IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10636

PANKAJKUMAR S. PATEL, et al.,

Petitioners,

v.

UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

BRIEF *AMICUS CURIAE* OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER (EN BANC PROCEEDINGS)

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FRAP RULE 29 STATEMENTS

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a)(2), undersigned counsel for *Amicus Curiae* states that all parties have consented to the filing of this brief.

Pursuant to FRAP 29(a)(4)(E), undersigned counsel for *Amicus Curiae* states that no counsel for the parties authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *Amicus Curiae* and their counsel contributed money that was intended to fund the preparing or submitting of this brief.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Undersigned counsel for *Amicus Curiae* certifies pursuant to FRAP 26.1 and LAR 26.1-1 that the American Immigration Lawyers Association is a non-profit organization that does not have any parent corporation and does not issue stock, so there is no publicly held corporation owning 10% or more of its stock.

In accordance with FRAP 26.1 and the Local Rules for the United States Court of Appeals for the Eleventh Circuit, undersigned counsel for *Amicus Curiae* certifies that the following is a complete list of trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case:

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INTEREST OF AMICUS CURIAE

The American Immigration Lawyers Association ("AILA") is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and United States Supreme Court.

SUMMARY OF THE ARGUMENT

The question of whether Mr. Patel is inadmissible as having made a false claim to U.S. citizenship, and therefore eligible for adjustment of status, is reviewable by this Court. Issues relating to whether a noncitizen falls within a ground of removal under the Immigration and

Nationality Act ("INA") are distinct from issues relating to discretionary relief. Although 8 U.S.C. § 1252(a)(2)(B) bars review over some decisions related to discretionary relief, it has no application whatsoever to review of removability.

Immigration court proceedings typically have two stages—a removability stage and a relief stage. In the first stage, immigration judges determine whether the individual is removable under either the grounds of inadmissibility or the grounds of deportation in the INA. In the second stage, immigration judges adjudicate applications for relief from removal, including discretionary relief like adjustment of status.

Under the adjustment of status statute, applicants like Mr. Patel must be admissible to qualify. The first and second stages of proceedings therefore overlap in this case. But this convergence in no way alters the nature of this case as something other than review of a removability determination.

The decision of the Department of Homeland Security ("DHS") to not charge Mr. Patel with inadmissibility under the false claim to U.S. citizenship ground in the first stage of proceedings, and to only raise it in the second stage as a barrier to adjustment, does not insulate the

inadmissibility determination from review by this Court. The Supreme Court has held that discretionary charging decisions by DHS cannot control substantive rights like access to relief or judicial review. No matter the timing of DHS's assertion that Mr. Patel is removable, this Court has jurisdiction to review it.

This Court not only has jurisdiction to review removability determinations but any legal or factual determination regarding whether a person is statutorily eligible to apply for discretionary relief, such as adjustment of status. In *Gonzalez-Oropeza v. U.S. Atty. Gen.*, 321 F.3d 1331 (11th Cir. 2003), this Court was correct to read 8 U.S.C. § 1252(a)(2)(B) as barring only review of the exercise of discretion. This Court, and all of the many appellate courts to decide the matter, have held repeatedly that § 1252(a)(2)(B) does not bar review of non-discretionary determinations relating to statutory eligibility for discretionary relief. The Supreme Court has recognized that statutory eligibility is "distinct and separate" from the exercise of discretion and can "involve[] questions of fact and law." *Foti v. I.N.S.*, 375 U.S. 217, 228 n. 15 (1963).

There is no distinction between non-discretionary legal determinations about eligibility and related non-discretionary factual determinations, except that the former are reviewed de novo and the latter are reviewed for substantial evidence. As in Mr. Patel's case, the review of facts might involve the review of a credibility determination. But this review is not of a discretionary decision. Although it is an abuse of discretion to make a factual finding unsupported by substantial evidence, fact-finding is not inherently discretionary. This Court should not collapse fact-finding into the exercise of discretion.

The Real ID Act's jurisdictional provision, subsection (D) of 8 U.S.C. § 1252(a)(2), did not amend the meaning of subsection (B). This provision was a legislative reaction to the Supreme Court's decision in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), and a rejection of DHS's litigation position that even pure questions of law were barred if they related in any way to discretionary relief.

