No. 24-771

In the Supreme Court of the United States

JOCELYN COMMANDANT, ET AL.,
PETITIONERS

v.

BRETT RINEHART, DISTRICT DIRECTOR,
MIAMI DISTRICT (S24), USCIS, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, Congress has specifically precluded judicial review of "any judgment regarding the granting of relief under" several enumerated provisions of the INA. 8 U.S.C. 1252(a)(2)(B)(i). One of the enumerated provisions is 8 U.S.C. 1255, which governs an alien's ability to obtain adjustment of status. Section 1252(a)(2)(B) provides that, "regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review" the covered judgments. The questions presented are:

1. Whether the jurisdictional limitation at 8 U.S.C. 1252(a)(2)(B)(i) applies to an agency decision that is made outside of removal proceedings.

2. Whether 8 U.S.C. 1252(a)(2)(B)(i) contains an exception permitting review of a suit challenging the policies and practices underlying an agency decision to deny adjustment of status.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is unreported but is available at 2024 WL 3565390. The court of appeals' order denying rehearing (Pet. App. 23a-24a) is unreported. The district court's order (Pet. App. 25a-33a) is unreported but is available at 2021 WL 422177.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2024. A petition for rehearing was denied on October 18, 2024. The petition for a writ of certiorari was filed on January 15, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, allows various categories of aliens to become lawful permanent residents. See 8 U.S.C.

1153 (2018 & Supp. IV 2022). The primary statutory framework for adjudicating an application for adjustment of status to that of a lawful permanent resident is set out at 8 U.S.C. 1255(a). Under that provision, the status of an alien "who was inspected and admitted or paroled into the United States * * * may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. 1255(a).[1]

Regulations provide that an immigration judge (IJ) has jurisdiction to adjudicate adjustment-of-status applications made by aliens in removal proceedings, 8 C.F.R. 1245.2(a)(1)(i), while the United States Citizenship and Immigration Services (USCIS) has jurisdiction to decide applications for adjustment of status in other contexts, 8 C.F.R. 245.2(a)(1). Specifically, where an alien has been placed "in removal proceedings (other than as an arriving alien)," the IJ presiding over the removal proceedings has "exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file." 8 C.F.R. 1245.2(a)(1)(i). And "USCIS

[1] Various INA functions formerly vested in the Attorney General have been transferred to the Secretary of Homeland Security. Some residual statutory references to the Attorney General that pertain to those functions are now deemed to refer to the Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 542 note, 557; 8 U.S.C. 1551 note; see also *Nielsen* v. *Preap*, 586 U.S. 392, 397 n.2 (2019).

has jurisdiction to adjudicate an application for adjustment of status * * * unless the [IJ] has jurisdiction to adjudicate the application under 8 C.F.R. 1245.2(a)(1)."

2. Petitioners are five aliens who were charged as inadmissible and ordered removed by an IJ after unlawfully entering or remaining in the United States. Pet. App. 3a. Each petitioner was subsequently granted Temporary Protected Status (TPS), which temporarily shields recipients from removal because certain conditions in their home countries make it temporarily unsafe or unfeasible to return. *Ibid.*; see 8 U.S.C. 1254a(a)(1) and (b)(1). TPS beneficiaries may travel outside of the United States if they obtain advance consent from USCIS. 8 U.S.C. 1254a(f)(3); see 6 U.S.C. 251, 557.

After becoming TPS beneficiaries, petitioners traveled abroad with USCIS's consent. Pet. App. 3a. Upon returning, each petitioner filed an application for adjustment of status with USCIS, seeking to have his or her immigration status adjusted under 8 U.S.C. 1255(a) to that of a lawful permanent resident. Pet. App. 3a. In each case, USCIS determined that it lacked jurisdiction over the application because petitioners were the subject of final orders of removal, and 8 C.F.R. 1245.2(a)(1)(i) gives IJs "exclusive jurisdiction" over applications for adjustment of status filed by individuals in removal proceedings. See Pet. App. 3a. USCIS further determined that the removal orders were still in effect because, under the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. No. 102-232, § 304(c)(1), 105 Stat. 1749 (8 U.S.C. 1254a note), a TPS beneficiary returning from travel abroad must have "the same immigration status [he] had at the time of departure." See

ibid. (providing that a beneficiary who is "authorize[d] to travel abroad temporarily and who returns to the United States * * * shall be inspected and admitted in the same immigration status the alien had at the time of departure").

