No. 20-979

# In the Supreme Court of the United States

PANKAJKUMAR S. PATEL, ET AL., PETITIONERS

*v.*

MERRICK B. GARLAND, ATTORNEY GENERAL

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

## REPLY BRIEF FOR THE RESPONDENT SUPPORTING PETITIONERS

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Under 8 U.S.C. 1252(a)(2)(B)(i), "no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under" five specified provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq*. Section 1252(a)(2)(B)(i) precludes review of both the ultimate, discretionary decision to grant or deny relief under one of the specified provisions (here, involving an adjustment of status under 8 U.S.C. 1255), as well as any underlying determinations of a discretionary character. The government's long-established interpretation is supported by the statutory text, context, and history, as well as this Court's precedents and congressional policy. The counterarguments advanced by petitioners and the Court-appointed amicus curiae (amicus) are unavailing.

As to text, the phrase "judgment regarding the granting of relief," 8 U.S.C. 1252(a)(2)(B)(i), naturally

refers to discretionary determinations pertaining to the grant or denial of relief. Amicus contends that it refers to the agency's final decision and necessarily subsumes any antecedent eligibility determinations. But had Congress sought to establish a flat ban on review of final judgments, it had a far more straightforward way of doing so: it could have simply barred review of "any judgment granting or denying relief." And petitioners' contrary contention that "judgment" refers only to the ultimate, discretionary decision to grant or deny relief fails for a similar reason, because it cannot be squared with the statute's use of the term "regarding." 8 U.S.C. 1252(a)(2)(B)(i).

As to context, the INA repeatedly uses the term "judgment" to refer to discretionary decisions. Indeed, amicus does not identify a single instance in which Congress used the term to refer to findings of fact. Moreover, the adjoining clause's reference to "other" "discretion[ary]" decisions, 8 U.S.C. 1252(a)(2)(B)(ii), indicates that Section 1252(a)(2)(B)(i) is similarly limited to discretionary determinations, as this Court recognized in *Kucana* v. *Holder*, 558 U.S. 233, 246-247 (2010). Amicus acknowledges *Kucana* in passing, but does not square her interpretation with it.

As to history, Congress's enactment of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106(a)(1)(A)(iii), 119 Stat. 310, ratified a circuit consensus that had adopted the government's interpretation. Amicus barely disputes the virtual unanimity among the courts of appeals, and her argument that Congress did not ratify the government's interpretation because it did not add a provision expressly adopting that interpretation misapplies the doctrine of ratification. Amicus also repeatedly conflates the scope of the

bar in subparagraph (B)(i) with that of the exception in subparagraph (D). Petitioners' factual challenge is reviewable because it falls outside the former, not because it falls within the latter.

Finally, the presumption of judicial review supports the government's interpretation. Amicus says that the statute's plain meaning overcomes the presumption. But amicus's interpretation is not the best reading of the text, much less a reading so unambiguous that it overcomes the presumption. The government's interpretation preserves judicial review to the maximum extent possible while still advancing Congress's purpose of protecting the Executive's discretion. Amicus offers no cogent rationale for why Congress would have chosen to bar review of even non-discretionary findings in this context.

### A. The Text Of Section 1252(a)(2)(B)(i) Permits Review Of Non-Discretionary Determinations

Section 1252(a)(2)(B)(i) provides that "no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1255 of this title." 8 U.S.C. 1252(a)(2)(B)(i). The term "judgment" refers to decisions that involve subjective and evaluative decision-making. Dictionary definitions contemporaneous with Section 1252(a)(2)(B)(i)'s enactment define "judgment," variously, as an "opinion," "estimate," or "notion." Gov't Br. 17. The statute's plain meaning accordingly bars review of discretionary determinations, but not of non-discretionary ones.

1. Amicus offers no consistent, alternative understanding of the term "judgment." Amicus's frontline position appears to be that Section 1252(a)(2)(B)(i) uses the term "'judgment'" to refer to "'an opinion or decision of a formal authoritative nature,'" and that a bar

on review of formal judgments necessarily "subsumes any and all reasons for the order denying relief." Br. 23 & n.18, 27 (citation omitted); see *id.* at 26 ("The 'judgment' is the denial of discretionary relief. Period.").

