Secretary."

4 JUSTICE ALITO: But isn't your
5 argument that findings of fact never constitute
6 discretionary -- never constitute a judgment?

7 MR. RAYNOR: Our position is that
8 objective findings of historical fact will not
9 constitute a judgment within the meaning of this
10 particular provision. I'm not disputing that
11 colloquially it -- it might be used to refer to
12 findings of fact, but the contextual cues here
13 indicate that that's not the case.

14 JUSTICE ALITO: So you -- you are not
15 making the argument that simply looking at the
16 -- the dictionary definition of the term
17 "judgment" is sufficient to support your
18 position?

19 MR. RAYNOR: No, Justice Alito. The
20 dictionary definitions support our position.
21 They do define this to have a subjective
22 component, but they're not alone enough. And I
23 think the -- the most important contextual --

24 JUSTICE ALITO: Why do they support
25 your position at all? Because any factual

1 determination involves some exercise of
2 judgment, doesn't it? Some are -- some involve
3 questions about which no reasonable person could
4 disagree, but many, like a determination of
5 credibility, involve consideration of a number
6 of factors, and -- and it's very natural to say,
7 in my judgment, this person was telling the
8 truth or, in my judgment, this person was not
9 telling the truth, right?

10 MR. RAYNOR: It -- it is possible to
11 speak in that way. The dictionary definition --

12 JUSTICE ALITO: Is there anything odd
13 about speaking in that way?

14 MR. RAYNOR: Well, the dictionary
15 definitions at the time tend to have a little
16 more nuance to the meaning of the term
17 "judgment." They define it in terms of
18 subjectivity, discerning competing factors,
19 weighing competing factors.

20 And the INA similarly consistently
21 uses the term "judgment" in this way. The INA
22 uses the term "judgment" 12 times outside of
23 this provision. Eight of those times it's
24 referring to a court judgment, which wouldn't
25 apply here, and then two of those times it's

1 referring to a discretionary judgment, and it
2 uses --

3 JUSTICE ALITO: What is your
4 definition of a "discretionary judgment"?

5 MR. RAYNOR: I think there it's just a
6 bootstrapping example. Congress is just making
7 absolutely clear that judgment has the
8 discretionary component.

9 JUSTICE ALITO: But what -- all right.
10 What is a "discretionary decision"? What is
11 your definition of a "discretionary decision"?

12 MR. RAYNOR: A discretionary decision
13 in terms of identifying one for purposes of this
14 statute would be something that is value-laden,
15 requires weighing of competing factors. There
16 may often be a history of non-reviewability, as
17 there is with the hardship criterion. It may be
18 traditionally have been reviewed for abuse of
19 discretion under *Pierce v. Underwood*, looking at
20 those kind of factors.

21 And sometimes there will be an express
22 textual indicator that it's discretionary, for
23 example, if the statute says "in the opinion of
24 the Attorney General" or "in the opinion of the
25 Secretary."

1 CHIEF JUSTICE ROBERTS: Well, we treat
2 a credibility determination as a question of
3 fact. You don't have discretion, right? That
4 -- that's your position?

5 MR. RAYNOR: Correct, Mr. Chief
6 Justice.

7 CHIEF JUSTICE ROBERTS: But -- but
8 can't you have people who, when they're making a
9 judgment about whether an applicant is lying or
10 not, somebody could say: I place a lot of
11 weight on demeanor. I mean, if a person looks
12 nervous or something, I -- I tend to think she's
13 -- she's -- she's more likely lying.

14 And somebody else says: No, I don't
15 do that. I don't regard it at all because I
16 think people applying for, you know, this type
17 of relief, they're going to be nervous. They're
18 facing a lot of things.

19 Now isn't it an exercise of discretion
20 what type of criteria you apply in determining a
21 -- what you say is a -- ultimately a factual
22 question?

23 MR. RAYNOR: I don't think so, Mr.
24 Chief Justice, and I don't -- I don't think
25 there's any dispute that credibility

1 determinations would be non-discretionary fact
2 questions.

3 I don't want to get hung up too much
4 on the colloquial meaning, though, because the
5 statutory context here is very important. And
6 the second clause this Court interpreted in
7 Kucana to cover "the same genre" of decisions as
8 the first clause, in other words, decisions made
9 discretionary by legislation.

10 And the only way to read those two
11 clauses together, as Kucana did, in this case,
12 is our interpretation. We read the first clause
13 to be limited to discretionary determinations
14 and to cover all discretionary determinations
15 underlying the listed forms of relief.

16 CHIEF JUSTICE ROBERTS: So I guess I
17 don't understand whether you've answered my
18 question, is what would you call it if somebody
19 says, I put a lot of weight on -- on personal
20 demeanor, and somebody else says, well, I don't
21 put any weight on demeanor? Isn't that an
22 exercise of discretion in determining a factual
23 issue?

24 MR. RAYNOR: No, Your Honor. I think
25 that would require a searching inquiry. They --

1 they would have to be paying close attention,
2 sorting what they find more persuasive or not,
3 but I don't think that we would say that they
4 have the discretion to choose what the right
5 answer is to this factual question.

6 JUSTICE KAGAN: Mr. Raynor --

7 CHIEF JUSTICE ROBERTS: But they have
8 the discretion to determine, I take it, that
9 they're going to regard nervousness or they're
10 not going to regard nervousness.

11 MR. RAYNOR: That's not typically how
12 this Court talks about credibility
13 determinations. When it talks about complex
14 factual questions like this, it will review them
15 for clear error or substantial evidence. It
16 won't typically review them for abuse of
17 discretion. And I think the same approach is
18 appropriate here.

19 JUSTICE KAGAN: Mr. Raynor, I think
20 I'm a bit confused. The factual issue here is
21 not the ordinary kind of was he lying in the
22 legal proceeding, right, in which we usually
23 say, oh, it's a credibility determination as to
24 whether he was lying on the stand.

25 The factual issue here, if I

1 understand correctly, is whether he was -- what
2 his intent was when he checked the box. So it's
3 a question of historical intent. It's not a
4 question of his credibility in the particular
5 legal proceeding. Is that right?

6 MR. RAYNOR: I agree with that,
7 Justice Kagan. I don't want to run from the
8 fact that the immigration judge did find his
9 testimony to be non-credible. The judge did say
10 that. But I agree with you it is an objective
11 question of historical fact.

12 JUSTICE KAGAN: But the -- the factual
13 issue at issue here is not that. It's what --
14 what was his intent when he checked the box.

15 MR. RAYNOR: Correct. Did he tell a
16 lie or not.

17 CHIEF JUSTICE ROBERTS: Well, but he's
18 asked questions about what his intent was,
19 right, and that -- credibility comes into that,
20 right?

21 MR. RAYNOR: In terms of assessing the
22 answer to this historical question, the
23 immigration judge did consider his credibility
24 on the stand.

25 JUSTICE KAGAN: But he's -- he's

1 always -- he's -- he's asked questions about a
2 lot of factual issues, right?

3 MR. RAYNOR: Yes.

4 JUSTICE KAGAN: That doesn't make them
5 any less factual.

6 MR. RAYNOR: I agree.

7 JUSTICE KAGAN: You know, did you
8 check the box with a pen or a pencil or did, you
9 know, I mean, and, I mean, the fact that he's
10 later asked questions and his credibility is --
11 is at issue doesn't make the underlying factual
12 issue less factual.

13 MR. RAYNOR: I agree, Justice Kagan.
14 And nobody is suggesting that the -- the -- the
15 --

16 CHIEF JUSTICE ROBERTS: Well, what are
17 you agreeing to? I mean, I don't understand.
18 Is it -- is it an exercise? You -- you think no
19 discretion is involved in examining credibility,
20 which is a predicate determination in
21 determining what you think the historical fact
22 is, right?

23 MR. RAYNOR: Credibility was important
24 here in determining the historical fact. That
25 won't always be the case. But I agree that it

1 was here.

2 CHIEF JUSTICE ROBERTS: Well, I know,
3 but it'll be an exercise of discretion, for
4 example, if you think it is, the extent to which
5 you think it is pertinent.

