No. 20-979

In the Supreme Court of the United States

PANKAJKUMAR S. PATEL, ET AL.,

Petitioners,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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October 19, 2021

QUESTION PRESENTED

Whether 8 U.S.C. §1252(a)(2)(B)(i) bars federal courts from reviewing a factual determination made as part of an immigration court's decision, affirmed by the Board of Immigration Appeals, that a noncitizen is not entitled to discretionary relief from removal.

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INTEREST OF *AMICUS CURIAE*

The Court appointed *amicus curiae*, Taylor A.R. Meehan, to brief and argue this case in support of the judgment below.

INTRODUCTION

This case depends on the meaning of the following words: "[N]o court shall have jurisdiction to review any judgment regarding the granting of" five forms of what is commonly called "discretionary relief," except that a court of appeals may consider "constitutional claims or questions of law." 8 U.S.C. §1252(a)(2)(B)(i), (D). The question here is whether these words permit a court to review questions of fact.

Facing removal, Mr. Patel and his wife asked an immigration court for one of the five forms of discretionary relief listed in the jurisdictional bar above. They lost. The Board of Immigration Appeals affirmed. And the Patels asked the court of appeals to review the denial of discretionary relief. Their petition for review raised two questions—a question of statutory interpretation and a question of fact. The court of appeals reviewed the statutory interpretation question but held it had no jurisdiction to review the question of fact given the text above.

Petitioners and the Government argue that the court of appeals got it all wrong. They contend that there is jurisdiction to review constitutional questions, questions of law, *and* questions of fact about the denial of discretionary relief. They interpret the words above to limit jurisdiction in only one way—courts of appeals cannot review a purely "discretionary" determination made on the way to denying discretionary

relief. In practice, that means every denial of discretionary relief is reviewable in some way because every denial will have some so-called "non-discretionary" factfinding.

The Eleventh Circuit was right to reject the "discretionary" versus "non-discretionary" gloss that Petitioners and the Government advance here. This Court should too. Except for "constitutional claims or questions of law," "no court shall have jurisdiction to review any judgment regarding the granting of" discretionary relief. 8 U.S.C. §1252(a)(2)(B)(i), (D). That bar plainly excludes questions of fact about whether such relief may be granted.

OPINIONS BELOW

The opinion of the *en banc* Eleventh Circuit is reported at 971 F.3d 1258 and is reproduced at Pet.App.1a-77a. The panel opinion is reported at 917 F.3d 1319 and is reproduced at Pet.App.79a-102a. The BIA decision is reproduced at Pet.App.103a-110a. The immigration court's decision is reproduced at Pet.App.111a-119a.

JURISDICTION

The Court has jurisdiction to review the judgment of the Court of Appeals, entered on August 19, 2020. 28 U.S.C. §1254(1). The petition for writ of certiorari was timely filed on January 15, 2021, and the Court granted the petition on June 28, 2021.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. §1252, titled "Judicial review of orders of removal," is reprinted in full in the statutory appendix

at App.1-16. At issue here, subparagraphs (a)(2)(B) and (D) provide in relevant part:

> **(a)(2) Matters not subject to judicial review**
>
> …
>
> **(B) Denials of discretionary relief**—Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.
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> …
>
> **(D) Judicial review of certain legal claims**—Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed

with an appropriate court of appeals in accordance with this section.

Predecessor judicial review provisions are reprinted at App.17-38.

STATEMENT OF THE CASE

I. Statutory background

A. The first 200 years

1. For the country's first century, immigration was largely unregulated. Federal immigration policy was an "open door." *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588 n.15 (1952).

Congress enacted the first immigration restrictions in 1875. *See* Act of Mar. 3, 1875, ch. 141, 18 Stat. 477; *INS v. St. Cyr*, 533 U.S. 289, 305 (2001). For almost as long, Congress limited the reviewability of executive decisions related to those restrictions. The Immigration Act of 1891 clarified that such "decisions … shall be final." Act of Mar. 3, 1891, ch. 551, §8, 26 Stat. 1084, 1085; *see Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1976-77 (2020). Later immigration acts contained similar finality provisions. *See, e.g.*, Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, 390; Immigration Act of 1907, ch. 1134, §25, 34 Stat 898, 907; Immigration Act of 1917, ch. 29, §19, 39 Stat. 874, 890 ("In every case where any person is ordered deported … the decision of the Secretary of Labor shall be final.").

During this so-called "finality era," a petition for writ of habeas corpus was the only way to obtain some judicial review of immigration decisions. *See Thuraissigiam*, 140 S. Ct. at 1976. The Habeas Corpus Act of

1867 permitted petitions by noncitizens held in custody in violation of the immigration laws. *Id.* Still, questions of fact were generally unreviewable. A habeas court would take "the facts found by the immigration authorities." *Id.*; *see St. Cyr*, 533 U.S. at 306; *see, e.g.*, *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (when a "statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts"); *Lem Moon Sing v. United States*, 158 U.S. 538, 549-50 (1895). A habeas court would ordinarily answer only questions of law about the statute and procedure. *See Thuraissigiam*, 140 S. Ct. at 1976-77; *St. Cyr*, 533 U.S. at 306-07 & n.29 (collecting examples); *see, e.g.*, *Nishimura Ekiu*, 142 U.S. at 660-64; *Yamataya v. Fisher*, 189 U.S. 86, 100-02 (1903).

2. New questions about the scope of judicial review arose when Congress enacted the Administrative Procedure Act in 1946. Soon after, Congress enacted the Immigration and Nationality Act of 1952.[1] This Court grappled with the APA's applicability to immigration proceedings before and after the INA's comprehensive changes. In *Heikkila v. Barber*, the Court held that pre-1952 immigration laws foreclosed judicial review under the APA. 345 U.S. 229, 234-35 (1953). But then

[1] Pub. L. No. 82-414, 66 Stat. 163. The INA comprehensively set out "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *DeCanas v. Bica*, 424 U.S. 351, 359 (1976). The Act granted unprecedented discretion to the executive to grant relief from deportation. *See Foti v. INS*, 375 U.S. 217, 222 (1963) (explaining that "[p]rior to 1940" deportation was often "mandatory" absent "a private bill in Congress").

in *Schaughnessy v. Pedreiro*, the Court held that the INA, in combination with the APA, permitted judicial review of deportation orders in the district courts. 349 U.S. 48, 51-52 (1955). Post-1952, noncitizens could challenge deportation orders in either a district court action or a habeas petition.

3. Then came the 1961 amendments to the INA.[2] The 1961 Act constricted judicial review with a new judicial review provision, codified for the next three decades in section 1105a of title 8. Congress withdrew the district courts' jurisdiction. Going forward, a petition for review filed in the federal courts of appeals would be the "sole and exclusive procedure" for judicial review of deportation orders.[3] The changes had the express purpose of "abbreviat[ing] the process of judicial review of deportation orders" and preventing "dilatory tactics." *Foti*, 375 U.S. at 224. In *Foti*, this Court interpreted the judicial review provision to encompass all aspects of a deportation hearing, which by that time included *both* the deportation order itself *and* any denial of discretionary relief from deportation, such as suspension of deportation. *Id.* at 225-26. Consolidating these questions in one appeal served the Act's related goals of "expedit[ing] the deportation" and "preventing successive dilatory appeals to various federal courts." *Id.* at 226.

Under former section 1105a, both questions of law and fact were reviewable. *See, e.g.*, *INS v. Yueh-Shaio*

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[2] Pub. L. No. 87-301, 75 Stat. 650.

[3] §106(a), 75 Stat. 651. The Act also left open habeas review for any noncitizen "in custody pursuant to an order of deportation." §106(a)(9), 75 Stat. 652; *see Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

Yang, 519 U.S. 26, 29 n.1 (1996) (citing APA and stating that the Court's "jurisdiction over this matter is not in question"). But agency factfinding was conclusive unless "no reasonable factfinder" would agree. *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992).

B. The Illegal Immigration Reform and Immigrant Responsibility Act

In 1996, Congress made a major overhaul of the immigration laws by enacting the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[4] Congress created an entirely new judicial review provision, codified in section 1252 of title 8.[5] The new rules clarified what exactly courts of appeals could review when noncitizens appealed removal orders.[6]

1. Under the new provision, the courts of appeals remained the exclusive federal courts of review. It contained what this Court has called a "zipper clause," requiring "all questions of law and fact" regarding removal proceedings to be raised in a petition for review:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only

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[4] Pub. L. No. 104-208, 110 Stat. 3009-546.

[5] §306, 110 Stat. 3009-607–3009-612.

[6] IIRIRA also changed the terminology. What were once known as "exclusion" or "deportation" proceedings are now "removal" proceedings. *See Judulang v. Holder*, 565 U.S. 42, 45-46 (2011).

> in judicial review of a final order under this section.[7]

But not all questions would be reviewable. The new provision put in place multiple jurisdictional bars. Titled "[m]atters not subject to judicial review," section 1252(a)(2) stated that "no court shall have jurisdiction to review" three categories of immigration decisions: (1) expedited removal orders, (2) denials of discretionary relief, and (3) removal orders against criminal aliens.[8]

This case involves the second category, denials of discretionary relief. In 1996, IIRIRA barred review as follows:

> (2) MATTERS NOT SUBJECT TO JUDICIAL REVIEW.—
>
> …
>
> (B) DENIALS OF DISCRETIONARY RELIEF.—Notwithstanding any other provision of law, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or
>
> (ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other

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[7] §306(a)(2), 110 Stat. 3009-610 (codified at 8 U.S.C. §1252(b)(9)); *see Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999).