That interpretation is not borne out by the statutory text. Had Congress intended to establish a flat ban on review of final judgments, it had a far more straightforward option available: it could have simply barred review of "any judgment granting or denying relief." Cf. 8 U.S.C. 1252(a)(2)(B)(ii) (barring review of discretionary determinations "other than the granting of relief" for asylum). But Congress took a different approach, precluding review of "any judgment *regarding* the granting of relief." 8 U.S.C. 1252(a)(2)(B)(i) (emphasis added). That language prohibits review of a particular type of decision (a "judgment") pertaining to the grant or denial of relief. Amicus's frontline position renders the term "regarding" superfluous.

In other places, amicus appears to embrace the court of appeals' interpretation that "judgment" means "any decision," Pet. App. 27a, suggesting that the term "judgment" refers separately to each individual, subsidiary determination and any ultimate determination. See, *e.g.*, Amicus Br. 28 (arguing that "the 'judgment' need not be one that itself grants relief," and "is instead any judgment 'regarding' or relating to whether such relief could be granted"); see also *id.* at 25-26.

That position is no more compelling. It ignores the relevant meaning of the term, which emphasizes evaluative, value-laden decision-making. Amicus responds (Br. 41) that "all judging (and all judgments) will reflect some 'exercise of discernment.'" That blanket assertion overstates the matter, as many factual questions are simple and straightforward. See Pet. App. 49a-50a

(Martin, J., dissenting) (giving the example of a person's age). In any event, amicus's contention again oversimplifies the meaning of the term "judgment," which connotes *subjective* decision-making. See, *e.g.*, *Webster's Third New International Dictionary* 1223 (1993) (defining "judgment" as "the mental or intellectual process of forming an opinion or evaluation by discerning and comparing" and, relatedly, "an opinion or estimate so formed"); see also Gov't Br. 16-17. The government's interpretation does not "read into [the] statute[] words that aren't there," Amicus Br. 41 (citation omitted), but rather correctly interprets the word that is there.

Amicus also stresses (Br. 25, 27) that Section 1252(a)(2)(B)(i) refers to "*any* judgment *regarding* the granting of relief." 8 U.S.C. 1252(a)(2)(B)(i) (emphases added). But amicus concedes (Br. 25) that "'[a]ny'" does no more than "expand[] 'judgment' to all judgments." And she acknowledges (Br. 28) that "regarding" merely "conveys that the 'judgment' need not be one that itself grants relief[,] * * * and is instead any judgment 'regarding' or relating to whether such relief could be granted." Thus, even on amicus's own account, neither term is capable of expanding the statute's scope to encompass *non*-judgments.

2. For their part, petitioners agree (Br. 20) that "'judgment' most naturally describes decisions that involve the weighing or balancing of factors by the decisionmaker." But that definition offers no support for petitioners' further attempt to limit the term to the ultimate decision to grant or deny relief. See *ibid.* Although petitioners identify various subsidiary determinations that are non-discretionary in character (such as whether a noncitizen paid an application fee, see *id.* at

21), other subsidiary determinations underlying certain forms of discretionary relief indisputably require the "weighing or balancing of factors," *id.* at 20, by the adjudicator (such as whether a "marriage was entered into in good faith," 8 U.S.C. 1255(e)(3)). In short, petitioners' understanding of the term "judgment" supports the government's construction, not petitioners'.