Principles of statutory interpretation, the strong presumption in favor of review of agency decisions, and the principle that ambiguity in deportation statutes should be resolved in favor of the noncitizen all point to this Court having review over Mr. Patel's case.

ARGUMENT

I. A Noncitizen's Removability is a Distinct Determination from the Noncitizen's Eligibility for Relief from Removal. Review of Removability is Not Precluded by § 1252(a)(2)(B).

Nothing in 8 U.S.C. § 1252(a)(2)(B) precludes this Court from reviewing a finding of whether a person is removable under a ground of inadmissibility contained in the INA. The provision only bars review of certain decisions relating to discretionary relief.[1] This Court thus has jurisdiction over Mr. Patel's claim that he is not inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii) as having made a false claim to U.S. citizenship.

In legislating restrictions on judicial review, Congress could have chosen to eliminate jurisdiction over the question of whether a noncitizen is removable. But it did not. Neither § 1252(a)(2)(B), nor any other jurisdictional bar, eliminates review over inadmissibility determinations made in removal proceedings under 8 U.S.C. § 1229a. As a result, this Court has jurisdiction to review whether Mr. Patel is inadmissible as having made a false claim to U.S. citizenship.

[1] As explained in Section II, the jurisdictional provision only bars review of the exercise of discretion, not *non*-discretionary determinations.

A. Whether a Noncitizen is Removable is Separate From the Denial of the Noncitizen's Application for Relief and Is Reviewable By this Court.

In finding it lacked jurisdiction over Mr. Patel's challenge to inadmissibility, the Panel in this case erroneously conflated the predicate question of Mr. Patel's removability with his application for relief. In a removal proceeding, there are two distinct stages.[2] *See Matovski v. Gonzales*, 492 F.3d 722, 727 (6th Cir. 2007). The first addresses whether a noncitizen is removable. If an immigration judge determines that the noncitizen falls into a ground of removal, the court proceeds to the second stage and asks whether the noncitizen qualifies to apply for, and should receive, relief from removal. Some forms of relief, however, incorporate grounds of removal as eligibility requirements. The form of relief at issue in Mr. Patel's case, adjustment of status, requires that an applicant be "admissible" for permanent residence. 8 U.S.C. § 1255(a)(2); 8 U.S.C. § 1182(a) (grounds of inadmissibility).

The first question in Mr. Patel's case is whether he is inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii) for having falsely claimed to be a U.S.

[2] Removability encompasses the grounds of inadmissibility, 8 U.S.C. § 1182(a), and the grounds of deportation, 8 U.S.C. § 1227(a).

citizen for any purpose or benefit under the INA or any other federal or state law. In other cases, the removability inquiry might mean determining whether a noncitizen has been convicted of a removable offense, or sought an immigration benefit through fraud or misrepresentation, or smuggled a noncitizen into the United States, or any one of the many other removal grounds listed in 8 U.S.C. §§ 1182 and 1227. The second question is whether Mr. Patel is eligible for relief from removal. A noncitizen might be eligible for adjustment of status, cancellation of removal,[3] a waiver of the inadmissibility grounds,[4] or some other form of relief. In Mr. Patel's case, however, the first and second questions are the same. A finding of inadmissibility under § 1182(a)(6)(C)(ii) would make Mr. Patel both inadmissible and ineligible for adjustment of status. But the fact that Mr. Patel's adjustment of status application is tied to the question of admissibility does not convert his case into something other than a case about removability. *See Godfrey v. Lynch*, 811 F.3d 1013 (8th Cir. 2016) (reviewing inadmissibility in context of adjustment); *Mochabo v. Lynch*, 615 Fed.Appx. 209 (5th Cir.

[3] 8 U.S.C. § 1229b.
[4] *See, e.g.,* 8 U.S.C. §§ 1182(h) and (i).