6 MR. RAYNOR: Mr. Chief Justice, I
7 don't think this Court has traditionally
8 described credibility determinations as
9 discretionary determinations.

10 However, if -- if the Court were
11 inclined to go this way, to agree with us that
12 this is limited to discretionary determinations
13 but to be unsure about whether credibility fell
14 within that bucket, I think a remand would
15 probably be appropriate here.

16 That would be a second-order analysis,
17 because the first-line question is -- is does
18 this cover discretionary determinations.

19 JUSTICE BREYER: Yeah, yeah, all
20 right. But look -- look at the -- this -- the
21 discussion you've just been having.

22 What I don't really see is the virtue,
23 legal virtue, of taking the government's
24 position as compared with Mr. Fleming's.

25 I mean, if those were the choices,

1 what you seem to have done, think about this,
2 step 1/step 2 is at least comprehensible to an
3 ordinary person and even to a judge. Okay? I
4 got that.

5 And now what we're doing, we're going
6 to have, like we have in the code here, about
7 eight pages of tiny print in some of these
8 things about what goes before "the Attorney
9 General may." I'll grant you the "may" could be
10 discretionary.

11 And you want to throw in the box
12 called discretionary things like good character,
13 extremely unusual hardship, et cetera. And who
14 knows what else. We just have an example here.

15 So all we're going to do is introduce,
16 if we take yours, a new issue, and this new
17 issue is going to be whether any of these words
18 -- and there are loads of them -- fit within the
19 government's idea of special discretion or not.

20 And at that point, I foresee lots of
21 arguments of this kind. But all we need to say
22 is: Wait a minute. B has to do with the step 2
23 kind of discretion. And if you look through all
24 five, you find in the first sentence of each of
25 those five either the word "discretion" or at

1 least the word "may."

2 Do you see my question? How did the
3 government get to this point? I don't get it.

4 MR. RAYNOR: Justice Breyer,
5 respectfully, I don't think Petitioners'
6 position allows you to avoid this issue. They
7 concede that certain eligibility criteria will
8 be unreviewable under the second clause. So
9 you're going to have to do precisely the same
10 analysis, simply under the second clause.

11 JUSTICE KAGAN: I don't think that
12 that's what they concede. They concede that
13 under the second clause there may be overlapping
14 judgments. But they would say the initial
15 eligibility criteria are always reviewable.

16 Now, if -- if in the second -- if in
17 the second stage the Attorney General or the
18 Secretary or whoever makes this decision, you
19 know, talks about overlapping issues, that's
20 what they've conceded. But their -- theirs is a
21 very simple line: Step 1, eligibility,
22 reviewable. Step 2, discretionary, not
23 reviewable.

24 MR. RAYNOR: Justice Kagan, with
25 respect, their footnote says subsection (B)(i)

1 does not strip review of first-step eligibility
2 determinations. Review of such a determination
3 may be barred if it satisfied subsection
4 (B)(ii)'s requirement. And I think that's --

5 JUSTICE KAGAN: Well, I think I read
6 that differently than you. I just read them as
7 saying, once you get to the step 2 stage,
8 everything is not reviewable any longer, but the
9 step 1 stage, everything is reviewable.

10 MR. RAYNOR: I just don't think
11 there's -- it's inconceivable that that's their
12 actual position because certain eligibility
13 criteria are expressly in the Attorney General's
14 discretion. To take inadmissibility as an
15 example, some -- in some cases, the non-citizen
16 will seek waiver of inadmissibility at the
17 eligibility stage, and that's in the Attorney
18 General's discretion. The statute expressly
19 says that.

20 And if all step 1 questions are
21 reviewable, that means courts would be able to
22 review even waiver decisions. And I just don't
23 think there's any way to read the statute that
24 that kind of thing is reviewable simply because
25 it happens to fall under step 1.

1 JUSTICE BREYER: Okay. Got it.

2 CHIEF JUSTICE ROBERTS: Justice
3 Thomas, anything?

4 JUSTICE THOMAS: No.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer?

7 JUSTICE BREYER: No, thank you.

8 JUSTICE ALITO: What is the mens rea
9 requirement, if any, for the inadmissibility
10 determination here? I don't have the statutory
11 language in front of me, but my recollection is
12 that it says someone is inadmissible if the
13 person represents -- falsely represents being a
14 U.S. citizen. Isn't that what it says?

15 MR. RAYNOR: It does say that, Justice
16 Alito, but it also says for a purpose or a
17 benefit. And the Board of Immigration Appeals
18 has read that to mean that you have to make the
19 representation for the sake of obtaining the
20 benefit. So a mere mistake in checking the box
21 we wouldn't call --

22 JUSTICE ALITO: So the BIA has read in
23 a mens rea requirement?

24 MR. RAYNOR: That's correct. And we
25 --

1 JUSTICE ALITO: Okay.

2 MR. RAYNOR: -- we didn't challenge
3 that below.

4 JUSTICE SOTOMAYOR: I do want to make
5 clear the difference between you and the
6 Petitioner is irrelevant to this case, correct?

7 MR. RAYNOR: That's correct. We both
8 agree that this particular fact question is
9 reviewable.

10 JUSTICE SOTOMAYOR: So the
11 conversation we've been having is more on a
12 theoretical level?

13 MR. RAYNOR: I don't know that it's
14 theoretical, Justice Sotomayor. I do think, if
15 this Court's going to draw a line between
16 discretionary --

17 JUSTICE SOTOMAYOR: But we don't have
18 to? That's what you're telling us. On the
19 facts of this case, we don't have to?

20 MR. RAYNOR: I don't know that there's
21 any way that this Court could hold that fact
22 questions are reviewable without drawing some
23 kind of a line based on the text of the statute,
24 and the only one --

25 JUSTICE SOTOMAYOR: Well, but you're

1 conceding here that these are facts.

2 MR. RAYNOR: Yes, Justice Sotomayor.
3 But the -- the reason we think fact questions
4 are reviewable is because the term "judgment
5 regarding the granting of relief" only applies
6 to discretionary determinations.

7 CHIEF JUSTICE ROBERTS: Justice Kagan,
8 anything further?

9 JUSTICE KAGAN: Much of Ms. Meehan's
10 article rests on the meaning of 1252(a)(2)(D),
11 and, essentially, she says that ought to be read
12 back into the provision that we're interpreting.
13 It says that law questions, constitutional
14 questions, are reviewable. The natural
15 implication of that is that factual questions
16 are not. What is your answer to that?

17 MR. RAYNOR: Justice Kagan,
18 structurally, that's not how the statute works.
19 The statute establishes review bars, including
20 this one, and then it carves out an exception in
21 subparagraph (D). And if a determination
22 doesn't fall within the review bar in the first
23 place, you never need to reference subparagraph
24 (D).

25 So this was -- this was at issue in

1 Nasrallah, for example. The determination there
2 simply didn't fall within the review bar in the
3 first place, so whether it fell within
4 subparagraph (D) was irrelevant. Sub --

5 JUSTICE KAGAN: If Congress had
6 thought that there was review of these sorts of
7 factual issues, wouldn't it have been concerned
8 in adding that provision that the implication
9 was to the opposite effect?

10 MR. RAYNOR: I don't think so because
11 the provision actually says "shall not be
12 construed." So, if anything, it's confirmatory
13 of the existing circuit consensus. Eight
14 circuits had held that this was limited to
15 discretionary determinations. The REAL ID Act
16 was what enacted subparagraph (D), and that was
17 nine years after IIRIRA enacted this (B)(i).
18 And there's just no indication that in the REAL
19 ID Act Congress meant to constrict or expand the
20 scope of the review bar in (B)(i).

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 JUSTICE KAVANAUGH: Has this been the
24 government's position since 1996 consistently?

25 MR. RAYNOR: No, Justice Kavanaugh.

1 This was our position starting in 2001. I
2 acknowledge that before 2001 the government took
3 the court of appeals' position. After St. Cyr,
4 when it became clear there might be
5 constitutional issues with that position, the
6 government flipped, acknowledged its flip in
7 light of St. Cyr, and argued for the position
8 that we have now held since that time.

