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 OF THE AMERICAN IMMIGRATION COUNCIL, THE BRONX DEFENDERS, THE CATHOLIC LEGAL IMMIGRATION NETWORK, INC., THE NATIONAL IMMIGRATION LAW CENTER, THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND THE SOUTHERN POVERTY LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici are nonprofit organizations established to serve immigrants, to increase public understanding of immigration law and policy, and to protect the legal rights of noncitizens. Amici have extensive experience working within the immigration system and on immigration cases in the federal courts. Amici have a strong interest in ensuring fair process for immigrants, in part by speaking out against inaccurate and unduly restrictive interpretations of America's immigration laws, such as the Eleventh Circuit's jurisdiction-stripping rule at issue here.

The American Immigration Council ("Council") is a non-profit, non-partisan organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act ("INA").

The Bronx Defenders is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief's preparation and submission. All parties have consented to this filing.

indigent Bronx residents. It represents individuals in over 20,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents non-detained immigrants in removal proceedings. The Bronx Defenders' representation extends to affirmative immigration applications, motions to reopen, appeals and motions before the Board of Immigration Appeals, petitions for review, and federal district court litigation and appeals.

The Catholic Legal Immigration Network, Inc. ("CLINIC") is the nation's largest network of non-profit immigration legal services providers, with over 400 affiliates in 49 states. CLINIC's mission, which derives from its broader purpose of embracing the Gospel value of welcoming the stranger, is to promote the dignity and protect the rights of immigrants in partnership with its network of affiliates. CLINIC regularly engages in federal court litigation and has an important interest in ensuring that federal courts exercise their statutory authority to review agency decisions affecting noncitizens.

The National Immigration Law Center ("NILC") is a national non-profit, non-partisan legal organization dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Employing litigation, policy advocacy, and technical assistance and legal support to

advance its mission, NILC focuses on issues affecting the security and well-being of immigrant communities, including those related to immigrants' access to status, justice, and due process. Over the past 40 years, NILC has won landmark legal decisions protecting fundamental rights and has advanced policies that reinforce the nation's values of equality, due process, opportunity, and justice.

The National Immigration Project of the National Lawyers Guild ("NIPNLG") is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. Through federal litigation, advocacy, publications and continuing legal education efforts, NIPNLG has been promoting these objectives for almost fifty years. NIPNLG frequently appears as amicus before the federal courts in litigation related to the proper administration of immigration law and has a direct interest in assuring that the rules governing removal proceedings comport with due process and are not erroneously restrictive.

The Southern Poverty Law Center ("SPLC") is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. Through its Southeast Immigrant Freedom Initiative ("SIFI"), SPLC provides pro bono direct representation before immigration courts across the Deep South to

hundreds of persons in detention. SIFI clients seek all types of relief from removal in immigration proceedings and thus are directly impacted by the Eleventh Circuit's ruling under review. SPLC's Immigrant Justice Project is also engaged in impact litigation and advocacy to promote and protect the rights of immigrants throughout the southeast and at the southern border.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a divided *en banc* ruling, the Eleventh Circuit *sua sponte* created a novel jurisdiction-stripping rule in immigration cases that Congress did not write, and that yields an unfair, arbitrary result. The decision should be reversed.

The Eleventh Circuit's ruling addresses 8 U.S.C. § 1252(a)(2)(B)(i), which bars review of "any judgment" by the executive "regarding the granting of" five enumerated forms of discretionary relief from removal. By its terms, the statute bars review of the ultimate "judgment" regarding discretionary relief. It does not, however, preclude review of determinations on the threshold factors relating to whether a noncitizen is potentially *eligible* to be considered for that ultimate, discretionary judgment. This is a crucial distinction because the discretionary relief decision requires a two-step process. First, to be able to apply for such discretionary relief, a noncitizen must satisfy certain

threshold eligibility criteria set out by statute. Then, to ultimately be awarded discretionary relief, an eligible noncitizen must be granted a favorable exercise of discretion by the executive.

Nearly every other circuit and the government have interpreted Section 1252(a)(2)(B)(i) to *allow* judicial review of non-discretionary eligibility determinations like the one at issue here, and to *preclude* jurisdiction over the executive's ultimate, discretionary decision to grant or deny relief from removal. The Eleventh Circuit, however, misinterpreted Section 1252(a)(2)(B)(i) to strip courts of the jurisdiction to review *all* agency determinations bearing on a noncitizen's request for relief from removal, including non-discretionary, threshold eligibility determinations like the one here.