[8] §306(a)(2), 110 Stat. 3009-607–3009-608 (codified at 8 U.S.C. §1252(a)(2)(A), (B), & (C)).

> than the granting of relief under section 208(a).[9]

2. Simultaneously as part of IIRIRA, Congress legislated "transitional" rules that would apply to pending deportation proceedings.[10] Those transitional rules prohibited appeals of "any discretionary decision under" five discretionary relief statutes:

> (E) there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of this enactment of this Act).[11]

C. The 2005 REAL ID Act amendments

In 2005, Congress again amended the judicial review provision as part of the REAL ID Act.[12] The amendments were in part a response to this Court's decision in *St. Cyr*.

1. In *St. Cyr*, a noncitizen facing removal for drug crimes filed a habeas petition raising a pure question of law. The Court considered whether IIRIRA, which generally foreclosed appeals by criminal aliens, also foreclosed the habeas petition. 533 U.S. at 298, 310-

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[9] §306(a)(2), 110 Stat. 3009-607 (codified at 8 U.S.C. §1252(a)(2)(B)). Sections 212(h), 212(i), 240A, 240B, and 245 correspond to 8 U.S.C. §§1182(h), 1182(i), 1229b, 1229c, and 1255 respectively. Section 208(a) corresponds to 8 U.S.C. §1158(a), relating to asylum.

[10] §309, 110 Stat. 3009-625–3009-627.

[11] §309(c)(4)(E), 110 Stat. 3009-626. Sections 212(c) and 244 corresponded to former 8 U.S.C. §1182(c) and §1254 (both used for suspension of deportation), which IIRIRA repealed.

[12] Pub. L. No. 109-13, 119 Stat. 302.

11; *see* 8 U.S.C. §1252(a)(2)(C). The Court observed that construing the criminal alien jurisdictional bar to "entirely preclude review of a pure question of law by any court," including a habeas court, "would give rise to substantial constitutional questions" under the Suspension Clause. *Id.* at 300. Invoking the canon of constitutional avoidance, the Court held that St. Cyr could file his habeas petition to raise a pure question of law, despite the jurisdictional bar. *Id.* at 314.

2. Congress responded to *St. Cyr* by amending section 1252's judicial review provision in two ways. First, Congress generally barred habeas petitions, leaving no doubt that a petition for review is the exclusive means of judicial review.[13] Second, Congress added a *St. Cyr*-inspired carve-out allowing "constitutional claims or questions of law" to be raised in that petition for review.[14] The amendments added the following underlined text:

> (B) DENIALS OF DISCRETIONARY RELIEF.—Notwithstanding any other provision of law <u>(statutory or nonstatutory), including section 2241 of title 28, United States Code or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judg-</u>

[13] §106(a)(1)(A)(i)-(ii), (B), 119 Stat. 310-11 (codified at 8 U.S.C. §1252(a)(2)(A)-(C), (a)(5)). The REAL ID Act left in place habeas exceptions related to expedited removal. *See* 8 U.S.C. §1252(e)(2).

[14] §106(a)(1)(A)(iii), 119 Stat. 310 (codified at 8 U.S.C. §1252(a)(2)(D)).

ment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

…

(D) JUDICIAL REVIEW OF CERTAIN LEGAL CLAIMS.—Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.[15]

The House Conference Committee Report for the 2005 amendments explained that the added text would "permit judicial review over those issues that were historically reviewable on habeas—constitutional and statutory-construction questions, not discretionary or factual questions." H.R. Conf. Rep. No.

[15] §§101(f), 106(a)(1)(A), 119 Stat. 305, 310.

109-72, 175 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 300. The report added, "When a court is presented with a mixed question of law and fact," the court "should not review any factual elements." *Id.*; *see also Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068-69 (2020) (interpreting section 1252(a)(2)(D) to encompass "the application of law to settled facts").

3. Still today, removal proceedings and requests for discretionary relief ordinarily occur in the same proceedings. *See Foti*, 375 U.S. at 222-23 (describing history). Immigration courts have jurisdiction to grant or deny the five categories of discretionary relief listed in the jurisdictional bar at issue as part of removal proceedings. *See* 8 C.F.R. §1240.1(a)(1)(ii). In any such removal proceeding, the government must prove removability for the reasons charged, 8 C.F.R. §1240.8, while the noncitizen must prove entitlement to discretionary relief, 8 U.S.C. §1229a(c)(4)(A). What results from those proceedings is a final order of removal, encompassing all of "the rulings made by the immigration judge or Board of Immigration Appeals that affect the validity of the final order of removal." *Nasrallah v. Barr*, 140 S. Ct. 1683, 1691 (2020). "[A]ll questions of law and fact" arising from the removal proceeding must be appealed to the court of appeals in a petition for review, but some of those questions will be unreviewable. *See* 8 U.S.C. §1252(a)(2), (b)(9). At issue here, in light of this history and the current text, is whether factual questions regarding Mr. Patel's entitlement to discretionary relief are unreviewable.

II. Proceedings below

The Patels are from India and entered the country illegally in the 1990s. Administrative Record ("AR") 245-47, 264. In 2007, Mr. Patel applied for "adjustment of status" with U.S. Citizenship and Immigration Services. *See* AR73-75; 8 C.F.R. §245.2. If granted, his immigration status would be changed to lawful permanent resident, even though he previously entered the country illegally. *See* 8 U.S.C. §1255(i). His application was denied because he falsely claimed he was a U.S. citizen on a Georgia driver's license application while his adjustment of status request was pending. *See* Pet.App.112a; AR73-75. Having admitted that he entered the country illegally, Mr. Patel could soon face removal proceedings.

In 2012, the Department of Homeland Security issued a notice to appear for a removal hearing. AR1811-12. The notice charged Mr. Patel with being present in the United States without being admitted. *See id.*; 8 U.S.C. §1182(a)(6)(A)(i).

A. Immigration court proceedings

In removal proceedings before an immigration judge, Mr. Patel conceded that he was removable. Pet.App.112a. He then renewed his request for discretionary relief from removal for himself and, derivatively, for his wife and son. Pet.App.112a; *see* 8 U.S.C. §1255(i); 8 C.F.R. §1245.2(a)(1)(i).[16]

The removal proceedings focused mostly on whether Mr. Patel was eligible for discretionary relief.

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[16] Mr. Patel's son has since become a lawful permanent resident and is no longer a party to the proceeding. Pet. Br. 12 n.3.

The particular question before the immigration judge was whether Mr. Patel was ineligible because he misrepresented himself as a U.S. citizen on the 2008 driver's license application. Pet.App.113a. A false representation of citizenship in certain circumstances will render a noncitizen "inadmissible":

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

8 U.S.C. §1182(a)(6)(C)(ii)(I). If Mr. Patel was "inadmissible," he was ineligible for adjustment of status. *Id.*, §1255(i)(2)(A).

At Mr. Patel's immigration hearing, there was no dispute that Mr. Patel claimed he was a citizen on the Georgia driver's license application. Pet.App.113a. The application contained this question: "Are you a U.S. citizen? If No, what is your Alien Registration Number or I-94 Number?" AR66-67. Mr. Patel admitted that he checked "Yes." Pet.App.113a; AR275.

The dispute was instead whether Mr. Patel meant to misrepresent his citizenship and whether the misrepresentation mattered for purposes of obtaining a driver's license. Pet.App.113a, 116a. Through an interpreter, the immigration judge asked Mr. Patel about his alleged "mistake":

> Q. Sir, you would agree that you checked a box on the driver's license application indicating that you're a United States citizen?

A. I did it, but I didn't have my intention at that time.

Q. Sir, what box did you intend to check?

A. No. I don't know, exactly.

Q. Well, if you said you checked it by mistake, were you planning to check another box, instead?

A. No.

AR235-36. Mr. Patel also testified that he showed his work permit card and wrote his alien registration number on the application too. AR239-40.

On cross-examination, the government impeached Mr. Patel's testimony with a copy of the application. AR239-245. The government established that the application did not reflect that he showed his work permit to get the license. AR243-44. And the government impeached Patel's testimony that he provided his alien registration number:

Q. Did you write your alien number down on the application?

A. Yes. I wrote it.

Q. Sir, I have your application here, and it does not show that you wrote your alien number on the application….

AR240. The immigration judge again followed up:

Q. Sir, the question says are you a citizen, if no, what is your registration number or I-94 number, and you checked the box. It looks like there was a box checked. Do you see that?

A. Yes. I see that.

Q. It doesn't reflect that you put down your alien registration number.

A. Yeah. I just signed it just like as usual, whatever I was getting it earlier. And I just signed it, and I showed them my card, and then it was all done.

AR243.

At the conclusion of the hearing, the immigration court announced that it would give "little credence" to Mr. Patel's claim that he made a mistake. Pet.App.115a. The court deemed him not credible, describing his testimony as "not candid," "somewhat evasive," and "not forthcoming." Pet.App.113a. The decision recounted the inconsistencies between Mr. Patel's testimony that he provided his work permit and his alien registration number and the evidence, which showed that he did not. Pet.App.113a-114a.[17] Mr. Patel "checked the box stating that he is a citizen" instead. Pet.App.114a. The immigration court concluded that Mr. Patel "willfully and purposefully indicated that he was a United States citizen." Pet.App.115a.

The court also considered Patel's separate argument that he would have been eligible for a driver's license even if he hadn't misrepresented his citizenship—the "materiality" question. Pet.App.116a. The

[17] The court identified further support for its credibility finding based on Patel's testimony and conflicting evidence about whether he entered the United States through Mexico, Newark, or New York. *See* Pet.App.115a; AR246; AR264-69.

court concluded that Mr. Patel failed to carry his burden on that question too. Pet.App.116a-117a.