9 JUSTICE KAVANAUGH: And I guess one of
10 the questions that comes up -- and this follows
11 on Justice Kagan's question -- is I think
12 there's a little bit of a mismatch between the
13 government's position starting in 2001 and the
14 statutory language of the provisions that
15 include the subsequent REAL ID Act.

16 So I understand why the government in
17 2001 would have said St. Cyr, we need to do
18 something different. And the courts of appeals
19 cases were out there, some of them were out
20 there at that time as well.

21 But then what St. Cyr said was
22 questions of law. It didn't say discretionary.
23 So the government's position seems to be a
24 little bit of a mismatch, which then becomes
25 more of a problem once you have the REAL ID Act,

1 the mismatch. Tell me how to work my way
2 through that.

3 MR. RAYNOR: Our constitutional
4 avoidance reading in 2001, you're correct, was
5 slightly overbroad with respect to the concerns
6 that St. Cyr identified, but that's because that
7 was the plausible way to read the text. There
8 really wasn't any way to read the text to just
9 exclude questions of law and precisely track the
10 concerns identified in St. Cyr. So we took the
11 position in 2001 this is the best reading of the
12 text, and it takes care of the concerns in St.
13 Cyr.

14 Now, once that was justified as a
15 constitutional avoidance reading, the addition
16 of subparagraph (D) ameliorating the
17 constitutional concerns doesn't retroactively
18 change what the best reading of the text is.
19 Clark v. Martinez says whether constitutional
20 concerns come or go, we're not going to change
21 our reading of the text.

22 And in the REAL ID Act, Congress left
23 intact the operative language here.

24 JUSTICE KAVANAUGH: I guess the REAL
25 -- if the REAL ID Act had been present as of

1 '01, maybe the government would have adopted a
2 different position, but that's speculative, I
3 suppose.

4 Let me ask two -- sorry to prolong
5 this -- but two questions. What are the
6 problems if we adopt the Petitioners' position
7 and what are the problems if we adopt the
8 amicus's position from the perspective of the
9 government, which has had a consistent position
10 on this since 2001?

11 MR. RAYNOR: Yes. With respect to
12 Petitioners, again, I think their position is
13 largely aligned with ours, except for perhaps an
14 analytical distinction in that they would put
15 discretionary eligibility criteria under (B)(ii)
16 rather than (B)(i).

17 So, if an inadmissibility waiver comes
18 up at the eligibility stage, for example, I
19 think they would acknowledge that's unreviewable
20 under the second clause but not the first.
21 That's purely an analytical difference.

22 With respect to amicus, obviously,
23 there are large practical differences. As my
24 friend pointed out this morning, the starkest
25 practical difference is at the district court

1 level. When DHS makes these adjudications
2 outside of removal proceedings, there's going to
3 be no review whatsoever.

4 But then, of course, there's also a
5 practical difference at the court of appeals
6 stage in that we think factual questions are
7 reviewable --

8 JUSTICE KAVANAUGH: On the --

9 MR. RAYNOR: -- albeit under a very
10 deferential standard of review.

11 JUSTICE KAVANAUGH: -- on the district
12 court point, what's the volume there?

13 MR. RAYNOR: Unfortunately and
14 somewhat surprisingly, there's not a lot of
15 clear data that precisely tracks this question.
16 Based on some internal calculations, it appears
17 that there were probably north of a thousand
18 challenges in district court to DHS
19 determinations in the past year.

20 Petitioners' reply brief at Note 8
21 cites some additional statistics, but those
22 don't precisely map onto 1255 adjudications. It
23 includes a slightly broader set of adjustment
24 applications.

25 So I think it's fair to say that U.S.

1 CIS likely adjudicates or receives more
2 applications than does the Executive Office for
3 Immigration Review, but, unfortunately, I don't
4 have very good data on that question.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 JUSTICE BARRETT: I just have one
9 question, Mr. Raynor, and this is following up
10 on Justice Breyer's point.

11 I mean, the -- the virtue of both the
12 amicus's position and the Petitioners' position,
13 both positions are easily administrable, and
14 they both draw a bright line. I find the
15 treating the discretionary part -- as Justice
16 Breyer pointed out, it introduces complications
17 for courts, then have to figure out which bucket
18 something falls into.

19 And so, given that the bar also
20 applies to judgments regarding cancellation of
21 removal, can you just explain, you know, how the
22 court is supposed to decide whether the -- the
23 quality -- the -- the factor whether the removal
24 would result in exceptional and extremely
25 unusual hardship to spouse or child or parent,

1 how do -- how does a court decide
2 discretionary/non-discretionary?

3 MR. RAYNOR: There's --

4 JUSTICE BARRETT: Isn't that also
5 mixed fact and -- but it also has some
6 discretion mixed in?

7 MR. RAYNOR: Your Honor, we would not
8 agree that it's a mixed question of law and fact
9 under Guerrero, but there is some question about
10 that in the lower courts right now.

11 In terms of identifying discretionary
12 determinations, you would look to several
13 factors. One is, does it include express
14 discretionary language, like "in the opinion of
15 the Attorney General"? The example you gave
16 doesn't happen to include that language, but
17 some hardship criteria, as, for example, under
18 1255, do include such language.

19 Then you would look at whether it
20 requires value-laden decision-making, and you
21 would also look at whether there was a history
22 of non-reviewability.

23 For example, there was a fair amount
24 of pre-IIRIRA case law treating hardship
25 determinations as discretionary, and we think it

1 would be appropriate for the Court to look at
2 that in making that -- that determination.

3 I would just note, in terms of the
4 practical concerns here, the courts of appeals
5 have been doing this for 20 years. The
6 executive has stood behind this interpretation
7 for 20 years. And we obviously have a strong
8 interest in a practical line.

9 And, regardless of what you hold about
10 (B)(i), this type of parsing is indisputably
11 required under (B)(ii). (B)(ii) requires you to
12 identify precise criterion -- criteria and then
13 determine whether they're discretionary or not.

14 So courts are going to be doing this
15 under one of the two provisions.

16 JUSTICE BARRETT: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MR. RAYNOR: Thank you.

20 CHIEF JUSTICE ROBERTS: Ms. Meehan.

21 ORAL ARGUMENT OF TAYLOR A.R. MEEHAN,
22 COURT-APPOINTED AMICUS CURIAE IN SUPPORT
23 OF THE JUDGMENT BELOW

24 MS. MEEHAN: Mr. Chief Justice, and
25 may it please the Court:

1 I'd like to come back to some of the
2 questions about an alternative meaning of
3 "judgment" and why that will still bar review
4 here. But, before I do that, I'd like to start
5 with what I think is the only correct meaning of
6 "judgment" as used by Congress here in the
7 jurisdictional bar.

8 "Judgment" here means any decision
9 with a connotation of formality or
10 authoritativeness. That formal decision or
11 judgment is the overall denial of discretionary
12 relief. Like all judgments, it subsumes any
13 discretion -- subsidiary determination made
14 along the way to denying relief. So whatever
15 the reasons leading to the denial of relief, the
16 resulting judgment is barred.

17 The only exceptions to that
18 jurisdictional bar are in subparagraph (d)'s
19 exceptions clause, precluding review of
20 constitutional claims and questions of law.

21 Congress left no doubt in 2005 that
22 these are the only exceptions. How? By also
23 adding to the text of the jurisdictional bar.

24 In the jurisdictional bar itself,
25 Congress added, except as provided in

1 subparagraph (d), meaning except for
2 constitutional claims or questions of law, no
3 court shall have jurisdiction to review any
4 judgment regarding the granting of relief.

5 There is not a lurking third exception
6 for some findings of fact un-enumerated in
7 either the jurisdictional bar or the exceptions
8 clause. To say that there is would be contrary
9 to the text of the statute, contrary to the
10 structure of the statute, and contrary to one of
11 IIRIRA's overarching purposes, to streamline
12 judicial review, here, leaving fact-finding in
13 the hands of the Executive Branch, consistent
14 with historical practice.

