No. 20-

IN THE

Supreme Court of the United States

PANKAJKUMAR S. PATEL and JYOTSNABEN P. PATEL,
Petitioners,

v.

UNITED STATES ATTORNEY GENERAL,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MARK C. FLEMING
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

JUSTIN M. BAXENBERG
JOSS A. BERTEAUD
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington DC 20006

MARGARET T. ARTZ
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

IRA J. KURZBAN
Counsel of Record
HELENA TETZELI
JOHN P. PRATT
EDWARD F. RAMOS
ELIZABETH MONTANO
KURZBAN KURZBAN TETZELI & PRATT P.A.
131 Madeira Avenue
Coral Gables, FL 33134
(305) 444-0060
ira@kktplaw.com

THOMAS G. SPRANKLING
WILMER CUTLER PICKERING HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306

QUESTIONS PRESENTED

Petitioner Pankajkumar S. Patel checked a box on a Georgia driver's license application erroneously identifying himself as a U.S. citizen, even though Mr. Patel was eligible for a license regardless of his citizenship. When Mr. Patel later sought to adjust his status to lawful permanent resident, a divided panel of the Board of Immigration Appeals (BIA) denied him relief, holding that he is inadmissible because he "falsely represented" himself as a U.S. citizen for a benefit under state law. 8 U.S.C. § 1182(a)(6)(C)(ii).

Rejecting the government's own position and that of nearly every other circuit, the en banc Eleventh Circuit, by a 9-5 vote, held that it lacked jurisdiction to review threshold eligibility findings for five major categories of discretionary relief from removal, such as whether Mr. Patel is inadmissible for mistakenly representing himself as a U.S. citizen. The Eleventh Circuit separately held, contrary to a precedential BIA decision, that Section 1182(a)(6)(C)(ii) renders noncitizens inadmissible even if their misrepresentation of citizenship is immaterial to the government benefit sought.

The questions presented are:

1. Whether 8 U.S.C. § 1252(a)(2)(B)(i) preserves the jurisdiction of federal courts to review a nondiscretionary determination that a noncitizen is ineligible for certain types of discretionary relief.

2. Whether 8 U.S.C. § 1182(a)(6)(C)(ii), which renders a noncitizen inadmissible for "falsely represent[ing]" oneself to be a U.S. citizen for a government benefit, applies to immaterial misrepresentations.

PARTIES TO THE PROCEEDING

The petitioners are Pankajkumar S. Patel and Jyotsnaben P. Patel.[*]

The respondent is the United States Attorney General.

[*] Nishantkumar Patel sought relief in front of the court of appeals, but is not a petitioner here.

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Pankajkumar S. Patel and Jyotsnaben P. Patel respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION

Congress has long granted the Executive Branch discretionary authority to allow otherwise removable noncitizens to remain in the United States. While the Executive's ultimate decision to exercise that authority is "a matter of grace," courts have traditionally exercised jurisdiction to review agency rulings regarding a noncitizen's *eligibility to seek* such relief. *INS* v. *St. Cyr*, 533 U.S. 289, 307-308 (2001). Yet in this case, the

en banc Eleventh Circuit—abrogating its own precedent, disagreeing with nearly every other circuit, and rejecting the government's own position—held that it lacked such authority. The Eleventh Circuit separately ruled, contrary to a precedential decision of the Board of Immigration Appeals (BIA), that the inadmissibility ground for "falsely represent[ing]" oneself as a U.S. citizen for a government benefit applies even if the misrepresentation is immaterial to the benefit sought. Both issues are important and recur in many immigration cases. They accordingly warrant this Court's review.

First, the en banc Eleventh Circuit's jurisdictional ruling is on the wrong side of an acknowledged division among the courts of appeals, almost all of which have reached the contrary conclusion. Eight other circuits, five dissenting judges in this case, and the government itself have all agreed that courts have jurisdiction to review whether noncitizens like Mr. Patel are inadmissible and thus ineligible for discretionary relief.

The Eleventh Circuit, however, now holds that 8 U.S.C. § 1252(a)(2)(B)(i) strips courts of appeals of jurisdiction to consider such issues—and indeed, any aspect of a ruling on eligibility for discretionary relief that is not a question of law. 8 U.S.C. § 1252(a)(2)(D); *see also St. Cyr*, 533 U.S. at 300. (And where review is sought in district court rather than a court of appeals, the Eleventh Circuit's ruling appears to foreclose *any* review, even on issues of law.) Only the Fourth Circuit takes a similar view. The Fourth and Eleventh Circuits' interpretation of Section 1252(a)(2)(B)(i) cannot be squared with the provision's plain text, its broader statutory context, or settled rules of statutory construction. Indeed, this Court has already rejected the Eleventh Circuit's view, albeit in dicta. *See Kucana* v.

Holder, 558 U.S. 233, 247 (2010). The division is entrenched and no further percolation can be expected. This Court should grant the petition to resolve this important question of federal jurisdiction.

Second, the en banc Eleventh Circuit adopted the panel's erroneous ruling interpreting 8 U.S.C. § 1182(a)(6)(C)(ii), which renders inadmissible (and thus ineligible for certain discretionary relief) a noncitizen who "falsely represents … himself … to be a citizen of the United States for" a government benefit. The panel wrongly held that a "false[] represent[ation] … for" a government benefit does not require that the false statement be *material* to the benefit—a ruling contrary to a precedential BIA opinion and in serious tension with decisions from at least three other circuits. As this Court and the courts of appeals have routinely held, the established common-law meaning of "false representation"—which Congress presumably knew of and incorporated—requires a materiality element. *E.g.*, *Neder* v. *United States*, 527 U.S. 1, 25 (1999). This Court should reaffirm that principle.

The petition for a writ of certiorari should be granted.

OPINIONS BELOW

The Eleventh Circuit panel's opinion (App. 79a-101a) is reported at 917 F.3d 1319. The en banc Eleventh Circuit's opinion (App. 1a-47a) is reported at 971 F.3d 1258.

The immigration judge's order (App. 111a-119a) is unreported. The BIA's decision (App. 103a-108a) is unreported but available at 2017 WL 1045537.

JURISDICTION

The en banc Eleventh Circuit issued its judgment on August 19, 2020. On March 19, 2020, by general order, this Court extended the time to file this petition to January 16, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following provisions of the Immigration and Nationality Act ("INA") are reproduced in the appendix to this petition: 8 U.S.C. §§ 1182(a)(6)(C) and 1252(a)(2) (App. 121a-125a).

STATEMENT

A. Statutory Framework

Noncitizens who are removable from the United States are frequently able to seek various forms of discretionary relief from removal that—for eligible applicants—are granted only as a matter of grace. Well-known forms of discretionary relief include cancellation of removal, voluntary departure, and adjustment of status to permanent resident.

