No. 20-979

In the

Supreme Court of the United States

PANKAJKUMAR S. PATEL, ET AL.,

Petitioners,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

Brief of Amici Curiae National Immigration Litigation Alliance & National Immigrant Justice Center

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Interest of Amici Curiae[1]

The National Immigration Litigation Alliance ("NILA") is a not-for-profit organization dedicated to championing the rights of noncitizens and to elevating the capacity and quality of those who represent them. NILA engages in impact litigation to extend the rights of noncitizens and to eliminate systemic obstacles noncitizens routinely face. In addition, NILA builds the capacity of immigration attorneys to litigate in federal court by co-counseling individual federal court cases and by providing strategic advice and assistance. NILA has a direct interest in ensuring that noncitizens who are not in removal proceedings have a federal court forum to challenge erroneous agency denials of their applications for immigration benefits.

The National Immigrant Justice Center ("NIJC"), a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based not-for-profit organization that provides legal representation and consultation to immigrants,

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

refugees and asylum-seekers of low-income backgrounds. Each year, NIJC represents thousands of individuals before the immigration courts, Board of Immigration Appeals, and the U.S. Courts of Appeals, through its offices in Illinois, Indiana, and California and through its network of nearly 1,500 pro bono attorneys. NIJC's case load includes hundreds of individuals and families seeking adjustment of status before USCIS. Those adjustment cases include family-based immigration cases, asylees and refugees seeking to adjust to permanent resident status, individuals with "special immigrant juvenile status" in the U.S. after having been abused, abandoned, or neglected by their parents, victims of crime who obtain U-visa status after cooperating with police or prosecutors, and survivors of human trafficking adjusting status from T visa status to permanent resident status. When NIJC attorneys observe errors in USCIS adjudication, they employ a variety of techniques to attempt to resolve the errors, including motions to reopen with the agency, advocacy with the agency, and requests for Congressional intervention. In NIJC's experience, due to agency workload and bureaucratic inertia, those informal means are insufficient to correct agency errors in adjudicating adjustment of status applications. Thus, NIJC has an interest in ensuring judicial review of erroneous denials of adjustment of status applications.

Introduction

The *Patel* court's overbroad and incorrect interpretation of 8 U.S.C. § 1252(a)(2)(B)(i) will foreclose *all judicial review of all issues*, including constitutional claims and questions of law, for noncitizens whose only option for challenging adverse immigration rulings is in federal district court, raising constitutional, statutory, and policy concerns.

The *Patel* court interpreted subsection (B)(i)'s jurisdiction-limiting provision through the lens of 8 U.S.C. § 1252(a)(2)(D), which allows *courts of appeals* to review questions of law and constitutional claims related to adjustment of status *in removal proceedings*.[2] But subsection (D) does not apply to the many tens of thousands—or more—noncitizens who apply for adjustment of status with U.S. Citizenship and Immigration Services ("USCIS") because they are not in removal proceedings, including those sponsored by U.S. employers, immediate relatives of U.S. citizens, and victims of human trafficking, among other categories, and who are never placed in such proceedings, either because they have lawful status or because immigration officials

[2] "[W]e determine that we lack jurisdiction to review Patel's challenges to 'any judgment regarding the granting of relief' under § 1255 unless such challenges involve a viable constitutional or legal claim." Pet. App. 29a (referencing 8 U.S.C. § 1252(a)(2)(D)).

exercise discretion not to do so.[3] These individuals can challenge denials of their adjustment of status applications—made by non-judge, non-lawyer officials—only in district court under the Administrative Procedure Act ("APA") or the Declaratory Judgment Act ("DJA"). But if the Eleventh Circuit's interpretation were adopted, there would be no avenue for review of any such denials, no matter how erroneous or capricious.

Congress did not intend this result. As Petitioners and the Eleventh Circuit dissent below point out, the Eleventh Circuit's interpretation violates basic rules of statutory construction. Moreover, the Eleventh Circuit's interpretation is particularly problematic when applied to individuals whose adjustment applications are denied by USCIS and who are not placed in removal proceedings, as it would foreclose *all review* of applications for discretionary relief, even for questions of law or constitutional challenges. Congress is more explicit when it intends to foreclose *all review* of any agency action.

The Eleventh Circuit's erroneous interpretation is also poor policy, with significant negative consequences. Shielding the clearly erroneous—and unpublished—decisions of administrative officers from judicial review allows the law to be repeatedly misapplied without any recourse for those adversely

[3] In addition, in most cases, "arriving aliens" have no opportunity for review of this decision, even on removal. *See* 8 C.F.R. § 1245.2(a)(1)(ii).

affected and impairs the development of doctrinal coherence. Hundreds of thousands of affirmative applications for adjustment of status are pending with USCIS, and the consequences of wrongful denials are severe: financial and mental distress, employment difficulties, and relegation to immigration limbo, where applicants may be unable to secure permanent resident status and are left without a path to citizenship. As a result, as Congress and this Court have explained, such denials warrant judicial scrutiny.