The Eleventh Circuit's erroneous ruling creates a perverse incentive for the executive to delay asserting certain grounds of ineligibility for relief from removal until *after* the noncitizen has sought discretionary relief (when they are not subject to judicial review, under the Eleventh Circuit's ruling), rather than raise them earlier in the noncitizen's removal proceeding (when the same grounds are unquestionably reviewable, even under the Eleventh Circuit's approach). The Eleventh Circuit's ruling creates this unjustified asymmetry because the INA sets out multiple grounds of inadmissibility and deportability (together, removability), all of which serve as bases for removing a noncitizen from the United States, and many of which also render a noncitizen ineligible for discretionary relief

from removal.[2] Thus, a noncitizen can be both removable and ineligible for discretionary relief based on the same facts. But the Department of Homeland Security ("DHS") does not always raise the same grounds of removability at the initial removability stage (in the Notice to Appear) as it does in the subsequent relief stage (after a noncitizen seeks discretionary relief from removal).

Under the reading of Section 1252(a)(2)(B)(i) adopted by most circuits and the government, a nondiscretionary inadmissibility determination[3] is subject to judicial review regardless of whether it is made during the *removability* stage of an immigration court proceeding (when the immigration judge decides whether the noncitizen is removable based on the charged grounds of removability) or the *relief* stage (when the immigration judge decides whether the noncitizen is eligible to apply for discretionary relief from removal).

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[2] Federal immigration law sets out two bases for removal from the United States—inadmissibility (which applies to noncitizens seeking entry) and deportability (which applies to noncitizens previously admitted). *Judulang v. Holder*, 565 U.S. 42, 45 (2011). The substantive grounds for inadmissibility and deportability are set out in two "sometimes overlapping and sometimes divergent" statutory lists. *Id.* at 46 (citing 8 U.S.C. §§ 1182(a), 1227(a)).

[3] Because Mr. Patel entered the United States without inspection and so was charged as removable on a ground of inadmissibility, *see* Pet. App. 3a, this brief usually refers to "inadmissibility determinations" rather than the more general "removability determinations." But *amici*'s argument applies equally to noncitizens for whom the relevant removability charge is a deportation ground.

But under the Eleventh Circuit's interpretation, an inadmissibility determination is only reviewable when made at the removability stage; no judicial review is available if the exact same determination is made at the relief stage. *See* Pet. App. 75a (Martin, J., dissenting); *id.* at 37a n.26 (majority op.).

In other words, in the Eleventh Circuit's view, a noncitizen's ability to obtain judicial review of an immigration judge's inadmissibility determination turns entirely on when in the noncitizen's immigration proceeding DHS chooses to raise the issue. Nothing in the statute grants DHS that power, and for good reason—such an interpretation would render a substantive inquiry on a critical issue wholly dependent on a procedural maneuver.

The arbitrariness of the Eleventh Circuit's rule operated with particular force in Petitioner Pankajkumar Patel's case. A citizen of India who has lived and worked in the United States since entering without inspection nearly thirty years ago, Mr. Patel was charged as removable after he checked a box on a Georgia driver's license application indicating that he was a U.S. citizen. Mr. Patel has maintained that he was not seeking any advantage through his error; indeed, he was eligible for a driver's license regardless of his citizenship and had secured a driver's license multiple times through the years. *See* Pet. Br. 12-13.

The only ground of inadmissibility for which DHS charged Mr. Patel as removable in the Notice to Appear was entering without inspection—a charge that would

not bar him from adjusting his status under Section 1255(i) (his sought-after discretionary relief). But after Mr. Patel conceded his removability and applied for adjustment of status in his removal proceeding, the government raised as an admissibility bar that Mr. Patel falsely claimed U.S. citizenship to obtain a benefit. Under the Eleventh Circuit's decision, because the government elected not to charge the false-claim-of-citizenship ground at the removability stage and instead chose to raise it after Mr. Patel sought relief from removal, Mr. Patel could not obtain judicial review of the immigration judge's finding that he was inadmissible on that basis. Further, because a false-claim-of-citizenship inadmissibility determination precludes a noncitizen from obtaining a waiver allowing a subsequent immigrant visa to the country, the Eleventh Circuit's decision means that Mr. Patel will never be able to return to the United States as an immigrant, without ever having had the opportunity for judicial review of the agency's inadmissibility finding, simply because of the timing of the government's inadmissibility argument.

The Eleventh Circuit's reading of Section 1252(a)(2)(B)(i) is wrong and should be reversed. Section 1252(a)(2)(B)(i) preserves the jurisdiction of federal courts to review a threshold determination that a noncitizen is statutorily ineligible for discretionary relief, even if the government did not rely on that ineligibility ground as a basis to assert removability. The Eleventh's Circuit's interpretation is contrary to Congress's chosen judicial-review scheme, gives

undue (and unchecked) authority to immigration officials, and contravenes the longstanding presumption of judicial review over agency action and immigration statutes. It therefore stands in serious tension with this Court's decision in *Kucana v. Holder*, 558 U.S. 233 (2010). The Eleventh Circuit's interpretation also contradicts this Court's decision in *Judulang v. Holder*, 565 U.S. 42 (2011), which rejected schemes that predicate the availability of immigration relief on optional executive charging decisions. This Court should hold similarly here, and thus avoid the unprecedented, unfair, and arbitrary regime engendered by the Eleventh Circuit's decision.