2015) (same); *Maloney v. Holder*, 394 Fed.Appx. 413 (9th Cir. 2010) (same); *Valadez-Munoz*, 623 F.3d 1304 (9th Cir. 2010); *Ferrans v. Holder*, 612 F.3d 528 (6th Cir. 2010) (same); *Hashmi v. Mukasey*, 533 F.3d 700 (8th Cir. 2008) (same). Although Congress has restricted the ability of federal courts to review discretionary agency "judgment[s] regarding the granting of [certain specified applications for] relief" and other discretionary determinations, nothing restricts the ability of federal courts to review removability determinations. *See* 8 U.S.C. § 1252(a)(2)(B) (silent as to jurisdiction over removability).

It is no surprise that Congress would preserve jurisdiction over removability determinations. Findings of inadmissibility, regardless of whether they are made during the first or second stage of proceeding, often remain relevant far into the future, including after deportation. *See Matter of Salazar*, 17 I. & N. Dec. 167, 169 (B.I.A. 1979) (immigration judge have authority to make excludability rulings at any time during the proceeding). If the Court affirms the denial of Mr. Patel's adjustment of status application based on the finding that he is inadmissible as having made a false claim to U.S. citizenship, this finding of inadmissibility will prevent him from qualifying for an immigrant visa in

the future. It is among the most severe grounds of removability in the INA. It is permanent and unwaivable, much like a conviction for murder or drug trafficking. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i) and 1182(h) & (h)(2). Due to the enduring nature of findings of removability, particularly § 1182(a)(6)(C)(ii), it is unsurprising that Congress preserved jurisdiction over them.

B. The DHS's Charging Decisions Do Not Deprive the Court of Jurisdiction to Review the Removability Determination.

The DHS's discretionary choice not to lodge a charge of inadmissibility in the first stage of proceedings in no way alters the reviewability of findings of inadmissibility made in the second, relief stage. DHS only charged Mr. Patel with removability under 8 U.S.C. § 1182(a)(6)(A)(i) (present without admission or parole), a charge that Mr. Patel conceded. When Mr. Patel applied for adjustment of status, however, the DHS alleged that he was ineligible for this relief because he is inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii).

DHS could not explain to the immigration judge why it did not formally charge him with this ground of inadmissibility. AR 192. In response, the immigration judge stated: "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." AR 207.

DHS cannot, through its charging decisions, seek to deprive the Court of jurisdiction over a Mr. Patel's removability. In *Judulang v. Holder*, the Supreme Court held that DHS' discretionary charging decisions did not control whether a lawful permanent resident was eligible for a waiver under former 8 U.S.C. § 1182(c) (1994). *Judulang v. Holder*, 132 S. Ct. 476, 486 (2011).

> And underneath this layer of arbitrariness lies yet another, because the outcome of the Board's comparable-grounds analysis itself may rest on the *happenstance of an immigration official's charging decision. … So everything hangs on the charge*. And 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 [§ 1182(c)] in mind. … *So at base everything hangs on the fortuity of an individual official's decision*.

Id. (emphasis added). DHS's ability to charge a noncitizen with being inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii) or to instead raise inadmissibility later when the person applies for relief is precisely the type of discretion the *Judulang* Court rejected as arbitrary and

capricious. These charging decisions could be mere "happenstance," or they could be intentional acts by DHS officials attempting to insulate removability determinations from judicial review by raising them only in the context of discretionary relief. Either way, this Court should not hinge judicial review on discretionary charging decisions.

II. Non-discretionary Findings of Fact or Law Relating to Discretionary Relief Are Reviewable, Notwithstanding § 1252(a)(2)(B).

More generally, this Court has jurisdiction to review any question regarding whether a person is statutorily eligible to apply for adjustment of status. Although immigration judges grant adjustment in the exercise of discretion, they invoke no discretion when deciding whether applicants meet the threshold eligibility requirements dictated by the Immigration and Nationality Act. This Court in *Gonzalez–Oropeza v. U.S. Atty. Gen.,*321 F.3d 1331, 1332 (11th Cir. 2003), correctly interpreted 8 U.S.C. § 1252(a)(2)(B) to only bar review of the exercise of discretion, leaving untouched review of non-discretionary decisions pertaining to statutory eligibility for discretionary relief. To the extent this Court's decision in *Camacho-Salinas v. U.S. Atty. Gen.*, 460 F.3d 1343 (11th Cir. 2006) suggests otherwise, it is incorrect.