Petitioners also attempt to derive support from the broader phrase "any judgment *regarding the granting of relief*." 8 U.S.C. 1252(a)(2)(B)(i) (emphasis added). They contend that this language "bars review of the Executive's discretionary judgment whether to 'grant[] . . . relief'—not of threshold eligibility rulings that are gateways to that discretionary judgment." Pet. Br. 23 (brackets in original). But the statute is *not* limited to judgments "whether" to grant relief. "Whether" is not a synonym for "regarding." "Regarding" expands the scope of the review bar beyond the Executive's ultimate, discretionary decision to grant or deny relief. See *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1760 (2018) (noting that "'respecting' * * * generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject"); see also Gov't Br. 19-20. Petitioners contend, without explanation, that the government's interpretation renders the phrase "regarding the granting of relief," 8 U.S.C. 1252(a)(2)(B)(i), "pure surplusage," Pet. Br. 34. But that phrase serves the obvious function of defining *which* judgments are insulated from review and rebutting any inference that the provision is limited to the ultimate decision to grant or deny relief, rather than any judgment pertaining to that decision.

### B. Statutory Structure And Context Support The Government's Interpretation

Several aspects of the statutory structure and context confirm that Section 1252(a)(2)(B)(i) precludes review of discretionary determinations, but not of non-discretionary determinations, including findings of fact. Amicus's attempts to diminish the force of those contextual cues are unpersuasive.

1. When the INA uses the term "judgment" to specify a determination of the relevant official, it consistently refers to determinations of a discretionary nature. See Gov't Br. 20 (citing provisions). Amicus does not identify a single instance in the INA where "judgment" refers to findings of fact. Instead, amicus notes that the statute sometimes uses the phrase "discretionary judgment," and she argues that its failure to do so here is significant. Br. 47 & n.40 (citation omitted). But the statute elsewhere employs the unadorned term "judgment" to refer to discretionary determinations. See, *e.g.*, 8 U.S.C. 1103(a)(7). And the examples that amicus identifies likely represent nothing more than "belt and suspenders" drafting. *Facebook, Inc.* v. *Duguid*, 141 S. Ct. 1163, 1172 n.7 (2021) (citation omitted). Section 1252(b)(4)(D), for instance, provides that the Executive'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." 8 U.S.C. 1252(b)(4)(D). Because Section 1158 explicitly vests asylum decisions in the Executive's discretion, see 8 U.S.C. 1158(b)(1)(A) (providing that the Executive "may grant asylum"), Section 1252(b)(4)(D) could have simply referred to the Executive's "judgment" without any difference in meaning.

2. Section 1252(a)(2)(B)(i)'s neighboring clause bars review of "any *other* decision or action * * * *in the discretion*" of the Executive, 8 U.S.C. 1252(a)(2)(B)(ii) (emphases added), thereby signaling that the preceding clause is similarly limited to determinations that are discretionary in character. Amicus responds (Br. 43) that, given the "grammatical structure" of the two clauses, "[i]t is completely unnatural to read that buried phrase, 'in the discretion,' to also modify and thereby limit what 'judgment' is barred here." Invoking the last-antecedent rule, she contends (Br. 44) that "[t]he 'in the discretion' language of (B)(ii) limits only the 'decision or action' barred by (B)(ii)."

Amicus's grammatical arguments miss the point. Regardless of whether the modifiers in clause (ii) apply to clause (i) as a matter of syntax, the context "suggests that," in both clauses, "Congress had in mind decisions of the same genre, *i. e.*, those made discretionary by legislation." *Kucana*, 558 U.S. at 246-247. More broadly, that observation in *Kucana* is consistent with the routine recognition that the word "other" before a final list item (as in clause (ii)) signifies the presence of a catchall clause that shares the defining characteristics of the preceding list items. In *Paroline* v. *United States*, 572 U.S. 434 (2014), for example, the Court construed a statute "enumerat[ing] six categories of covered losses," including "a final catchall category for 'any *other* losses suffered by the victim as a proximate result of the offense.'" *Id.* at 446 (emphasis added; citation omitted). In applying a proximate-cause requirement to all six categories, the Court reasoned that the final "category is most naturally understood as a summary of the type of losses covered" and that it is a "'familiar canon of statutory construction that [catchall] clauses are to be

read as bringing within a statute categories similar in type to those specifically enumerated.'" *Id.* at 447 (quoting *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973)) (brackets in original). Other cases recognize the same principle. See, *e.g.*, *United States* v. *Standard Brewery, Inc.*, 251 U.S. 210, 218 (1920). Although amicus acknowledges *Kucana* in passing (Br. 43, 45), she does not square her interpretation with its understanding of how Section 1252(a)(2)(B)'s two clauses relate to each other or with that body of precedent.