15 Mr. Patel's factual claim is
16 concededly not a question of law or a
17 constitutional claim. The Eleventh Circuit was
18 right to reject it on jurisdictional grounds.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Ms. Meehan, you seem
21 to rely quite a bit on regard -- the clause
22 "regarding the granting of relief" as having a
23 broadening effect on judgment.

24 How would you interpret the statute if
25 that -- if that clause did not exist?

1 MS. MEEHAN: I -- I think I would
2 still interpret it the same, but -- but here is
3 why it needs to exist, especially for the
4 statute as written in -- in 1996.

5 The statute in 1996 was directed at
6 appeals from removal proceedings, and so that
7 phrase, "regarding the granting of relief,"
8 under those five subsections, at its most basic
9 level is serving an identifying function,
10 because, in the removal proceeding, you will
11 have judgments regarding the granting of relief
12 under these five statutes.

13 You'll also have a removability
14 decision, and perhaps you'll also have, say, the
15 denial of asylum. And what that phrase
16 "regarding" is doing is telling you the set of
17 decisions, the discretionary relief denial, that
18 is what is barred by the jurisdictional bar, but
19 the removability decision is still appealable.

20 And that's one of the -- the larger
21 problems with Petitioners' alternative reading,
22 that Congress should have just said final order.
23 Mr. Patel has every right to appeal the
24 removability decision. And if you say that he
25 can't appeal the final order of removal, that

1 brings along with it that removability decision.

2 Now "regarding" also has a broadening
3 function. I think it's Congress's way of
4 explaining that a -- a judgment denying relief
5 for eligibility reasons stands on the same
6 footing as a judgment denying relief for
7 discretionary reasons or perhaps a judgment
8 denying relief for a mix of reasons falling into
9 either category.

10 One way to think about it is
11 "regarding" was Congress's way of rejecting
12 Petitioners' interpretation here.

13 And -- and to Petitioners' argument
14 that -- that -- that "regarding" is -- is -- is
15 a term of art or is a way of thinking about
16 targeting those second-step decisions, I think
17 that's just wrong, and -- and Section 1252 shows
18 us why.

19 So, in the next subparagraph, in
20 1252(b)(4)(D), Congress did exactly what
21 Petitioners said it should have done here.

22 In (b)(4)(D), regarding asylum,
23 Congress refers to the Attorney General's
24 discretionary decision whether to grant asylum
25 relief. And that comparison between

1 1252(b)(4)(D) and the much more categorical
2 language here in the jurisdictional bar, I
3 think, is the end of Petitioners' argument.

4 We don't assume that the language
5 Congress used in (b)(4)(D) is that same
6 "regarding" language we here -- we see here in
7 the jurisdictional bar.

8 JUSTICE SOTOMAYOR: Counsel, I don't
9 understand your answer at all because I don't
10 see how your interpretation in the various
11 subdivisions you gave us give any meaning to
12 "regarding the granting of relief" whatsoever.

13 Congress need not have specified any
14 judgment in (B)(i) as distinct from a decision
15 or action in (B)(ii). Why didn't it just say
16 any decision or action? It used different
17 words, "judgment regarding," and it seems to me
18 that if "decision or action" is as broad as you
19 claim it is, then "judgment regarding the
20 granting of relief" has to be more narrow. You
21 can't make it broad at the same time because,
22 otherwise, they would have used identical
23 language.

24 Second, I'm not sure how we ignore
25 neighboring subsections (a) and (c) that show

1 when Congress wanted to strip jurisdiction
2 broadly in the way that you want it to -- you
3 want it to strip both factual and legal
4 jurisdiction -- Congress knew how to do that in
5 (a) and (c), and it could have just copied that
6 language. Yet it used distinctive language
7 altogether.

8 Then add to all of this, I think all
9 of this means that, at best, the statute is
10 ambiguous. It's not clear. And if it's
11 ambiguous, I don't know what to do with the
12 presumption favoring judicial review. That's so
13 well embedded in our jurisprudence. It's what
14 made us decide *Kucana* last year.

15 This makes no sense to me. So give me
16 a reason why Congress would do something
17 different in (B)(i) and (B)(ii) --

18 MS. MEEHAN: Well, to your first
19 question --

20 JUSTICE SOTOMAYOR: -- that would give
21 -- that would give meaning to all of the words.

22 MS. MEEHAN: To your first question,
23 Justice, I actually think looking at the full --
24 the context, I agree with you we should look at
25 the surrounding provisions and the differences

1 in language Congress used here. I think,
2 actually, once you do that, it all points in the
3 direction that the jurisdictional bar means the
4 overall denial of relief.

5 Second, with respect to (a) and (c),
6 those are -- those are helpful examples of
7 having to use different language for different
8 things.

9 So I -- I read (a)(2)(A) actually as a
10 bit narrower. I think it's interesting that
11 Congress in that -- in that provision says "any
12 individual determination" and doesn't say "any
13 judgment." And -- and when Congress says that,
14 they're reserving the right to -- to have a
15 legal challenge or whatever else about expedited
16 removal proceedings.

17 With respect to (c), the real problem
18 is what I mentioned earlier with Justice Thomas.
19 You can't speak categorically like a final order
20 of removal in subparagraph (b) in the
21 jurisdictional bar here because, if you did
22 that, you'd be precluding Mr. Patel from
23 appealing anything related to the removability
24 decision.

25 And -- and he's not -- he's not

1 subject to the criminal alien bar. He has every
2 right to appeal the criminal alien -- pardon,
3 the removability decision. And so what's left
4 is Congress's choice of words to bar instead
5 just the denial of discretionary relief.

6 And -- and -- and, again, "any
7 judgment" is much different here than any --
8 "the Attorney General's discretionary judgment,"
9 for example, in 1252(b)(4)(D) or "the Attorney
10 General's discretionary judgment" in 1226(e) or
11 the other examples that Petitioner and the
12 government point to, where "judgment" is being
13 used as the object of the preposition, "in the
14 judgment of someone."

15 I would agree if the state -- if -- if
16 the provision here said something about "a
17 determination in the judgment of the Attorney
18 General," it's a closer case.

19 JUSTICE SOTOMAYOR: So give me a
20 reason why Congress would want to separate out
21 judicial review regarding factual matters on
22 removability, which it sort of -- it has
23 permitted, from those that have to do with the
24 decisions of agents like this.

25 MS. MEEHAN: Before 2005, I think,

1 arguably, what Congress was doing here was
2 prohibiting review of the entire denial of
3 discretionary relief. I think that's the
4 easiest way to make sense of the jurisdictional
5 bar then amended by the exceptions clause.

6 But even if that's not what Congress
7 was doing and it was just making fact review
8 different for removability or discretionary
9 relief, one reason Congress might have wanted to
10 do that is the removability decision itself has
11 higher stakes. There are greater due process
12 concerns. And so we would want to afford a
13 non-citizen the ability to appeal that in a way
14 that discretionary relief is but a matter of
15 grace. And so, in streamlining judicial review,
16 as one -- as was one of IIRIRA's overarching
17 purposes, Congress took off the table that fact
18 review.

19 JUSTICE SOTOMAYOR: Thank you.

20 JUSTICE KAGAN: Ms. -- Ms. --

21 JUSTICE BREYER: Well, there's a part
22 you left out. I mean, I think Justice Sotomayor
23 brought up a set of relevant factors. Where --
24 where I am at the moment, I think it would be
25 very -- if you really ask a congressman have you

1 ever thought about this, he -- he probably would
2 say before St. Cyr we wanted no review. At
3 least I didn't. But that isn't what they said.

4 And so then what we have now, we have
5 (D) and we have the St. Cyr, anti-St. Cyr review
6 or whatever. Then we go and you look at (A),
7 (B), and (C). Okay. When I read it, the music
8 of those words, look, the -- "any individual
9 determination or to entertain any other cause or
10 claim." God, it sounds like we really mean it.