The agency's decision whether to grant discretionary relief typically follows a two-step process. First, the applicant must show that he or she meets certain threshold eligibility requirements. 8 U.S.C. § 1229a(c)(4)(A)(i). These can include, for example, being admissible to the United States, being physically present in the United States for a certain length of time, or not having been convicted of particular criminal offenses. Second, if these eligibility requirements are satisfied, the applicant is entitled to a determination whether he or she "merits a favorable exercise of

discretion" and should ultimately be granted the relief sought. *Id.* § 1229a(c)(4)(A)(ii).

While the Executive's decision at the second step—whether to grant relief at all—is indisputably discretionary, the first-step eligibility analysis frequently involves criteria that are not discretionary. For example, lawful permanent residents are eligible for cancellation of removal only if they have held that status "for not less than 5 years." 8 U.S.C. § 1229b(a)(1).

In 1961, Congress channeled review of "all final orders of deportation" to the courts of appeals. 8 U.S.C. § 1105a(a) (1961). This Court interpreted that authority to include review of denials of discretionary relief from deportation, and to encompass both first-step findings on "eligibility requirements" and second-step denials of relief "as a discretionary matter." *Foti* v. *INS*, 375 U.S. 217, 228-229 & n.15 (1963).

In 1996, Congress altered the judiciary's authority to review discretionary decisions by enacting the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 309(c)(4)(E), 110 Stat. 3009-546, 3009-626. The first IIRIRA provision to take effect was a transitional rule, applicable to noncitizens in proceedings before IIRIRA's effective date, which barred "appeal[s] of any discretionary decision under" five specified INA sections.[1]

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[1] These enumerated INA sections covered five types of discretionary relief, including waivers of certain criminal grounds for inadmissibility under 8 U.S.C. § 1182(h); waivers of inadmissibility based on fraud or material misrepresentation under 8 U.S.C. § 1182(i); adjustment of status under 8 U.S.C. § 1255; and two forms of relief repealed by IIRIRA, namely relief under INA Section 212(c), 8 U.S.C. § 1182(c) (1994), and INA Section 244, 8 U.S.C. § 1254 (1994).

See IIRIRA § 309(c)(4)(E), 110 Stat. at 3009-626. Courts reviewing this transitional rule generally understood it to bar review of the ultimate second-step discretionary decision whether to grant relief, but to preserve review over first-step non-discretionary eligibility determinations. *See, e.g.*, *Billeke-Tolosa* v. *Ashcroft*, 385 F.3d 708, 711 (6th Cir. 2004); *Gonzales-Torres* v. *INS*, 213 F.3d 899, 901 (5th Cir. 2000).

The permanent IIRIRA rule, codified in relevant part at 8 U.S.C. § 1252(a)(2)(B), took effect on April 1, 1997, and drew from the language of the transitional rule. Section 1252(a)(2)(B)(i), at issue here, removed jurisdiction to review "any judgment regarding the granting of relief" under five specified INA sections, three of which had been listed in the transitional rule.[2] Section 1252(a)(2)(B)(ii) removed jurisdiction to review "any other decision or action of the Attorney General … the authority for which is specified under this subchapter to be in the discretion of the Attorney General …, other than the granting of [asylum under 8 U.S.C. § 1158(a)]." Courts of appeals interpreted the permanent rule, as they had the transitional rule, to preserve review of first-step non-discretionary determinations. *See, e.g.*, *Montero-Martinez* v. *Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002); *Mendez-Moranchel* v. *Ashcroft*, 338 F.3d 176, 178 (3d Cir. 2003).

In 2005, reacting to this Court's decision in *St. Cyr*, Congress amended Section 1252(a)(2) as part of the REAL ID Act to add a new subparagraph providing

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[2] Like the transitional rule, *see supra* note 1, Section 1252(a)(2)(B)(i) applies to discretionary relief under 8 U.S.C. §§ 1182(h), 1182(i), and 1255. It also applies to review of two other forms of discretionary relief, namely cancellation of removal under 8 U.S.C. § 1229b and voluntary departure under 8 U.S.C. § 1229c.

that "[n]othing in subparagraph (B) … 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[.]" 8 U.S.C. § 1252(a)(2)(D); *see also St. Cyr*, 533 U.S. at 300 (suggesting that a contrary rule that "would entirely preclude review of a pure question of law by any court" would raise constitutional concerns). Courts of appeals continued to interpret Section 1252(a)(2)(B)(i) as preserving review of non-discretionary determinations. *See, e.g.*, *Mamigonian* v. *Biggs*, 710 F.3d 936, 945 (9th Cir. 2013).

This Court examined Section 1252(a)(2)(B) in *Kucana* v. *Holder*, 558 U.S. 233 (2010). Although the case turned on the interpretation of Section 1252(a)(2)(B)(ii) rather than (i), the Court stated that Section 1252(a)(2)(B) as a whole may be "[r]ead harmoniously … [to] convey that Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General's discretionary authority in the statute." *Id.* at 247. In other words, Congress "had in mind" that Section 1252(a)(2)(B) would strip courts of jurisdiction to review only decisions expressly "made discretionary by legislation." *Id.* at 246-247.

The form of discretionary relief at issue here is adjustment of status under 8 U.S.C. § 1255(i). Adjustment of status enables certain noncitizens to obtain lawful permanent residence (also known as a "green card"), typically through sponsorship by a family member or employer. To qualify, an applicant must, among other things, be "eligible to receive an immigrant visa," have an "immigrant visa … immediately available to him at the time his application is filed," and be "admissible to the United States." 8 U.S.C. § 1255(a). All but one of the relevant threshold criteria for adjustment of

status are indisputably satisfied in this case; the only eligibility requirement at issue is admissibility to the United States. *Id.* § 1255(i)(2)(A).

B. Agency Proceedings

Petitioner Pankajkumar Patel is an Indian national who has lived in the United States for close to thirty years. He and his wife, Petitioner Jyotsnaben Patel, have three sons—one U.S. citizen and two lawful permanent residents. After entering the country without inspection in 1992, Mr. Patel moved to Georgia. Administrative Record ("AR") 221-223, 245. His employer filed a petition for alien worker (Form I-140) on his behalf, which the government approved and which is now current, such that an "immigrant visa" is now "immediately available" to him. 8 U.S.C. § 1255(i)(2)(B). Based on that approved petition, Mr. Patel filed an application for adjustment of status under 8 U.S.C. § 1255(i). *See* AR61, 74-75. The Department of Homeland Security issued him an employment authorization document ("EAD") while his application was pending. *See* AR48-50, 52.

