No. 23-115

In the Supreme Court of the United States

FATHI ELLTAIF SAAD ELLDAKLI, ET AL., PETITIONERS

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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In its brief in opposition, the government makes two critical concessions. *First*, the government concedes that the court of appeals erred when it held that the decision to grant petitioners' applications for status adjustment was nonfinal and thus nonreviewable. *Second*, the government concedes that the courts of appeals disagree on whether a status-adjustment decision constitutes final agency action when removal proceedings are not pending. That is all that is required to render this case a straightforward candidate for certiorari.

In the wake of those concessions, the government makes only gossamer-thin arguments as to why certiorari

should nevertheless be denied. The government first contends that this case, which involved the *grant* of a status adjustment, does not implicate any circuit conflict, because the decisions of other circuits involved *denials* of status adjustment. That is a distinction without a difference. The decisions of other circuits finding final agency action turn simply on the fact that removal proceedings were not pending. Those decisions apply equally where, as here, an application is prematurely granted.

The government further contends that the court of appeals should have resolved this case on the ground that 8 U.S.C. 1252(a)(2)(B)(i) bars review of petitioners' claims. But the court of appeals did not pass on that question, because it held that the lack of final agency action deprived it of jurisdiction. The government does not argue that this Court would be required to address the Section 1252(a)(2)(B)(i) question, rather than leaving it for the court of appeals on remand in the first instance. In any event, Section 1252(a)(2)(B)(i) does not deprive the federal courts of jurisdiction.

The certiorari decision here is not complicated. This case squarely implicates a circuit conflict, and, as the government concedes, the court of appeals answered the question presented incorrectly. And the mere fact that the court of appeals would need to address additional issues on remand is hardly an obstacle to this Court's review. The petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

The government concedes that the court of appeals incorrectly held that the status-adjustment decision here did not constitute final agency action. See Br. in Opp. 11-12. The government further acknowledges that the courts

of appeals disagree on the question whether a status-adjustment decision constitutes final agency action when removal proceedings are not pending. See *id.* at 13-14. The government argues only that this case does not implicate any circuit conflict. That is incorrect.

As the government acknowledges, the Third, Sixth, and Eleventh Circuits have held that a status-adjustment decision constitutes final agency action when the decision cannot be revisited in pending removal proceedings. See Br. in Opp. 13; see also Pet. 12-14 (citing *Pinho* v. *Gonzales*, 432 F.3d 193 (3d Cir. 2005); *Hosseini* v. *Johnson*, 826 F.3d 354 (6th Cir. 2016); and *Perez* v. *USCIS*, 774 F.3d 960 (11th Cir. 2014)). Three other courts of appeals have adopted positions consistent with that view. See Pet. 14-16 (citing *Cabaccang* v. *USCIS*, 627 F.3d 1313 (9th Cir. 2010); *Howell* v. *INS*, 72 F.3d 288 (2d Cir. 1995); and *Randall* v. *Meese*, 854 F.2d 472 (D.C. Cir. 1988), cert. denied, 491 U.S. 904 (1989)). By contrast, in the decision below, the Fifth Circuit held that a status-adjustment decision does not constitute final agency action when the decision may be revisited in future removal proceedings, and the Seventh Circuit has held that a status-adjustment decision is unreviewable for failure to exhaust administrative remedies. See Br. in Opp. 11-12; see also Pet. 16 (citing *McBrearty* v. *Perryman*, 212 F.3d 985 (7th Cir. 2000)).