11 And, of course, that makes sense
12 because, in my mind, those are people standing
13 up in line at Ellis Island or in the -- and we
14 don't -- the courts don't look at visas from --
15 given in Paris and we're not going to have them
16 look at the people in line in Ellis Island
17 either. We really mean it. Okay?

18 And then you look at (C), and these
19 are criminals. I mean, get rid of them. Okay?

20 And then we look at (B), and (B) uses
21 softer language. "Any judgment regarding the"
22 is softer language. Moreover, we look at the
23 title, and the first one in effect says the Line
24 at Ellis Island, and the third one says
25 Criminals, and the second one says Discretionary

1 Relief. Oh.

2 And then we have awfully good reasons,
3 which Justice Sotomayor brought up, to say, hey,
4 the Attorney General is supposed to decide this
5 discretionary deal. I mean, keep the courts out
6 of that.

7 But that reason doesn't quite apply to
8 all the subsidiary fact things. So now we stick
9 in (D) and maybe they carry along with it. I
10 don't know how to do that, but it just looks
11 different to me.

12 So, once it looks different, well,
13 then you call in the presumption of review, you
14 see, and -- and I -- and once we get the
15 presumption in review, that sort of pushes
16 against what was a good brief. I mean, that
17 pushes the other way. Hmm.

18 And so I'm slightly stuck and I -- and
19 I'm slightly stuck on this presumption of
20 review. And I can see how to deal with the
21 government. You say, discretion, you know,
22 discretionary decision, which is that last
23 decision, stay here, my friend. And anything in
24 the 19,000 words in 1182(B) or wherever, that's
25 the same, and we don't have to decide what's the

1 same in this case.

2 So -- so I can see it both ways, but I
3 think that presumption is tough for you.

4 MS. MEEHAN: I'll take your questions
5 in reverse order, Justice, which -- I'd like to
6 say something about the presumption of review
7 first. It hangs together a bit with the text,
8 right? So the -- the starting point here for
9 the presumption is this is a jurisdictional bar.
10 Right out of the gate, Congress has indicated
11 with clear language that it anticipates some set
12 of decisions will be beyond -- will be beyond
13 review.

14 And then, when you combine that --
15 that observation that we have a juris- --

16 JUSTICE KAGAN: Well, still, Ms.
17 Meehan, wouldn't the presumption apply in terms
18 of deciding what the scope of that provision is?
19 I mean, it doesn't just disappear because we're
20 dealing with a review bar.

21 MS. MEEHAN: I -- I agree. I agree.
22 But this is unlike a case like Bowen, for
23 example, where the statute doesn't say one way
24 or another. It's silent. But -- but I agree.
25 So you combine that jurisdictional bar --

1 JUSTICE KAGAN: I mean, not to press
2 the point if you agree, but, I mean, you might
3 think that Congress acts with the presumption in
4 mind, especially when it's doing a review bar,
5 as opposed to when it's silent.

6 MS. MEEHAN: You might and in which
7 case you go to the next order of analysis, which
8 is you exhaust every canon of construction.
9 That includes grappling with what subparagraph
10 (D) can possibly mean if subparagraph (B) means
11 what the government says it means in particular.

12 And you're left with a clear -- you're
13 left with a clear implication -- or, pardon,
14 you're left with a clear conclusion that the
15 jurisdictional bar must mean the overall denial
16 of relief. And if that is clear, there's no
17 reason to apply a presumption of review. It is
18 only a tiebreaker only if once you --

19 JUSTICE KAGAN: I didn't mean to take
20 you off of Justice Breyer's main point.

21 MS. MEEHAN: So the -- well, to
22 Justice Breyer's question, the -- the main
23 reason I would -- I would not apply the
24 presumption of reviewability here is because,
25 once you exhaust the canons of construction, I

1 do think the only correct way to read the
2 statute is as the Eleventh Circuit read it.

3 But even if you disagree with me on
4 that, this would be an awfully strange case to
5 apply the presumption of reviewability if you
6 consider the origins for the presumption of
7 reviewability, how it's ordinarily applied, and
8 then historic reviewability of immigration
9 decisions more broadly.

10 The presumption of reviewability
11 largely originated with the APA. The -- the
12 purpose of it was to review questions of law
13 about whether agencies were following their own
14 rules, whether they were following Congress's
15 rules. No one disputes here that Mr. Patel
16 could -- could appeal a question of law of that
17 order.

18 But I am not aware of any of this
19 Court -- Court's cases in an immigration case
20 where the Court has applied the presumption of
21 review to allow a petitioner to relitigate a
22 question of fact.

23 JUSTICE BREYER: Yeah, but, I mean,
24 we're going to -- if we take that view, we're in
25 the same mess as the other because, you know,

1 the APA has them all in the same place,
2 substantial evidence, on the record as a whole,
3 and that's in review law, fact. It's all in the
4 same place in the statute. And we start making
5 those distinctions, at least if we don't have
6 to, between a review for substantial evidence
7 and a review for -- that's a question of law
8 and -- and -- really. I mean, it really is.
9 You call it a question of fact, but -- but, God,
10 I -- I can think we'll get into a mess or the
11 courts will get into a mess. Is this -- I've
12 not seen it distinguished, in other words, and I
13 don't see why it should be.

14 MS. MEEHAN: The best example of that
15 distinction is in McNary, which is helpfully an
16 immigration case where the presumption of review
17 was at issue. In McNary, the Court reviewed
18 what it called a generic question of statutory
19 interpretation about visas for these special
20 agricultural workers.

21 The Court went out of its way in
22 McNary to say, to be clear, we are not
23 reviewing, no one has asked us to review, the
24 merit of the individual applicants' applications
25 here. We are only reviewing the more abstract,

1 the more generic question of what the statute
2 means, and then we're leaving it to the agency
3 to determine how to apply that in this case.

4 And that is consistent with decades of
5 this Court's case law and other federal courts'
6 case law acknowledging that they take executive
7 officials' facts as found. And the courts' only
8 role is to answer the questions of law that
9 would arise --

10 JUSTICE BREYER: We actually say facts
11 as found, even if not supported by substantial
12 evidence?

13 MS. MEEHAN: St. Cyr is -- St. Cyr is
14 the best --

15 JUSTICE BREYER: No, St. Cyr didn't
16 deal with that. It dealt with the law, and it
17 dealt with what you have to have in habeas and
18 --

19 MS. MEEHAN: On -- on page 306 of St.
20 Cyr, the Court actually distinguishes between
21 fact review and these historical habeas
22 decisions and questions of law. And I actually
23 take that passage of St. Cyr to mean that if Mr.
24 St. Cyr had come to this Court with a factual
25 dispute, the case would not come out the same.

1 JUSTICE BREYER: Yeah, but that's
2 habeas.

3 MS. MEEHAN: It is habeas. And -- and
4 that -- that is only more helpful here. So, if
5 it is true that this Court was reluctant or
6 unwilling or -- to -- to review factual
7 questions in a habeas case about an alien
8 detained pending removal, then it must
9 necessarily follow that it would be odd to apply
10 the presumption of judicial review here for a
11 denial of discretionary relief, a fact question
12 about the denial of discretionary relief.

13 JUSTICE BARRETT: Ms. Meehan, I want
14 to clarify the scope of your position. So isn't
15 it true that your position does lead to the
16 conclusion that, in district court, even legal
17 questions are not reviewable?

18 MS. MEEHAN: I -- I think that is --
19 that is the -- the right way to interpret the
20 statute as amended in 2005. So, before 2005, I
21 -- I actually don't think that was true.

22 In 2005, one of the REAL ID Act
23 amendments was to -- if you look at pages 10 and
24 11 of my brief, Congress adds the phrase
25 "regardless of whether the judgment, decision,

1 or action occurs during a removal proceeding."
2 And the courts of appeals are relatively uniform
3 that that means a petitioner must wait until
4 they're placed into removal proceedings to
5 dispute a -- a denial of discretionary relief.

6 Now I -- I -- I think that is an issue
7 of Congress's own making and could be something
8 that Congress could -- could solve. There's a
9 good reason why Congress wants that to be the
10 case, which is exhaustion. But, before I say
11 more about that, I would like to address some of
12 the statistics questions and put it all in
13 perspective.