In December 2008—while his adjustment application was pending—Mr. Patel sought to renew his Georgia driver's license. AR237-238. Mr. Patel had already applied for and received a Georgia driver's license on several prior occasions between 1998 and 2008, AR237-238, and was eligible for a driver's license as a noncitizen with a pending application for adjustment of status and a valid EAD. When filling out the application, however, Mr. Patel answered the question "Are you a U.S. Citizen?" by checking "yes." AR235-236. Mr. Patel has consistently stated that this was an inadvertent mistake.

Based on Mr. Patel's error, however, the government denied Mr. Patel's application for adjustment of status, finding that he had falsely represented himself to be a U.S. citizen for the purpose of obtaining a Georgia driver's license. This misrepresentation, the government asserted, made him inadmissible under Section 1182(a)(6)(C)(ii)(I), and therefore ineligible for adjustment of status. AR73-75; 8 U.S.C. § 1255(i)(2)(A) (adjustment applicants must be "admissible to the United States").

The government then placed Mr. Patel in removal proceedings, charging him as removable for being present in the United States without having been admitted or paroled—a charge Mr. Patel conceded. *See* 8 U.S.C. § 1182(a)(6)(A)(i); App. 3a. Mr. Patel renewed his application for adjustment of status as a defense to removal. The government countered by again asserting that he was ineligible for adjustment of status because his answer on his Georgia driver's license application made him inadmissible under Section 1182(a)(6)(C)(ii)(I).[3]

Mr. Patel testified before an Immigration Judge ("IJ") that his answer on the driver's license application was a mistake, and therefore that he lacked the intent required to trigger Section 1182(a)(6)(C)(ii)(I). *See* AR235-236. In the alternative, he argued that the misstatement was immaterial and thus did not render him

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[3] Notably, the government chose not to charge Mr. Patel as removable for being inadmissible by falsely claiming citizenship. *See* 8 U.S.C. § 1182(a)(6)(C)(i). Had it done so, the entire en banc court agreed, it would be "indisputable that" the IJ's factual findings in this case "would have been reviewable." *See* App. 75a (Martin, J., dissenting); *accord* App. 37a n.26 (majority opinion agreeing that this is a "quirk" of its reading of Section 1252(a)(2)(B)(i)).

inadmissible because, as an adjustment applicant with a valid EAD, he qualified for at least a temporary driver's license under Georgia law. *See* Ga. Code Ann. § 40-5-21.1(a) (2008) ("[A]n applicant who presents in person valid documentary evidence of … [o]ther federal documentation verified by the United States Department of Homeland Security to be valid documentary evidence of lawful presence in the United States under federal immigration law" is eligible to "be issued a temporary license, permit, or special identification card.").[4]

The IJ rejected both arguments. First, the IJ held that Mr. Patel's false representation of U.S. citizenship was material. Although Mr. Patel's briefing cited the relevant Georgia law, the IJ refused to consider it. At the hearing, the IJ said he was "familiar with Georgia enough" and that it was "common knowledge" that for driver's licenses, Georgia required documentation of lawful status in the United States, AR283, which the IJ appeared to incorrectly believe did not include a valid EAD, AR283-285. Because the IJ "c[ould] discern no accurate answer that [Mr. Patel] could have set forth ... that would have allowed him to obtain a driver's license," the IJ found Mr. Patel's misrepresentation of U.S. citizenship to be material. App. 116a.

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[4] At the time of the incident, the Georgia Department of Driver's Services stated that an EAD—like the one Mr. Patel held at the time—was sufficient to meet this standard. *See* https://web.archive.org/web/20081217105635/http://www.dds.ga.gov/drivers/DLdata.aspx?con=1741471757&ty=dl (visited Jan. 14, 2021). That rule has since been codified in Georgia's regulations. *See* Ga. Comp. R. & Regs. § 375-3-1-.02(3)(e) (noting that documents acceptable to establish the identity of a customer seeking to renew a driver's license include an "[u]nexpired employment authorization document (EAD) issued by the DHS").

The IJ also rejected Mr. Patel's argument that he checked the wrong box by mistake. App. 115a. While the IJ criticized Mr. Patel's testimony in various respects, a key reason for the IJ's ruling was his mistaken belief that, under Georgia law, Mr. Patel could not have obtained a driver's license "if he had disclosed that he was neither a citizen or a lawful permanent resident o[f] the United States," and therefore that Mr. Patel must have been lying in order to obtain the license. App. 116a. The IJ accordingly concluded that Mr. Patel was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii)(I), and therefore ineligible for adjustment of status.

A divided panel of the BIA upheld the IJ's decision. App. 103a-108a. Two Board members agreed with the IJ that the "'implication of the questions set forth in the driver's license application is that [Mr. Patel] needed to show that he was either a citizen or a lawfully admitted alien in order to obtain the driver's license.'" App. 108a. Board Member Wendtland dissented, pointing out that the pertinent Georgia law did not require either citizenship or lawful permanent residence, but merely "lawful *presence* in the United States," which was satisfied by Mr. Patel's "valid employment authorization document *and* a pending adjustment of status application." App. 109a (Wendtland, Board Member, dissenting) (first emphasis added); *see also* App. 110a (noting that a noncitizen "who has a pending application for lawful permanent residence" is considered to be in "'lawful status'" under 6 C.F.R. § 37.3). Relying on a precedential BIA opinion, Board Member Wendtland would therefore have held that Mr. Patel's lack of citizenship "did not 'actually affect or matter to the purpose or benefit sought.'" App. 109a-110a (quoting *Matter of Richmond*, 26 I. & N. Dec. 779, 787 (BIA 2016)).

C. Eleventh Circuit Proceedings

Mr. Patel petitioned the Eleventh Circuit for review of the BIA's decision, arguing that (1) he lacked the requisite intent to make a false representation on the license application and, regardless, (2) his mistake did not render him inadmissible because it was not material to his ultimate eligibility for a license. The government agreed that the Eleventh Circuit had jurisdiction to review the first issue because it concerned a non-discretionary threshold eligibility finding—a position supported by Eleventh Circuit precedent. Nonetheless, the panel ruled *sua sponte* that 8 U.S.C. § 1252(a)(2)(B)(i) deprived it of jurisdiction to review the issue. App. 84a-90a. The panel concluded that it did have jurisdiction to review the second issue, but held on the merits that 8 U.S.C. § 1182(a)(6)(C)(ii) does not require that a misrepresentation of U.S. citizenship be material to the government benefit sought, contrary to the BIA's precedential decision in *Matter of Richmond*, 26 I. & N. Dec. 779. App. 99a-101a.