Background

A. "Adjustment of status" allows eligible noncitizens to become lawful permanent residents.

Adjustment of Status ("AOS"), outlined at 8 U.S.C. § 1255, is the process allowing noncitizens already physically present in the United States to "adjust" their immigration status to "lawful permanent resident" ("LPR"), essentially "immigrating from within." Lauren E. Sasser, *Waiting in Immigration Limbo: The Federal Court Split Over Suits to Compel Action on Stalled Adjustment of Status Applications*, 76 Fordham L. Rev. 2512, 2514–15 (2008). LPRs are also known as "Green Card" holders.[4] While some

[4] "AOS is an alternative to consular processing, the more traditional process requiring noncitizens to apply at U.S. consulates overseas before entering the United States." Sasser, *supra*, at 2514–15.

noncitizens seek to adjust their status while in removal proceedings, many—if not most—applications for adjustment are filed outside of removal proceedings—by, for example, an individual in the United States on a work visa, an immediate relative of a U.S. citizen, or a victim of human trafficking.[5]

The benefits of permanent status are significant. Permanent resident status is a requisite step in the path to U.S. citizenship. Sasser, *supra*, at 2515. Permanent residents have the right to travel overseas freely, to leave the country for long periods, and to petition for close family members' immigration. *Id.* In addition, permanent status grants freedom from restrictions on employment. Lawful Permanent Residents (LPR), DHS, https://www.dhs.gov/immigration-statistics/lawful-permanent-residents. For instance, H-1B nonimmigrant visas condition residency in the United States on employment with a certain employer. *See* H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models, USCIS, https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations. Other nonimmigrant visas (like a K-1 fiancé visa or other family visas) require the individual to apply for and regularly renew an employment authorization document, without which they cannot legally work. Visas for

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[5] Dep't of Homeland Sec., *Legal Immigration and Adjustment of Status Report Fiscal Year 2020, Quarter 4*, https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration.

Fiancé(e)s of U.S. Citizens, USCIS, https://www.uscis.gov/family/family-of-us-citizens/visas-for-fiancees-of-us-citizens. But permanent residents receive unrestricted work authorization and can change employers or quit their jobs without affecting their immigration status. Lawful Permanent Residents (LPR), DHS, https://www.dhs.gov/immigration-statistics/lawful-permanent-residents.

B. AOS has two parts.

There are two parts to getting a Green Card—a preliminary determination of eligibility and, for those deemed eligible, a discretionary decision whether to adjust status. Part one asks whether the applicant meets statutorily described criteria for eligibility and whether there are any statutory bars to adjustment of status, *see* 8 U.S.C. § 1255(c). Briefly, and in general, the applicant must have been inspected and admitted or paroled into the United States, be eligible to receive an available immigrant visa and be admissible to the United States for permanent residence. 8 U.S.C. § 1255(a). The principal questions are whether the person is "eligible," "admissible," and not barred. The three major categories of immigrant visas are: family-sponsored, employment-based, or diversity. Sasser, *supra*, at 2515.

Most aspects of determining whether an individual is eligible and admissible are clear-cut. For example, whether an applicable visa—for instance, one based on family sponsorship, *see* 8 U.S.C. §§ 1151,

1153(a)— is immediately available; whether the person has a sponsoring employer whose petition on their behalf has been approved, *see* 8 U.S.C. § 1153(b); or whether their entry to the United States was authorized by immigration officials. 8 U.S.C. §§ 1101(a)(13); 1225(a)(3).

Part two allows the Attorney General, through USCIS—a component of the Department of Homeland Security ("DHS"), *see* 6 U.S.C. § 271; 8 U.S.C. § 1103—or the Executive Office for Immigration Review ("EOIR"), 6 U.S.C. § 521, to decide who among those eligible should receive relief. The discretion delegated to the Attorney General is a "matter of grace." *Patel v. INS*, 738 F.2d 239, 242 (7th Cir. 1984). So an individual could meet the statutory eligibility criteria and avoid the statutory bars in Section 1255(c) in part one but still be denied relief.

C. Individuals who apply for AOS outside of removal proceedings must sue in district court to obtain any review of the denial of their application.

The decision-maker for Green Card applications varies depending on whether an applicant is in removal proceedings—if they are, an immigration judge makes the initial call, subject to review by the Board of Immigration Appeals ("BIA"). If not, USCIS

makes the decision. 8 C.F.R. §§ 245.2(a)(1); 1245.2(a)(1).[6]

For applications submitted outside removal proceedings, a non-attorney, non-judge "Immigration Services Officer" ("Officer") at USCIS, decides the fate of Green Card applicants. Career Opportunities, USCIS, https://www.uscis.gov/about-us/careers/career-opportunities. The Officer, who need not be an attorney or other immigration specialist, is typically stationed at one of 88 field offices or a USCIS Service Center. *See* Job Announcement, USAJOBS, https://www.usajobs.gov/GetJob/ViewDetails/610448600 (requiring "one year of specialized experience" working in a federal government position at the GS-04 level or a bachelor's degree).