The government contends that this case does not implicate that conflict because U.S. Citizenship and Immigration Services (USCIS) initially granted petitioners' application, rather than denying it. See Br. in Opp. 13-14. But that distinction has no footing in the court of appeals decisions that have held that a denial of status adjustment constitutes final agency action, and those decisions apply equally here. Without pending removal proceedings, petitioners have no avenue to challenge their status-adjustment decisions, and the agency "retains sole control" over

the reviewability of its own decisions. *Pinho*, 432 F.3d at 202; see *Perez*, 774 F.3d at 966. As those courts have recognized, the mere "possibility" of future removal proceedings is insufficient to render a decision nonfinal because, "if the agency does not seek to deport the immigrant, there can never be an appeal within the agency by which any higher level of administrative authority can be invoked to review the legal determination." *Pinho*, 432 F.3d at 201; see *Hosseini*, 826 F.3d at 360; see also Pet. App. 8a (Higginbotham, J., concurring in the judgment). Put simply, it is precisely because petitioners did not then have the opportunity to "renew[]" their challenge "in removal proceedings," Br. in Opp. 13 (citation omitted), that they would prevail in all of the circuits on the other side of the conflict.[1]

In essence, the government appears to be arguing (Br. in Opp. 13-14) that the decisions of those circuits, while correct as applied to a grant of status adjustment, would be incorrect as applied to a denial, on the ground that a denial would be unreviewable for failure to exhaust potentially available administrative remedies. But that is simply a merits position (on different facts) that has no bearing on the existence of a circuit conflict (on these facts). Because petitioners lost below but would indisputably prevail in the Third, Sixth, and Eleventh Circuits,

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[1] Conversely, the Fifth Circuit's reasoning would apply equally to the denial of status adjustment. An alien whose application was denied would "retain[] the right to *de novo* review of that decision in his final removal proceedings." Pet. App. 7a. The circuit precedent on which the Fifth Circuit relied involved a challenge to the denial of requests for status adjustment. See *Cardoso* v. *Reno*, 216 F.3d 512, 513, 516 (2000). And in his separate opinion urging reconsideration of that precedent, Judge Higginbotham did not distinguish this case from that precedent or from the decisions of the Second, Third, Sixth, and Ninth Circuits, all of which similarly involved denials. See Pet. App. 7a, 11a-12a & nn.16-17 (opinion concurring in the judgment).

this case squarely implicates a conflict that warrants the Court's review.

B. The Question Presented Is Important And Warrants Review In This Case

1. The government does not dispute that the question presented in this case is enormously consequential. Review of a status-adjustment decision in removal proceedings may never occur. USCIS processes tens of thousands of applications for adjustment of status every month, and only a fraction of noncitizens are ultimately placed in removal proceedings. Both denials and premature grants nonetheless have immediate consequences. What is more, the decision below creates a perverse incentive for noncitizens to break the law in order to obtain review in removal proceedings. The ability to seek review under the Administrative Procedure Act (APA) is thus an essential safeguard for noncitizens. See Pet. 20-22.

2. The government seemingly contends that the Court should deny review because "[t]he *district court* correctly recognized that it lacked jurisdiction to review petitioner's APA challenges" under 8 U.S.C. 1252(a)(2)(B)(i). Br. in Opp. 7 (emphasis added). But the government recognizes that the *court of appeals* did not pass on that question. See *id.* at 7-11. And the government does not argue that the Court must address that question or that it otherwise poses an obstacle to resolving the question presented. Nor does the government dispute that, if this Court were to grant review and vacate the judgment below, the Court's ordinary practice would be to remand for the court of appeals to address that question, along with the merits of petitioners' claims, in the first instance.

As a preliminary matter, the government does not argue that the Court must determine whether Section 1252(a)(2)(B)(i) applies before deciding whether a status-

adjustment decision constitutes final agency action. While a federal court "may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits," *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 577 (1999), the government does not dispute that the question whether there is a reviewable final agency action under Section 704 of the APA is itself jurisdictional. And as between two jurisdictional issues, this Court's case law "does not dictate a sequencing." *Id.* at 584.