14 So, first off, this concern about U.S.
15 CIS denials being -- not being immediately
16 reviewable affects only one of the four
17 categories of discretionary relief in the
18 jurisdictional bar. As best I can tell, it
19 affects only adjustment of status. It doesn't
20 affect cancellation or some of the
21 inadmissibility waivers, including because
22 something like cancellation or voluntary removal
23 is only happening in the context of a removal
24 proceeding.

25 Second off, even for that set of

1 adjustment-of-status applicants, the vast
2 majority are unaffected by this. I think we're
3 only dealing with a very small percentage. This
4 year alone, the average approval rate for one of
5 these U.S. CIS adjustment-of-status applications
6 has hovered around 87 percent. Two hundred and
7 thirteen thousand adjustment-of-status
8 applications have been granted this year.

9 And of those 10 to 15 percent of cases
10 of adjustment-of-status applications that are
11 denied, again, there's good reason. Congress
12 expected those individuals to exhaust their
13 administrative remedies before involving the
14 courts of appeals, as Mr. Patel did here. He
15 applied for adjustment of status with U.S. CIS
16 in 2007, 2008. Then he had a hearing before the
17 immigration court. Then he had an appeal before
18 the BIA. He has an opportunity to file a
19 reopening motion within a certain amount of
20 time, and only then does the Eleventh Circuit
21 get involved. And -- and, again, this is, I --
22 I think, what Congress anticipated by that
23 amended text in 2005.

24 There are additional issues with
25 Petitioners' and the government's interpretation

1 that are not what Congress -- that were not
2 problems of Congress's own making.

3 JUSTICE KAGAN: Ms. -- Ms. -- can I
4 stop you there and just can I take you back to
5 the basic question here, which is "judgment
6 regarding the granting of relief" and what that
7 phrase means.

8 And -- and I think, you know, you come
9 into this with a kind of good, ordinary meaning
10 argument. And I -- I take Mr. Patel to be
11 saying it's really not the ordinary meaning
12 here. This is a kind of term of art that refers
13 to the step 2 determination as opposed to the
14 step 1 eligibility functions.

15 And I'm just going to give you a bunch
16 of places in which that language is -- it -- it
17 sort of supports his argument and -- and ask you
18 for your response to it.

19 So 1229a, which is the overarching
20 statute governing how removal proceedings work,
21 that statute basically breaks it down into two
22 steps, in just the way that Mr. Patel does, and
23 says the non-citizen has to prove that she
24 satisfies the initial eligibility requirements.

25 And then -- this is number 2 -- with

1 respect to any form of relief that is granted in
2 the exercise of discretion, that she merits a
3 favorable exercise of discretion. So the
4 granting of relief is in that part.

5 Then, similarly, there's a regulation
6 that breaks the relief down into two steps and
7 in that second step says it should be "granted
8 in the exercise of discretion," a phrase that
9 does not appear in the first step, which is
10 eligibility.

11 And then Mr. Fleming, I think, cited
12 1252(b)(4)(D), whether to grant relief under
13 1158(a) of the asylum title, which pretty
14 clearly has to be about the -- the -- the -- the
15 -- the second-stage inquiry rather than any
16 first-step factual issues.

17 Then -- I'm -- I'm sorry to do this to
18 you -- but we several times, we in St. Cyr, in
19 Bagamasbad, in Pereida very, very recently,
20 cases spanning nearly 50 years of immigration
21 law, all of them distinguish between eligibility
22 and the step 2 discretionary determination, and
23 all of them talk about the discretionary
24 determination as being about whether relief
25 should be granted.

1 So using that exact same language,
2 basically coming from the statute and appearing
3 in all of our cases. So that's my question to
4 you. Sorry.

5 MS. MEEHAN: I'll try to hit each of
6 them, and then please tell me if I don't.

7 So I -- I agree with you as a general
8 matter. Certainly, the Court has observed and
9 then the statutes seem to observe that there are
10 eligibility questions or issues and there are
11 discretionary issues. I agree with that.

12 Often, the reason that is so is the
13 Court here has had -- has had to make clear that
14 those eligibility considerations are a floor and
15 that the Attorney General doesn't have
16 discretion always to go beneath that floor. You
17 can't grant cancellation, for example, to
18 someone who has committed an aggravated felony,
19 and that floor remains.

20 I don't think those observations about
21 the two-step mean anything for the -- the
22 jurisdictional bar because Congress didn't, in
23 -- in codifying the jurisdictional bar, say
24 eligibility or say discretion.

25 JUSTICE KAGAN: It's -- it's true, but

1 it keeps on using the word "granted." And --
2 and, you know -- excuse me, it -- it says, you
3 know, "granting relief," which is the phrase
4 that appears in the two-step -- in the
5 second-step part of all these provisions and our
6 cases rather than in the first step part. But
7 we just don't talk about granting relief with
8 respect to making these eligibility
9 determinations.

10 MS. MEEHAN: I -- I agree with you
11 there, and I think this would be a much harder
12 case if the word "regarding" and if the word
13 "any" were not involved.

14 But -- but I don't think the word
15 "granting" can carry that amount of weight, and
16 the -- the -- the reason for that is -- is how
17 Congress used "granting" in Section
18 1252(b)(4)(D), whether to grant relief, or,
19 here, a harder statute would be the granting of
20 relief in the discretion of Attorney -- of the
21 Attorney General.

22 I -- I -- I don't think the granting
23 of relief is necessarily limited to the second
24 step. If it were, the statute would be phrased
25 as the asylum statute is phrased in (b)(4)(D).

1 With respect to 1229a in particular,
2 it's setting out a two-step for the immigration
3 courts. That is a provision that governs the
4 immigration proceedings.

5 But, even as this Court said in
6 Bagamasbad, the immigration court doesn't
7 necessarily need to do step 1. They can go
8 straight to step 2 and deny relief for
9 discretionary reasons, which would -- which
10 would be unreviewable.

11 JUSTICE KAGAN: Well, they could do
12 that and that would be unreviewable. I guess
13 the -- the -- the point that Mr. Patel is making
14 is that, when you're doing step 1, step 1 is not
15 about the granting of relief, and so it is
16 reviewable.

17 MS. MEEHAN: One way -- one way to
18 think about the difference between the granting
19 of relief and granting of relief, which I think
20 is the main textual problem with Petitioners'
21 argument, they're reading them the same.

22 You -- if I told you we're making
23 decisions about -- we're making decisions
24 regarding the sending of astronauts to Mars, you
25 would know that means something different than

1 decisions regarding sending astronauts to Mars,
2 right? At least the latter feels a little bit
3 narrower. The granting of relief naturally
4 encompasses decisions based both on eligibility
5 grounds and on discretionary grounds.

6 JUSTICE KAGAN: So I take that
7 argument, you know, the/of as a different sort
8 of formulation, but -- but in a context in which
9 there's a review -- presumption of
10 reviewability, that starts looking like, whoa,
11 that's a little bit fine for, you know, this
12 context.

13 MS. MEEHAN: As -- as this Court has
14 said, there is both the presumption of
15 reviewability and there is an expectation with
16 jurisdictional bars that the Court will construe
17 the jurisdictional bar with strict fidelity to
18 its terms.

19 Just as much as the Court has to
20 preserve its power of review, Congress has its
21 power to restrict review. And, here, Congress
22 did so.

23 And think about "regarding the
24 granting of relief" as a way of eliminating that
25 ambiguity. "Regarding the granting of relief"

1 has that broadening effect, and it shouldn't be
2 read in isolation.

3 I -- I agree this might have been a
4 harder case before 2005. But there's no way to
5 understand the exceptions clause or there's no
6 great way to understand the exceptions clause if
7 altogether any judgment regarding the granting
8 of relief under these five discretionary forms
9 doesn't mean the overall denial so that when
10 Congress, in the exceptions clause, restores
11 jurisdiction for constitutional claims and
12 questions of law, there's something to restore.