BACKGROUND

Immigration court proceedings typically have two stages: a removability stage and a relief stage. *See Matovski v. Gonzales*, 492 F.3d 722, 727 (6th Cir. 2007) ("Removal proceedings against [a noncitizen] are divided into two phases: (1) determination of the [noncitizen]'s removability; and (2) consideration of applications for discretionary relief.").

At the removability stage, which is commenced with a Notice to Appear filed by DHS stating the grounds for removal under the INA, *see* 8 U.S.C. §§ 1182(a), 1227(a), the immigration judge must determine whether the noncitizen is removable based on the cited grounds. Bases for removal include grounds related to health, criminal convictions, national security,

and immigration violations, among others. Often, basic removability is uncontested, such as when the charge is that a noncitizen overstayed their temporary admission or entered the country without inspection (as in Mr. Patel's case). If the immigration judge determines that the noncitizen is removable (either because the government proves removability or the noncitizen concedes it), the case proceeds to the relief stage, where the noncitizen may apply for various forms of relief from removal.

At the relief stage, the immigration judge must adjudicate any applications for relief from removal. When a noncitizen seeks a form of discretionary relief—such as adjustment of status, cancellation of removal, or voluntary departure, *see* 8 U.S.C. §§ 1229b, 1229c[4]—the relief stage itself proceeds in two discrete steps. The immigration judge first determines whether the noncitizen is eligible for relief, and, if so, then determines whether the noncitizen "merits a favorable exercise of discretion" and therefore should receive that relief. 8 U.S.C. § 1229a(c)(4)(A). The immigration judge's decision at the second step—whether relief should be granted at all—is undoubtedly a discretionary determination. But the predicate question of whether the noncitizen is *eligible* for discretionary relief turns on the satisfaction of enumerated statutory

[4] Most forms of immigration relief are discretionary, but some, like withholding of removal, are not. *See* 8 U.S.C. § 1231(b)(3) (prohibiting removal to a country if the Attorney General determines that the noncitizen's "life or freedom would be threatened in that country" based on a protected ground).

criteria. For example, to be eligible for cancellation of removal, lawful permanent residents must have been lawfully admitted for permanent residence "for not less than 5 years." 8 U.S.C. § 1229b(a)(1). Determining whether a noncitizen has satisfied that threshold eligibility criterion thus requires only a non-discretionary determination—either the lawful permanent resident has held that status for five years or more or not. Other forms of discretionary relief have similar non-discretionary eligibility requirements. *See*, *e.g.*, 8 U.S.C. § 1229b(b)(1)(A) (requiring ten years of continuous residence in the United States for cancellation of removal and adjustment of status for nonpermanent residents); *id.* § 1229c(b)(1)(A) (requiring at least one year of physical presence in the United States prior to when the Notice to Appear was served for voluntary departure). As many circuits have previously held, Congress did not bar review of such determinations, and for good reasons, as such determinations can be erroneous, and with enormous consequences.

Although the removability and relief stages of removal proceedings are procedurally distinct, the determinations made at each stage often turn on the same facts. That is because some eligibility requirements for discretionary relief turn on the same grounds relevant to a removability determination. For example, for a noncitizen who entered without inspection to be eligible for adjustment of status (the form of discretionary relief sought in Mr. Patel's case), the applicant must be "admissible" for permanent residence.

8 U.S.C. § 1255(i)(2)(A).[5] Being "inadmissible" is also a basis for removal. *See* 8 U.S.C. § 1182(a). Thus, "in some cases, a noncitizen could be both removable and ineligible for discretionary relief based on the same facts." Pet. App. 74a-75a (Martin, J., dissenting); *see also id.* at 37a n.26 (majority op.).

Mr. Patel's case demonstrates this duality. A finding that Mr. Patel is inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii) because he falsely claimed to be a U.S. citizen for "any purpose or benefit" would render Mr. Patel both removable *and* ineligible for adjustment of status.