In the last sixteen years, this Court has ratified its ruling in *Gonzalez-Oropeza* on numerous occasions. *See Alvarado v. U.S. Atty Gen.*, 610 F.3d 1311, 1314 (11th Cir. 2010) (finding jurisdiction over "non-discretionary judgment regarding [the petitioners'] statutory eligibility to request discretionary relief") (citing *Gonzalez-Oropeza*, 321 F.3d at 1332 (citing *Al Najjar v. U.S. Att'y Gen.*, 257 F.3d 1262, 1297-98 (11th Cir. 2011)); *Mejia Rodriguez v US DHS*, 562 F.3d 1137, 1143 (11th Cir. 2009) (finding jurisdiction over "preliminary *statutory* eligibility decisions" involving "facts" and "law" because "[t]he [jurisdictional bar] requires us to look at the *particular* decision being made and to ascertain whether *that* decision is one that Congress has designated to be discretionary") (emphasis in original); *Williams v. Sec. US Dept of Homeland Sec*, 741 F.3d 1228, 1231 (11th Cir. 2014) (finding jurisdiction over "statutory eligibility" because it is "not a discretionary agency action") (citing *Mejia Rodriguez*, 562 F.3d at 1142-45)).

All courts to have considered the matter agree with this Court and have found that whether or not someone qualifies to be considered for the positive exercise of discretion is a non-discretionary judgment that courts can review, notwithstanding jurisdictional bars to the review of

discretionary decisions. *See Succar v. Ashcroft*, 394 F.3d 8, 10 (1st Cir. 2005); *Sepulveda v. Gonzales*, 407 F.3d 59, 61 (2d Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98, 111 (3d Cir. 2005); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 215 (5th Cir. 2003); *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Morales–Morales v. Ashcroft,* 384 F.3d 418, 423 (7th Cir. 2004); *Ortiz-Cornejo v. Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002); *Sabido Valdivia v. Gonzales*, 423 F.3d 1144, 1148-49 (10th Cir. 2005). The strict eligibility requirements and the discretionary nature of this relief supports reading the jurisdictional limitations in § 1252(a)(2)(B) narrowly. *See Moncrieffe v. Holder*, 569 U.S. 184, 204 (2013) (narrowly interpreting provision limiting eligibility for cancellation of removal in part because of discretionary nature of relief).

Reviewable non-discretionary decisions relating to discretionary relief include questions of fact, questions of law, and mixed questions. As the Supreme Court recognized decades ago, judgments about a person's statutory eligibility for discretionary relief are "distinct and separate matters" from the exercise of discretion and can "involve[] questions of fact and law." *Foti v. I.N.S.*, 375 U.S. 217, 228 n. 15 (1963); *see also*

McGrath v. Kristensen, 340 U.S. 162 (1950) ("Eligibility is a statutory prerequisite to the Attorney General's exercise of his discretion to suspend deportation in this case."). To answer the Court's third question in its Order granting en banc review, there is no distinction between non-discretionary legal determinations about eligibility and related non-discretionary factual determinations, except that different standards of review apply to legal and factual findings. Courts review non-discretionary legal questions de novo and factual questions for substantial evidence. *Perez-Sanchez v. U.S. Atty. Gen.*, 935 F.3d 1148, 1152 (11th Cir. 2019) ("We review factual determinations by the agency for substantial evidence.") (citing *Chen v. U.S. Atty. Gen.*, 463 F.3d 1228, 1230-31 (11th Cir. 2006) (per curiam)).

In this case, the immigration judge evaluated both the law and the facts, including Mr. Patel's credibility, to determine that he made a false claim to U.S. citizenship and is inadmissible within the meaning of 8 U.S.C. § 1182(a)(6)(C)(ii)(I) such that he is ineligible to apply for adjustment of status. Because neither the factual nor the legal findings of the judge involved the exercise of discretion, this Court now has jurisdiction to review all of them. Mr. Patel either is, or is not,

inadmissible. There is no room for the immigration judge to find him inadmissible as a matter of discretion if substantial evidence does not support it. The inadmissibility statute does not use discretionary language like "may." 8 U.S.C. § 1182(a)(6)(c)(ii)(I). Mr. Patel's subjective intent to obtain a purpose or benefit, which is an element for inadmissibility under § 1182(a)(6)(c)(ii)(I), is a non-discretionary finding pertaining to statutory eligibility for immigration relief that is reviewable by this Court.