Instead, amicus responds (Br. 44) that treating clause (ii) as a catchall would render clause (i) superfluous. But Congress may have wished to identify specifically the determinations that it was most concerned should be insulated from judicial review. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (reasoning that "§ 1252(g) as we interpret it serves the * * * function of making it clear that those specified decisions and actions * * * are covered by the 'zipper' clause of § 1252(b)(9)") (emphasis omitted). The Court made precisely that point in *Paroline*, rejecting a similar surplusage argument as "unpersuasive" and reasoning that "[t]he first five categories provide guidance to district courts as to the specific types of losses Congress thought would often be the proximate result of [an] offense and could as a general matter be included in an award of restitution." 572 U.S. at 448. Nor was *Paroline* an outlier: delineating a category by enumerating salient members of that category and then adding a residual clause is common in statutory drafting. See Gov't Br. 24. Amicus is also incorrect in accusing (Br. 45) the government of reading the two clauses to cover "'the same' decisions." Clause (i) covers judg-

ments pertaining to the listed forms of relief, and clause (ii) covers "'other'" decisions or actions of the "same genre." *Kucana*, 558 U.S. at 246.

Petitioners acknowledge (Br. 26) that clause (ii) supports limiting clause (i) to discretionary determinations. But they contend that the former's exception for "the granting of relief under section 1158(a)," 8 U.S.C. 1252(a)(2)(B)(ii), confirms their reading of clause (i) because the exception encompasses "only the second-step decision whether to grant asylum in the exercise of discretion," Pet. Br. 29 (emphases omitted). But even assuming petitioners' interpretation of the scope of the asylum exception is correct, that example helps the government, not petitioners. The asylum exception omits the term "regarding," thus confirming that Section 1252(a)(2)(B)(i), unlike the asylum exception, extends beyond the ultimate decision to grant or deny relief. See also 8 U.S.C. 1252(b)(4)(D) (providing that "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") (emphasis added).

3. Nearby subparagraphs prove that Congress knew how to preclude review of all aspects of a decision when that was its intent—and that it did not do so in Section 1252(a)(2)(B)(i). See, *e.g.*, 8 U.S.C. 1252(a)(2)(C) (barring review of "any final order of removal against an alien who is removable by reason of having committed" certain criminal offenses); see also Gov't Br. 25. Amicus contends (Br. 46) that those provisions "do not 'flatly bar all claims'" because the statute "list[s] exceptions" to them, but that simply proves the government's point: the express exceptions are necessary precisely because the provisions, on their face, flatly bar all claims.

4. Lastly, the decision below produces inequitable outcomes by barring review of a particular issue when it arises in the discretionary-relief context but permitting review of the same issue when it arises in the removal context. See Gov't Br. 25-26. Amicus does not dispute that the decision has that effect or attempt to explain why Congress might have intended it. She instead counters (Br. 52) that the court of appeals' interpretation reflects "the plain meaning of the statute." That misunderstands the government's argument, which is not that inequitable outcomes justify any departure from the statute's "plain meaning," but rather that they suggest the court of appeals misapprehended that meaning. "[N]othing is better settled than that statutes should receive a sensible construction," *In re Chapman*, 166 U.S. 661, 667 (1897), and this Court regularly considers the "anomalies which result from [a] construction" when interpreting statutory text, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994). The same approach is appropriate here.

### C. Statutory History Supports The Government's Interpretation

The statutory history of Section 1252(a)(2) confirms that it permits review of non-discretionary determinations. Amicus's effort to refute the historical record is unavailing, and both amicus's and petitioners' affirmative historical arguments lack merit.