DHS, however, does not always raise the same grounds as the initial bases for the noncitizen's removability and as bars to the noncitizen's eligibility for discretionary relief. Here, for instance, the government did not premise its removal charges and opposition to discretionary relief on the same grounds. Rather, the government charged Mr. Patel in the Notice to Appear with being removable based only on being present in the United States without being admitted or paroled (a ground of inadmissibility that is not a bar to the discretionary relief of adjustment of status sought by Mr. Patel, *see* 8 U.S.C. § 1255(i)). Mr. Patel conceded that charge at the removability stage. Then, after having extracted that concession—and having failed to premise Mr. Patel's removal on falsely

[5] Adjustment of status enables certain noncitizens to obtain lawful permanent residence, typically through sponsorship by a family member or employer, a grant of asylum, or status as a crime victim.

claiming U.S. citizenship—the government raised that inadmissibility ground at the subsequent relief stage, arguing it rendered Mr. Patel ineligible for adjustment of status. *See* Pet. App. 75a.

When presented with the issue at the relief stage, the immigration judge rejected Mr. Patel's arguments that he lacked the intent required to trigger Section 1182(a)(6)(C)(ii), and that Mr. Patel's misstatement was immaterial. As a result, the immigration judge concluded (and the divided Board of Immigration Appeals affirmed) that Mr. Patel was inadmissible under Section 1182(a)(6)(A)(i) and therefore ineligible for adjustment of status. The immigration judge thus never reached the subsequent discretionary "judgment" that the statute protects from review.

Mr. Patel petitioned for review by the Eleventh Circuit, but the panel *sua sponte* held that Section 1252(a)(2)(B)(i) strips jurisdiction over *all* determinations bearing on relief from removal, including non-discretionary threshold eligibility determinations like the one here that precede the ultimate exercise of discretion to grant or deny relief, other than to address constitutional claims and questions of law. Pet. App. 84a-90a. The Eleventh Circuit then *sua sponte* ordered the case reheard *en banc*, and in a divided 9-5 vote, the *en banc* majority agreed with the panel. Pet. App. 1a-77a. Under the *en banc* court's interpretation of Section 1252(a)(2)(B)(i), the court lacked jurisdiction to review the immigration judge's inadmissibility determination because it was made while considering

Mr. Patel's application for discretionary relief rather than while assessing his removability.

ARGUMENT

As Judge Martin explained in her dissent, the Eleventh Circuit's interpretation of Section 1252(a)(2)(B)(i) creates a "serious problem": it "gives the government the ability to insulate agency findings from judicial review, solely by the way it charges a case." Pet. App. 73a-74a. In the following sections, *amici* (1) address the nature of that serious problem; (2) demonstrate how hinging the availability of judicial review on the government's charging decisions undermines Congress's chosen scheme for judicial review of immigration proceedings, a result this Court criticized in *Kucana*; and (3) explain that such an approach would represent the kind of fundamentally unfair and arbitrary approach to immigration relief that this Court rejected in *Judulang*. That the Eleventh Circuit's interpretation yields a result at odds with the INA and this Court's precedent—as well as with the position of nearly every other circuit and the government itself—demonstrates why the decision should be reversed.

I. The Eleventh Circuit's Interpretation of Section 1252(a)(2)(B)(i) Erroneously Conditions the Availability of Judicial Review on the Executive's Charging Decision.

As Petitioner, the government, and several circuit decisions demonstrate, under established principles of statutory construction, Section 1252(a)(2)(B)(i) preserves judicial review over non-discretionary eligibility determinations like the one at issue here. *See*, *e.g.*, *Hosseini v. Johnson*, 826 F.3d 354, 358-59 (6th Cir. 2016) ("Satisfaction of the eligibility requirements is a condition precedent to any exercise of discretion. So eligibility determinations underlying the agency's decision are non-discretionary determinations that are subject to judicial review.") (cleaned up); *Singh v. Gonzales*, 413 F.3d 156, 160 n.4 (1st Cir. 2005) ("In this case, the IJ denied [the noncitizen's] application based on a finding that he did not meet the statutory prerequisite of admissibility. This is not a discretionary denial; it is mandated by the statute. 8 U.S.C. § 1252 does *not* limit our review over these types of denials.") (emphasis added); Pet. Br. 10-11, 41 n.13 (collecting cases); U.S. Br. 15 ("Section 1252(a)(2)(B)(i) bars review only of discretionary judgments, not of non-discretionary findings of the kind at issue here."); *id.* at 31, 34-35 (collecting cases); *but see Lee v. USCIS*, 592 F.3d 612, 620 (4th Cir. 2010) (taking the Eleventh Circuit's view).

The Eleventh Circuit's erroneous reinterpretation of Section 1252(a)(2)(B)(i) gives rise to a perverse and deleterious consequence: the government can avoid

judicial review solely by the way it charges an immigration case. Specifically, under the Eleventh Circuit's approach, DHS can avoid judicial review of the applicability of grounds of inadmissibility by failing to include all potential grounds in the Notice to Appear, and then later asserting previously excluded grounds of inadmissibility as a statutory bar to discretionary relief.