The Officer issues a letter to the applicant stating whether the application was granted or denied. 8 C.F.R. § 103.3(a)(1)(i). The letter is not published. *See* 8 C.F.R. § 103.3(c) (requiring only "precedent decisions" by USCIS's appeals office to be published).

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[6] USCIS also has jurisdiction over most "arriving alien" applicants, regardless of whether the applicant is in removal proceedings. 8 C.F.R. §§ 245.2(a)(1); 1245.2(a)(1). An "arriving alien" is a noncitizen who applies for admission at a port of entry. 8 C.F.R § 1.2. Because an "arriving alien" may be paroled into the United States, *id.*, he or she may be present in the country for many years.

A noncitizen whose adjustment application is denied by an Officer has no administrative appeal, and unless the United States seeks to remove the applicant, no administrative recourse. 8 U.S.C. § 245.2(a)(5)(ii). *If* the applicant is placed in removal proceedings, *then* the applicant can renew the adjustment application, in which case EOIR generally has jurisdiction.[7] *Id.* But applicants have no control over if, or when, they are placed in removal proceedings. *See id.* And some adjustment applicants, such as noncitizens in valid student or temporary-work status, are not subject to removal at all because they are in lawful status when their application is denied by USCIS. *See* 8 U.S.C. § 1229a(a)(2) (specifying that removal proceedings are to determine a noncitizen's inadmissibility or deportability). For the remainder who are subject to removal, DHS has sole and unreviewable discretion whether—and when—to initiate removal proceedings. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-85 (1999).

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[7] The exception to this rule is if the applicant is an "arriving alien" in which case the applicant is *necessarily* deprived of any review by the Eleventh Circuit's interpretation—even if placed in removal proceedings—because (with limited exception) an immigration judge would have no jurisdiction over the application. *See* 8 C.F.R. § 245.2(a)(1). For an "arriving alien," the immigration judge "does not have jurisdiction to adjudicate any application for adjustment of status filed by the arriving alien" unless one narrow exception applies. See 8 C.F.R. § 1245.2(a)(1)(ii).

And for "arriving aliens" (*supra* n.7), review is only ever available in district court.

A challenge to an AOS denial can be lodged in federal district court under the APA or the DJA by an applicant not in removal proceedings—this is the *only* means of obtaining *any* review, of any kind, over a USCIS Officer's denial outside of removal proceedings. In contrast, an individual whose adjustment-of-status application is denied in removal proceedings can obtain judicial review of that decision through a petition for review with the court of appeals of the removal order that follows. *See* 8 U.S.C. § 1252(b).

D. Congress altered the courts' jurisdiction over certain aspects of AOS proceedings.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which limited federal courts' jurisdiction over certain aspects of immigration cases. Specifically, 8 U.S.C. § 1252(a)(2)(B), titled "[d]enials of discretionary relief," states in relevant part that no court shall have jurisdiction to review "any judgment regarding the granting of relief under" section 1255, the AOS provision.[8] 8 U.S.C. § 1252(a)(2)(B)(i).

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[8] This provision was first enacted in IIRIRA, and the language of the relevant subpart, subsection (B)(i), has not been amended (other than to update cross-references) since then.

Subsection (B) also prohibits review of "any other decision or action" that 8 U.S. Code Subchapter II specifies to be in the discretion of the Attorney General or Secretary of Homeland Security. 8 U.S.C. § 1252(a)(2)(B)(ii).

Before the enactment in 2005 of the REAL ID Act, courts did not interpret subsection (B)(i) to strip federal district or appellate courts' jurisdiction over nondiscretionary legal and factual issues, such as whether an individual was married to a U.S. citizen. *See Sepulveda v. Gonzales*, 407 F.3d 59, 63 (2d Cir. 2005) (holding that subsection (B)(i) does not bar judicial review of legal determination regarding noncitizen's eligibility for cancellation of removal and adjustment of status); *Mamigonian v. Biggs*, 710 F.3d 936, 946 (9th Cir. 2013) (reaffirming pre-REAL ID Act caselaw regarding subsection (B)(i) and holding that district court could review nondiscretionary aspects of USCIS's denial of adjustment of status); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1143 (9th Cir. 2002) (interpreting "judgment" in subsection (B)(i) to apply only to ultimate discretionary determination and not to nondiscretionary eligibility determinations); *see also Succar v. Ashcroft*, 394 F.3d 8, 19–20 (1st Cir. 2005); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 178 (3d Cir. 2003);

See Pet. App. 18a-19a. The other specified sections all concern decisions that primarily arise in removal proceedings, and thus would not be reviewed in district court, or that have separate jurisdictional bars that prevent district court review. 8 U.S.C. §§ 1182(h)(2) and (i)(2).

Mireles-Valdez v. Ashcroft, 349 F.3d 213, 215 (5th Cir. 2003); *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Iddir v. INS*, 301 F.3d 492, 497–98 (7th Cir. 2002); *Reyes-Vasquez v. Ashcroft*, 395 F.3d 903, 906 (8th Cir. 2005); *Sabido Valdivia v. Gonzales*, 423 F.3d 1144, 1149 (10th Cir. 2005) (decided after enactment of REAL ID Act but relying on other circuits' pre-REAL ID Act caselaw).

