No. 23-583

IN THE

# Supreme Court of the United States

AMINA BOUARFA,

*Petitioner*,

—v.—

ALEJANDRO MAYORKAS,
SECRETARY OF HOMELAND SECURITY, ET AL.,

*Respondents.*

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

## BRIEF FOR *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF FLORIDA


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## INTEREST OF *AMICI*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU, through its Immigrants' Rights Project ("IRP") and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens. The ACLU of Florida is an affiliate of the ACLU.

*Amici* have a longstanding interest in the jurisdictional issues in this case. ACLU IRP has litigated numerous cases addressing the jurisdictional provisions of the immigration laws, including *INS v. St. Cyr*, 533 U.S. 289 (2001) as counsel, and *Kucana v. Holder*, 558 U.S. 233 (2010) and *Guerrero-Lasprilla v. Barr*, 589 U.S. 221 (2020) as amicus.

## INTRODUCTION AND SUMMARY OF ARGUMENT

If a noncitizen seeking a family-based immigrant visa has entered into a sham marriage in the past, the government has no discretion to grant the visa; it must deny. There is no dispute that if the government denies the visa on this nondiscretionary sham-marriage ground, the noncitizen's petitioning spouse may seek judicial review. This case presents the question whether judicial review is precluded under 8 U.S.C. § 1252(a)(2)(B)(ii) if that same sham-

[1] No party or counsel for a party authored this brief in whole or in part, and no one other than *amici*, their members, and their counsel have paid for the preparation or submission of this brief.

marriage determination is made in the context of a visa revocation, rather than by denying the visa petition in the first place.

In this case, the government initially approved Petitioner Amina Bouarfa's visa petition on behalf of her husband, Ala'a Hamayel. However, the government subsequently revoked the petition under 8 U.S.C. § 1155, which provides that the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke" a visa approval, after the agency concluded that Mr. Hamayel had entered into a prior marriage for the purpose of evading the immigration laws. The agency's conclusion that Mr. Hamayel's prior marriage was a "sham" was a nondiscretionary determination. It is thus reviewable because the jurisdictional statute at issue here, 8 U.S.C. § 1252(a)(2)(B)(ii), eliminates review over discretionary determinations, but does not bar review of nondiscretionary determinations, whether or not related to discretionary forms of relief. As set forth below, Congress made that clear by the words it chose.

The government has offered two principal arguments for why the agency's nondiscretionary determination is nonetheless unreviewable. *See* Br. for Resp'ts in Opp'n ("BIO") 8–13. The government's first argument is sweeping: that the Court should apply its jurisdictional holding in *Patel v. Garland*, 596 U.S. 328 (2022), regarding clause (i) of § 1252(a)(2)(B), to the jurisdictional provision at issue here, clause (ii). BIO 12.[2] On that

[2] 8 U.S.C. § 1252(a)(2)(B) provides in relevant part:

view, clause (ii) would bar review of all determinations, whether discretionary or nondiscretionary, that relate in some way to the various discretionary issues covered by clause (ii).[3] The government's narrower argument is that, even if *Patel*'s holding does not apply and the jurisdictional provision at issue here precludes review of only discretionary determinations—as the plain words of the statute indicate—Ms. Bouarfa is still not entitled to review. *Id.* at 8–11. That is because, in the government's view, it seemingly does not matter *why* the agency chose to revoke the visa petition as long as it *could* revoke a visa petition under § 1155 in the exercise of discretion. Both arguments are incorrect. In this brief, *amici*

---

> [N]o court shall have jurisdiction to review--
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

[3] In the course of reaching a decision on discretionary relief, an agency may make numerous subsidiary determinations, each of which may or may not be discretionary. For example, the Secretary of Homeland Security or the Attorney General may, "in the Secretary's or the Attorney General's discretion," adjust the status of an asylee to that of a lawful permanent resident. *See* 8 U.S.C. § 1159(b). But in order to do so, the Attorney General must conclude, *inter alia*, that the noncitizen has been physically present in the United States for at least one year after being granted asylum; this issue is a nondiscretionary determination. *Id.* § 1159(b)(2).

address only the government's first argument and explain why *Patel*'s holding should not apply here.