The government's objection is thus highly unusual. When the Court reverses or vacates on a "threshold question," it "typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *City of Austin* v. *Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022) (citation omitted). The government offers no reason for a different course here. The Court should grant review, decide the question presented, and then remand as necessary for further proceedings on the applicability of Section 1252(a)(2)(B)(i).[2]

3. In any event, contrary to the government's contention (Br. in Opp. 8-11), Section 1252(a)(2)(B)(i) does not deprive the federal courts of jurisdiction in this case. That provision states that, "[n]otwithstanding any other provision of law * * * and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review * * * any

[2] The same can be said of the requirement that a plaintiff must have "suffer[ed] legal wrong" or been "adversely affected or aggrieved" by agency action in order to have a cause of action under the APA. Br. in Opp. 12 n.5; see 5 U.S.C. 702. The government asserts, without citation, that petitioners "will revert back to the status" they had when they filed their applications. Br. in Opp. 13 n.5. But that question—on which the government does not take a definitive position and which it never suggests is jurisdictional—can properly be left for remand as well.

judgment regarding the granting of relief under" Section 1229b. The "judgment" is that of the immigration judge (and ultimately the Board of Immigration Appeals), as evidenced by the references to immigration judges elsewhere in the same section. See 8 U.S.C. 1252(a)(3), (b)(2). Moreover, "[t]he provisions of 8 U.S.C. § 1252 are not meant to preclude review of non-discretionary decisions that cannot be raised efficaciously within the administrative proceedings already available." *Duarte* v. *Mayorkas*, 27 F.4th 1044, 1057 (5th Cir. 2022) (internal quotation marks and citation omitted). And under "the presumption favoring judicial review," any ambiguity in the statute should be resolved in petitioners' favor. *Kucana* v. *Holder*, 558 U.S. 233, 251 (2010).

Contrary to the government's assertions, this Court's decision in *Patel* v. *Garland*, 142 S. Ct. 1614 (2022), does not resolve the applicability of Section 1252(a)(2)(B)(i) here. See Br. in Opp. 8-11. That case involved a petition for direct appellate review of the judgment of a DOJ immigration judge, not a district-court APA challenge to a decision of USCIS. See 142 S. Ct. at 1620. This Court specifically noted in *Patel* that "the reviewability of such decisions" by USCIS was "not before [it]." *Id.* at 1626. And less than three years ago, the Court exercised jurisdiction over an APA challenge to the denial of an application for status adjustment—a challenge indistinguishable from the challenge to a grant of status adjustment at issue here. See *Sanchez* v. *Mayorkas*, 141 S. Ct. 1809 (2021).

The government's interpretation of Section 1252(a)(2)(B)(i) to reach such challenges would have sweeping consequences. In *Patel*, the government represented that USCIS "likely adjudicates or receives more applications [for adjustment of status] than does the Executive Office for Immigration Review," which employs immigration judges. Oral Arg. Tr. at 56-57, *Patel*, *supra* (No. 20-979).

The government would now foreclose any review of the majority of applications for status adjustment, at least until applicants are placed in removal proceedings.[3] The resulting delay would be intolerable.

In any event, there would be no need for this Court to interpret Section 1252(a)(2)(B)(i) if it were to grant review. The court of appeals did not pass on that question, and consistent with this Court's ordinary practice, it should be left for the court of appeals on remand in the first instance. See, *e.g.*, *City of Austin*, 142 S. Ct. at 1476.

* * * * *

The courts of appeals are divided on a question of great significance, and this case squarely implicates that conflict. The Court should reject the government's attempt to skirt review by raising an additional question that was not decided below and that need not be decided here. Especially in light of the government's concession that the court of appeals' decision on the question presented was incorrect, the Court should grant review.[4]

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[3] Oddly, while the government thinks there is a material distinction between grants and denials of status adjustment for purposes of the question presented, see Br. in Opp. 11-12, it says that distinction is immaterial for purposes of Section 1252(a)(2)(B)(i), see *id.* at 11.

[4] Should the Court grant review, it may wish to consider appointing an amicus curiae to defend the court of appeals' decision.

Respectfully submitted.

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