In 2005, Congress added a subsection (D) to Section 1252 through the REAL ID Act. Titled "[j]udicial review of certain legal claims," subsection (D) states that nothing in the jurisdiction-limiting provision "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." *Id.* § 1252(a)(2)(D). Subsection (D) was enacted as a response to the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), rejecting the government's argument that a jurisdiction-stripping provision of the IIRIRA precluded judicial review. "A construction of the [IIRIRA] amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions." 533 U.S. at 300. Congress enacted subsection (D) for the express purpose of giving "every alien a fair opportunity to obtain judicial review while restoring order and common sense to the judicial review process." H.R. Rep. No. 109–72, at 174 (2005), as reprinted in 2005 U.S.C.C.A.N. 240, 299.

By its plain language, subsection (D) does not save judicial review of legal or constitutional questions arising in APA or DJA claims brought by AOS applicants to challenge denials by USCIS Officers, since those arise in federal district court, not the courts of appeals.

E. The Eleventh Circuit's interpretation of the jurisdiction-limiting provision leaves some individuals without *any* review of the denial of their adjustment application.

The Eleventh Circuit's interpretation of subsection (B)(i) in *Patel* involved an appeal of a final order of removal from the BIA—*not* an appeal from a district court review of a USCIS Officer's determination. Pet. App. 8a. Patel applied for adjustment prior to removal, was denied, and then renewed his application after being placed in removal proceedings. Pet. Br. 12-14. An immigration judge denied his second application, and the BIA affirmed. *Id.* at 14-15. On review, the court interpreted subsection (B)(i) to bar review of any part of the decision to deny Patel's adjustment of status under Section 1255—except, because of subsection (D), for viable constitutional or legal claims. "[W]e determine that we lack jurisdiction to review Patel's challenges to 'any judgment regarding the granting of relief' under § 1255 unless

such challenges involve a viable constitutional or legal claim." Pet. App. 29a.

In so doing, the court chose the broadest of multiple definitions of the word "judgment," *id.* at 25a-28a, despite multiple canons of statutory interpretation militating against that choice, *id.* at 48a (Martin, J., dissenting) (citing presumption in favor of judicial review of administrative actions and principle of construing any lingering ambiguities in deportation statutes in favor of the noncitizen). The court, contrary to nine other circuits,[9] determined that "judgment" meant "any decision," including any determination as to whether Patel met certain binary, nondiscretionary statutory eligibility criteria.

To justify its choice of the broadest among multiple definitions of the word "judgment," the *Patel* court specifically relied on subsection (D)'s carveout for appellate court jurisdiction. *Id.* at 28a-30a. Because, under subsection (D), courts of appeals may review "questions of law" in appeals of removal orders, the *Patel* majority deemed its interpretation of the jurisdiction-limiting provision consistent with *St. Cyr* and the "strong presumption in favor of judicial review of administrative action." *Id.* at 29a. "Applicants who have been denied a form of discretionary relief enumerated in § 1252(a)(2)(B)(i) can still obtain review of constitutional and legal challenges to the denial of that relief, including review of mixed questions of law and fact." *Id.* at 30a.

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[9] *See infra* pp. 10-11.

But, as noted, subsection (D) does not apply to district courts. As a result, the Eleventh Circuit's interpretation of the jurisdiction-limiting provision forecloses *any* judicial review of adjustment decisions in non-removal cases and for "arriving aliens," even when such challenges involve colorable constitutional or legal claims, leaving those individuals without any avenue for review and no path to citizenship. As discussed below, this immigration purgatory—or outright denial of review—has profound negative effects on applicants and their families, and on society as a whole.

Summary of Argument

In addition to the other problems with its opinion, the Eleventh Circuit majority failed to appreciate the effect of its decision on Green Card applicants who are not in removal proceedings. In endorsing a broad interpretation of subsection (B)(i) that precludes judicial review of nondiscretionary questions of statutory eligibility, the court relied on subsection (D)'s restoration of jurisdiction to appellate courts—and only appellate courts—to decide legal and constitutional questions, apparently overlooking the many noncitizens who are not placed in removal proceedings and therefore can only seek review in district court under the APA or DJA. Without subsection (D)'s backstop, the Eleventh Circuit's already shaky rationale crumbles.

I. The incorrectness of the Eleventh Circuit's interpretation of subsection (B)(i) is evidenced by its effect on individuals who are denied a Green Card outside of removal proceedings: the deprivation of any judicial review. Subsection (D), which applies only to petitions for review filed in the courts of appeals, does not help these individuals because they can challenge denials only in district court. For that reason, under the Eleventh Circuit's view, there is *no* judicial review of these important agency decisions, a result that devitalizes the Eleventh Circuit's reliance on subsection (D) as an escape hatch from the strong presumption of judicial review of executive and agency action.