The immigration court's decision concluded with an order stating in relevant part: "IT IS HEREBY ORDERED that the [Patels'] application for adjustment of status under Section 245(i) of the Immigration and nationality Act be, and hereby is, denied. IT IS FURTHER ORDERED that [the Patels] be removed from the United States based on the charge set forth in the Notice to Appear, and that they be deported to India." Pet.App.118a.

B. BIA proceedings

The BIA agreed. Pet.App.103a-108a. The court concluded there was "no clear error in the Immigration Judge's factual finding" that Mr. Patel was not "a credible witness" and "falsely represented himself to be a citizen." Pet.App.106a. The court noted the "discrepant testimony" about documents submitted for his driver's license application, "inaccurate testimony" about providing his alien registration number, and his "false representation" about how he entered the United States. Pet.App.106a-107a.

Separately, the BIA rejected Mr. Patel's argument that his misrepresentation of citizenship was immaterial to the driver's license application. Pet.App.107a. Over a dissent, the court agreed that Mr. Patel failed to meet his burden that he could have obtained the same license had he told the truth. Pet.App.108a-109a.

C. Eleventh Circuit proceedings

1. Mr. Patel filed a petition for review to appeal the denial of discretionary relief to the Eleventh Circuit.

His appeal presented two questions: a question of fact (whether he misrepresented his citizenship) and a question of law (whether the statute required the misrepresentation to be material to getting a driver's license). Pet.App.80a. With respect to the first question, the court concluded that 8 U.S.C. §1252(a)(2)(B)(i) barred the court from reviewing that "standard factual dispute." Pet.App. 90a. With respect to the second question, the court of appeals reached the merits and concluded that the statute did not require the false claim of citizenship to be "material" to obtaining the driver's license. Pet.App.98a-101a.

2. The Eleventh Circuit reheard the case *en banc* to consider the jurisdictional question. The court explained that prior panel precedent had wrongly interpreted the jurisdictional bar to distinguish between "discretionary" and "non-discretionary" determinations made as part of the denial of discretionary relief. Pet.App.3a. The court explained that distinction was one based on IIRIRA's transitional rules (barring review of "any discretionary decision") and was no match for the statute today. Pet.App.3a; *see* IIRIRA §309(c)(4)(E), 110 Stat. 3009-626. The *en banc* court overruled those prior precedents for a new rule more faithful to section 1252's text. Pet.App.3a.

The court held that the jurisdictional bar precluded judicial review of "'any judgment regarding the granting of relief under [8 U.S.C. §§] 1182(h), 1182(i), 1229b, 1229c, or 1225' except to the extent that such review involves constitutional claims or questions of law." Pet.App.3a. The court interpreted "any judgment" to mean "any decision" regarding the five forms of discretionary relief listed in the provision.

Pet.App.27a. The court added that the words "any" and "regarding" confirmed that more "expansive" reading. Pet.App.27a-28a. Putting all that together, the court concluded that section 1252(a)(2)(B)(i) "precludes [the court] from reviewing 'whatever kind' of judgment 'relating to' the granting of relief under the five enumerated sections," including the form of discretionary relief that Mr. Patel sought. Pet.App.28a. The only exception is section 1252(a)(2)(D), which "restores [the court's] jurisdiction to review constitutional claims or questions of law," but not "factual challenges." Pet.App.28a-30a.

Applied to Mr. Patel, there was no jurisdiction to consider the "claim that, as a factual matter, he checked the wrong box and thus lacked the requisite subjective intent" to falsely represent that he was a U.S. citizen. Pet.App.24a. The court rejected Mr. Patel's argument that the jurisdictional bar applies only to "the final grant or denial of relief," which would permit review of "each individual determination underpinning the final decision" and render the "jurisdictional limits meaningless." Pet.App.45a.

Similarly, the court rejected the Government's argument that any "non-discretionary" determinations were reviewable, including findings of fact. *See* Pet.App.32a-35a. The court observed that section 1252 bars review of "any judgment" (not "any discretionary decision") and thus "encompasses both discretionary and non-discretionary determinations" related to the denial of discretionary relief. Pet.App.34a. The court rejected the "mental gymnastics" of deciding which eligibility determinations were sufficiently "discretionary" and which were not. Pet.App.37a.

3. This Court granted certiorari limited to the jurisdictional question—that is, whether section 1252(a)(2)(B)(i) bars review of the finding of fact that Mr. Patel "willfully and purposefully indicated that he was a United States citizen." Pet.App.115a.

SUMMARY OF ARGUMENT

In 1996, Congress overhauled the immigration laws and created a new judicial review provision. That provision contained multiple jurisdictional bars limiting judicial review of immigration proceedings. *See* 8 U.S.C. §1252(a)(2). The jurisdictional bar at issue states that "no court shall have jurisdiction to review any judgment regarding the granting of relief under" five enumerated categories of discretionary relief, including Mr. Patel's request for adjustment of status. *Id.*, §1252(a)(2)(B)(i). In 2005, Congress amended the judicial review provision and added this carve-out: the jurisdictional bar shall not "be construed as precluding review of constitutional claims or questions of law raised upon a petition for review" in the court of appeals. *Id.*, §1252(a)(2)(D). The question here is whether the jurisdictional bar forecloses *factual challenges* such as Mr. Patel's. It does.

I. The phrase "any judgment regarding the granting of relief" means any decision related to granting or denying one of the five enumerated forms of discretionary relief listed in the jurisdictional bar. "Any judgment" subsumes all subsidiary determinations about whether such relief may be granted, including eligibility determinations. It does not discriminate between "any *discretionary* judgment" and "any *non-dis-*

cretionary judgment," as Petitioners and the Government argue. The terms "any" and "regarding" sweep broadly, barring *any* decision *relating to* the question of whether discretionary relief may be granted.

The only exception to the jurisdictional bar is the carve-out added in 2005 for "constitutional claims or questions of law" that might arise—for example, a statutory construction question about one of the discretionary relief provisions. 8 U.S.C. §1252(a)(2)(D). Importantly, Congress did *not* also carve out questions of fact. Facts remain unreviewable, consistent with the historical deference to immigration officials as final factfinders.

II. Alternative interpretations are atextual. They depend on reading "any judgment" as limited to "any *discretionary* judgment." Neither the text of the jurisdictional bar nor the commonly understood meaning of "judgment" supports that limitation.

Petitioners and the Government make various arguments about context, but context confirms that "any judgment" encompasses more than purely "discretionary" or "subjective" determinations. Elsewhere, Congress specified when it meant "discretionary judgment." *See, e.g.*, 8 U.S.C. §1226(e). The absence of any similar limiting language here confirms the "any judgment" bar's broader sweep. An alternative reading rewrites section 1252(a)(2)(B)(i) as doubly discretionary—foreclosing review of only *discretionary* judgments regarding the denial of *discretionary* relief. But the statute does not say only "some judgments." It says "any judgment."

III. Interpretive presumptions and other arguments about nonexistent congressional ratification

and anomalies should also be rejected. The presumption of judicial review cannot overcome clear statutory text that precludes such review. Here, the text bears every indication that there is no jurisdiction to consider Mr. Patel's factual dispute regarding the denial of discretionary relief. Similarly, one must ignore the text to believe that Congress silently ratified the "discretionary" / "non-discretionary" dichotomy when it amended section 1252 in 2005. The amended language permits "constitutional claims or questions of law" to be raised in a petition for review, not "questions of fact" or "non-discretionary" questions. Finally, the text leaves no reason to second-guess Congress's policy judgment that questions of fact regarding the denial of discretionary relief are unreviewable. The Eleventh Circuit's decision should be affirmed.

ARGUMENT

I. Questions of Fact Related to Denials of Discretionary Relief Are Unreviewable.

The statutory text at issue prohibits federal courts from reviewing denials of discretionary relief, except for constitutional questions or questions of law. "[A]ny judgment," meaning any decision, about Patel's entitlement to discretionary relief as a factual matter is off-limits. 8 U.S.C. §1252(a)(2)(B)(i). This reading is confirmed by neighboring text in section 1252, as well as the historical treatment of fact questions.

A. "Any judgment" sweeps broadly.

Section 1252(a)(2)(B)(i) begins by stating that "no court shall have jurisdiction to review *any judgment*." That text—"any judgment"—encompasses any and all

decisions relating to the granting or denying of the five enumerated forms of discretionary relief.

1. The term "judgment" is universally defined as a "decision" or "determination."[18] Webster's Second defines "judgment" as the "pronouncing of an opinion or decision of a formal authoritative nature."[19] The legal usage is the "act of determining, as in courts, what is conformable to law and justice."[20] When Congress enacted section 1252, Black's Law Dictionary described "judgment" as synonymous with "decision" and noted the terms are "used interchangeably."[21]

Context confirms that "judgment" means a "decision" for purposes of the jurisdictional bar. The "any judgment" text in section 1252(a)(2)(B)(i) is immediately followed by (B)(ii)'s bar for "any *other* decision or action" by the Attorney General or Secretary of Homeland Security as follows:

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[18] Webster's New International Dictionary of the English Language Unabridged 1343 (2d ed. 1956) (Webster's Second); *see also* Black's Law Dictionary 842 (6th ed. 1990) ("final determination") (Black's Sixth); Black's Law Dictionary 858 (8th ed. 2004) ("final determination"); Oxford English Dictionary (2d ed. online 1989) ("a judicial decision or order in court"); Oxford English Dictionary (3d ed. online 2021) ("formal or authoritative decision, as of an umpire or arbiter"); Webster's Third New International Dictionary of the English Language Unabridged 1223 (3d ed. 1967) (Webster's Third) ("a formal decision or determination given in a cause by a court of law or other tribunal").