As noted, *see* Background, *supra*, there are two overarching stages to immigration court proceedings—the removability stage and the relief stage. The INA unquestionably allows for judicial review of inadmissibility grounds asserted at the removal stage. Specifically, Section 1252(b)(9) grants federal courts jurisdiction to review "all questions of law and fact . . . arising from any action taken or proceeding brought to remove [a noncitizen] from the United States." Nothing in Section 1252(a)(2)(B)—or any other jurisdictional provision—eliminates judicial review of an immigration judge's determination that a noncitizen is removable under a ground of inadmissibility. The Eleventh Circuit recognizes this. *See* Pet. App. 37a n.26.

But inadmissibility is not solely a basis for removal; it may also be a bar to eligibility for *relief* from removal. The Eleventh Circuit's interpretation of Section 1252(a)(2)(B)(i) precludes judicial review of all aspects of the immigration court's decision bearing on relief from removal, including non-discretionary determinations of inadmissibility on grounds raised by the government for the first time at the relief stage. Thus, under the Eleventh Circuit's novel approach, whether judicial review of an inadmissibility determination is

available is wholly dependent on *when* during immigration court proceedings the government chooses to raise inadmissibility. If the government charges a noncitizen as removable based on a given inadmissibility ground, the immigration judge's finding that the noncitizen is inadmissible on that ground is subject to judicial review. But if the government chooses to raise the same inadmissibility ground only to defeat a noncitizen's claim of eligibility for relief, then the immigration judge's finding of inadmissibility on that ground is not subject to judicial review. In both scenarios, the immigration judge faces the same question—whether the noncitizen is inadmissible based on the given ground—but that decision is either reviewable or insulated from review based solely on the government's timing.

Mr. Patel's case captures precisely this unfairness. The entire Eleventh Circuit *en banc* court—both majority and dissent—agreed that, had the government charged Mr. Patel as removable because he was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii) for having falsely claimed to be a citizen, it is "indisputable" that the immigration judge's finding of inadmissibility would be reviewable under Section 1252(b)(9). *See* Pet. App. 75a (Martin, J., dissenting); *id.* at 37a n.26 (majority op.). But the government chose not to charge Mr. Patel as removable on the ground that he was inadmissible for falsely claiming citizenship. Instead, DHS charged Mr. Patel as removable only for being present without inspection (a charge Mr. Patel conceded). *See* 8 U.S.C. § 1182(a)(6)(A)(i); Pet. App. 3a. It was not until

Mr. Patel sought discretionary relief from removal by applying for adjustment of status under 8 U.S.C. § 1255(i) that the government asserted in Mr. Patel's removal proceeding that he was inadmissible under Section 1182(a)(6)(C)(ii) for falsely claiming citizenship and thus ineligible for adjustment of status.

Given that falsely claiming U.S. citizenship can operate as a bar to relief from removal, if the government had charged Mr. Patel with inadmissibility on that basis at the removal stage, Mr. Patel likely would *not* have conceded it. Rather, he could have contested the charge and, even under the Eleventh Circuit's approach, would have had the right to have any decision by the immigration judge on the issue reviewed by an Article III court. Instead, because the government did not raise falsely claiming U.S. citizenship as a basis for Mr. Patel's inadmissibility until after he moved for discretionary relief, the Eleventh Circuit held that the executive's determination of ineligibility on that basis could not be subject to judicial review. It so held even though the inquiry as to whether Mr. Patel falsely claimed to be a U.S. citizen for the purpose of obtaining a state benefit is the same at both the removability and relief stages.

The immigration court itself recognized the government's charging decision in this case was a "problem," stating during Mr. Patel's hearing: "This is typically a removability issue. The Government says it doesn't want to charge it as a removability issue, but it's really the issue of the case. That's the only issue here. So we have to listen today to the evidence to

determine whether the respondent made a false claim to citizenship. . . . That's what we have to do." Administrative Record ("AR") 207.

Under the Eleventh Circuit's erroneous ruling, simply because of the timing of the government's inadmissibility argument, Mr. Patel was left unable to challenge in federal court the decision that will prevent him from ever qualifying for an immigrant visa to return to the United States, where he has lived, worked, and raised his family for nearly three decades.[6] Were this rule allowed to stand, that arbitrary and unfair result could repeat itself in case after case. The government regularly declines to charge a ground of inadmissibility as a basis for removal, only to later raise it as a basis for denying discretionary relief. *See*, *e.g.*, *Barton v. Barr*, 140 S. Ct. 1442, 1446 (2020) (government charged a noncitizen as removable based on state firearms and drug offenses that rendered him inadmissible, and then argued he was inadmissible and therefore ineligible for cancellation of removal based on different state aggravated assault offenses); *Romero v.*

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[6] The finding that Mr. Patel is inadmissible as having made a false claim to U.S. citizenship (based on checking the wrong box on a routine driver's license renewal) is among the most severe grounds of removability in the INA. *See* 8 U.S.C. § 1182(a)(6)(C)(ii). Although the INA grants the Attorney General and DHS Secretary discretion to waive the application of certain inadmissibility grounds, making a false claim to U.S. citizenship is not one of those grounds. *See* 8 U.S.C. § 1182(h). A finding of inadmissibility because a noncitizen made a false claim to U.S. citizenship is permanent and cannot be waived, much like a conviction for murder or drug trafficking. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i), 1182(h), 1182(h)(2).