1. Amicus discusses at length the state of judicial review preceding the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, see Amicus Br. 4-7, 36-38, but she does not explain how that history informs the meaning of Section 1252(a)(2)(B)(i). She observes (Br. 36) that "[d]uring

the finality era in the 19th and early 20th centuries, factual determinations were largely unreviewable." She does not, however, cite anything to suggest that the Congress that enacted IIRIRA intended to resuscitate limitations on review that had lapsed many decades earlier.

Nor does amicus dispute that the regime in place immediately before IIRIRA permitted limited review of fact questions. See Amicus Br. 36; see also Gov't Br. 27-28. She notes (Br. 38) that the pre-IIRIRA regime permitted such review only under a deferential standard, but that observation is fully consistent with the government's position. The government agrees that factual questions (like the one at issue in this case) are subject only to deferential judicial review. See Gov't Br. 28; 8 U.S.C. 1252(b)(4)(B) (providing that "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"). It is the court of appeals' interpretation, not the government's, that upsets the historical norm by insulating factual determinations from *any* review.

Petitioners, for their part, invoke the purportedly "longstanding 'distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand.'" Br. 28 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 307 (2001)); see *id.* at 6 (citing cases). With respect to the question presented here, however, the decisions that petitioners cite do not reflect a consistent relationship between that distinction and the scope of judicial review. See, *e.g.*, *Foti* v. *INS*, 375 U.S. 217, 229 n.15 (1963) (noting that even "denial of suspension of deportation as a discretionary matter is reviewable * * * for arbitrariness and abuse of discretion"). And petitioners point to nothing that

might suggest Congress intended to incorporate that distinction into Section 1252(a)(2)(B)(i).

2. In 1996, Congress enacted Section 1252(a)(2)(B)(i) as part of IIRIRA. See § 306(a)(2), 110 Stat. 3009-607 to 3009-612. Amicus notes that "IIRIRA's transitional judicial review rules barred 'any *discretionary* decision under' the enumerated statutes," and she contrasts that with Section 1252(a)(2)(B)(i)'s use of "judgment" without modification. Br. 47 (quoting IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626); 8 U.S.C. 1252(a)(2)(B)(i). In amicus's view, the transitional rule covered an altogether different type of agency decision than does the final rule. The textual difference that she identifies is insufficient to support such a counterintuitive result. The more natural inference is that the reference to a "judgment" or "any other decision or action * * * specified" to be in the Executive's "discretion," 8 U.S.C. 1252(a)(2)(B), encompasses the same type of decision as the transitional rule's reference to "discretionary decision," IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626.

3. Within five years of IIRIRA's enactment, this Court, applying the canon of constitutional avoidance, construed separate limitations on judicial review in IIRIRA to permit habeas review of questions of law underlying a denial of discretionary relief. *St. Cyr*, 533 U.S. at 314. After that decision, nearly all courts of appeals to address the scope of Section 1252(a)(2)(B)(i) concluded that it barred review of discretionary, but not of non-discretionary, determinations. See Gov't Br. 31 (citing cases). In 2005, Congress enacted the REAL ID Act, which amended Section 1252(a)(2)(B)—while leaving the term "judgment" intact—and added Section 1252(a)(2)(D). See § 106(a)(1)(A), 119 Stat. 310. The

REAL ID Act thus ratified the prevailing interpretation of Section 1252(a)(2)(B)(i). See Gov't Br. 33-34.

Amicus's counterarguments are unpersuasive. She makes virtually no effort to contest the pre-REAL ID Act circuit consensus favoring the government's interpretation. She points to one case that had purportedly "rejected the 'discretionary' / 'non-discretionary' dichotomy," Br. 51 n.41, but that case is from the Seventh Circuit—an outlier circuit that the government acknowledged had mixed precedent, see Gov't Br. 31. She also quibbles with various decisions cited in the government's brief, arguing, for example, that some of them "relied on cases interpreting the transitional rules." Br. 33 n.32. But she does not explain why that is a problem—after all, amicus herself repeatedly invokes the transitional rules as relevant context for ascertaining the meaning of Section 1252(a)(2)(B)(i). See, *e.g.*, *id.* at 47-48; see also p. 13, *supra* (discussing proper interpretive inference to be drawn from transitional rules).