II. The practical consequences of precluding judicial review of unpublished administrative decisions by USCIS Officers are severe. The lack of judicial review leads to "secret agency law" that has proven to be subject to frequent error. In addition, an absence of judicial review will lead to less uniformity in these decisions, contrary to Congress's goals for immigration law in particular, and important ideals of fairness and equity in general. Inaccurate and inconsistent denials of AOS applications cause severe negative personal and societal effects, including wrongly leaving those improperly denied without a path to U.S. citizenship.

Argument

I. The effect of the Eleventh Circuit's incorrect interpretation of subsection (B)(i) on individuals who are denied a Green Card outside of removal proceedings highlights the decision's shortcomings.

In addition to the reasons discussed by Petitioner and the Eleventh Circuit dissent, the Eleventh Circuit's interpretation is incorrect because it deprives many individuals of any federal court review of their denied AOS applications.

The Eleventh Circuit's interpretation is especially unpersuasive when applied to individuals who apply for AOS outside of removal proceedings, as those individuals cannot rely on subsection (D) in order to seek judicial review. The *Patel* majority relied heavily on subsection (D)'s carveout for appellate jurisdiction to avoid an otherwise irreconcilable conflict with this Court's precedent favoring judicial review of agency action, but that provision undisputedly does not apply to individuals whose applications are adjudicated by USCIS outside of removal proceedings. For those applicants, the *Patel* court's interpretation of the jurisdiction-limiting provision would "entirely preclude review of a pure question of law by any court," *St. Cyr*, 533 U.S. at 300. This result is directly at odds with what the *Patel* court itself recognized as the "clear import of *St. Cyr*"—namely, "that judicial review of questions of law

regarding removal orders need[s] to be preserved in some manner to avoid creating serious constitutional questions." *Patel*, 971 F. 3d at 1271.

Indeed, the Eleventh Circuit's interpretation of subsection (B) improperly expands the provision's jurisdiction-stripping effect and would create circumstances in which there is no judicial review of any questions—including those of fact or law—contrary to *St. Cyr*, other decisions of this Court, and the APA. This Court has "consistently applied" the "well settled" presumption of reviewability to immigration statutes—including to Section 1252. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069–70 (2020); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496–99 (1991) (stating restrictions on jurisdiction are to be construed narrowly, and the court will not assume that its jurisdiction has been repealed unless the statute says so explicitly); *Reno v. Am.–Arab Anti–Discrimination Comm.*, 525 U.S. 471, 480–82 (1999) (rejecting the Ninth Circuit's "broad reading of § 1252(g)"); *Kucana v. Holder,* 558 U.S. 233, 252 (2010) (rejecting a construction of subsection (B)(ii) that would give the executive "a free hand to shelter its own decisions from abuse-of-discretion appellate court review" by self-labeling those decisions "discretionary"). And the APA, under which individuals challenge the denial of their AOS applications by USCIS Officers, makes clear that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . *is entitled to judicial review*." APA, 5 U.S.C. § 702

(emphasis added); *see also* APA, 5 U.S.C. § 704 ("final agency action for which there is no other adequate remedy in a court are subject to judicial review").

As discussed, the Eleventh Circuit's interpretation forecloses judicial review of *any* aspect of any adjustment decision by a USCIS Officer when the noncitizen is not in removal proceedings, no matter how arbitrary or unlawful that decision might be. And it could preclude judicial review for "arriving aliens," even if their removal is sought. *See* 8 C.F.R. § 1245.2(a)(1)(ii). In fact, under this interpretation, the agency could deny an application based on the color of the applicant's skin, their religion, country of origin, or the fact that their first name begins with a P and never face any judicial scrutiny. As such, the Eleventh Circuit's interpretation greatly exceeds the permissible bounds of jurisdiction stripping, granting Congress broad authority to impair rights of noncitizens and intrude on the constitutional bounds of judicial authority. With such broad authority, Congress could then "sanction the achievement . . . of any impairment of . . . rights whatever so long as it [is] cloaked in the garb of the realignment of [jurisdiction]." *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960).

Moreover, because the "arriving alien" rule—which deprives immigration courts of jurisdiction to review AOS application denials even in removal proceedings—is solely the product of regulation, it could be expanded to encompass a larger class of

noncitizens who, under the Eleventh's Circuit interpretation of subsection (B)(i), would be deprived of any review at all. This unchecked ability to create disfavored groups, precluded from judicial review, is indefensible. *Kucana*, 558 U.S. at 252 ("If the Seventh Circuit's construction of § 1252(a)(2)(B)(ii) were to prevail, the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'"). Such an extraordinary delegation of authority cannot be extracted from the statute. Where noncitizens have no opportunity for judicial review of clearly incorrect legal or factual non-discretionary decisions of administrative agents, the power ceded to both the executive and legislative branches would be "literally boundless." Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129, 133 (1981).

The Eleventh Circuit does not appear to have considered the implications of such an expansive interpretation: that those who are "arriving aliens," remain in lawful status, or are considered low-priority for deportation would be deprived of *any* judicial review of a bureaucrat's denial of their path to citizenship. Under this scheme, a foreign student who meets his U.S.-citizen spouse at university or a skilled worker whose employer successfully sponsors her for permanent employment would each face a stark choice in the face of an AOS denial: accept the impossibility of ever achieving permanent

residency or citizenship, or intentionally fall out of lawful status in the hopes that USCIS will exercise its discretion to initiate removal proceedings, thus opening the door to review of the AOS denial.