Garland, 7 F.4th 838 (9th Cir. 2021) (*per curiam*) (government charged noncitizen as removable for unlawfully remaining in the United States, then argued he was ineligible for adjustment of status because he was inadmissible for having falsely claimed U.S. citizenship to obtain a benefit); *Godfrey v. Lynch*, 811 F.3d 1013, 1016-17 (8th Cir. 2016) (government charged noncitizen as removable for violating the terms of his student visa, then argued he was ineligible for adjustment of status because he was inadmissible for having falsely claimed U.S. citizenship to obtain a benefit). This Court should not allow—indeed, incentivize—the executive to insulate administrative decisions from judicial review.

II. The Eleventh Circuit's Interpretation Is Contrary to the Will of Congress and Improper Under *Kucana v. Holder*.

Congress imposed a discrete set of restrictions on judicial review when it enacted the Illegal Immigrant Responsibility Act of 1996 ("IIRIRA"). *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999); *e.g.*, 8 U.S.C. §§ 1252(a)(2)(A)(i), 1252(a)(2)(C). Among them, Congress restricted the ability of Article III courts to review the ultimate discretionary agency judgments regarding certain applications for relief. *See* 8 U.S.C. § 1252(a)(2)(B)(i). At the same time, Congress preserved courts' jurisdiction to review both removability determinations and determinations of eligibility for discretionary relief. Nothing in Section 1252(a)(2)(B) or any other provision of the INA

restricts the ability of federal courts to review such determinations. *See*, *e.g.*, *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (recognizing the "strong presumption . . . that executive determinations generally are subject to judicial review" (quotation marks omitted)).

It is no surprise that Congress would preserve jurisdiction over removability determinations. Findings of inadmissibility—whether they are made during the removability stage or the relief stage—often have harsh and enduring consequences, as exemplified by Mr. Patel's case. As a result, this Court has long recognized a "principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

The Eleventh Circuit's reading of Section 1252(a)(2)(B)(i) subverts Congress's chosen scheme of judicial review by allowing the government to circumvent review that Congress sought to preserve—*i.e.*, of bases of inadmissibility. That interpretation contravenes the "well-settled" and "strong presumption" of judicial review over executive determinations, which this Court has "consistently applied . . . to immigration statutes," including the very statute at issue here, 8 U.S.C. § 1252(a). *Guerrero-Lasprilla*, 140 S. Ct. at 1069-70 (quotation marks omitted). Indeed, the "presumption in favor of judicial review is so embedded in the law that it applies even when determining the scope of statutory provisions specifically designed to limit judicial review." *Make the Rd. New York v. Wolf*,

962 F.3d 612, 624 (D.C. Cir. 2020); *see also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 43, 46 (2000) (THOMAS, J., concurring) (discussing the "longstanding canon that judicial review of executive action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress" and noting that the Court had applied the presumption in the immigration context, "notwithstanding the statute's express prohibition of judicial review" (quotation marks omitted)).[7]

This Court has previously reversed decisions that purported to circumscribe judicial review over executive determinations in the absence of express congressional mandates. For example, in *Kucana*, 558 U.S. 233, this Court rejected an attempt to limit judicial review of decisions made discretionary by means other than a statute. *Kucana* considered the availability of judicial review over agency decisions denying motions to

[7] The Eleventh Circuit's interpretation also affords the executive a strategic litigation advantage in some cases that Congress did not intend it to have, distorting the balance that Congress struck. The INA expressly affords the executive certain strategic advantages through its charging decisions. For example, Congress provided that during the removability stage, the government bears the burden of proving deportation grounds by clear and convincing evidence, 8 U.S.C. § 1229a(c)(3)(A), but that during the relief stage, the noncitizen bears the burden of establishing that they satisfy "the applicable eligibility requirements," 8 U.S.C. § 1229a(c)(4)(A). Congress did not, however, permit the government to use its charging decisions to obtain the ultimate litigation advantage—escaping judicial review entirely.

reopen removal proceedings.[8] *Id.* at 242. Although the Attorney General had issued a regulation placing "[t]he decision to grant or deny a motion to reopen . . . within the discretion of the Board [of Immigration Appeals]," 8 C.F.R. § 1003.2(a), no statute specified that reopening decisions were within the agency's discretion. Nonetheless, the Seventh Circuit had held that it lacked jurisdiction to review the denial of a motion to reopen because Section 1252(a)(2)(B)(ii)—the neighbor to the provision at issue in this case—removes jurisdiction over a decision of the Attorney General "the authority for which is specified under this subchapter to be in the discretion of the Attorney General." *Kucana*, 558 U.S. at 242 (quotation marks omitted).