[19] Webster's Second at 1343.

[20] *Id*.

[21] Black's Sixth at 842.

> [N]o court shall have jurisdiction to review—
>
> (i) any judgment regarding …, or
>
> (ii) any other decision or action ...

8 U.S.C. §1252(a)(2)(B)(i)-(ii). Tied together in this way, (B)(ii) reveals that "judgment" in subparagraph (B)(i) is most naturally understood to be a "decision" too. *See Kucana v. Holder*, 558 U.S. 233, 246-47 (2010).[22]

Understanding "judgment" as a "judicial decision or order in court"[23] or "a formal decision or determination … by a court of law or other tribunal"[24] is also consistent with the nature of the five forms of discretionary relief covered by section 1252(a)(2)(B)(i). Those five forms of relief—waivers of inadmissibility after the commission of certain crimes or fraud, 8 U.S.C. §1182(h) & (i), cancellation of removal, *id.*, §1229b, voluntary departure from the country, *id.*, §1229c, and adjustment of status, *id.*, §1255—share a common thread. Immigration courts have jurisdiction to grant or deny each of these forms of discretionary relief as part of removal proceedings. *See* 8 C.F.R. §1240.1(a)(1)(ii). Decisions regarding these forms of

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[22] While (B)(i) and (B)(ii) bar "decisions of the same genre," *Kucana*, 558 U.S. at 246, they do not bar *identical* decisions. Addressed in Part II.B, the two provisions are "harmonious[]," *id.* at 247, not *superfluous*. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012) (provision should not "needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence").

[23] Oxford English Dictionary (2d ed. online 1989) ("judgment").

[24] Webster's Third at 1223.

discretionary relief will thus ordinarily be a "judgment" by an immigration court as part of a removal proceeding.[25] Here, for example, the immigration court entered an order specific to the denial of discretionary relief: "IT IS HEREBY ORDERED, that the [Patels'] application for adjustment of status under [§1255(i)] be, and hereby is, denied." Pet.App.118a.

2. Petitioners agree that "decision" is a plausible reading of "judgment," but they contend that such a reading would not bar "first-step" decisions about whether a person is eligible for discretionary relief. Pet. Br. 20-23. Petitioners are wrong.

The term "judgment" subsumes all subsidiary determinations, including eligibility determinations. This is confirmed by the bar on "*any* judgment," not "the *ultimate* judgment" or "the *second-step* judgment." The modifier "'any' has an expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997). "Any" expands "judgment" to all judgments, "selected

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[25] As Petitioners note, USCIS may also consider applications for certain forms of discretionary relief outside of removal proceedings. Pet. Br. 42 n.14. For that reason, section 1252 was amended to clarify that any judgment, decision, or action is barred "regardless of whether [it] is made in removal proceedings." REAL ID Act §101(f), 119 Stat. 305 (codified at 8 U.S.C. §1252(a)(2)(B)). But "any judgment" in section 1252, prescribing rules for appeals from removal proceedings, is naturally read to address the mine-run case where an immigration judge denies discretionary relief. Cancellation, for example, occurs only within removal proceedings. 8 C.F.R. §1240.20. Similarly, immigration courts have "exclusive jurisdiction" over requests for adjustment of status once removal proceedings begin. *Id.*, §1245.2(a)(1)(i); *see also Immigration Court Practice Manual* §1.5, Office of Chief Immigration Judge, U.S. Dep't of Justice Executive Office for Immigration Review (2020), bit.ly/3oxXd47.

without restriction on limitation of choice," where "every one is open to selection without exception."[26] It confirms that the jurisdictional bar encompasses all decisions related to the question of whether the enumerated forms of discretionary relief may be granted, excepting only "constitutional claims or questions of law" about the discretionary relief statutes. 8 U.S.C. §1252(a)(2)(D).

A narrower reading that excludes "some judgments" because they are based on eligibility determinations is at odds with the commonly understood meaning of "judgment," especially when used in the legal sense. The "judgment" is the denial of discretionary relief. Period. It is distinct from the underlying reasons for the denial. While "judgment" is sometimes used interchangeably with "opinion," a "judgment" is more properly understood as the "decision" while the reasons for that decision are "more properly denominated" as the "opinion."[27] *See, e.g.*, *Jennings v. Stephens*, 574 U.S. 271, 277 (2015) ("This Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*."); *Harrington v. Richter*, 562 U.S. 86, 98-99 (2011) (distinguishing between a "decision" and "statement of reasons" for that decision); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 893 (2011) (Breyer, J., concurring in the judgment) ("[T]hough I agree with the plurality as to the

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[26] Webster's Second at 121.

[27] Black's Sixth at 842; *see also id.* at 407 ("A decision of the court is its judgment; the opinion is the reasons given for that judgment, or the expression of the views of the judge. But the two words are sometimes used interchangeably.").

outcome of this case, I concur only in the judgment of that opinion and not its reasoning.").

Applied here, section 1252(a)(2)(B)(i) does not permit courts of appeals to parse the reasoning of immigration courts to decide whether a "judgment" denying discretionary relief was based on sufficiently "discretionary" or "non-discretionary" reasons. Rather, the judgment subsumes any and all reasons for the order denying relief. And "no court shall have jurisdiction to review" that judgment, "except as provided in subparagraph (D)." 8 U.S.C. §1252(a)(2)(B). In Patel's case, the "judgment" was the denial of "relief under … section 1255" for adjustment of status. *Id.*; *see* Pet.App.118a. The factual determination that he was ineligible for such relief is encompassed within it. And the Eleventh Circuit had no jurisdiction to review that judgment, except for constitutional claims or questions of law. That exception permitted the court to examine Mr. Patel's separate statutory interpretation question. It did not permit it to revisit factfinding.

B. "Regarding the granting of relief" is expansive.

"Any judgment" in section 1252(a)(2)(B)(i) is followed by the phrase "regarding the granting of relief under" the five types of discretionary relief. That phrase also sweeps broadly. It further confirms that "any judgment" encompasses the many subsidiary determinations about whether discretionary relief could be granted—that is, whether a noncitizen is *eligible* for the granting of relief.

1. "Regarding" or "regard" mean "[c]oncerning" or "respecting," or "to respect," "relate to," or "touch

on."[28] As this Court has explained, modifiers including "respecting" or "relating to" or "regarding" have "a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018); *see also id.* at 1759 (identifying "relating to," "regarding," "respecting," and "about" as synonyms). Applied here, the modifier "regarding" conveys that the "judgment" need not be one that itself grants relief (*i.e.*, "any judgment granting relief") and is instead any judgment "regarding" or relating to whether such relief could be granted.[29]

Judgments *relating to* whether discretionary relief could be granted necessarily subsume the many determinations about a noncitizen's eligibility for such relief. Here, for adjustment of status, Mr. Patel had to show that he was the "beneficiary" of "an application for a labor certification" before April 2001, that he was "eligible to receive an immigrant visa," that the visa was "immediately available" when he applied, and that he would be "admissible to the United States." 8 U.S.C. §1255(i)(1)-(2); *see Lee v. U.S. Citizenship & Immigration Servs.*, 592 F.3d 612, 614-16 (4th Cir. 2010) (detailing adjustment of status process). These determinations then entail more subsidiary determi-

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[28] Webster's Second at 2096; *see also id.* (defining "with regard to" as "[w]ith respect to; with regard to; concerning; as to").

[29] A nearby provision illustrates the difference. While the jurisdictional bar at issue forecloses "any judgment *regarding the granting of* relief," the very next provision bars other decisions "other than *the granting of* relief" for asylum. 8 U.S.C. §1252(a)(2)(B)(ii) (emphasis added).

nations. For example, whether Mr. Patel was "admissible" turned on whether he misrepresented his citizenship. 8 U.S.C. §1182(a)(6)(C)(ii). Similarly, cancellation of removal—one of the other forms of discretionary relief covered by the jurisdictional bar—would require a nonpermanent resident to show:

- He was "physically present in the United States for a continuous period of not less than 10 years";
- he was a person of "good moral character" during those ten years;
- he has not been convicted of certain criminal offenses; and
- removal would result in "exceptional and extremely unusual hardship" to his spouse, parent, or child.

Id., §1229b(b). These determinations likewise entail more subsidiary determinations. For example, is the person "a habitual drunkard"? Has he "given false testimony"? Is his income "derived principally from illegal gambling"? Or is he otherwise in one of the *per se* categories foreclosing a finding of good moral character? *Id.*, §1101(f). Does the evidence support that his presence has been continuous or just intermittent? *See, e.g.*, *Garcia-Melendez v. Ashcroft*, 351 F.3d 657, 661-62 (5th Cir. 2003). What would happen to his family members if he were removed? *See, e.g.*, *Trejo v. Garland*, 3 F.4th 760, 772 (5th Cir. 2021). Deciding any of these eligibility questions is a decision "regarding" or relating to the granting of discretionary relief. *See Lee*, 592 F.3d at 620 (explaining that an eligibility decision "cannot be divorced from the denial itself").

2. Petitioners and the Government invite this Court to slice-and-dice the above questions. They argue the "non-discretionary" or "objective" determinations made on the way to denying discretionary relief are reviewable. *See* Pet. Br. 34-35; Gov't Br. 41 & n.5; *see also* Former Immigration Judges *Amicus* Br. 7 (describing "non-discretionary determination embedded within" denial of relief). They contend that those "non-discretionary" (and thus reviewable) determinations include factfinding. *See* Gov't Br. 15.