3. After USCIS denied their applications for adjustment of status, petitioners filed a putative class action suit in the United States District Court for the Southern District of Florida, pressing two claims. Pet. App. 4a. First, they alleged that USCIS had denied their applications based on an erroneous interpretation of MTINA. *Ibid.* Second, they asserted that USCIS had arbitrarily and capriciously changed the agency's policies by applying MTINA to deny their applications, alleging that the agency had not applied MTINA to deny jurisdiction in this way before 2017. *Ibid.*

The district court dismissed the suit for lack of jurisdiction. Pet. App. 25a-33a. The court determined that 8 U.S.C. 1252(a)(2)(B)(i) deprived it of jurisdiction to review petitioners' claims because Section 1252(a)(2)(B)(i) bars review of "any judgment regarding the granting of relief" under 8 U.S.C. 1255, the statute governing petitioners' adjustment-of-status applications. Pet. App. 30a. The district court explained that the term "judgment," as the Eleventh Circuit Court of Appeals read it in *Patel* v. *United States Att'y Gen.*, 971 F.3d 1258 (11th Cir. 2020), aff'd, 596 U.S. 328 (2022), "includ[es] *all* determinations incorporated in [adjustment-of-status] decisions" under Section 1255. Pet. App. 29a.

4. The court of appeals affirmed. Pet. App. 1a-18a. The court observed that its decision in *Patel*, *supra*, had recently been affirmed by this Court. See *Patel* v. *Garland*, 596 U.S. 328 (2022); Pet. App. 5a. The court of appeals explained that *Patel* interpreted the phrase

"any judgment regarding the granting of relief" in Section 1252(a)(2)(B)(i) to "encompass not just 'the granting of relief' but also any judgment *relating to* the granting of relief." Pet. App. 7a (citing *Patel*, 596 U.S. at 339). And the court found that, in challenging USCIS's denial of their adjustment-of-status applications, petitioners were plainly challenging "judgment[s] *relating to* the granting of relief." *Id.* at 7a-8a (citation omitted).

The court of appeals rejected petitioners' contention that it is necessary to construe Section 1252(a)(2)(B)(i) to preserve review of their claim "to avoid constitutional concerns that would arise if they can't challenge the USCIS's patterns and practices." Pet. App. 9a. The court "assume[d] without deciding that true pattern and practice claims are carved out of [S]ection 1252(a)(2)(B)(i)." *Ibid.* But the court determined that petitioners' claims do not "fall 'within that narrow category,'" *ibid.* (brackets and citation omitted), because petitioners "do not challenge any policy or practice in the abstract," instead challenging "specific results of discrete proceedings—the denials of their [S]ection 1255 applications."

Judge Jordan dissented. Pet. App. 19a-22a. He disagreed with the majority's determination that petitioners "are not really asserting 'abstract' pattern and practice claims." *Id.* at 21a. In his view, the complaint should be understood to advance some challenges to USCIS policy, and Section 1252(a)(2)(B) does not bar review of those aspects of the complaint. *Id.* at 22a.

ARGUMENT

Petitioners contend that this Court should grant review to decide whether 8 U.S.C. 1252(a)(2)(B) applies outside the removal context and whether it bars review of pattern and practice claims. Neither question is

properly presented. The contention that Section 1252(a)(2)(B) applies only in removal proceedings was neither pressed nor passed upon below, and the court of appeals expressly declined to decide whether Section 1252(a)(2)(B) applies to true pattern and practice claims, explaining that petitioners' complaint does not fall in that category. In any event, the court of appeals correctly affirmed the district court's determination that Section 1252(a)(2)(B) bars review of petitioners' claims, and the decision does not conflict with the decisions of this Court or any other court of appeals. The petition for certiorari should therefore be denied.