This Court unanimously reversed, holding, as the government conceded, that Section 1252(a)(2)(B)(ii) precludes judicial review only of decisions made discretionary by statute, not by agency regulation. *Kucana*, 558 U.S. at 252-53. *Kucana* explained that "a paramount factor in the decision" was that, if the Seventh Circuit's view that Section 1252(a)(2)(B)(ii) allowed the Attorney General to strip courts of jurisdiction via regulation had prevailed, "the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary." *Id*. at 252. "Such an extraordinary delegation of authority,"

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[8] Motions to reopen do not themselves afford substantive relief but are "a form of procedural relief" that can be an important tool in enabling a noncitizen to apply for discretionary relief. *Dada v. Mukasey*, 554 U.S. 1, 12 (2008).

this Court said, "cannot be extracted from the statute Congress enacted." *Id.* Rather, "Congress ensured that it, and only it, would limit the federal courts' jurisdiction." *Id.*

The same fundamental statutory interpretation principles animating the reversal in *Kucana* demand reversal here. As *Kucana* provided, courts must construe statutes affecting jurisdiction "with precision and with fidelity to the terms by which Congress has expressed its wishes," and also must recognize that IIRIRA "did not delegate to the Executive authority to . . . pare[ ] back judicial review." *Id.* at 252-53 (quotation marks omitted). Here, as Judge Martin similarly observed in her dissent, "[i]f Section 1252(a)(2)(B) does not permit the executive branch to insulate its decisions from review by regulation, surely it does not allow it to do the same through the exercise of its immigration charging discretion." Pet. App. 76a (Martin, J., dissenting). Yet the Eleventh Circuit's approach would "give[ ] precisely this extraordinary degree of authority to immigration officials." *Id.* at 77a. It therefore cannot stand.

III. The Eleventh Circuit's Interpretation Subjects Noncitizens Facing Removal to an Unfair and Arbitrary Regime, Contrary to *Judulang v. Holder*.

The Eleventh Circuit's decision is further at odds with this Court's precedent because it creates a deeply unfair and arbitrary regime governing access to

immigration relief. This Court has specifically disapproved of leaving eligibility for immigration relief to "the fortuity of an individual official's decision" with respect to charge. *Judulang*, 565 U.S. at 58. But that is exactly what the Eleventh Circuit's construction of Section 1252(a)(2)(B)(i) would do—render judicial review dependent on the executive's charging decision.

In *Judulang*, this Court held that a Board of Immigration Appeals "comparable grounds" rule governing eligibility for a form of discretionary relief referred to as "Section 212(c) relief" was arbitrary and capricious under the Administrative Procedure Act. *Id.* at 45. Section 212(c) created a form of discretionary relief for certain noncitizens facing exclusion (a pre-1996 process used for noncitizens seeking entry to the United States).[9] *See* 8 U.S.C. § 1182(c) (1994). Noncitizens who were excludable on one of two specific exclusion grounds were not eligible. *Id.* By its terms, Section 212(c) relief did not apply to noncitizens being deported (a pre-1996 process for noncitizens already admitted to the United States), but because that created some "peculiar asymmetr[ies]," the BIA

[9] As noted, *see supra* note 2, inadmissibility (previously called excludability, or exclusion from admission, which applies to noncitizens seeking entry) and deportability (which applies to noncitizens previously admitted) are the two bases for removal from the United States. *Judulang*, 565 U.S. at 45. Prior to 1996, noncitizens seeking entry were placed in exclusion proceedings, and noncitizens already here were placed in deportation proceedings. *Id.* at 45-46. But since IIRIRA's enactment in 1996, the government "has used a unified procedure, known as a 'removal proceeding,' " whether the noncitizen is charged with being inadmissible or being deportable. *Id.* at 46.

adopted a policy allowing the Attorney General to grant Section 212(c) relief to noncitizens facing exclusion and deportation alike. *Id.* at 47-48.