Indeed, the Government invites the federal courts to slice-and-dice *ad infinitum*. The Government acknowledges that determinations about "good moral character" or "hardship" might be too "discretionary" to review. Gov't Br. 41 n.5. The solution for that? Review all "non-discretionary" ingredients of these otherwise unreviewable "discretionary" determinations. Gov't Br. 12. For example, even if "discretionary" fact-balancing were unreviewable, "non-discretionary" factual errors made as part of that balancing would be. Gov't Br. 41 n.5. If that were so, then every denial of discretionary relief would be reviewable for every lurking question of fact. Congress might as well re-title the section "[m]atters ~~not~~ always subject to judicial review."

3. Petitioners offer an even more categorical interpretation that writes "regarding" out of the statute entirely. They argue *all* eligibility determinations are reviewable. Pet. Br. 17-18. They believe that "regarding the granting of relief" is "limiting language" that bars only the "second-step judgment whether to grant relief as a discretionary matter," leaving any "first-step

determinations of a noncitizen's *eligibility* for such relief" reviewable. Pet. Br. 17, 20.

That argument ignores the critical word, "regarding," which is "broadening" language not "limiting language." *Lamar, Archer & Cofrin, LLP*, 138 S. Ct. at 1760. Indeed, "regarding" at times drops out of Petitioners' arguments altogether. *See, e.g.*, Pet. Br. 17 ("A first-step ruling on eligibility does not 'grant[] … relief' to a noncitizen, because the Executive retains full authority to deny any benefit at the second step." (alterations in original)); *id.* at 23 (parsing the word "grant"); *id.* at 24 ("'granting of relief'" describes "final-step exercises of discretion"). Petitioners are right that an eligibility determination is not itself "the granting of relief." But Petitioners cannot seriously dispute that an eligibility determination is a decision "*regarding* the granting of relief." Indeed, deciding eligibility is *necessary* to the granting of such relief.[30]

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[30] Alternatively, Petitioners suggest that the jurisdictional bar forecloses "review only of *grants* of relief, while preserving review of *denials* of relief." Pet. Br. 25 n.7. One must ignore "regarding" to conclude that decisions "regarding the granting of relief" encompass only "grants of relief." That reading would also lead to an absurdity—a jurisdictional bar with nothing to bar. The Attorney General retains discretion to vacate decisions granting relief without prevailing upon the courts of appeals. *See* 8 C.F.R. §1003.1(h); *see generally* A. Gonzales & P. Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L. Rev. 841 (2016). And the district courts otherwise retain jurisdiction over immigration suits brought by the United States. *See* 8 U.S.C. §1329; *see also id.*, §1252(b)(3)(A) (designating Attorney General as "respondent" for petitions for review).

C. Context and history distinguish between questions of law and fact.

1. Today, "any judgment regarding the granting of" discretionary relief is unreviewable, except for "constitutional claims or questions of law." 8 U.S.C. §1252(a)(2)(B)(i), (D). In practice, that means questions of fact regarding the denial of discretionary relief will be unreviewable. This reading is consistent with the well-worn distinction between questions of law and fact in immigration law.

IIRIRA required that "all questions of law and fact" arising from removal proceedings be consolidated into one appeal. 8 U.S.C. §1252(b)(9). IIRIRA then made some of those "questions of law and fact" unreviewable in a "Matters not subject to judicial review" subsection. *Id.*, §1252(a)(2). "Matters not subject to judicial review" then and now includes a subsection titled "Denials of discretionary relief." *Id.*, §1252(a)(2)(B).[31] Therein lies the provision at issue here—"no court shall have jurisdiction to review any judgment regarding" the five forms of discretionary relief. *Id.*, §1252(a)(2)(B)(i). In simple terms, IIRIRA made denials of discretionary relief unreviewable in a petition for review to the court of appeals.[32]

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[31] Congress enacted these headings as part of IIRIRA. *See* §306(a)(2), 110 Stat. 3009-607. They are "[r]einforcing" and "supply cues" as to the jurisdictional bar's meaning. *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (quotation marks omitted).

[32] Still, some courts of appeals continued to permit review of "non-discretionary" questions of law and fact after IIRIRA. *See*

Then in *St. Cyr*, this Court raised concerns about the constitutionality of IIRIRA's judicial review limitations. *St. Cyr* involved a criminal alien who filed a habeas petition raising a pure question of law. 553 U.S. at 293. But IIRIRA generally prohibited appeals by criminal aliens. *Id.* at 298. To avoid "serious constitutional problems" with IIRIRA's judicial review limitations, this Court interpreted IIRIRA *not* to foreclose St. Cyr's habeas petition raising that pure question of law. *Id.* at 299-300. Nothing in *St. Cyr* suggests that the same would have been true had St. Cyr wanted to relitigate questions of fact. *See id.* at 304-06 (distinguishing between "pure questions of law" as generally reviewable and "factual determinations made by the Executive" as generally unreviewable).

Congress responded to *St. Cyr* by amending section 1252. The way in which Congress did so is further evidence of its meaning. The 2005 amendments expressly prohibited habeas petitions going forward.[33] But Congress added a subsection stating that "nothing in" the jurisdictional bars "shall be construed as

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Gov't Br. 13-14, 31-32. Some decisions relied on cases interpreting the transitional rules, not the actual text at issue. *See, e.g.*, *Garcia-Melendez*, 351 F.3d at 661; *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1332-33 (11th Cir. 2003). Others rested on procedural oddities, making circuit precedent less clear than has been suggested. *See, e.g.*, *Succar v. Ashcroft*, 394 F.3d 8, 20 (1st Cir. 2005) (noting there was no "judgment" because regulation precluded even applying for relief); *Iddir v. INS*, 301 F.3d 492, 497-98 (7th Cir. 2002) (noting "INS never held a hearing or made any determinations").

[33] §106(a)(1)(A)(i)-(ii), 119 Stat. 310 (codified at 8 U.S.C. §1252(a)(2)(A)-(C)).

precluding review of constitutional claims or questions of law raised upon a petition for review" from removal proceedings.[34]

The 2005 amendments reveal two things about the jurisdictional bar: *First*, before 2005, section 1252 forbade courts of appeals from reviewing so-called "non-discretionary" determinations underlying denials of discretionary relief in a petition for review. *See, e.g.*, *Kharkhan v. Ashcroft*, 336 F.3d 601, 604 (7th Cir. 2003) (refusing to review denial of cancellation of removal). If not, then carving out "constitutional claims or questions of law" in 2005 was unnecessary and superfluous. *Second*, after 2005, section 1252 still bars some review regarding the denial of discretionary relief. If not, then the jurisdictional bar is nugatory. If, after 2005, "constitutional claims or questions of law" may be raised, what's still barred? Questions of fact.

The House Conference Committee Report for the 2005 amendments confirmed that the reason for adding section 1252(a)(2)(D) was "to permit judicial review over those issues that were historically reviewable on habeas—constitutional and statutory-construction questions, not discretionary or *factual questions*." H.R. Conf. Rep. No. 109-72, 175 (emphasis added). The report anticipates that "statutory-construction questions" would be the typical questions of law encountered by courts of appeals, while acknowledging the possibility that they might also encounter "mixed question[s] of law and fact." *Id.* But relitigating facts was off-limits: "When a court is presented with a

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[34] §106(a)(1)(A)(iii), 119 Stat. 310 (codified at 8 U.S.C. §1252(a)(2)(D)).

mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements." *Id.*

2. As recently as *Nasrallah v. Barr*, this Court explained the jurisdictional bar in this common-sense way—permitting review of questions of law while foreclosing review of questions of fact. *Nasrallah* involved a factual challenge to a Convention Against Torture order. 140 S. Ct. at 1688. The challenger was a criminal alien, who was otherwise barred from appealing the removal order against him except for "constitutional claims or questions of law." *Id.* at 1689; *see* 8 U.S.C. §1252(a)(2)(C)-(D). Even so, the Court held that Nasrallah could raise his factual challenge because the CAT order was distinct from the removal order. *Id.* at 1688, 1691. In reaching that decision, the Court considered "slippery slope" arguments—in particular, "[i]f factual challenges to CAT orders may be reviewed, what other orders will now be subject to factual challenges in the courts of appeals?" *Id.* at 1693. This Court identified the jurisdictional bar at issue here as the backstop: "[A]nother jurisdiction-stripping provision, §1252(a)(2)(B), states that a noncitizen may not bring a *factual challenge to orders denying discretionary relief*, including … adjustment of status." *Id.* at 1693-94 (emphasis added).

Similarly in *Guerrero-Lasprilla*, this Court considered whether section 1252(a)(2)(D)'s carve-out for "questions of law" permitted a criminal alien to appeal a "mixed" question of law and fact, where facts are "undisputed or established." 140 S. Ct. at 1067-69. In answering yes, this Court explained section

1252(a)(2)(D) "will still forbid appeals of *factual determinations*." *Id.* at 1073 (emphasis added). Section 1252(a)(2)(D) has the same scope and effect with respect to denials of discretionary relief here.

Nasrallah and *Guerrero-Lasprilla* exemplify the most natural reading of section 1252(a)(2)(B)(i)'s jurisdictional bar in combination with (a)(2)(D) today: in appeals about the denial of discretionary relief, "constitutional claims or questions of law" are reviewable, leaving questions of fact unreviewable.

3. The Government contends that questions of fact are still reviewable based on observations about fact review *before* IIRIRA. Gov't Br. 13-14, 27. They argue that history supports reviewing facts *after* IIRIRA. *Id.* The history cuts the other way.