1. Petitioners' first question presented asks this Court to decide "[w]hether the jurisdictional limitations at 8 U.S.C. 1252(a)(2)(B) extend to agency decisions made in cases that are not in removal proceedings." Pet. i. But before the lower courts, petitioners did not dispute that Section 1252(a)(2)(B) applies outside the removal context, and—as a result—the courts did not address the issue. This Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

There is no reason for the Court to depart from that rule here, particularly because there can be no real dispute about whether Section 1252(a)(2)(B) applies outside the removal context. The statutory text makes clear that it does. Section 1252(a)(2)(B) provides that "Notwithstanding any other provision of law * * * and *regardless of whether the judgment, decision, or action*

is made in removal proceedings, no court shall have jurisdiction to review" judgments "regarding the granting of relief under" Section 1255. 8 U.S.C. 1252(a)(2)(B) (emphasis added). The italicized language makes plain that the jurisdictional bar applies "regardless of whether" the decision is "made in removal proceedings."

Moreover, Congress added the relevant text to Section 1255 in the REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, 119 Stat. 302, "presumably to resolve" the disagreement in the circuits at the time "as to whether" Section 1252(a)(2)(B) "applied outside the context of removal proceedings." *Mejia Rodriguez* v. *DHS*, 562 F.3d 1137, 1142 n.13 (11th Cir. 2009) (per curiam). This Court has observed that those amendments "expressly extended the jurisdictional bar to judgments made outside of removal proceedings." *Patel* v. *Garland*, 596 U.S. 328, 346 (2022). And while this Court has more recently "assume[d]—without deciding—that [Section] 1252(a)(2)(B) applies when * * * a noncitizen is neither in removal proceedings nor seeking review of a final order of removal," *Bouarfa* v. *Mayorkas*, 604 U.S. 6, 13 n.4. (2024), the validity of that assumption is scarcely in doubt given the clarity of the text.

Indeed, petitioners do not point to any courts that have found that Section 1252(a)(2)(B)'s application is limited to removal proceedings in the wake of the REAL ID Act amendments. And this Court has previously denied a post-*Bouarfa* petition for certiorari raising a similar question. See *Shaiban* v. *Jaddou*, cert. denied, No. 24-183 (Jan. 13, 2025). The Court should follow the same course here.

2. Petitioners' second question presented asks the Court to decide "whether judicial review of USCIS practices and policies governing adjustments of status is available," Pet. i, despite Section 1252(a)(2)(B)(i)'s bar on judicial review of "any judgment regarding the granting of relief under" Section 1255. Again, that question is not properly presented. While petitioners advanced that argument below, the court of appeals declined to address it because it found that petitioners' claims did not fit within the "'narrow category'" of "true pattern and practice claims." Pet. App. 9a (citation omitted). Because the court of appeals expressly "assume[d] without deciding that true pattern and practice claims are carved out of [S]ection 1252(a)(2)(B)(i)'s reach," *ibid.*, petitioners' arguments about why Section 1252 should not bar all review of pattern and practice claims are simply beside the point.

Moreover, petitioners offer no sound textual basis for their assertion that Section 1252(a)(2)(B)(i) preserves judicial review for challenges to policies and practices related to adjustment of status. The provision expressly bars review of "*any* judgment regarding the granting of relief" under Section 1255. 8 U.S.C. 1252(a)(2)(B)(i) (emphasis added). In *Patel*, *supra*, this Court made clear that the "expansive" term "any" covers "judgments of whatever kind." 596 U.S. at 338 (quotation marks and citations omitted). The Court further emphasized that, because "regarding" means "relating to," the provision bars review of "any judgment *relating to* the granting of relief" under Section 1255. *Id.* at 339 (quotation marks and citations omitted). A challenge to a USCIS policy or practice governing adjustment of status is plainly a challenge to an agency "judgment *relating to*" an adjustment of status. *Ibid.*