Moreover, amicus's contention (Br. 34, 51) that Section 1252(a)(2)(B)(i) prohibited all challenges to denials of discretionary relief, legal and factual, before the 2005 addition of subparagraph (D), suggests that the provision was unconstitutional for nearly a decade before the REAL ID Act ameliorated the concerns identified in *St. Cyr*. The courts of appeals sensibly avoided that outcome by limiting Section 1252(a)(2)(B)(i) to discretionary determinations, thereby preserving an outlet for judicial review of questions of law without disrupting Congress's overarching effort to consolidate review in the courts of appeals. See *St. Cyr*, 533 U.S. at 328, 334-335 (Scalia, J., dissenting). Although any constitutional concerns have now been cured by Section 1252(a)(2)(D),

this Court should reject an interpretation under which Section 1252(a)(2)(B)(i) was arguably unconstitutional for a substantial period of its existence.

Amicus also resists ratification on the ground that "Congress did not codify the 'discretionary' / 'non-discretionary' dichotomy in 2005," but instead "carved out only 'constitutional claims or questions of law.'" Br. 51 (citation omitted). That is not how the doctrine of ratification works. Congress did not literally and expressly endorse the circuit consensus by codifying it in the REAL ID Act, and the government does not contend as much. Rather, Congress signaled its agreement with that consensus by amending the relevant provision without changing the language that the courts of appeals had construed. This Court has endorsed inferences of ratification in analogous circumstances. See, *e.g.*, *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536 (2015) ("Congress' decision in 1988 to amend the FHA while still adhering to the operative language in §§ 804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability."); see also Gov't Br. 33. And although the Court declined to rely on a ratification theory in *BP P.L.C.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) (cited at Amicus Br. 51-52), the lower-court decisions there were "contrary" to the "text and structure of the statute," which this Court found to be "clear." *BP P.L.C.*, 141 S. Ct. at 1541 (citations omitted).

Nor did the enactment of Section 1252(a)(2)(D) reflect congressional disapproval of the then-prevailing circuit consensus. See Amicus Br. 51. There is nothing in the statutory or legislative history indicating that

Congress intended to alter the meaning of the unamended term "judgment," 8 U.S.C. 1252(a)(2)(B)(i), when it added subparagraph (D). Rather, Section 1252(a)(2)(D) ensured compliance with *St. Cyr* by eliminating all doubt about the reviewability of constitutional claims and questions of law. See *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1071-1072 (2020). That purpose is fully compatible with continuing to construe Section 1252(a)(2)(B)(i) as permitting judicial review of non-discretionary determinations.

In the same vein, amicus contends (Br. 34) that Section 1252(a)(2)(D) would be superfluous if Section 1252(a)(2)(B)(i) did not preclude review of non-discretionary determinations in the first place. But Section 1252(a)(2)(D) applies to more provisions than just Section 1252(a)(2)(B)(i), and Congress may simply have wished to "remove all doubt" about the reviewability of constitutional and legal questions in light of *St. Cyr*. *McAllister* v. *United States*, 141 U.S. 174, 187 (1891).

Amicus's separate superfluity argument—that "the jurisdictional bar is nugatory" if factual review is permissible, Br. 34—is even more plainly incorrect. The government's interpretation preserves a robust role for Section 1252(a)(2)(B)(i) in precluding review of the ultimate decision to grant or deny relief and any discretionary determinations underlying that decision.

Amicus also points (Br. 34-35) to the REAL ID Act's legislative history. In particular, she quotes a conference report stating that "[t]he purpose of section [1252(a)(2)(D)] is to permit judicial review over * * * constitutional and statutory-construction questions, not discretionary or factual questions," and that "[w]hen a court is presented with a 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." H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005). But that passage discussed the scope of review permitted under the exception in Section 1252(a)(2)(D), not the scope of preclusion under Section 1252(a)(2)(B)(i). See *Guerrero-Lasprilla*, 140 S. Ct. at 1072. The factual question in this case is reviewable because it falls outside the latter, not because it falls within the former.