II. The Eleventh Circuit's decision is wrong as a matter of policy.

In addition to its legal inadequacies, the Eleventh Circuit's decision is harmful as a matter of policy—and thus unlikely to reflect the intent of Congress—for two reasons. First, it would foment inaccurate application of immigration law. Left uncorrected, erroneous denials of adjustment applications cause severe individual and societal harms, ranging from financial and other personal difficulties to a collective detrimental impact on the U.S. economy and employment due to a chilling effect on lawful immigration. Second, it would increase inconsistent application of immigration law, undermining important immigration policy ideals and goals.

The error-correcting and error-inhibiting functions of independent review are needed to ameliorate the deleterious effects of incorrect decisions and provide settled guidance to future adjudicators. Moreover, where a split does develop, independent review provides an opportunity for resolution via courts of appeals. These important functions are entirely lost where judicial review is abrogated.

A. Precluding review of legally erroneous decisions will cause significant personal and societal harms.

Without judicial review, incorrect agency decisions will go uncorrected. This is no small matter, as erroneous agency decisions are not uncommon, and their consequences are significant. In fact, district courts regularly find that USCIS Officers wrongly deny adjustment of status applications based on incorrect interpretations of the law. For instance, in appeals from district court decisions, courts of appeals have held that USCIS erred in denying adjustment applications based on a finding that the death of the applicants' U.S. citizen spouses voided the "immediate relative" basis for adjustment of status. *See, e.g., Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) (reversing district court dismissal); *Lockhart v. Napolitano*, 573 F.3d 251 (6th Cir. 2009) (affirming district court grant of summary judgment to plaintiff); *Neang Chea Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009) (affirming district court's denial of motion to dismiss and remand to USCIS); *but see Robinson v. Napolitano,* 554 F.3d 358 (3d Cir. 2009) (reversing district court and finding that plaintiff did not remain an immediate relative under facts of the case). Similarly, the Third Circuit reversed a district court's grant of summary judgment, holding that USCIS erred in predicating the denial of an application on the applicant's vacated conviction for a drug possession charge. *See Pinho v. Gonzales*, 432 F.3d 193 (3d Cir. 2005).

District courts have corrected other dispositive legal errors by USCIS officers on a variety of occasions. *See, e.g., Duron v. Nielsen*, 491 F. Supp. 3d 256, 267 (S.D. Tex. 2020) (holding that USCIS misinterpreted the meaning of an "admission" to the United States where a purportedly improper "admission" was the basis of denial); *Alimoradi v. USCIS*, No. CV 08-02529, 2008 WL 11336668, at *6 (C.D. Cal. Aug. 29, 2008) (holding that USCIS's regulatory interpretation of a statutory exception to a bar on adjustment was impermissibly narrow as applied to the plaintiff); *Verovkin v. Still*, No. C 07-3987, 2007 WL 4557782, at *5 (N.D. Cal. Dec. 21, 2007) (finding remand warranted because USCIS applied the wrong provision of the statute in denying plaintiff's adjustment application). In the absence of judicial review, these and other injustices have the potential to remain indefinitely unresolved, leading to a proliferation of incorrect—and uncorrected—administrative decisions.

Errors are, unfortunately, prevalent in administrative agency application of immigration law. The Amicus Curiae brief filed by the Former EOIR Judges explains that Immigration Judges and BIA officers face heavy caseloads and are under substantial pressure to complete cases rapidly. Brief for Former Executive Office of Immigration Review Judges as Amici Curiae in Support of Petitioner at 2-3, *Patel v. Garland*, No. 20-979 (U.S. 2021). These conditions, compounded with resource constraints in immigration court, often result in erroneous interpretations of state and federal law, as evidenced by

numerous federal appellate decisions sharply criticizing those errors. *Id.* at 3. Against this backdrop, the former Immigration Judges welcome Article III review of non-discretionary determinations to maintain "fair, reasoned, and legally sound immigration court adjudications." *Id.* It stands to reason that judicial review serves an equally important role for USCIS Officer decisions, particularly given that such Officers have less familiarity with and expertise in immigration law than immigration judges.

In fact, the mere prospect of judicial review likely encourages administrative adjudicators to engage in more thoughtful, careful, and rational decision-making that is consistent with the law and thus less likely to be reversed. Patrick C. Wohlfarth, How the Prospect of Judicial Review Shapes Bureaucratic Decision Making, (2010) (Ph.D. dissertation, University of North Carolina), available at https://doi.org/10.17615/h706-4949 (showing, via empirical analyses, that the presence of independent review significantly affects agency decision making).