The statutory scheme made applying Section 212(c)'s eligibility criteria to noncitizens charged as deportable a complicated process. The list of grounds rendering a noncitizen excludable (what is now called inadmissible) did not fully overlap with the list of grounds rendering a noncitizen deportable. To address that situation, the BIA created the "comparable-grounds" approach. Instead of asking whether the specific offense that rendered the noncitizen deportable fell within a statutory ground for exclusion, the comparable-grounds rule considered whether the more general ground for deportation charged in a case consisted of a set of offenses 'substantially equivalent' to the set of offenses making up an exclusion ground[]." *Id.* at 49-50. If so, the noncitizen could be eligible for Section 212(c) relief. But "if the deportation ground charged cover[ed] significantly different or more or fewer offenses than any exclusion ground," the noncitizen was not eligible, "even if the particular offense committed by the [noncitizen]" that made them deportable would also have made them excludable and eligible for Section 212(c) relief. *Id.*

In *Judulang*, this Court unanimously concluded that the BIA's comparable-grounds approach to determining eligibility for Section 212(c) relief "flunked" the arbitrary and capricious test. *Id.* at 53. Among other problems, "the outcome of the Board's comparable-grounds analysis itself may rest on the

happenstance of an immigration official's charging decision." *Id.* at 57. As the Court explained, "[t]his problem arises because [a noncitizen]'s prior conviction may fall within a number of deportation grounds, only one of which corresponds to an exclusion ground." *Id*. To illustrate, it proposed the following example involving a noncitizen who entered the United States in 1984 and committed voluntary manslaughter in 1988. *Id.* at 57-58. If that person was charged as deportable with an "aggravated felony" involving a "crime of violence," as Mr. Judulang was, they could not seek Section 212(c) relief because there would be no comparable exclusion ground. *Id.* at 58 (quoting 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii)). But if the noncitizen instead was charged with "'a crime involving moral turpitude committed within five years after the date of admission,'" they "*could* apply for relief, because the ground corresponds to the 'moral turpitude' ground used in exclusion cases." *Id.* (quoting 8 U.S.C. § 1227(a)(2)(A)(i)(I)). Under the comparable-grounds rule, then, "*everything hangs on the charge*." *Id.* (emphasis added). So too here. On the Eleventh Circuit's interpretation, judicial review of an inadmissibility determination turns wholly on the charging decision. That is contrary to *Judulang.*

Judulang further explained that hinging the availability of relief on the "happenstance" of a charging decision was especially problematic because "the Government has provided no reason to think that immigration officials must adhere to any set scheme in deciding what charges to bring, or that those officials

are exercising their charging discretion with § 212(c) in mind." *Id.* Without any such scheme, "*everything hangs on the fortuity of an individual official's decision*. [A noncitizen] appearing before one official may suffer deportation; an identically situated [noncitizen] appearing before another may gain the right to stay in this country." *Id.* (cleaned up, emphasis added).

The same infirmities exist with the Eleventh Circuit's rule here. No set scheme dictates which grounds of inadmissibility the government will charge in the Notice to Appear and which will be raised as bars to eligibility for relief. In Mr. Patel's case, for example, the government could not explain to the immigration judge why it did not formally charge Mr. Patel as removable based on inadmissibility for falsely claiming U.S. citizenship. When asked, the government simply said, "I don't know." AR192. It does not matter whether the government's charging decisions are arbitrary "happenstance" or intentional efforts to insulate removability determinations from judicial review by raising them only in the context of discretionary relief. Conditioning judicial review entirely on the fortuity of the government's charging decision is impermissibly arbitrary and unfair.

As this Court has repeatedly warned, removal decisions "cannot be made a 'sport of chance.' " *Judulang*, 565 U.S. at 59 (quoting *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947)). "In a foundational deportation case," this Court "recognized the high stakes for [a noncitizen] who has long resided in this country, and reversed an agency decision that would 'make his right

to remain here dependent on circumstances so fortuitous and capricious.'" *Id*. at 58 (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)). Accordingly, there is a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]." *Cardoza-Fonseca*, 480 U.S. at 449.

The result of the Eleventh Circuit's interpretation of Section 1252(a)(2)(B)(i) is similarly arbitrary to the comparable-grounds rule rejected in *Judulang*: it grants the government the unilateral power to determine whether a life-changing inadmissibility determination is subject to judicial review simply by virtue of the timing of the government's argument. The government itself acknowledges this is not the correct result. *See* U.S. Br. 15.

* * *

Section 1252(a)(2)(B)(i) embodies Congress's intent that ultimate determinations of whether to grant discretionary relief from removal are immune from judicial review. There is no evidence that Congress intended Section 1252(a)(2)(B)(i) to grant immigration officials the extraordinary power to eliminate judicial review of threshold eligibility determinations through their charging decisions. Nor is there any evidence that Congress intended to create the fundamentally unfair and arbitrary system governing access to immigration relief that would arise under the Eleventh Circuit's approach. This Court should reject the Eleventh Circuit's erroneous construction of Section 1252(a)(2)(B)(i), and

instead hold that courts have jurisdiction to review threshold eligibility determinations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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