A. The Language of § 1252(a)(2)(B)(i), Its Relationship to Surrounding Provisions, the Presumption In Favor of Jurisdiction, and the Rule That Ambiguities Should Be Construed In Favor Of Noncitizens Facing Deportation, Dictate That Non-discretionary Judgments Are Reviewable.

The language of § 1252(a)(2)(B)(i), the context provided by the jurisdictional provisions around it, the longstanding rule that Congress must speak clearly if it intends to repeal jurisdiction, and the principle that courts construe ambiguities in deportation statutes in favor of the noncitizen all weigh in favor of interpreting § 1252(a)(2)(B)(i) to apply only to those judgments that involve the actual exercise of discretion. No court has held otherwise.

As with all matters of statutory interpretation, the starting point is the statutory language itself. The provision bars review of "any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title," which are all discretionary forms of relief from removal. The question is whether "judgment" means "any decision" or "any decision involving the exercise of discretion." *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 (9th Cir. 2002).

As noted by the Ninth Circuit, the term "judgment" is only ever used in the INA to refer to a court order, such as a "judgment of conviction," or to determinations involving the exercise of discretion. *Id.* at 1141-42. Moreover, Congress chose the phrase "judgment regarding the granting of relief," not the simpler phrase "granting of relief." This choice of phrase suggests that § 1252(a)(2)(B) does not apply to all bases for granting relief but only that involving the exercise of "judgment." *Id.* at 1142-43. Given the context in which the bar appears—relief involving the exercise of discretion—"judgment" most naturally refers to the exercise of discretion, not to the other, non-discretionary determinations of fact and law that pertain to whether a person qualifies to be considered for the positive exercise of discretion. *Id.* at 1142 ("The only judgment

exercised regarding the order or decision lies in the Attorney General's discretionary authority to determine who among the eligible persons should be granted discretionary relief.").

Subsection (i) of § 1252(a)(2)(B) must also be read in the context of the other provisions around it, including subsection (ii). Subsection (ii) states that courts cannot review "any other decision or action … the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) [asylum] of this title." Subsection (ii)'s use of the modifier "other" suggests that the barred "judgments" in subsection (i) are of the same kind as the decisions barred in subsection (ii), namely discretionary ones.

The asylum exception in subsection (ii) also supports the reading of "judgment" in subsection (i) as limited to discretionary determinations. The exception employs the sweeping phrase "granting of relief," indicating that all determinations relating to asylum, discretionary and non-discretionary, remain reviewable (emphasis added). In contrast, the more limited phrase "*judgment[s] regarding* the granting of relief" in

subsection (i) indicates a subset of all determinations relating to a discretionary application.

Similarly, the jurisdictional bar that appears just before § 1252(a)(2)(B), which relates to expedited removal, contains broad language to make clear that the bar applies to all types of determinations relating to an expedited decision or order. *See* 8 U.S.C. § 1252(a)(2)(A)(i). As the Ninth Circuit has pointed out, "[i]f Congress had wanted to eliminate judicial review over all decisions by the BIA regarding discretionary relief, surely it would have employed the same language in § 1252(a)(2)(B)(i) that it employed in § 1252(a)(2)(A)(i)." *Montero-Martinez v. Ashcroft*, 277 F.3d at 1143; *see also id.* at 1144 (cataloging language in other jurisdictional provisions that unambiguously repealed all determinations).

But this Court need not delve into the statutory analysis discussed above to rule that non-discretionary determinations fall outside the bar. The Court need only recognize the ambiguity in the statutory language and then adhere to the Supreme Court's mandate that there is a "strong presumption in favor of judicial review of administrative action." *I.N.S. v. St. Cyr*, 533 U.S. at 298. Moreover, the "longstanding principle of

construing any ambiguities in deportation statutes in favor of the alien" instructs that the word "judgment" refers to discretionary judgments only. *Id.* at 290 (quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). Indeed, as discussed above, all courts that have interpreted § 1252(a)(2)(B) have followed these principles and erred on the side of caution, limiting the provision's reach to discretionary determinations only.