That USCIS Officers issue their decisions as unpublished brief letters only heightens the problems that arise from shielding these—often wrongful—decisions from judicial review. There is no administrative secondary review within DHS of these decisions. As a result, denials reflecting legal or factual errors are consigned to the obscurity of the applicant's immigration file, contributing to the phenomenon of "secret agency law," which "systematically limit[s] the access to information of parties opposing

the government in immigration proceedings." *N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 223 (2d Cir. 2021). Secret agency law not only limits the ability of applicants to advocate for their own interests, but also the ability of USCIS to self-audit its rulings for consistency and "avoid the inherently arbitrary nature of unpublished ad hoc [administrative] determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (emphasizing that the APA was adopted to ensure that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures" rather than merely arbitrarily).

And when there are errors, the Eleventh Circuit's decision risks leaving the wrongfully denied applicants in a purgatorial immigration status from which they have no opportunity to seek relief. In the first quarter of 2021 alone, USCIS denied over 15,000 adjustment of status applications, while more than 750,000 remain pending. *See Number of I-485 Applications to Register Permanent Residence or Adjust Status by Category of Admission Case Status, and USCIS Field Office or Service Center Location January 1 - March 31, 2021*, U.S. Citizenship and Immigration Servs., https://www.uscis.gov/sites/default/files/document/reports/I485_performance-data_fy2021_qtr2.pdf (last visited Aug. 24, 2021). Unless they are placed in removal proceedings, these applicants have no opportunity to appeal their denials other than by filing an APA or DJA claim in federal district court. As noted, *see supra* p. 8, not all

AOS applicants are subject to removal upon denial of their adjustment application; moreover, DHS chooses not to place many others—who may be subject to removal—in proceedings. As explained, the Eleventh Circuit's erroneous reading of the law would remove the lone forum of review for all these individuals, leaving them in indefinite immigration limbo.

B. The Eleventh Circuit's interpretation encourages inconsistent outcomes.

Stripping district—and, by extension, appellate—courts of jurisdiction to review USCIS Officers' denials outside of removal proceedings also promotes inconsistency in decision-making, undermining important immigration policy ideals and goals. Indeed, doctrinal coherence—the pursuit of orderly and consistent administration of laws—is especially important in immigration matters to ensure legal rights are respected within the complex framework of national laws and regulations, often applied by local administrative officials such as USCIS Officers. *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (referencing "Nation's need to 'speak with one voice' in immigration matters"); *see also* 151 Cong. Rec. H2813-01, H2872-2873 (2005) (Section 106 of the REAL ID Act "address[es] the anomalies created by *St. Cyr* and its progeny by restoring uniformity and order to the law."); *see* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration*

and Judicial Review, 78 Tex. L. Rev. 1615, 1631 (2000) (explaining benefits of independent review in immigration context).

Abrogating judicial review of agency action undermines the twin goals of curbing incorrect agency decisions and establishing doctrinal coherence. *See e.g. Ornelas v. United States*, 517 U.S. 690, 697 (1996) ("de novo review tends to unify precedent and will…provid[e]… a defined set of rules which, in most instances, makes it possible to reach a correct determination.") (internal quotations omitted); *see Thompson v. Keohane*, 516 U.S. 99, 100 (1995) ("As the Court's decisions bear out, the law declaration aspect of independent review potentially may guide [law enforcement], unify precedent, and stabilize the law."); *see also* Aaron G. Leiderman, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 Colum. L. Rev. 1367, 1399–400 (2006) ("[Independent] review empower[s] courts to ensure that agencies are applying the law consistently.").

Indeed, even administrative tribunals that *do* publish their decisions are vulnerable to inconsistent and arbitrary interpretations of the law. For example, the Department of Justice previously found that the BIA has long struggled to apply even basic principles coherently and consistently. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management; Final Rule, 8 C.F.R. pt. 3 (2002) ("[T]he Board's precedent decisions indicate an inability to reach consensus about even

fundamental approaches to the law." (statement of John Ashcroft, U.S. Attorney General)). It is entirely plausible, if not likely, that such problems are even more common among decisions rendered by USCIS Officers, for whom legal education is not a prerequisite. Precluding judicial review of such decisions shields them from the vital role of the federal courts in ensuring correct and consistent interpretation of the law.

C. The personal and societal effects of the Eleventh Circuit's decision are severe.

Incorrect and inconsistent USCIS decisions exact a personal and societal toll. At a personal level, the American Psychological Association has recognized that the stresses of the immigration experience "can cause or exacerbate mental health difficulties, including anxiety, depression, posttraumatic stress disorder (PTSD), substance abuse, suicidal ideation, and severe mental illness." Working with Immigrant-Origin Clients - An Update for Mental Health Professionals, Am. Psych. Ass'n 2 (2013), https://www.apa.org/topics/immigration-refugees/report-professionals.pdf. Many noncitizens' livelihoods depend upon attaining some degree of permanency in the United States. Indeed, the inability to pursue permanent residency—and by extension citizenship—has a significant and lasting impact on noncitizens' earnings relative to naturalized U.S. citizens, with the latter earning 50 to 70

percent more than their unnaturalized counterparts. *See* Madeleine Sumption & Sarah Flamm, *The Economic Value of Citizenship for Immigrants in the United States*, Migration Pol'y Inst. (Sept. 2012), https://www.migrationpolicy.org/pubs/citizenship-premium.pdf. Some employment disparities are expressly linked to the ability to obtain a Green Card. For example, Dr. Xiaoqing Tang, a Chinese diabetes researcher at the University of Kentucky, received a $300,000 research grant from the National Institutes of Health, contingent on proof of her LPR status or evidence of meaningful progress toward that end. Sasser*, supra*, at 2512. For Dr. Tang and others like her, a USCIS adjustment of status denial is far more than an administrative inconvenience; it is a potentially insurmountable barrier to pursuing a fully realized life and career in the United States.