IIRIRA replaced the existing judicial review scheme and "instituted a new (and significantly more restrictive) one in 8 U.S.C. §1252." *Reno*, 525 U.S. at 475. There is no reason to presume that the scope of review immediately before IIRIRA remained the same after IIRIRA. Indeed, Congress gave every reason to presume it did not by stating "no court shall have jurisdiction to review" denials of discretionary relief as one of IIRIRA's "[m]atters not subject to judicial review." 8 U.S.C. §1252(a)(2)(B).

The Government's history is also short-sighted. During the finality era in the 19th and early 20th centuries, factual determinations were largely unreviewable, even those related to the removal decision itself (as compared to here, where a noncitizen concedes removability and seeks discretionary relief from removal). As this Court explained in *Nishimura Ekiu*, "the final determination" of facts "may be intrusted by

congress to executive officers." 142 U.S. at 660. A statute may give "a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts," thereby making him "the sole and exclusive judge of the existence of those facts." *Id.* And "no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted." *Id.*; *see also Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893) (power to expel "may be exercised entirely through executive officers" unless Congress "call[s] in the aid of the judiciary"); *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) (immigration decisions "conclusiv[e] upon matters of fact"). Later in *United States ex rel. Accardi v. Shaughnessy*, involving the Immigration Act of 1917, this Court examined the denial of suspension of deportation, a pre-IIRIRA form of discretionary relief. 347 U.S. 260, 268 (1954). The Court made special emphasis of the fact that it was *not* "reviewing and reversing the manner in which discretion was exercised," which would entail "discussing the evidence in the record supporting or undermining the alien's claim to discretion." *Id.*[35]

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[35] Even that limited review in *Accardi* drew the dissent of Justice Jackson, who distinguished the Court's review of the denial of discretionary relief from its review of deportation orders: "Of course, it may be thought that it would be better government if even executive acts of grace were subject to judicial review. But the process of the Court seems adapted only to the determination of legal rights, and here the decision is thrusting upon the courts the task of reviewing a discretionary and purely executive function." 347 U.S. at 270-71.

Congress ultimately codified a form of substantial evidence review in 1952 as part of the INA's new procedures. The 1952 Act stated that "no decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." §242(b)(4), 66 Stat. 210. The 1961 Act retained that "reasonable, substantial, and probative evidence" standard. §106(a), 75 Stat. 651-52. But IIRIRA codified a new and more deferential formulation: "administrative findings of fact are conclusive unless any reasonable adjudicator would be *compelled* to conclude to the contrary." 8 U.S.C. §1252(b)(4)(B) (emphasis added); *see also Elias-Zacarias*, 502 U.S. at 483-84 (deciding, on the eve of IIRIRA, that an asylum seeker would have to "show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution"). That substantial deference applies even to the removability decision itself and is consistent with the long history of leaving factfinding largely unreviewable.

This history confirms that the jurisdictional bar means what it says. The jurisdictional bar does not, *sub silentio*, permit judicial review of any and all "nondiscretionary findings of fact" underlying denials of discretionary relief.

4. Finally, distinguishing between questions of law and fact makes practical sense. Questions of fact are not simply "objective determinations" or "straightforward factual findings." Gov't Br. 40-42. Here, reviewing Mr. Patel's misrepresentation of his citizenship would entail reviewing his credibility on a cold record, layers of review removed from the live testimony, evidence, and impeachment from 8 years ago—

hardly "an objective finding of historical fact," as the Government describes it. Gov't Br. 15. Appellate courts are not automatons.[36] Even if they were, it makes little practical sense for a federal appeals court to re-review a factfinding that was first made by USCIS in 2010, then made again by an immigration judge in 2013, and then affirmed by the BIA in 2017. Pet.App.107a, 113a-115a; AR73-75.

IIRIRA's overarching goal, moreover, was to streamline appeals and avoid delay in removal. *See Reno*, 525 U.S. at 475, 490; *Kucana*, 558 U.S. at 249. Permitting review of any question of fact for every denial of discretionary relief frustrates that goal. If there were any doubt on that score, the 2005 amendments—namely the absence of "questions of fact" from section 1252(a)(2)(D)—eliminated it.

* * *

Section 1252 precludes review of any judgment—meaning any decision—regarding the granting of discretionary relief, except for constitutional claims or questions of law raised by the denial of relief. 8 U.S.C. §1252(a)(2)(B)(i), (D). Applied here, no court shall have jurisdiction to review whether Mr. Patel did in fact misrepresent his citizenship, thereby making himself ineligible for discretionary relief.

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[36] Section 1252's highly deferential standard of review for other facts is telling in this regard. *See* 8 U.S.C. §1252(b)(4)(B). If factfinding were so black-and-white, such deference would be unnecessary.

II. Any alternative interpretation is atextual.

A. "Any judgment" is not synonymous with "any discretionary judgment" or "any subjective judgment."

The starting point for both Petitioners and the Government is their re-definition of "judgment." They re-define "judgment" to mean a decision made with complete discretion or subjectivity. Petitioners contend "judgments" are "decisions that involve the weighing or balancing of factors by the decisionmaker, often involving matters within the decisionmaker's *unique power or authority*." Pet. Br. 20 (emphasis added). They believe that eligibility determinations are not "judgments" because "such decisions are not *subjective* 'opinions or estimates,' and they lack the inherent 'discerning and comparing' function." Pet. Br. 21 (emphasis added). Likewise, the Government argues that a "judgment" is limited to "a decision that requires *subjective* or evaluative decision-making and results from the exercise of discernment." Gov't Br. 12 (emphasis added). The Government describes judgments as only those "decisions that are the product of a particular decisionmaker's *exercise of discernment*," by which it means unmitigated discretion. Gov't Br. 17 (emphasis added). They assume the "non-discretionary findings" at issue here involve no such "judgment" and are therefore reviewable. Gov't Br. 15; *see also* Pet. Br. 20-21.

That starting point is atextual. It limits the term "judgment" to that which is "subjective" or "discretionary," even though these limitations are absent in the statutory text. The statute bars review of "*any judgment* regarding the granting of" discretionary relief. It

is not limited to "any *discretionary* judgment regarding the granting of" discretionary relief. *See Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020) (refusing to "read into statutes words that aren't there").

Worse, no dictionary supports the parties' gloss on "judgment" to exclude factfinding. Extrapolating from cited dictionaries, the Government contends that the "exercise of discernment," forming "an opinion," or "exercising the mind" describes only that which is *purely* "subjective" or "discretionary." Gov't Br. 16-17; *see also* Pet. Br. 20 (similar). To the contrary, all judging (and all judgments) will reflect some "exercise of discernment." Factfinding in particular entails some amount of discretion and discernment as the factfinder assesses the evidence before him. Factfinders can disagree. For that reason, federal appellate courts routinely defer to the factfinder, even if they would have found the facts differently. *See, e.g.*, *Gall v. United States*, 552 U.S. 38, 59-60 (2007) (faulting appellate court for reviewing facts *de novo* instead of for an abuse of discretion); *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (describing "clearly erroneous" standard of review as one that "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently"); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) ("We may not substitute our judgment for that of the Secretary, but instead must confine ourselves to ensuring that he remained 'within the bounds of reasoned decisionmaking.'"). Even "judgment" in this non-legal sense encompasses the factfinding here—*i.e.*, "forming an opinion or evaluation by discerning

and comparing" the evidence and testimony to discern whether Mr. Patel misrepresented his citizenship.[37] The dictionary definitions do not suggest otherwise.

The "discretionary" / "non-discretionary" gloss on "any judgment" has no support in the text or dictionaries. Whether "judgment" is understood in the legal or non-legal sense, it encompasses factfinding made on the way to denying discretionary relief.

B. Subparagraphs (B)(i) and (B)(ii) are harmonious, not superfluous.

The Government and Petitioners also believe that the jurisdictional bar is limited to only "discretionary judgments" based on (B)(ii)'s neighboring jurisdictional bar. Together, the provisions state:

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

8 U.S.C. §1252(a)(2)(B)(i)-(ii) (emphasis added).

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[37] Webster's Third at 1223.

In *Kucana*, this Court explained that the proximity of (B)(i) and (B)(ii) "suggests that Congress had in mind decisions of the same genre, *i.e.*, those made discretionary by legislation." 558 U.S. at 246-47. Petitioners and the Government take this observation beyond its outer limits. They argue that because (B)(ii) bars only decisions "in the discretion" of the Attorney General or Secretary, then (B)(i) must be limited to only "discretionary judgments" too. Gov't Br. 22-24; Pet. Br. 26, 30-31. That argument is based on an unnatural reading of the text. It renders (B)(i) unnecessarily superfluous and ignores the different functions served by subparagraphs (B)(i) and (B)(ii).

1. Altering the statute, the Government argues that (B)(ii)'s "reference to 'other' 'discretion[ary]' 'decision[s] or action[s]' confirms that clause (i) is also limited to discretionary determinations." Gov't Br. 23 (alterations in original; citation omitted). But (B)(ii) does not say "any other discretionary decisions or actions." The grammatical structure is more complex, making "any other decision or action" unreviewable if the "authority" for that decision or action "is specified" by statute to be "in the discretion" of the Attorney General or the Secretary. The prepositional phrase "in the discretion" is buried among other prepositional phrases in a clause that modifies "authority." It is more than 20 words removed from the antecedent "decision or action." It is completely unnatural to read that buried phrase, "in the discretion," to also modify and thereby limit what "judgment" is barred here.