B. Non-discretionary Judgments Relating to Discretionary Relief Include Factual Determinations, Reviewed For "Substantial Evidence."

Given the unanimity among courts that non-discretionary determinations remain reviewable, the next question is what type of findings fall into this category. As explained below, courts retain jurisdiction to review both legal *and factual* determinations pertaining to eligibility for discretionary relief, as long as they do not involve the exercise of discretion. Although many non-discretionary determinations involve legal issues, including the application of law to undisputed or adjudicated facts, immigration judges and other adjudicators also make non-discretionary factual findings that relate to discretionary relief.

A factual finding is a determination of whether something occurred as a matter of "historical fact" (e.g., whether a person did, or experienced, what they said they did). *Townsend v. Sain*, 372 U.S. 293, 309 n. 6 (1963) ("By 'issues of fact' we mean to refer to what are termed basic, primary, or historical facts … So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense."); *Jean-Pierre v. U.S. Atty. Gen.*, 500 F.3d 1315, 1321 n. 4 (11th Cir. 2007) (citing *Townsend v. Sain*, 372 U.S. at 309 n. 6 (1963)). For example, in a cancellation of removal case, another discretionary form of relief, an immigration judge might determine (1) the date a person entered the United States for purpose of the continuous physical presence requirement; (2) whether a person has a child, spouse, or parent for the purpose of the qualifying relative requirement; or (3) whether an applicant gambles illegally, and the extent of their gambling income, for the purpose of the statutory bars to showing good moral character. 8 U.S.C. § 1229a(b)(1)(B); 8 U.S.C. § 1101(f)(4). These findings might involve assessments of credibility. For example, determining when a person entered the United States might require evaluation of the truthfulness of testimony. A ruling on whether

or not someone has a child might involve assessing documents related to paternity. Deciding whether or not a person's income comes primarily from gambling might require both evaluation of testimony and documents relating to income.

These agency determinations are factual and must be supported by substantial evidence, but they do not involve the exercise of discretion. Black's Law Dictionary defines "fact-finding" as "[t]he process of considering the evidence presented to determine the truth about a disputed point of fact." Black's Law Dictionary (11th Ed. 2019). Fact-finding must be "impartial" and "fair." *Id*.

Courts generally review facts found by agencies under the "substantial evidence test." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 414 (1971); *Esparza-Diaz v. U.S. Atty. Gen.*, 606 Fed.Appx 962, 965 (11th Cir. 2015) (reviewing for "substantial evidence" threshold eligibility question in discretionary cancellation of removal case). This test is objective, not subjective. Black's Law Dictionary (11th Ed. 2019) (defining "substantial evidence" as "[e]vidence that *a reasonable* mind could accept as adequate to support a conclusion")

(emphasis added); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939).

Substantial evidence review differs from review of the exercise of discretion. *See* Moore's Federal Practice § 206.01 (3d ed. 2019). Factual rulings not based on substantial evidence may constitute an abuse of discretion, but this does not mean that fact finding is discretionary. The abuse of discretion standard of review is distinct from, and less searching than, substantial evidence review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 143 (1967) (stating that "'substantial evidence' test [] afford[s] a considerably more generous judicial review than the 'arbitrary and capricious' test"); *Al Najjar v. Ashcroft*, 273 F.3d at 1297 (distinguishing between discretionary decisions reviewed for "abuse of discretion" and the "substantial evidence test") (internal citations omitted).

The Panel in Mr. Patel's case appears to have mistaken factual adjudications for the exercise of discretion, characterizing his claim as "nothing more than a request for us to reweigh the evidence." But it is a mistake to conflate factual findings with discretionary judgments.[5] The

[5] Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction In Immigration Law*, 5 INTERCULTURAL HUM. RTS. L.

distinction between non-discretionary and discretionary findings does not line up with the law/fact distinction. Although reasonable factfinders might disagree about the facts, this disagreement does not mean that factfinding is discretionary. Agency factual findings are usually non-discretionary and reviewed for substantial evidence, not the abuse of discretion. As the Second Circuit has remarked, "[t]o review a Board of Appeals decision for an abuse of discretion when its decision involves no exercise of discretion would fly in the face of common sense." *Melendez v. U.S. Dept. of Justice*, 926 F.2d 211, 281 (2d 1991); *see also Wong Wing Hang v. I.N.S.*, 360 F.2d 715, 717 (2d Cir. 1996) ("factual findings on which a discretionary denial of suspension [of deportation] is predicated must pass the substantial evidence test"). Equating review of agency factual findings with review of the exercise of discretion is simply incorrect and has implications far beyond Mr. Patel's case for how courts review agency decisions.