More generally, applicants awaiting permanent residency report that the uncertainties of the process—compounded by legally or factually erroneous agency decisions—cause them financial insecurity and hinder their ability to invest in a home, or even a car. *See* Pooja B. Vijayakumar & Christopher J. L. Cunningham, *An Indentured Servant - The Impact of Green Card Waiting Time on the Life of Highly Skilled Indian Immigrants in the United States of America*, Indus. and Organizational Psych. Translational Rsch. and Working Papers (2019), https://scholar.utc.edu/cgi/viewcontent.cgi?article=1002&context=iopsy. They also report wage stagnation, obstacles to promotion, and an inability to start their own businesses or engage in other

forms of entrepreneurship. *See id.* at 27.

The vagaries of the immigration process have negative implications not only for individual AOS applicants, but also for U.S. domestic policy. This nation—which, as Franklin D. Roosevelt recognized, is "descended from immigrants and revolutionists"—derives enormous wealth and vibrancy from the innovations of its immigrant residents. Oxford Essential Quotations, Franklin D. Roosevelt, Daughters of the American Revolution Convention, Washington, D.C., 21 April 1938 (4th ed. 2016) https://www.oxfordreference.com/view/10.1093/acref/9780191826719.001.0001/q-oro-ed4-00008907 (last visited Aug 26, 2021). To take but one example, more than half of startup companies worth $1 billion in 2016 had at least one immigrant founder, and 71% of those companies had at least one immigrant in a key management or product development position. *See* Stuart Anderson, *Immigrants and Billion Dollar Startups*, Nat'l Found. for Am. Pol'y (Mar. 2016), https://www.immigrationresearch.org/system/files/Immigrants-and-Billion-Dollar-Startups.NFAP-Policy-Brief.March-2016.pdf. And the H-1B visa program, championed as having allowed "some of the most talented persons in the world to come to the United States," allows domestic employers to obtain needed business skills and abilities from unique individuals not otherwise authorized to work in the United States. *Examining the Importance of the H-1B Visa to the American Economy*, *Hearing Before the Committee*

on the Judiciary of the United States Senate, *One Hundred Eighth Congress*, S. Hrg. 108–415, 1 (2003) (statement of Sen. Orrin Hatch); U.S. Dep't of Labor, "H-1B Program," available at https://www.dol.gov/agencies/whd/immigration/h1b.

But skilled immigrants are increasingly unwilling to tolerate the personal, financial, and bureaucratic stresses associated with the AOS process, and, as a result, significant numbers of these highly skilled individuals are contemplating a return to their home countries, or to more visa-friendly third countries. *See, e.g.*, Vijayakumar et. al, *supra*, https://www.researchgate.net/publication/341611638 (noting that 32% of skilled Indian immigrants surveyed reported "seriously thinking of returning to their home country in the next 12 months," while 70% reported seriously considering emigrating to a more hospitable third country in the face of obstacles posed by the U.S. green card process). The loss of such highly skilled immigrants from just one country, India, would—in a single year—directly cost U.S. organizations $19–54 billion. *Id.* at 44. The United States "can no longer expect highly skilled arrivals from other countries to endure the indignities and inefficiencies of an indifferent immigration system" without looking for opportunities elsewhere. V. Vivek Wadhwa, *A Reverse Brain Drain*, Issues in Sci. & Tech. 45, (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1358382. The lack of judicial review for adjustment of status denials and the concomitant increase in errors and inconsistencies can only

exacerbate these "indignities and inefficiencies," which risks further chilling lawful immigration by leaving immigrants with the not unreasonable sense that the immigration system is not only arduous, but arbitrary and unjust.

It is, of course, not the role of the courts to set the direction of the nation's immigration policy. But it is entirely appropriate and right that courts should continue to exercise judicial review over an already often-arbitrary, lengthy, and confusing process, providing much-needed consistency and transparency to agency determinations while also ensuring that the executive branch properly interprets the conditions that Congress has set for discretionary relief. In doing so, the judiciary indirectly benefits broader policy aims such as providing denied applicants with an avenue for relief, correcting agency misinterpretations of relevant law, and alleviating some of the more extreme bureaucratic obstacles facing would-be permanent residents of the United States.

Conclusion

Amici curiae respectfully ask that the Court reverse the opinion of the Eleventh Circuit and adopt a construction of 8 U.S.C. § 1252(a)(2)(B) that allows all applicants for adjustment of status under Section 1255 adequate judicial review by preserving judicial review of eligibility determinations for discretionary relief.

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