13 In the -- in the government's view,
14 the -- the judgment has always excluded
15 questions of law and constitutional claims, and
16 that makes very little sense then why Congress
17 would cross-reference the jurisdictional bar in
18 the exceptions clause in 2005.

19 The presumption of reviewability
20 doesn't hang only on the phrase "regarding the
21 granting of relief." It requires interpretation
22 of the whole statute. And once --

23 JUSTICE KAVANAUGH: Sorry. Keep
24 going.

25 MS. MEEHAN: And -- and once you do

1 that, I think there's more than a clear
2 statement that review here for this -- for
3 fact-finding is barred.

4 JUSTICE KAVANAUGH: Can I pick up on
5 your reference there to the government's
6 argument and just get your reaction to what I
7 think is the music of their argument?

8 So you have the '96 act and they agree
9 with your position for the first five years.
10 Then St. Cyr comes along, 2001, and the Bush
11 Administration decides we need to interpret this
12 statute in a way to avoid the constitutional
13 problem, and they come up then, the government
14 comes up with its current position, the
15 discretionary position relying on the title and
16 other things.

17 Then 2005, the REAL ID Act comes in,
18 really talks again, like St. Cyr, about
19 questions of law and constitutional questions.

20 So a little bit of a mismatch with the
21 government's position. But I think what the
22 government's saying is we've now done it this
23 way through four administrations, for 20 years,
24 and the courts have interpreted it that way, and
25 at least after St. Cyr, we found enough

1 ambiguity in this, the title provision, other
2 things, of how they fit together, that our
3 interpretation should be good enough.

4 I think that's something. I don't
5 want to put words in their mouths, what they're
6 saying. Why -- why do you think that isn't good
7 enough in this instance? We don't usually have
8 the government coming in in an immigration case
9 through four administrations and saying, we want
10 courts to review issues.

11 MS. MEEHAN: I -- I don't think it's
12 good enough for two reasons. First, it doesn't
13 abide by the text, and, second, there are
14 serious workability issues.

15 So, first, even if the statute was
16 unclear before 2005, the exceptions make it
17 clearer. And the way I -- I have made sense of
18 the government's mismatch, Justice Kavanaugh, is
19 the government is saying that Congress did
20 something along the following lines: In 1996,
21 Congress told everyone you can't eat junk food.
22 And then, in 2005, Congress said: Except you
23 can eat peas and carrots.

24 And if I told you you can't eat junk
25 food, except you can eat peas and carrots, that

1 doesn't make a whole lot of sense. You know
2 what does make sense? You can't eat junk food,
3 but you can eat burgers and fries. And so junk
4 food is the larger category. Burgers and fries
5 are in that category. They're the exception.
6 And, by implication, everything else is still
7 unreviewable.

8 Now the workability problem: I think
9 there's an alternative meaning of "judgment"
10 somewhere between -- there's obviously an
11 alternative meaning of "judgment" in the
12 dictionary definitions, something about forming
13 -- forming an opinion, a judgment call,
14 exercising judgment.

15 That's not the right use of "judgment"
16 here. I think, on the outcome, it fairly
17 encompasses reviewability -- it fairly
18 encompasses credibility. But the government
19 will have this Court walking into a circuit
20 split if it -- if it adopts that meaning.

21 A judgment call. Again, not the right
22 usage, completely unworkable. The Court would
23 have to be creating a federal common law of what
24 is too discretionary or not discretionary
25 enough.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas?

4 JUSTICE THOMAS: Nothing further.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer, anything further? No?

7 Justice Sotomayor?

8 JUSTICE SOTOMAYOR: I'm assuming your
9 answer to Justice Barrett was, yes, you admit
10 that your reading bars review by the district
11 court of questions of law, but we shouldn't care
12 too much because it's a very small number of
13 people that are affected by that?

14 MS. MEEHAN: It bars immediate review
15 of questions of law in the same way this Court
16 in Reno versus AADC and Reno versus Catholic
17 Social Services barred immediate review, but
18 there will be some --

19 JUSTICE SOTOMAYOR: But I did think
20 that there are immediate consequences to this
21 failure to adjust. I thought the government
22 moves very slowly, and removal proceedings,
23 actual removal notices, take ages. But a
24 decision like this can affect a person's work
25 authorization, sponsoring of family members to

1 come here. It affects the pathway to
2 citizenships after three to five years. There's
3 a lot of consequences to not having immediate
4 review.

5 MS. MEEHAN: I -- I agree there are
6 consequences. Those are consequences, I think,
7 Congress anticipated in amending the statute in
8 2005. It could correct those. And I think the
9 Court's decision in Reno versus AADC is exactly
10 on point here, where there were immediate
11 constitutional claims, First Amendment claims
12 and Fifth Amendment claims, about the
13 government's selective prosecution, and the
14 Court here held that those claims would have to
15 wait. There couldn't be immediate review. It
16 would have to wait until the end of removal
17 proceedings.

18 JUSTICE SOTOMAYOR: Tell me something
19 in the history of this statute or in the logic
20 of St. Cyr, which made very clear that on the
21 habeas statute at least, suspending review of
22 questions of law provides a constitutional
23 problem, and what the government's basically
24 saying to us, once they got St. Cyr, a reading
25 that precludes judicial review is not the best

1 reading one should give to a statute. You
2 should go back to the first principles and look
3 at the ambiguity and figure out what the best
4 reading not to do that is.

5 And that's what they've come up with.
6 But your reading does exactly what the
7 government says we shouldn't do.

8 MS. MEEHAN: Do -- do you mean with
9 respect to the U.S. CIS denial and any question
10 of law?

11 JUSTICE SOTOMAYOR: Yes.

12 MS. MEEHAN: So, again, I -- I think
13 the statute is relatively clear that the review
14 of that question has to wait until it has been
15 exhausted through the agency process and it's
16 before the court of appeals and it --

17 JUSTICE SOTOMAYOR: Well, this has
18 nothing to do -- well, I'm sorry. Go ahead.

19 MS. MEEHAN: And it -- and it's in a
20 petition for review. And it also has nothing to
21 do with the case here. Mr. Patel, again,
22 exhausted his administrative remedies. He got
23 review of his question of law in the Eleventh
24 Circuit. The only question here is whether fact
25 findings are beyond review. With respect to the

1 history, that's fully consistent with the
2 history.

3 JUSTICE SOTOMAYOR: Thank you.

4 JUSTICE KAGAN: So the fast-food one
5 is -- it's -- it's good, but isn't -- isn't
6 really the government or -- or Mr. Patel saying,
7 you can't eat fast food at lunch, but you can
8 eat burgers and fries at dinner?

9 MS. MEEHAN: That's possible --
10 possibly that is what they're saying. As with
11 any hypothetical, it is imperfect, and so then I
12 just go right back to the text. And the text
13 speaks in a categorical way, in the way that
14 Congress didn't otherwise speak categorically
15 when referring to judgments, discretionary
16 judgments.

17 And if there were any doubt about
18 that, you've got to look at the transitional
19 rules. In the transitional rules, Congress took
20 a more modest approach, discretionary decisions.
21 The discretionary comes out in the permanent
22 rules, and we get "any judgment."

23 You can't read those two the same. So
24 even if we're having fast food sometimes and not
25 always, the transitional rules, I think, give us

1 an important key to that -- to the -- to the
2 text here.

3 JUSTICE KAGAN: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch?

6 JUSTICE GORSUCH: You're not going to
7 like this question. Assume for the moment the
8 Court were to disagree with you. As between the
9 two other options, there's slight variations
10 between the Petitioner and the government's
11 theories. But you -- you've -- you've raised
12 good metrics for us to measure any
13 interpretation on, the text and the workability.

14 Would -- would you care to grade the
15 two alternatives comparatively?

16 MS. MEEHAN: I -- I think that
17 Petitioners' -- the Petitioners' interpretation
18 doesn't abide by the text and has arbitrariness
19 problems. The government's interpretation
20 doesn't abide by the text and has workability
21 problems. There's actually an interpretation, a
22 fourth interpretation, lurking out there that
23 uses the government's definitions but doesn't
24 have the same workability problems.