This Court's decision in *Al Najjar v. Ashcroft*, 257 F.3d 1262 (11th Cir. 2001), demonstrates how findings related to eligibility for

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REV. 57, 61 (2009) ("the interplay between concepts of law-fact and discretion … has been a focal point of confusion").

discretionary relief are reviewable. In that case, this Court considered whether the eligibility requirement of "continuous physical presence" for suspension of deportation, the predecessor discretionary relief to cancellation of removal, was reviewable despite a bar under the transitional rules of IIRIRA that precluded review of "discretionary decisions" related to suspension of deportation. *Id*. at 1297 This Court found that it could review the continuous physical presence determination because it was not discretionary but instead involved "applying the law to the facts of the case." *Id*. at 1298. This Court then reviewed the facts to determine whether or not the petitioner had established the requisite number of years to qualify to apply for suspension of deportation. Although the facts in *Al Najjar* were not disputed, this Court's approach applies with equal force to cases like Mr. Patel's where some facts relating to statutory eligibility are contested. Just because the parties disagree about a fact does not mean the factfinder exercises discretion in the factual adjudication.

Decisions from other courts illustrate how review of a contested fact related to threshold eligibility, including credibility determinations, remains available. In *Richmond v. Holder*, 714 F.3d 725 (2d Cir. 2013),

the Second Circuit considered issues similar to those in Mr. Patel's case. The petitioner had applied for adjustment of status, a form of relief that, like cancellation, is discretionary. The immigration judge had denied adjustment after finding that the petitioner had made a false claim to U.S. citizenship. The judge found not credible the petitioner's claim that he "was confused about his citizenship status when he spoke to the ICE agents." *Id*. at 729. The Second Circuit reviewed this credibility finding, concluding that "[t]he IJ's credibility determination rested on substantial evidence." *Id*. Other courts have also reviewed contested factual findings related to eligibility for discretionary relief. *See, e.g*., *Kalaw v. I.N.S.*, 133 F.3d 1147, 1151 (9th Cir. 1997). Fact finding, like making legal determinations, does not inherently involve the exercise of discretion. For the purpose of interpreting the scope of § 1252(a)(2)(B), there is no distinction between non-discretionary legal determinations and related non-discretionary factual determinations. This Court can review both types of findings.

The agency's determination that Mr. Patel had a "subjective intent to obtain a purpose or benefit," and thus made a false claim to U.S. citizenship, is a non-discretionary determination reviewable by this

Court. Indeed, the BIA considered this issue a non-discretionary question of fact in Mr. Patel's case, reviewing it under the standard for factual review rather than the standard of review for discretionary decisions. *Compare* 8 C.F.R. § 1003.1(i) (BIA reviews IJ factual decisions for "clear error") *with* 8 C.F.R. § 1003.1(ii) (BIA reviews de novo IJ discretionary determinations); *see also Matter of Richmond*, 26 I. & N. Dc. 779, 781 (B.I.A. 2016) (reviewing under factual review standard of "clear error" a credibility determination relating to a false claim for citizenship in context of adjustment application); *Matter of Zhang*, 27 I&N Dec. 569, 573 (BIA 2019) (reviewing § 1182(a)(6)(C)(ii)(I) subjective intent determination for clear error because it is a factual and not a discretionary determination). It is of no moment that Mr. Patel disagrees with the immigration judge's factual finding about subjective intent. This Court can review for substantial evidence the judge's finding that Mr. Patel was not credible in his testimony that he made a mistake. Although Mr. Patel's case involves contested facts, it is just like the many other cases in which courts have reviewed false claim to U.S. citizenship inadmissibility in the context of discretionary relief. *See, e.g., Taman v.*

Sessions, 727 Fed.Appx. 709, 710 (2d Cir. 2018); *see also* cases cited *supra* at 13.