Since the REAL ID Act, the overwhelming majority of the courts of appeals have continued to endorse the distinction between discretionary and non-discretionary determinations that the government embraced in November 2001. See Gov't Br. 9, 34-35. In a footnote, amicus contends (Br. 51 n.41) that "[t]he uniformity of the court[s] of appeals is overstated," but she cannot substantiate that claim. The decisions that amicus cites from the Fourth and Seventh Circuits do not undermine the asserted consensus. See Gov't Br. 35 (acknowledging that the Seventh Circuit's precedent is mixed and that the Fourth Circuit has adopted the minority position). And the remaining cases she invokes are either irrelevant or provide, at best, weak support for her position. See *Ayeni* v. *Holder*, 617 F.3d 67, 70-71 (1st Cir. 2010) (assessing the scope of review under subparagraph (D)); *Xiao Ji Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 333 (2d Cir. 2006) (same); *Arambula-Medina* v. *Holder*, 572 F.3d 824, 828 (10th Cir. 2009) (construing "the term 'judgment' in [Section 1252(a)(2)(B)(i)] as referring to the discretionary aspects of a decision," though stating that "[t]his includes any underlying factual determinations") (citation omitted), cert. denied, 559 U.S. 1067 (2010).

**D. Other Considerations Support The Government's Interpretation**

Interpreting Section 1252(a)(2)(B)(i) to exclude nondiscretionary determinations is also consistent with other sources of statutory meaning, including this Court's precedents in related areas and the policy goals underlying the relevant provisions.

1. The presumption of judicial review makes clear that "[a]ny lingering doubt" about the correct interpretation of Section 1252(a)(2)(B)(i) should be resolved in favor of the government's interpretation, which forecloses judicial review to a lesser extent than the court of appeals' interpretation. *Kucana*, 558 U.S. at 251. Amicus does not defend the court of appeals' conclusion that the presumption is inapplicable because judicial review remains available for questions of law under Section 1252(a)(2)(D). See Pet. App. 29a-30a. Nor does she dispute that even that limited form of review is unavailable in district courts. See Gov't Br. 38-39. Instead, amicus contends that the plain meaning of the statute overcomes the presumption. That argument is unpersuasive for the reasons given above, and amicus's assertion (Br. 49) that "every possible indication" supports the court of appeals' interpretation is incorrect.

Amicus invokes (Br. 35) this Court's decision in *Nasrallah* v. *Barr*, 140 S. Ct. 1683 (2020), in which the Court commented that a noncitizen "may not bring a factual challenge" under Section 1252(a)(2)(B)(i). *Id.* at 1694. But as amicus effectively concedes (Br. 35), *Nasrallah* interpreted subparagraph (C), rendering its comment on subparagraph (B) a dictum. See Gov't Br. 39-40. Because subparagraph (B) was not at issue there, the Court had no need to specify its precise scope. The government agrees that "factual challenge[s]" to

the Executive's discretionary weighing of the facts are barred by Section 1252(a)(2)(B)(i), though "factual challenge[s]" to non-discretionary findings (as in this case) are not. *Nasrallah*, 140 S. Ct. at 1694. Moreover, *Nasrallah* recognized that a noncitizen may bring a factual challenge to an agency order, despite the inapplicability of the exception in subparagraph (D), when no statutory bar precludes review in the first place. *Id.* at 1690. That is precisely the case here.

Amicus also points to *Guerrero-Lasprilla*, which likewise involved the broader jurisdictional bar in subparagraph (C). 140 S. Ct. at 1067-1068; see Gov't Br. 25. In that context, the Court observed that Section 1252(a)(2)(D)'s exception for constitutional claims and questions of law "still forbid[s] appeals of factual determinations." *Guerrero-Lasprilla*, 140 S. Ct. at 1073. That observation is irrelevant to this case. As explained above, the factual determination at issue here is reviewable because it falls outside the bar in Section 1252(a)(2)(B)(i), not because it falls within the carveout in Section 1252(a)(2)(D).