The Eleventh Circuit *sua sponte* ordered the case reheard en banc. Mr. Patel's original counsel withdrew, and the Eleventh Circuit appointed undersigned counsel of record to brief and argue the en banc proceeding. In its briefs and at oral argument, the government again agreed that the Eleventh Circuit retained jurisdiction to review the IJ's finding as to intent. *E.g.*, Government's C.A. Answering En Banc Br. 21-29.

By a 9-5 vote, the en banc Eleventh Circuit held that it lacked jurisdiction to resolve Mr. Patel's claim that he mistakenly and unintentionally checked the incorrect citizenship box on his driver's license application. The majority opinion acknowledged that it was overruling "numerous cases" holding that courts

"retain jurisdiction to review non-discretionary decisions underlying [discretionary] … relief" specified under Section 1252(a)(2)(B)(i). App. 3a. The en banc majority also recognized that its jurisdictional ruling conflicted with the holdings of several other circuits. App. 32a-33a nn.22-23, 41a-42a n.30. On Mr. Patel's second appellate issue, the en banc majority summarily reinstated the panel's ruling that misrepresentations of U.S. citizenship need not be material to trigger inadmissibility under 8 U.S.C. § 1182(a)(6)(C)(ii)(I), without addressing Mr. Patel's arguments on that front. App. 47a.

Judge Martin dissented, joined by four other judges. Judge Martin wrote that the majority's reading of Section 1252(a)(2)(B)(i) should be rejected because it "[i]gnor[ed] the guideposts of the strong presumption of judicial review and the narrow interpretation of deportation statutes." App. 54a. She concluded that, in light of those interpretive canons, "[t]he best interpretation of § 1252(a)(2)(B) is that it excludes review of decisions that involve the exercise of discretion"—an approach that "has been adopted by almost every circuit court." App. 65a. And, citing *Kucana*, she stressed alternatively that "when a statute is reasonably susceptible to different interpretations, we must adopt the interpretation permitting federal court review." App. 53a. Judge Martin would have held that the Eleventh Circuit had jurisdiction "to review the IJ's finding that Mr. Patel's false claim of citizenship was made with subjective intent." App. 77a.

The Eleventh Circuit granted Petitioners' unopposed motion to stay issuance of the mandate pending disposition of this petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE FEDERAL COURTS' JURISDICTION TO REVIEW THRESHOLD ELIGIBILITY DETERMINATIONS IN CASES INVOLVING DISCRETIONARY RELIEF FROM REMOVAL

A. There Is An Acknowledged And Substantial Circuit Split

Section 1252(a)(2)(B) is entitled "Denials of discretionary relief." Subsection (i) of this provision removes jurisdiction to review "any judgment regarding the granting of relief under" five enumerated INA provisions, all of which empower the Executive to make a discretionary decision to grant immigration relief. Nearly every circuit has been confronted with the question whether Section 1252(a)(2)(B)(i) bars review of *all* aspects of the Executive's decisionmaking process or just those aspects that involve the exercise of discretion. The courts of appeals agree that the question turns on the word "judgment"—a term the INA does not define—but they are hopelessly divided on the correct interpretation. *See* App. 57a (Martin, J., dissenting) (observing that "all but one of our sister circuits who have considered this issue ... conclude that § 1252(a)(2)(B) does not eliminate review of factual or legal determinations related to eligibility for discretionary relief").

Most circuits take the approach that the government itself adopted in this case: the statute precludes review only of specific exercises of discretion. Under this view, the statute "plainly forecloses review of the Attorney General's exercise of discretion in granting" relief, *Zheng* v. *Gonzales*, 422 F.3d 98, 111 (3d Cir. 2005), but preserves jurisdiction to review non-discretionary actions leading up to that final discretion-

ary decision, *see, e.g.*, *Montero-Martinez* v. *Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002). Because "[s]atisfaction of the eligibility 'requirements is a condition precedent to any exercise of [] discretion,'" *Hosseini* v. *Johnson*, 826 F.3d 354, 358-359 (6th Cir. 2016), the majority view holds that courts retain jurisdiction to review non-discretionary eligibility decisions, such as whether a noncitizen is admissible. *See, e.g.*, *Rodriguez* v. *Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006) (per curiam) (reviewing agency's ruling on denial of adjustment of status, including the IJ's credibility determination related to admissibility).

Eight circuits clearly follow the majority approach; had this case arisen in any of them, Mr. Patel's argument that he checked the wrong box by mistake would have been heard. *See, e.g.*, *Succar* v. *Ashcroft*, 394 F.3d 8, 19-20 (1st Cir. 2005) (Section 1252(a)(2)(B)(i) does not bar review of non-discretionary determinations as to eligibility for the five listed types of relief); *Rodriguez*, 451 F.3d at 62 (same); *Pinho* v. *Gonzales*, 432 F.3d 193, 203 (3d Cir. 2005) (same); *Melendez* v. *McAleenan*, 928 F.3d 425, 426 (5th Cir. 2019) (same), *cert. denied*, 140 S. Ct. 561 (2019); *Hosseini*, 826 F.3d at 358-359 (same); *Ortiz-Cornejo* v. *Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005) (same); *Mamigonian* v. *Biggs*, 710 F.3d 936, 943 (9th Cir. 2013) (same); *Barrera-Quintero* v. *Holder*, 699 F.3d 1239, 1243 (10th Cir. 2012) (same); *see also* Government's C.A. Answering En Banc Br. 24 ("[T]he widely prevalent view across the federal courts of appeals is that § 1252(a)(2)(B) bars review only of discretionary decisions").[5]

[5] Interpreting Section 1252(a)(2)(B)(i) in the cancellation of removal context, 8 U.S.C. § 1229b, some have also suggested that judicial review should extend to all threshold eligibility determina-

The minority approach—adopted by the en banc Eleventh Circuit in this case—reads the statute to remove jurisdiction to review all determinations bearing on relief from removal, whether or not they are discretionary. *See* App. 34a ("[T]he statute bars review … [of] both discretionary and nondiscretionary determinations."). Under the minority view, a party seeking review of decisions on the listed types of relief can raise only constitutional claims or other questions of law on petition for review of a removal order. *See* 8 U.S.C. § 1252(a)(2)(D) (concerning judicial review of certain claims "raised upon a petition for review filed with an appropriate court of appeals"). The minority view may preclude judicial review in district-court actions entirely. *Id.*[6] The Fourth Circuit is the only other circuit that takes the Eleventh Circuit's view. *See Lee* v. *USCIS*, 592 F.3d 612, 620 (4th Cir. 2010); *see also Roland* v. *USCIS*, 850 F.3d 625, 629-630 (4th Cir. 2017) (citing *Lee* with approval).[7]

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tions short of the ultimate judgment to grant or withhold relief. *See, e.g.*, *Mendez* v. *Holder*, 566 F.3d 316, 322 (2d Cir. 2009) (per curiam). Mr. Patel would prevail under either the majority interpretation of the statute or the alternative view expressed in *Mendez*.