C. Nothing in Subsection (D) of § 1252(a)(2) Alters the Jurisdictional Boundary of Subsection (B).

When Congress added subsection (D) to § 1252(a)(2), the meaning of subsection (B) did not change. In 2005, as part of the Real ID Act, Congress enacted subsection (D) to transfer review occurring in habeas proceedings before U.S. district courts to the appellate courts. REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a), 119 Stat. 231, 310 (2005). This legislation was a reaction to the Supreme Court's decision in *I.N.S. v. St. Cyr*, which held that none of the INA's jurisdictional bars repealed 28 U.S.C. § 2241 habeas jurisdiction. *I.N.S. v. St.* Cyr, 533 U.S. 289 (2001); *Chen v. U.S. Dept. of Just.*, 471 F.3d 315, 326 (2d Cir. 2006) (explaining the legislative reaction to *St. Cyr* and citing H.R. Rep. No. 109-72, at 174 (2005)). Rather than permit judicial review through habeas petitions in U.S. district courts, Congress channeled it into the appellate courts. The scope of the review under subsection (D) was intended to expand, not contradict, review and to match the review traditionally available in habeas, namely review over questions of law, including application of law

to undisputed or adjudicated facts, and constitutional questions. *Chen*, 471 F.3d at 326.

When Congress added subsection (D) to § 1252(a)(2), it added cross-references between it and subsections (B) and (C). Section (D) states: "Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." 8 U.S.C. § 1252(a)(2)(D). Correspondingly, Congress amended section (B) to add a reference to section (D). *See* 8 U.S.C. § 1252(a)(2)(B) ("except as provided in subparagraph (D)").

Nothing in these amendments altered the meaning of subsection (B) to exclude review of non-discretionary factual findings. To the extent this Court's decision in *Camacho-Salinas v. U.S. Atty. Gen.*, 460 F.3d 1343 (11th Cir. 2006), suggests otherwise by citing to subsection (D), it is incorrect. Congress' cross-reference between subsections (B) and (D) simply rejects the federal government's litigation position at the time of the Real ID Act, which was that subsection (B) barred review of even

purely legal questions relating to discretionary relief. *I.N.S. v. St. Cyr.*, 533 U.S. at 298.[6] Section (D) does not amend subsection (B) to repeal jurisdiction over non-discretionary factual findings. Even if there is some ambiguity on this point, Congress certainly did not alter the language of subsection (B) to expressly repeal jurisdiction so as to overcome the presumption in favor of jurisdiction.

The fact that Congress did not amend the language of subsection (B) except to cross-reference the new subsection (D) supports the view that subsection (B) still only bars review of the exercise of discretion, not non-discretionary factual findings. At the time of the Real ID Act, all courts that had ruled on the matter had upheld jurisdiction over non-discretionary questions, including over factual issues. Congress is presumed to have been aware of the "settled [] meaning" of the jurisdictional interpretations of these court decisions. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). Yet Congress made no amendments to clarify that non-discretionary actions were barred by subsection (B). If Congress had intended to bar review of non-discretionary findings, clarification would have been necessary. Despite subsection (D) making clear that

[6] In the cases cited *supra* at 13, the government also took this position.

legal non-discretionary claims are reviewable, non-discretionary determinations also include findings of *fact*. Because Congress was legislating against a backdrop of court decisions upholding jurisdiction over non-discretionary determinations, including factual ones, we can presume that Congress intended to uphold the availability of this review even after adding subsection (D).

No court has held the cross-reference to subsection (D) alters the scope of subsection (B) and limits it to non-discretionary legal findings only. This Court should not break with its own precedent and the persuasive authority of other appellate courts. Non-discretionary determinations, like those raised by Mr. Patel, remain reviewable under § 1252(a)(2)(B), even after the Real ID Act.

CONCLUSION

For the above reasons, *Amicus Curiae* urges the Court to reverse the Panel's decision in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Rebecca Sharpless, hereby state that, pursuant to FRAP 32(a)(7)(B)(i), this Brief of *Amicus Curiae* American Immigration Lawyers Association In Support of Petitioner contains no more than 5,768 words, as counted by the word processing system used to prepare the Brief.

/s/ Rebecca Sharpless
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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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