Petitioners assert (Pet. 25) that this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), establishes that judicial review bars generally preserve "systemic challenges." But in *McNary*, the Court was interpreting a different statute with different text; it was not setting out a broad rule that policy and practice challenges are always reviewable. Moreover, as the court of appeals explained, see Pet. App. 9a-13a, petitioners' claims are very different from the "general collateral challenges" that the Court found reviewable in *McNary*. *Id.* at 10a. The petitioners in *McNary* "alleged a variety of claims aimed at [the immigration] program's rules and procedures in the abstract." *Ibid.* Here, by contrast, the decision below found that petitioners "challenge[] specific results of discrete proceedings—the denials of their [S]ection 1255 applications." *Id.* at 12a-13a. To permit review of such claims under a "pattern and practice" exception would therefore encourage aliens to circumvent Section 1252(a)(2)(B)'s clear bar by "casting [their] requested relief as attempting to remedy a systemwide pattern and practice." *Id.* at 13a.

Petitioners also err in suggesting (Pet. 27-31) that the canon of constitutional avoidance justifies grafting a carve out for pattern and practice claims onto Section 1252(a)(2)(B). Under that canon, a court may interpret "ambiguous statutory language" to "avoid serious constitutional doubts." *Iancu* v. *Brunetti*, 588 U.S. 388, 397 (2019) (citation omitted). But Section 1252(a)(2)(B)'s language is unambiguous in depriving the courts of jurisdiction over any judgment regarding adjustment of status under Section 1255. See *Patel*, 596 U.S. at 346-347 (finding Section 1252(a)(2)(B)(i) too "clear" to permit any "resort to the presumption of reviewability");

Bouarfa, 604 U.S. at 19 (same with respect to Section 1252(a)(2)(B)(ii)). And Section 1252(a)(2)(B)'s express jurisdictional limit does not raise constitutional doubts because "Congress has the constitutional authority to define the jurisdiction of the lower federal courts." *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993).

Petitioners assert (Pet. 29-30) that applying the review bar here could preclude review of constitutional and legal questions that arise from USCIS's adjudication of an adjustment of status application. The petitioners in *Patel* made an almost identical argument, asserting that the Court should adopt a limiting construction of Section 1252(a)(2)(B) to avoid "precluding all review of USCIS denials of discretionary relief." 596 U.S. at 345. The Court declined to decide whether the INA blocks judicial review of legal and constitutional questions arising from USCIS decisions, but it recognized that Congress may well have "intend[ed] to close that door" given that it "extended [Section 1252(a)(2)(B)'s] jurisdictional bar to judgments made outside of removal proceedings at the same time" it added an exception, 8 U.S.C. 1252(a)(2)(D), "preserv[ing] review of legal and constitutional questions made within removal proceedings," *Patel*, 596 U.S. at 346. And the Court reiterated that "policy concerns" about precluding judicial review "cannot trump the best interpretation of the statutory text." *Id.* at 346. The same reasoning applies here.

Finally, petitioners err in suggesting (Pet. 13-14) that the court of appeals' decision conflicts with *Nakka* v. *USCIS*, 111 F.4th 995 (9th Cir. 2024), which found that Section 1252(a)(2)(B)(i) does not bar review of "collateral challenges" to "generally applicable policies and

procedures." *Id.* at 1009.[2] There is no conflict because *Nakka* "conclude[d] that [Section] 1252(a)(2)(B)(i) d[id] not categorically strip federal district courts of jurisdiction to hear [the plaintiffs'] claims, which challenge[d] generally applicable agency policies *without referring to or relying on denials of individual applications for relief*." *Id.* at 999 (emphasis added). Similarly, the decision below "assume[d] without deciding that true pattern and practice claims are carved out of Section 1252(a)(2)(B)(i)" and found that that principle would not aid petitioners because they "plainly sought individualized relief regarding their own applications." Pet. App. 9a, 15a. Accordingly, this case does not create any conflict regarding whether pattern and practice claims are categorically unreviewable. This Court's intervention would be premature.

[2] Petitioners also reference (Pet. 14) the decision in *Make the Road N.Y.* v. *Wolf*, 962 F.3d 612 (D.C. Cir. 2020). But that case dealt with 8 U.S.C. 1252(e)(3), which, the court concluded, expressly grants jurisdiction for the distinct challenges to agency policies at issue in that case. 962 F.3d at 625-626.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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