[6] Some denials of discretionary relief cannot be channeled through petitions for review and are therefore reviewable only in district court. *See, e.g.*, *Mamigonian*, 710 F.3d at 945 (explaining why this is the case for most "arriving aliens" seeking adjustment of status). But Section 1252(a)(2)(D) has been held not to preserve review of legal or even constitutional claims in district-court actions. *See, e.g.*, *Lee* v. *USCIS*, 592 F.3d 612, 620 (4th Cir. 2010).

[7] Although the en banc majority suggested that the Seventh Circuit also follows its view (App. 29a), that court has decisions going both ways. *Compare Reyes-Sanchez* v. *Holder*, 646 F.3d 493, 496 (7th Cir. 2011) (holding that Section 1252(a)(2)(B)(i) poses no bar to review of non-discretionary threshold eligibility criteria),

This Court's intervention is especially important because there is no reason to think that the split will resolve itself if left alone. The en banc Eleventh Circuit was aware of the contrary approach of other circuits, yet expressly rejected it. *See* App. 32a-33a nn.22-23, 41a-42a n.30. And by joining with the Fourth Circuit in embracing the minority view, the Eleventh Circuit widened the split rather than narrowing it. Unless this Court grants review, the division in authority will remain, undermining the "uniform administration" of immigration matters "in the federal courts." *Zadvydas* v. *Davis*, 533 U.S. 678, 701 (2001).

B. The Jurisdictional Issue Is Of Exceptional Importance

Even setting aside the deep and entrenched circuit split on jurisdiction, the proper scope of judicial review of threshold eligibility determinations poses an important question of immigration law. Section 1252(a)(2)(B)(i) serves a major role in the broader statutory scheme, in that it governs the ability of nonciti-

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with Cevilla v. *Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006) (interpreting Section 1252(a)(2)(B)(i) to place "all rulings other than those resolving questions of law or constitutional issues beyond the power of judicial review").

The D.C. Circuit appears to be the only regional circuit that has not taken a position, which is unsurprising given its limited immigration docket. District court decisions in that circuit are divided. *Compare Ravulapalli* v. *Napolitano*, 773 F. Supp. 2d 41, 50-51 (D.D.C. 2011) (following the majority position that Section 1252(a)(2)(B)(i) does not preclude review of non-discretionary eligibility determinations), *and Mawalla* v. *Chertoff*, 468 F. Supp. 2d 177, 181 (D.D.C. 2007) (same), *with Jimenez-Verastegui* v. *Wolf*, 468 F. Supp. 3d 94, 97-101 (no jurisdiction), *appeal filed* No. 20-5215 (D.C. Cir.), *and Djodeir* v. *Mayorkas*, 657 F. Supp. 2d 22, 24 (D.D.C. 2009) (same).

zens to seek judicial review of determinations that affect the life-altering question of eligibility to seek relief from removal. *See INS* v. *St. Cyr*, 533 U.S. 289, 293 (2001) (whether courts have jurisdiction to review discretionary relief determinations is a question of "importance"). Indeed, as an amicus explained to the en banc Eleventh Circuit, a determination that a noncitizen is inadmissible for making a false claim to U.S. citizenship has the same practical effect as "a conviction for murder or drug trafficking," in that inadmissibility under that provision is "permanent and unwaivable." American Immigration Lawyers Ass'n C.A. Br. 9.

The Eleventh Circuit's decision on this consequential statute is of particular concern because, if allowed to stand, it will lead to unfair and arbitrary outcomes for noncitizens challenging agency rulings that raise issues of fact and, therefore, do not fall under the savings clause of Section 1252(a)(2)(D). Between January 2017 and September 2020, immigration judges decided over 94,000 applications for discretionary relief covered by Section 1252(a)(2)(B)(i). *See Beyond Asylum: Deportation Relief During the Trump Administration*, TRAC Immigr. (Oct. 29, 2020), https://trac.syr.edu/immigration/reports/631/ (reporting that approximately 72,526 applications for cancellation of removal under 8 U.S.C. § 1229b, 18,482 applications for adjustment of status under 8 U.S.C. § 1255, 2,956 applications for waivers under 8 U.S.C. § 1182(h), and 678 applications for waivers under 8 U.S.C. § 1182(i) were decided during this period).[8] Thus, absent this Court's review,

[8] This figure does not include the number of applications for voluntary departure under 8 U.S.C. § 1229c—in Fiscal Year 2018, over 20,000 such applications were *granted* by immigration courts. *See* EOIR, *Statistics Yearbook: Fiscal Year 2018*, at 13, https://www.justice.gov/eoir/file/1198896/download.

numerous noncitizens living in the Fourth and Eleventh Circuits will be unable to seek correction of many agency errors regarding the non-discretionary eligibility requirements of these five forms of relief, even though such errors would be corrected by courts of appeals taking the majority approach.

The human impact of this incongruity is profound. Under the status quo, a noncitizen who lives in Tennessee and is seeking relief from removal can obtain judicial review of an unfavorable ruling on admissibility, even absent a constitutional question or other question of law. *See* 8 U.S.C. § 1252(a)(2)(D). A similarly situated noncitizen who lives in Alabama, however, would be denied that same review—no matter how misguided the agency's ruling. The Court's intervention is needed so that federal jurisdiction no longer turns on the happenstance of geography.

C. The Eleventh Circuit's Decision Is Wrong

While the need to resolve the circuit split is ample reason to grant review, the Eleventh Circuit's en banc interpretation of an important federal statute further warrants this Court's attention because, as the government agrees, it is fundamentally incorrect. *See* Government's C.A. Answering En Banc Br. 22 ("In Respondent's view, the panel erred in so holding."). Section 1252(a)(2)(B) is best understood to allow courts to review threshold eligibility decisions like whether a noncitizen is admissible. *See id.* 24 ("Applying the statutory text here, 8 U.S.C. § 1252(a)(2)(B)(i) does not limit jurisdiction here because the agency's decision to deny Patel's application for adjustment of status does not rest on a 'judgment'—*i.e.*, it was not denied as a matter of discretion."). Indeed, this Court has already stated as much, explaining for subsections (i) and (ii) that

"both clauses convey that Congress barred court review of *discretionary decisions* only when Congress itself set out the Attorney General's *discretionary authority* in the statute." *Kucana* v. *Holder*, 558 U.S. 233, 247 (2010) (emphasis added). This reading springs naturally from the statute's text and context, and is reinforced by the strong presumption in favor of judicial review.