Consider a simplified example. A lease agreement could state that "no tenant is permitted to have—

(i) any dogs; or

(ii) any other pet, the weight of which exceeds 10 pounds.

Any reader of English would understand that the lease prohibits all dogs (even the smallest of breeds) as well as any other pets weighing more than 10 pounds. But as the Government would have it, a tenant's 7-pound Maltese is free to move in because "exceeds 10 pounds" modifies not only "any other pet" in (ii) but also "any dogs" in (i). That is no way to read the above provision and no way to read the even more complex syntax of section 1252(a)(2)(B).

The "in the discretion" language of (B)(ii) limits only the "decision or action" barred by (B)(ii). It does not also limit "any judgment" in (B)(i). *See* Scalia & Garner, *Reading Law* 152-53 ("prepositive or postpositive modifier normally applies only to the nearest reasonable referent"); *see also, e.g.*, *Barnhart v. Thomas*, 540 U.S. 20, 27 (2003) (illustrating last antecedent rule with example of parents' instruction not to "'throw a party or engage in any other activity that damages the house'" and concluding that son who throws a party cannot "avoid punishment by arguing that the house was not damaged"); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389-90 (1959) (applying "limiting clause" only to "last antecedent" to avoid "partial mutilation of th[e] Act").

Petitioners' and the Government's alternative reading introduces unwarranted superfluity. If (B)(i) contained all the same limitations as (B)(ii), then

(B)(i) would cover only those decisions specified in (B)(ii) and no more. That would render (B)(i) "entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (op. of Scalia, J.); *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

2. Subparagraphs (B)(i) and (B)(ii) bar "the same genre" of decisions. *Kucana*, 558 U.S. at 246. They do not bar "the same" decisions. Subparagraph (B)(i) bars "any judgment," ordinarily by an immigration court in a removal proceeding, while (B)(ii) bars other decisions specified to be in the discretion of executive officials. For example, consider an immigration judge who decides a noncitizen is ineligible for "relief under section … 1255[(i)]" because the judge finds he did not meet the visa requirements for adjustment of status. *See* 8 U.S.C. §§1252(a)(2)(B)(i), 1255(i)(2). Subparagraph (B)(i) makes that "judgment" unreviewable. It is enough that the decision is "regarding the granting of relief under section … 1255." *Id.*, §1252(a)(2)(B)(i). Meanwhile, outside of a removal proceeding, the Department of Homeland Security might revoke an immigrant visa. Subparagraph (B)(ii) makes that "decision or action" unreviewable only if it "is specified" by statute to be "in the discretion of" the Secretary. *Id.*, §1252(a)(2)(B)(ii); *see Kucana*, 558 U.S. at 248.[38] The provisions, while "harmonious[]," are not superfluous. *Id.* at 247.

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[38] *See iTech U.S., Inc. v. Renaud*, 5 F.4th 59, 66-68 (D.C. Cir. 2021); *El-Khader v. Monica*, 366 F.3d 562, 566-67 (7th Cir. 2004); *Green v. Napolitano*, 627 F.3d 1341, 1345 (10th Cir. 2010) (collecting cases).

C. Other context arguments do not support an alternative interpretation.

Petitioners' and the Government's other arguments about other provisions in section 1252 and beyond do not support their interpretations. If anything, context refutes them.

1. For example, they describe the jurisdictional bars for expedited removal decisions and appeals by criminal aliens, 8 U.S.C. §1252(a)(2)(A) & (C), as provisions that "flatly bar all claims," whereas the "narrower language" here "suggests a conscious decision not to bar categorically all review of the enumerated forms of relief." Gov't Br. 25; *see also* Pet. Br. 29-30. These other jurisdictional bars do not "flatly bar all claims." *See* 8 U.S.C. §1252(e) (listing exceptions to §1252(a)(2)(A)); *id.*, §1252(a)(2)(D). And the comparison is apples-to-oranges. Each bar deals with unique immigration decisions. These other bars foreclose review of *removal decisions* themselves. Section 1252(a)(2)(B)(i)'s target is different—five forms of discretionary relief from removal. Each bar begins unequivocally: "no court shall have jurisdiction to review…." *Id.*, §1252(a)(2)(A), (B), & (C). But from there, each is necessarily tailored to its particular target. For example, section 1252(a)(2)(A) bars review of "any *individual* determination" about expedited removal, which makes sense given (a)(2)(A)'s exception for constitutional and APA-like claims regarding expedited removal regulations. *Id.*, §1252(a)(2)(A)(i), (e)(3) (emphasis added). There is no adverse inference to be drawn from these differently worded jurisdictional bars given their different targets.

2. Petitioners and the Government also point to instances of "judgment" elsewhere in the immigration statutes as support for their "discretionary" / "non-discretionary" dichotomy. But these other uses illustrate that when Congress meant "discretionary decisions," it said so.[39] For example, section 1226 involves arresting and detaining criminal aliens pending removal. 8 U.S.C. §1226(a). Subparagraph (e) states, "The Attorney General's *discretionary* judgment regarding the application of th[at] section shall not be subject to review." *Id.*, §1226(e) (emphasis added). Another provision addresses "the Attorney General's *discretionary* judgment" about whether to grant asylum. *Id.*, §1252(b)(4)(D) (emphasis added).[40] Others similarly discuss a determination "in the judgment of" the Attorney General or Secretary. *Id.*, §1537(b)(2)(A); *see id.*, §1103(a)(7). And IIRIRA's transitional judicial review rules barred "any *discretionary* decision under" the enumerated statutes. §309(c)(4)(E), 110 Stat. 3009-626 (emphasis added).

The jurisdictional bar contains no such limiting language. It bars "any judgment." *See Gonzales*, 520

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[39] They are also not the only other instances of "judgment." The Act also uses "judgment" in the legal sense. *See, e.g.*, 8 U.S.C. §1451(f) (describing "judgment or decree" revoking naturalization); *id.*, §1503(a) (describing action "for a judgment"); *id.*, §1324b(i)(2) (stating "judgment shall be final"); *id.*, §1227(a)(2)(D) (describing "judgment" of conviction); *id.*, §1101(a)(48)(A) (defining "conviction" to include "a formal judgment of guilt").

[40] These instances of "discretionary judgment" also belie that the term "judgment" standing alone means only "discretionary" or "subjective" decisions. *See* Part II.A, *supra.* If so, then instances of "discretionary judgment" would translate to "discretionary discretion."

U.S. at 5 (finding it significant that "no similar restriction" modified phrase at issue, even though restriction modified other nearby phrases); *Romag*, 140 S. Ct. at 1495. Had Congress meant "any *discretionary* judgment regarding the granting of" discretionary relief, these other provisions illustrate Congress knew how to say so. *See Kucana*, 558 U.S. at 248. Indeed, Congress said so in the simultaneously enacted transitional rules, but then employed materially different language for section 1252(a)(2)(B)(i) and (ii)'s permanent bars. Context confirms that the jurisdictional bar reaches more than the purely "discretionary" decisions covered by these other provisions. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

III. Presumptions and anomalies are not a basis for ignoring the statutory text.

Finally, Petitioners and the Government make various arguments inviting this Court to disregard the plain text of the jurisdictional bar. These arguments should be rejected, and the text should be interpreted for what it says.

A. The presumption of reviewability is not unrebuttable.

The parties invoke the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *see* Pet. Br. 31-32; Gov't Br. 15, 38-39. However "well-settled," that presumption is not a basis for ignoring the words Congress wrote. It is, "after all, a presumption, and like all presumptions used in interpreting statutes,

may be overcome," including when "specific congressional intent to preclude judicial review … is fairly discernible in the detail of the legislative scheme." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 673 (1986) (quotation marks omitted). The best evidence of that "congressional intent" is the text of the statute itself. *See Richards v. United States*, 369 U.S. 1, 9 (1962) ("legislative purpose is expressed by the ordinary meaning of the words used"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment) ("if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity"). As this Court put it in *Jay v. Byrd*, courts "must adopt the plain meaning of a statute, however severe the consequences." 351 U.S. 345, 357-58 (1956). Jurisdictional statutes "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968).

Here, Congress has given every possible indication that there is no jurisdiction to consider Mr. Patel's factual dispute. The jurisdictional bar begins, "[n]o court shall have jurisdiction." 8 U.S.C. §1252(a)(2)(B). It applies without regard to "whether the judgment, decision, or action is made in removal proceedings." *Id.* It bars "any judgment," not a "*discretionary* judgment" or "*discretionary* decision" or a "decision … *in the discretion* of" someone, even though that phrasing was in Congress's toolbox. *See* Part II.C, *supra*. And—the nail in the coffin—when clarifying the scope of the jurisdictional bar in 2005, Congress specified that "constitutional claims or questions of law" were reviewable, *id.*, §1252(a)(2)(D), not questions of fact. Section

1252(a)(2)(B) and (D) leave no room for presumptions of reviewability here. *Accord Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984) ("when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded"); *see also, e.g.*, *Miller v. French*, 530 U.S. 327, 336-38 (2000) (rejecting interpretation that "would subvert the plain meaning of the statute," even to avoid a constitutional question).

The presumption of reviewability necessarily has limits, lest every jurisdictional bar become a nullity. It reaches its limits here. The jurisdictional bar at issue does not foreclose constitutional questions or questions of law. 8 U.S.C. §1252(a)(2)(D); *cf. Webster v. Doe*, 486 U.S. 592, 603 (1988) (specifying that "where Congress intends to preclude judicial review of *constitutional claims* its intent to do so must be clear" (emphasis added)). It does not foreclose questions about the grounds for removal. *Id.*, §1252(b)(9). It instead forecloses *factual questions* about the denial of *discretionary relief*—a "matter of grace," not an entitlement. *Jay*, 351 U.S. at 354; *see also Accardi*, 347 U.S at 270-71 (Jackson, J., dissenting).