25 So, if you'll permit me, I'll tell you

1 what the government-adjacent position is, which
2 is, if you look at pages 16 and 17 of their
3 brief and if you look at that more informal
4 meaning of "judgment," the formation of a -- the
5 formation of an opinion exercising discernment,
6 that clearly encompasses fact findings. The
7 fact-finding here is the best example of that.

8 The -- the immigration judge heard the
9 direct testimony of Mr. Patel, watched the
10 cross-examination, compared it to the record
11 evidence, and then, in his judgment, deemed him
12 not to be credible.

13 You could adopt that more informal
14 interpretation. It's -- it's close to the
15 government's, but it's not unworkable so long as
16 you agree that a credibility determination is a
17 judgment and not a non-judgment, as -- as the
18 Court says.

19 Now, in context, considering
20 everything else, I think that's a really
21 difficult interpretation after 2005, but it's
22 the second best alternative.

23 JUSTICE GORSUCH: That's the second
24 best. What's the third and the fourth?

25 MS. MEEHAN: I don't know if I would

1 take arbitrariness versus workability. I mean,
2 the arbitrariness problem in the Petitioners'
3 interpretation is real. The -- the Petitioners
4 explain there are fact findings all along the
5 way to denying discretionary relief. And the
6 government says half of them are reviewable and
7 the other half aren't reviewable.

8 I -- I think that's a -- that's a
9 difficult rule to adopt. I'm not sure which
10 other one I would take. I -- and perhaps --
11 perhaps Petitioners' despite the arbitrariness
12 because it's -- it's administrable, but, again,
13 I think the text leaves us -- I'm having trouble
14 with your question because I --

15 JUSTICE GORSUCH: I -- I -- I --

16 MS. MEEHAN: -- find the text so
17 unambiguous.

18 JUSTICE GORSUCH: -- I told you
19 weren't going to like it. So thank you very
20 much, counsel. I appreciate it.

21 JUSTICE KAVANAUGH: Can I just pick up
22 on your answer to the government's position,
23 which were -- as I described, the overall
24 situation was, one, text and, two, workability.

25 So, on text, if -- you gave a forceful

1 answer there. I think your argument is even
2 after St. Cyr, they're scrambling, they do a new
3 interpretation, maybe they get some leeway on
4 constitutional avoidance, but once Congress
5 responds to St. Cyr in 2005, the text is
6 sufficiently clear that they no longer have the
7 ambiguity hook to continue with that
8 interpretation. Is that --

9 MS. MEEHAN: I think that's exactly
10 right. And one of the ways to think about the
11 -- the circuit courts before St. Cyr is they
12 were grappling with exactly what the government
13 says.

14 And what's nice about the 2005
15 amendment is Congress solves the problem for
16 everyone. Congress says no
17 discretionary/non-discretionary. There's -- you
18 know, there's no mention of it. But Congress
19 says we're going to give you a line between
20 constitutional claims and questions of law and
21 everything else going forward. And -- and,
22 importantly, courts -- other courts of appeal
23 since then have abided by that line.

24 I think that's a way to understand
25 some of the confusion in 2001 that is no longer

1 with us today after 2005.

2 JUSTICE KAVANAUGH: And then your
3 other answer to the -- to the government's kind
4 of overarching position was workability. I
5 think they would respond, well, it's been 20
6 years now, it's out there, and a lot of courts
7 were -- were getting along okay.

8 You want to respond to that?

9 MS. MEEHAN: I don't think the courts
10 are getting along okay. And if you look at the
11 Trejo decision from the Fifth Circuit that's
12 cited, I think, in all the briefs here, that's
13 the existing circuit split, it's the best
14 illustration of the unworkability of the
15 government's approach, where some circuits have
16 said some eligibility determination is too
17 discretionary; other circuits have said no, it's
18 not discretionary. And then, as I take Footnote
19 5 of the government's brief, they think there's
20 also somewhere in the middle where we can review
21 some parts because they're not discretionary but
22 not other parts, and I think that itself
23 illustrates the unworkability.

24 JUSTICE KAVANAUGH: Thank you very
25 much.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Rebuttal, Mr. Fleming.

4 REBUTTAL ARGUMENT OF MARK C. FLEMING
5 ON BEHALF OF THE PETITIONERS

6 MR. FLEMING: Thank you, Your Honor.

7 Ms. Meehan said that exhaustion would
8 have to be required, I think, in response to
9 Justice Barrett's question. For people who are
10 not removable, there is no further exhaustion.

11 The American Immigration Lawyers
12 Association brief gives the example of Dr. Abu
13 Zaid, whose case is stayed in the D.C. Circuit
14 right now awaiting the decision in this case.
15 He has an H-1B visa. He's working as a doctor
16 at Augusta University Medical Hospital in
17 Georgia.

18 He's not going to go into removal
19 proceedings. He's here lawfully. He's trying
20 to get a green card so that he can have
21 permanent status here as opposed to temporary
22 status.

23 There is no further exhaustion he can
24 do. He has a final order of U.S. CIS denying
25 his application. The only way for him to get

1 review of that is not under the Eleventh
2 Circuit's vision of the statute but under ours.
3 Credibility is an issue of fact. In
4 this Court's decision in Nasrallah, on page
5 1693, the Court says those factual issues,
6 regarding a Convention Against Torture order,
7 may range from the non-citizen's past
8 experiences in the designated country of
9 removal, to the non-citizen's credibility, to
10 the political or other current conditions of the
11 country. And the BIA in this very case referred
12 to the issues as factual reviewed for clear
13 error. That's on page 106 of the Petition
14 Appendix.

15 Justice Kavanaugh raised the issue of
16 the REAL ID Act. I think what's important there
17 is that the REAL ID Act was reacting to the fact
18 that St. Cyr had taken legal issues that were
19 being pressed by people covered by (c), who had
20 qualifying criminal convictions, and put them
21 into habeas instead of into petitions for
22 review. REAL ID fixed that, moved them back
23 into petitions for review.

24 But it did not change the situation of
25 people like Mr. Patel, who are not subject to

1 (c) because they do not have criminal
2 convictions. Those people have always been able
3 to appeal factual matters, before IIRIRA and
4 after. REAL ID didn't change that. IIRIRA
5 didn't change that.

6 Finally, to clear up any confusion
7 about the difference between our position and
8 the government's, and I -- I don't think our
9 position is arbitrary, with all respect to Ms.
10 Meehan. Our position, I think, is pretty clear,
11 which is that (B)(i) doesn't bar review of any
12 first step decision.

13 Now I -- I -- I think -- we admit
14 because I think we have to that under the
15 language of (B)(ii), Congress could, if it
16 wished, pluck out an individual eligibility
17 requirement and specify in the statute that that
18 is in the discretion of the Attorney General.
19 And, if it were to do that, then there would be
20 no review under (B)(ii).

21 And now I think we -- I think Kucana
22 supports this. However, that is not just a
23 theoretical distinction from what the government
24 is doing. There is a real practical distinction
25 there, and that is because the government seems

1 to think, as the colloquy has demonstrated, that
2 some of the factors where the statute doesn't
3 specify the Attorney General's discretion are
4 somehow, according to some nebulous multifactor
5 test, sufficiently discretionary that they
6 should fall under (B)(i).

7 But the question then becomes a sharp
8 one of administrability, how do you determine
9 whether something is discretionary under their
10 view of (B)(i). We think our line is clear.
11 Theirs is not.

12 But, as everyone recognizes, for Mr.
13 Patel, that issue does not have to be resolved.
14 Everyone agrees that his appeal is of a
15 non-discretionary factor.

16 We would respectfully submit the
17 decision of the Eleventh Circuit should be
18 reversed.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Ms. Meehan, this Court appointed you
22 to brief and argue this case as an amicus curiae
23 in support of the judgment below. You have ably
24 discharged that responsibility, for which we are
25 grateful.

1 The case is submitted.
2 (Whereupon, at 11:32 a.m., the case
3 was submitted.)
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