1. The statute's text and context show that non-discretionary eligibility determinations remain reviewable

Like the statutory language at issue in *Kucana*, the term "judgment" in subsection (i) "is chameleon; it 'has many dictionary definitions and must draw its meaning from its context.'" 558 U.S. at 245 (discussing the meaning of "under" (quoting *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991))). As the Eleventh Circuit majority and dissent both acknowledged, "[s]ome of these definitions suggest that 'judgment' refers to a final decision." App. 26a.[9] The two opinions diverged, however, on whether "judgment" could be referring to what the dissent identified as "definitions like the 'process of forming an opinion or evaluation by discerning and comparing.'" *Compare* App. 59a, *with* App. 27a n.18 (majority opinion acknowledging that "[t]here are other definitions referring to 'judgment' as a faculty (e.g., one

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[9] *See e.g.*, *Judgment*, Black's Law Dictionary (6th ed. 1990) (including, *inter alia*, "[t]he final decision of the court resolving the dispute and determining the rights and obligations of the parties"); *Judgment*, Oxford English Dictionary (2d ed. 1989) ("the sentence of a court of justice, a judicial decision or order in court"); *Judgment*, Webster's Third New International Dictionary (1993) ("a formal utterance or pronouncing of an authoritative opinion after judging").

has good judgment), among other more obscure uses" before stating without explanation that "[t]hose are not relevant here"). Under either of these two definitions, and consistent with the traditional division in immigration-benefits adjudication between eligibility requirements and the executive's ultimate exercise of "grace," *see, e.g.*, *Foti* v. *INS*, 375 U.S. 217, 232 (1963); *supra* pp. 4-5, Section 1252(a)(2)(B)(i) should not be read to remove jurisdiction to review non-discretionary eligibility rulings that are made prior to the final (discretionary) decision to grant relief.

Two well-established principles of statutory interpretation strongly support that understanding. *First*, as this Court noted in *Kucana*, there is a "presumption favoring judicial review of administrative action," which this Court has "consistently applied ... to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." 558 U.S. at 251; *see also Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1069-1070 (2020) (applying this presumption to interpret Section 1252(a)(2)(D)). This canon applies with particular force where a jurisdiction-stripping provision is "'reasonably susceptible to divergent interpretations,'" *Kucana*, 558 U.S. at 251, as the circuit split here exemplifies. Because "Congress legislates with knowledge of [this Court's] basic rules of statutory construction," the Court has found it "most unlikely that Congress intended to foreclose all forms of meaningful judicial review" where it has not said so explicitly. *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (finding jurisdiction to review administrative action in the context of 8 U.S.C. § 1160(e)).

Second, there is a "longstanding principle of construing any lingering ambiguities in deportation statutes" in the noncitizen's favor. *INS* v. *Cardoza-*

Fonseca, 480 U.S. 421, 449 (1987). This guidance reflects the fact that "[d]eportation is always a harsh measure." *Id.* It is at the very least textually reasonable to read the statute's reference to "any judgment" to exclude non-discretionary eligibility determinations. Both the en banc Eleventh Circuit majority, App. 25a, and the dissent, App. 58a (Martin, J., dissenting), agreed that Congress has not spoken expressly on this issue. *See* App. 26a. Each of these two canons of construction therefore strongly urges selection of the reading that retains judicial review of non-discretionary determinations.

The broader statutory context of the INA only reinforces this understanding. While the INA does not expressly define "judgment," it employs the term exclusively in reference to either the formal order of a court or a discretionary determination. *See Montero-Martinez*, 277 F.3d at 1141 n.5. As *Kucana* strongly implies, Congress likely intended to use "judgment" in Section 1252(a)(2)(B)(i) to mean, most naturally, exercises of discretion.

Alternatively, the INA's remaining uses of "judgment" to mean "the formal order of a court" also support jurisdiction, in that they preclude review of the Executive's "final decision," not of what precedes it. This is akin to a court's ultimate "judgment" being independent of its underlying reasoning, as when a Member of this Court "concurs in the judgment." Indeed, where Congress intended to bar jurisdiction entirely in the INA, not only over a "final decision," it did so explicitly. The section immediately preceding Section 1252(a)(2)(B), for example, states: "no court shall have jurisdiction to review … *any individual determination* or to entertain *any other cause or claim* arising from or relating to the implementation or operation of an order

of removal pursuant to section 1225(b)(1) of this title[.]" 8 U.S.C. § 1252(a)(2)(A)(i) (emphasis added). Given that Congress "'include[d] particular language in one section of [the INA] but omit[ted] it in another section of the same Act,'" this Court should follow its normal presumption that Congress "purpose[fully]" limited the statute at issue here to the specific category of judgments involving the exercise of discretion. *Kucana*, 558 U.S. at 249 (quoting *Nken* v. *Holder*, 556 U.S. 418, 430 (2009)).

2. The Eleventh Circuit's contrary reasoning is unpersuasive

The Eleventh Circuit stated that—although "judgment" is open to several interpretations, including a "final decision of a court"—it believed that defining the term as "any decision" was a "better fit." App. 27a. The en banc majority principally justified this conclusion simply by noting that "the statutory language is not limited to a final judgment of removal, but rather 'any judgment' regarding the five enumerated categories of relief." *Id.* The Eleventh Circuit's reasoning assumes its own conclusion. It cannot be correct that anything short of a reference to "a final judgment" necessarily compels a finding of no jurisdiction. Indeed, as noted above, the same logic could be employed in the opposite direction: if Congress meant to strip jurisdiction over any issue relating to relief from removal, it could have written "any judgment *on any issue*"; because it did not, the better understanding—particularly given the presumption of judicial review and the principle of construing ambiguous immigration statutes in favor of the noncitizen—is that Congress meant only to prevent review of the "final decision of a court" (or in this case, an agency).

The Eleventh Circuit also relied on *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1173 n.2 (2020), for the proposition that the phrases "any" and "regarding" favored a "more expansive meaning." App. 27a. But whether such words broaden a statute's reach "necessarily depends on the statutory context, and the word 'any' in this context does not bear the heavy weight" the Eleventh Circuit gave it. *National Ass'n of Mfrs.* v. *Department of Defense*, 138 S. Ct. 617, 629 (2018). If "judgment" in Section 1252(a)(2)(B)(i) refers to discretionary decisions, then "the word 'any' cannot expand" the statute's reach to cover non-discretionary decisions. *Id.* To hold otherwise would be to "rewrite the statute." *Id.* (citation omitted). Moreover, *Babb* is inapposite. The case concerned the scope of an employee's right to be "free from any discrimination based on age" under the Age Discrimination in Employment Act and considered the word "any" as a synonym for "[s]ome, regardless of quantity or number," a definition that does not support the Eleventh Circuit's reading of the statute at issue here. 140 S. Ct. at 1173 & n.2.