B. Congressional repudiation, not ratification.

Petitioners and the Government also invite this Court to presume Congress has silently ratified the "discretionary" / "non-discretionary" dichotomy employed by some courts of appeals. *See* Gov't Br. 32-34;

Pet. Br. 41-43.[41] That ignores what Congress actually said in the 2005 amendments.

Congress did not codify the "discretionary" / "non-discretionary" dichotomy in 2005. Congress carved out only "constitutional claims or questions of law." 8 U.S.C. §1252(a)(2)(D). That more limited exception, distinct from the approach by some courts of appeals, undermines any ratification theory. *See TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1521 (2017); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (describing ratification when Congress "re-enacts a statute without change.").

The idea that Congress "ratified" the approach of some courts of appeals over the course of a few years is a stretch. *Compare BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1541 (2021) (rejecting that "a smattering of lower court opinions could ever represent the sort of 'judicial consensus so broad and unquestioned that we must presume Congress knew of and endorsed it'"), *with Comm'r of Internal Revenue v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) (describing "settled judicial and administrative interpretation over the course of a half century"). The

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[41] The uniformity of the court of appeals is overstated. Before and after 2005, Seventh Circuit decisions rejected the "discretionary" / "non-discretionary" dichotomy. *See Kharkhan*, 336 F.3d at 604; *Cevilla v. Gonzales*, 446 F.3d 658, 661-62 (7th Cir. 2006). After 2005, additional circuit court decisions concluded questions of fact were unreviewable. *See, e.g.*, *Ayeni v. Holder*, 617 F.3d 67, 71 (1st Cir. 2010); *Arambula-Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009); *see also Lee*, 592 F.3d at 620; *Xiao Ji Chen v. Gonzales*, 471 F.3d 315, 329 (2d Cir. 2006) (describing section 1252(a)(2)(D) as barring review of "correctness of an IJ's fact-finding or the wisdom of his exercise of discretion").

idea that Congress so "ratified" using words markedly different than what those courts were saying is a bridge too far. And no congressional ratification theory can overcome what Congress actually said. This Court "is to follow the law as [it] find[s] it, not to follow rotely whatever lower courts once might have said about it." *BP P.L.C.*, 141 S. Ct. at 1541.

C. Distinctions between removal and relief are not anomalous.

Finally, Petitioners and the Government contend an "anomaly" results if questions of fact are reviewable for the removal decision itself, but not for the denial of discretionary relief. Gov't Br. 25-26, 40; *see also* Pet. Br. 45-46. But that is the plain meaning of the statute. Section 1252(b)(9) consolidates "all questions of law and fact" into a single appeal, and then section 1252(a)(2)(B)(i) makes some of those questions unreviewable with respect to denials of discretionary relief. That denial of discretionary relief is distinct from the removal decision, even though ordinarily occurring in the same proceeding.[42] Once Mr. Patel conceded he was removable, his ability to remain in the country was only a matter of grace.

Relatedly, the Government asserts "[t]here is no more reason to shield straight-forward factual findings from review in the context of a determination about discretionary relief from removal than in the

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[42] They entail different burdens of proof. *Compare* 8 U.S.C. §1229a(c)(3), *with id.*, §1229a(c)(4). And they entail different Due Process considerations. *Compare, e.g.*, *Bridges v. Wixon*, 326 U.S. 135, 154 (1945), *with U.S. ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (Hand, C.J.), *and Delgado v. Holder*, 674 F.3d 759, 765-66 (7th Cir. 2012).

context of a determination about removability." Gov't Br. 40.[43] But it is not for the judiciary to "second-guess Congress" so long as Congress has acted within constitutional bounds. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1848 (2018); *see also Harisiades*, 342 U.S. at 590 ("Judicially we must tolerate what personally we may regard as a legislative mistake."). And here, no party suggests that removing jurisdiction to consider factual disputes about denials of discretionary relief comes close to any constitutional limit. *Accord St. Cyr*, 533 U.S. at 306 ("other than the question of whether there was some evidence to support the order, the courts generally did not review factual determinations made by the executive" in habeas actions before 1952).[44] Section 1252's restrictions on

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[43] The *amicus* brief of former immigration judges makes similar arguments, emphasizing the caseload of immigration judges (at 11-13). These arguments cannot overcome the congressionally enacted text. *Amici* also do not grapple with the fact that, according to *amici*'s cited statistics, most removal proceedings between 2017 and 2020 did not involve requests for relief from removal. *See Beyond Asylum*, TRAC Immigration (Oct. 9, 2020), bit.ly/3Ar9KbY. Of the roughly 37% of removal proceedings that did involve requests for relief from removal, the "overwhelming majority" of requests (roughly 89%) were for "asylum or asylum-related forms of relief"—*not* barred by section 1252(a)(2)(B)(i). *See id.* By comparison, roughly 10% of requests were for forms of discretionary relief listed in section 1252(a)(2)(B)(i), excluding voluntary departure. *See id.* Congress barred further review of that fraction of requests unless implicating constitutional questions or questions of law.

[44] Reviewing "whether there was some evidence" for a deportation order, as described in *St. Cyr*, is shorthand for a Due Process claim that would still be reviewable today. *See United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 106

judicial review reflect a policy choice that was Congress's to make. With respect to denials of discretionary relief, federal courts are not courts of factual error correction.

CONCLUSION

The Eleventh Circuit correctly interpreted the statute. The decision below should be affirmed.

Respectfully submitted,

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(1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus."). It is not, as the Government suggests (at 27), a mousehole for reviewing all factfinding regarding denials of discretionary relief. *See id.* ("want of due process is not established by showing merely that the decision is erroneous"); *see also, e.g.*, *Arambula-Medina*, 572 F.3d at 828 & n.4; *Cevilla*, 446 F.3d at 662.

STATUTORY APPENDIX

STATUTORY APPENDIX

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8 U.S.C. § 1252

(Current)

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

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

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

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

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

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

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

(B) Denials of discretionary relief

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

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

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

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)–

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that–

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the

administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection–

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g) [ ] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal–

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if–

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may–

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an

order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of–

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of–

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed

not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner–

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252

(As enacted Sept. 30, 1996, effective to May 10, 2005)

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

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

Notwithstanding any other provision of law, no court shall have jurisdiction to review–

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

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

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

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

(B) Denials of discretionary relief

Notwithstanding any other provision of law, no court shall have jurisdiction to review–

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered

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

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)–

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in

which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that–

> (i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or
>
> (ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28, United States Code.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection–

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[ ] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal–

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if–

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may–

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of–

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for

the District of Columbia, but shall be limited to determinations of–

> (i) whether such section, or any regulation issued to implement such section, is constitutional; or
>
> (ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to

expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner–

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

IIRIRA Transitional Rules

Pub. L. No. 104-208, § 309(c)(4), 110 Stat. 3009-626–3009-627 (Sept. 30, 1996)

* * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case described in paragraph (1) in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

(A) in the case of judicial review of a final order of exclusion, subsection (b) of such section shall not apply and the action for judicial review shall be governed by the provisions of subsections (a) and (c) of such in the same manner as they apply to judicial review of orders of deportation;

(B) a court may not order the taking of additional evidence under section 2347(c) of title 28, United States Code;

(C) the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation;

(D) the petition for review shall be filed with the court of appeals for the judicial circuit in which the administrative proceedings before the special inquiry officer or immigration judge were completed;

(E) there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act);

(F) service of the petition for review shall not stay the deportation of an alien pending the court's decision on the petition, unless the court orders otherwise; and

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

* * *

8 U.S.C. § 1105a

(As amended Oct. 25, 1994, effective to Sept. 30, 1996)

§ 1105a. Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that–

(1) Time for filing petition

a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony (including an alien described in section 1252a of this title), not later than 30 days after the issuance of such order;

(2) Venue

the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit;

(3) Respondent; service of petition; stay of deportation

the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs or unless the alien is convicted of an aggravated felony (including an alien described in section 1252a of this title), in which case the Service shall not stay the deportation of the alien pending determination of the petition of the court unless the court otherwise directs;

(4) Determination upon administrative record

except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) Claim of nationality; determination or transfer to district court for hearing de novo

whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of Title 28. Any such petitioner shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise;

(6) Consolidation

whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order;

(7) Challenge of validity of deportation order in criminal proceeding; motion for judicial review before trial; hearing de novo on nationality claim; determination of motion; dismissal of indictment upon invalidity of order; appeal

if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of Title 28. Any such alien shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty

days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 1252 of this title;

(8) Deferment of deportation; compliance of alien with other provisions of law; detention or taking into custody of alien

nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 1252 of this title. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 1252 of this title at any time after the issuance of a deportation order;

(9) Typewritten record and briefs

it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(10) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Limitation of certain aliens to habeas corpus proceedings

Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

(d) Petition contents

(1) A petition for review or for habeas corpus on behalf of an alien against whom a final order of deportation has been issued pursuant to section 1252a(b) of this title may challenge only–

(A) whether the alien is in fact the alien described in the order;

(B) whether the alien is in fact an alien described in section 1252a(b)(2) of this title;

(C) whether the alien has been convicted of an aggravated felony and such conviction has become final; and

(D) whether the alien was afforded the procedures required by section 1252a(b)(4) of this title.

(2) No court shall have jurisdiction to review any issue other than an issue described in paragraph (1).