2. The government's interpretation accords with Section 1252(a)(2)(B)'s basic function of protecting Executive discretion from judicial intrusion. See Gov't Br. 40-41. Amicus responds (Br. 53-54) that "Section 1252's restrictions on judicial review reflect a policy choice that was Congress's to make." But that argument begs the question, and amicus does not articulate any coherent policy rationale for why Congress might have wanted to bar review of non-discretionary determinations, including straightforward factual findings, underlying the denial of discretionary relief. Amicus relatedly contends that "it is not for the judiciary to 'second-guess Congress.'" Br. 53 (citation omitted). But the Court

need not rely on policy concerns to *override* the plain text; instead, Congress's undisputed policy goal of protecting Executive discretion *confirms* the import of the plain text, which does not bar review in these circumstances. See *Dolan* v. *United States Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

Amicus also criticizes the government's interpretation as impracticable. She contends (Br. 39 n.36) that factfinding is not always "black-and-white." But "Section 1252's highly deferential standard of review" for factfinding already accounts for that reality. *Ibid.* Amicus also argues that "[p]ermitting review of any question of fact for every denial of discretionary relief frustrates" IIRIRA's goal of "streamlin[ing] appeals and avoid[ing] delay in removal." *Id.* at 39; see *id.* at 30 (similar). The government's interpretation, however, "does not affect *whether* the noncitizen is entitled to judicial review of a [removal] order." *Nasrallah*, 140 S. Ct. at 1693. "[A] noncitizen facing removal * * * may already seek judicial review in a court of appeals of constitutional and legal claims," and, when he does, the government's interpretation "means only that, in that same case in the court of appeals, the court may also review the noncitizen's factual challenges to the [denial of adjustment of status] under the deferential substantial-evidence standard." *Ibid.* In addition, harmless-error review applies to challenges of denials of discretionary relief, thereby mitigating concerns that frivolous claims may delay removal or bog down appellate review. See, *e.g.*, *Calma* v. *Holder*, 663 F.3d 868, 878

(7th Cir. 2011) ("[T]he principle of harmless error applies to administrative proceedings in general, and to immigration rulings in particular."); *Pardo* v. *Lynch*, 637 Fed. Appx. 306, 307 (9th Cir. 2016) (reviewing challenge to denial of adjustment of status for harmless error).

Petitioners, for their part, suggest (Br. 34) that "it is unclear whether [petitioners' and the government's] approaches differ in practice." That is incorrect. The INA indisputably specifies certain eligibility criteria as within the Executive's authority and therefore insulated from judicial review by Section 1252(a)(2)(B)(i). See, *e.g.*, 8 U.S.C. 1182(h)(1)(A)(ii) (providing for waiver of inadmissibility if, among other things, "it is established *to the satisfaction of the Attorney General* that * * * the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States") (emphasis added). And the courts of appeals have repeatedly held that decisions applying highly subjective criteria, such as "exceptional and extremely unusual hardship," 8 U.S.C. 1229b(b)(1)(D), are also discretionary and therefore immune from review. See, *e.g.*, *Bencosme de Rodriguez* v. *Gonzales*, 433 F.3d 163, 164 (1st Cir. 2005) (per curiam); *Morales Ventura* v. *Ashcroft*, 348 F.3d 1259, 1262 (10th Cir. 2003); see also *Singh* v. *Rosen*, 984 F.3d 1142, 1150 (6th Cir. 2021) (citing cases).

Petitioners' interpretation, in contrast, would subject *all* eligibility determinations to judicial inquiry. Petitioners' citation (Br. 34) of two decisions that have recently departed from prior characterizations of the hardship criterion does not justify conflating the parties' constructions. Petitioners' interpretation would permit invasive judicial inquiry into virtually every aspect of

the Executive's discretionary grant or denial of relief. The government's interpretation would not.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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