Indeed, the kind of reasoning that the Eleventh Circuit applied was disapproved in *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 840 (2018) (plurality opinion). There, the plurality opinion rejected an "expansive interpretation" of the phrase "arising from," which would have foreclosed judicial review, explaining that such "'uncritical literalism' [would] lead[] to results that 'no sensible person could have intended.'" *Id.* (quoting *Gobeille* v. *Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016)).

The Eleventh Circuit's remaining textual reasoning fares no better. The decision states that Section 1252(a)(2)(B)(i), when read in combination with subsequently-enacted Section 1252(a)(2)(D)'s preservation of

judicial review for constitutional issues and questions of law, must bar judicial review of *all other* challenges to denials of relief. App. 29a. But nothing in the text of these provisions, or the drafting history of the INA, supports the Eleventh Circuit's conclusion. Quite the opposite: when Congress enacted Section 1252(a)(2)(D) as part of the REAL ID Act of 2005, many circuits had already adopted the majority interpretation of Section 1252(a)(2)(B)(i). *See Sepulveda* v. *Gonzales*, 407 F.3d 59, 63 (2d Cir. 2005); *Santana-Albarran* v. *Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Ortiz-Cornejo* v. *Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005); *Subhan* v. *Ashcroft*, 383 F.3d 591, 594 (7th Cir. 2004); *Mendez-Moranchel* v. *Ashcroft*, 338 F.3d 176, 178 (3d Cir. 2003); *Mireles-Valdez* v. *Ashcroft*, 349 F.3d 213, 215-217 (5th Cir. 2003); *Gonzales-Oropeza* v. *U.S. Attorney Gen.*, 321 F.3d 1331, 1332-1333 (11th Cir. 2003); *Montero-Martinez*, 277 F.3d at 1144. If, as the Eleventh Circuit suggests, this approach was contrary to Congress's intent, Congress could have amended Section 1252(a)(2)(B) at the same time to bring these circuits into line. It did not do so. *See Mamigonian*, 710 F.3d at 945-946 (noting that if Congress had intended to abrogate the courts' interpretation of Section 1252(a)(2)(B), "it would have done so explicitly by changing the language of the statute"). Given that congressional intent may be "inferred from contemporaneous judicial construction ... and the congressional acquiescence in it," Section 1252(a)(2)(B) and (D) read together support Petitioners' position. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984); *see also Guerrero-Lasprilla*, 140 S. Ct. at 1072 ("We normally assume that Congress is 'aware of relevant judicial precedent' when it enacts a new statute." (quoting *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010))).

The Eleventh Circuit also claimed that its minority view is the only interpretation "that appropriately reads § 1252(a)(2)(B)(i) & (ii) harmoniously." App. 44a. That assertion conflicts with *Kucana*, which noted that the subsections, when "[r]ead harmoniously ... convey that Congress barred court review of *discretionary decisions* only when Congress itself set out the Attorney General's *discretionary authority* in the statute." 558 U.S. at 247 (emphases added).

The en banc Eleventh Circuit was wrong to discard the reading of Section 1252(a)(2)(B)(i) that had been accepted by its own precedent, the vast majority of circuits, and the government itself.[10] The Court should grant the petition and reverse the Eleventh Circuit's judgment.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE WHETHER AN IMMATERIAL CLAIM OF U.S. CITIZENSHIP MAKES A NONCITIZEN INADMISSIBLE

The INA renders inadmissible a noncitizen "who falsely represents, or has falsely represented[] himself ... to be a citizen of the United States" for any purpose or benefit under federal or state law. 8 U.S.C. § 1182(a)(6)(C)(ii). This case implicates the recurring and important question whether a false representation makes a noncitizen inadmissible even if citizenship had no bearing on eligibility for the benefit sought. The en banc Eleventh Circuit held that no such materiality

[10] It is noteworthy that the only other circuit to have adopted the minority approach did so without any textual analysis of the statute or the meaning of the word "judgment." *See Lee* v. *USCIS*, 592 F.3d 612 (4th Cir. 2010). Accordingly, *Lee* provides no additional reasoning to support the Eleventh Circuit's flawed interpretation.

limitation exists. That holding is in serious tension with decisions from other circuits interpreting the same statutory language, contradicts the BIA's published precedent, and is wrong on the merits. The Court should review this question as well, which is an alternative basis for reversing the judgment below.

A. The Eleventh Circuit's Ruling Cannot Be Squared With Decisions From Other Circuits And The BIA

The Eleventh Circuit's ruling that Section 1182(a)(6)(C)(ii) unambiguously includes no materiality requirement cannot be squared with either the BIA's interpretation of the statute or rulings from the other circuits that have analyzed that inadmissibility provision or its deportability analogue.

The BIA, in a precedential decision, held that to establish the inadmissibility ground, the government must show that a false representation regarding citizenship was both objectively material to the benefit sought and subjectively made for the purpose of obtaining that benefit. *Matter of Richmond*, 26 I. & N. Dec. 779, 782 (BIA 2016). Three circuits likewise have applied the false-representation language to require proof that the noncitizen actually received (or sought to receive) a benefit through a representation of U.S. citizenship. Only the Eleventh Circuit has held that the statute unambiguously renders a noncitizen inadmissible for misstating citizenship even where there is no objective reason to believe it made a difference, creating a circuit split with the Second, Third, and Sixth Circuits.

The Second Circuit's decision in *Richmond* v. *Holder* is illustrative. The Second Circuit determined that the statute is not clear on "the important question"

whether (A) a noncitizen's false representation of citizenship must "actually affect" the possibility of receiving a benefit, (B) the noncitizen must simply "intend[]" it to have that effect, or (C) both. 714 F.3d 725, 730 (2d Cir. 2013). In light of its finding of ambiguity, the Second Circuit remanded to the BIA "to explain in the first instance" its understanding of the statutory requirements. *Id.* at 731. This led to the BIA's precedential decision that the statute requires both that the noncitizen's representation actually affect the possibility of receiving a benefit and that the noncitizen must intend it to have that effect. *See Matter of Richmond*, 26 I. & N. Dec. at 782. The Second Circuit subsequently determined that the BIA's interpretation was reasonable and entitled to deference. *Richmond* v. *Sessions*, 697 F. App'x 106, 107 (2d Cir. 2017).

The Third and Sixth Circuits have reached similar conclusions, recognizing that the statute reasonably can be read as requiring subjective and objective materiality. The Third Circuit, for example, has acknowledged that the statute's reach depends in part on "the relevance of the applicant's citizenship status" to the benefit sought. *Castro* v. *Attorney General*, 671 F.3d 356, 370 (3d Cir. 2012). Applying that interpretation, the Third Circuit reversed an IJ's ruling that a noncitizen was inadmissible for falsely telling state police he was a U.S. citizen; the false representation, the court explained, did not trigger inadmissibility because "Castro's citizenship status had no bearing on the police department's handling of his arrest." *Id.* at 370-371. The Sixth Circuit has likewise interpreted Section 1182(a)(6)(C)(ii)'s deportation analogue—which uses identical false-representation language—to incorporate a materiality element. *See Hassan* v. *Holder*, 604 F.3d 915, 928 (6th Cir. 2010) (addressing 8 U.S.C.

§ 1227(a)(3)(D)). The Sixth Circuit held that the statute did not trigger deportability because the government had made no effort to show that citizenship status was relevant to the benefit sought (a Small Business Administration loan). *Id.* These decisions conflict with the Eleventh Circuit's holding that Section 1182(a)(6)(C)(ii) unambiguously includes no materiality requirement.

B. The Eleventh Circuit's Ruling Is Wrong

The Eleventh Circuit's ruling should also be reviewed because it is clearly wrong. "Where Congress uses terms that have accumulated settled meaning under … the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of these terms." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981). This Court has held that "'false representation'" is such a term, and therefore that its usage "impl[ies] elements that the common law has defined [it] to include." *Field* v. *Mans*, 516 U.S. 59, 69 (1995).[11]

As relevant here, "false representation" has been repeatedly understood to include a materiality element even when none is specifically stated. For example, the federal mail fraud, wire fraud, and bank fraud statutes prohibit obtaining money or property "by means of false or fraudulent pretenses, representations, or promises," without any express reference to materiality. 18 U.S.C. §§ 1341, 1343, 1344. This Court nevertheless

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[11] The inadmissibility and deportability grounds for false-citizenship representations were enacted just months after this Court's decision in *Field*. *See* IIRIRA § 344, 110 Stat. 3009-546, 3009-637. This proximity in time only strengthens the presumption that Congress meant to incorporate the common-law meaning of "false representation."

held that "materiality of falsehood is an element" of these statutes, because of the common-law roots of the terms. *Neder* v. *United States*, 527 U.S. 1, 25 (1999).

As another example, the Fair Debt Collection Practices Act prohibits debt collectors from using "any false, deceptive, or misleading representation" and identifies numerous "false representations" that violate the law, with no explicit reference to materiality. 15 U.S.C. § 1692e. Yet a false statement must be material to be actionable under the statute.[12]

This consensus is in keeping with how courts have understood the common-law meaning of false representation. For example, the Third Circuit has described "an action for false representation" as requiring demonstration of a "specific false representation of *material* facts." *Christidis* v. *First Pa. Mortg. Tr.*, 717 F.2d 96, 99 (3d Cir. 1983) (internal quotation marks omitted, emphasis added). Similarly, the First Circuit identified the elements of "the common law tort of false representation" as including materiality concepts. *Palmacci* v. *Umpierrez*, 121 F.3d 781, 786 (1st Cir. 1997). And the Seventh Circuit recognized that "[t]he Wisconsin common law of false representations, similar to that of most states," likewise required a showing that the false representation was material to the

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[12] *See Bryan* v. *Credit Control, LLC*, 954 F.3d 576, 582 (2d Cir. 2020); *Jensen* v. *Pressler & Pressler*, 791 F.3d 413, 421 (3d Cir. 2015); *Powell* v. *Palisades Acquisition XVI, LLC*, 782 F.3d 119, 126 (4th Cir. 2014); *Van Hoven* v. *Buckles & Buckles, P.L.C.*, 947 F.3d 889, 894 (6th Cir. 2020); *Hahn* v. *Triumph P'ships LLC*, 557 F.3d 755, 757 (7th Cir. 2009); *Hill* v. *Accounts Receivable Servs., LLC*, 888 F.3d 343, 345-346 (8th Cir. 2018); *Donohue* v. *Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9th Cir. 2010).

aggrieved party. *In re Hardin*, 458 F.2d 938, 940 (7th Cir. 1972).

The Eleventh Circuit panel's ruling—adopted by the en banc court—strayed from this consensus. The court relied primarily on its observation that a preceding subsection expressly includes a materiality requirement. *See* App. 93a (citing 8 U.S.C. § 1182(a)(6)(C)(i), which renders inadmissible a noncitizen who engages in fraud or "willfully misrepresent[s] a material fact" related to a visa or other documents). But that subsection differs in that it does *not* use the term "false representation." The fact that Congress expressly included a materiality requirement in a *differently phrased* provision does not undermine the longstanding common-law meaning of "false representation." And, in any event, this Court has rejected the notion that negative implication overrides a phrase's common-law meaning, particularly where (as here) the relevant statutes were enacted at different times. *See Field*, 516 U.S. at 75-76 (canon is "strong[est]" when applied to "contrasting statutory sections originally enacted simultaneously" and "weakest when it suggests results strangely at odds with other textual pointers, like … common-law language"); *see also Gomez-Perez* v. *Potter*, 553 U.S. 474, 486 (2008) (declining to apply negative implication to statutes enacted seven years apart); *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-436 (2002) (the case for "inference" from negative implication is "more persuasive" when "the [relevant] omission [is] the sole difference").

The panel also wrongly relied on *Kungys* v. *United States*, 485 U.S. 759 (1988). While this Court held that "false *testimony*" did not incorporate a materiality requirement, it explicitly noted that "false testimony"

was not a common-law term. *Id.* at 781. As discussed above, however, "false *representation*" originates in the common law and commonly carries a materiality requirement with it. The Eleventh Circuit was wrong to discard the BIA's holding that the statute requires that the representation be material. And because the en banc Eleventh Circuit incorporated the panel's ruling on materiality without evaluating the common-law origins of the term "false representation," there is little chance that this error will be corrected absent the Court's intervention.

The Court should accordingly grant certiorari to resolve the courts of appeals' disparate interpretations of Section 1182(a)(6)(C)(ii).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

JUSTIN M. BAXENBERG
JOSS A. BERTEAUD
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington DC 20006

MARGARET T. ARTZ
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

IRA J. KURZBAN
Counsel of Record
HELENA TETZELI
JOHN P. PRATT
EDWARD F. RAMOS
ELIZABETH MONTANO
KURZBAN KURZBAN
TETZELI & PRATT P.A.
131 Madeira Avenue
Coral Gables, FL 33134
(305) 444-0060
ira@kktplaw.com

THOMAS G. SPRANKLING
WILMER CUTLER PICKERING
HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306

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