*Patel* addressed only clause (i) of 8 U.S.C. § 1252(a)(2)(B), which covers five specific forms of discretionary relief from removal. 596 U.S. at 336–37. The Court held that all agency judgments relating to those five forms of relief are barred from review regardless of whether the judgment at issue is discretionary or nondiscretionary. *Id.* at 338. Accordingly, the Court found no jurisdiction over the factual determination at issue there. *Id.* at 347.

This case involves clause (ii), 8 U.S.C. § 1252(a)(2)(B)(ii), which is a catchall provision covering other discretionary decisions or actions not enumerated in clause (i). Unlike clause (i), which refers to "any judgment regarding" the five enumerated forms of relief from removal, clause (ii) explicitly refers to "any other decision or action" statutorily placed "in the discretion of the Attorney General or the Secretary of Homeland Security." Therefore, clause (ii)'s bar on judicial review does not reach nondiscretionary determinations that form the basis of the agency's decision—here, the nondiscretionary determination that Mr. Hamayel's prior marriage was illegitimate.

The government's clause (ii) argument is that a nondiscretionary determination relating to an ultimate exercise of discretion triggers the bar on judicial review. But this ignores the critical distinction Congress made between the text of the two clauses: Clause (i) bars review broadly over "*any judgment regarding* the granting of relief" under the five enumerated statutory provisions. 8 U.S.C. § 1252(a)(2)(B)(i) (emphasis added). Stressing the

word "regarding," *Patel* held that Congress intended to preclude review not just of the ultimate exercise of discretion, but of any determination "relating to" these forms of relief. 596 U.S. at 338–39 (emphasis omitted).

Had Congress wanted to strip jurisdiction as broadly as the government suggests here, it could have included "any judgment regarding" in clause (ii), or as part of the prefatory language that applies across both clause (i) and clause (ii). Instead, as to discretionary "decisions" or "actions" not enumerated in clause (i), Congress did not use the broadening phrase "any judgment *regarding* [the discretionary decision]" and provided instead that review is barred only over "any other decision or action . . . the authority for which is specified [by statute] to be in the discretion of" agency officials. 8 U.S.C. § 1252(a)(2)(B)(ii). A sham-marriage determination is not "specified [by statute] to be in the discretion of" agency officials. Under the plain text of clause (ii), nondiscretionary decisions, like the sham-marriage determination at issue here, are therefore reviewable.

In arguing otherwise, the government suggests that because clause (ii) is a catchall provision, it should be understood to have the same scope as clause (i). BIO 17–18. But the catchall phrase "any other decision or action" refers back to "the granting of relief under [the five enumerated sections]" covered by clause (i)—not to "any judgment *regarding* the granting of relief" under those sections. That conclusion is compelled by the statutory text, context, and structure; by canons of statutory interpretation; and by this Court's decision in *Kucana v. Holder*, 558 U.S. 233 (2010), which explained the relationship between the two clauses.

The Court should reject the government's argument that *Patel* applies to clause (ii)—an argument that, if accepted, would vastly expand clause (ii)'s scope to bar review over all sorts of consequential nondiscretionary immigration decisions related to a potentially wide range of discretionary decisions and actions, far beyond the visa revocation statute at issue here. But Congress has given no indication that it intended such a broad bar on judicial review. To the contrary, the plain words Congress chose, and the presumption in favor of judicial review, foreclose the government's proffered reading.

## ARGUMENT

### I. *PATEL* DOES NOT APPLY TO 8 U.S.C. § 1252(a)(2)(B)(ii).

In *Patel,* the Court held that clause (i) of § 1252(a)(2)(B) eliminates judicial review over all determinations, discretionary and nondiscretionary, related to the listed forms of relief. 596 U.S. at 338–39. The government urges the Court to apply *Patel*'s broad interpretation of clause (i) to clause (ii), even though *Patel* relied on clause (i)'s specific text, and Congress used different words in the two clauses. Those differences in the text matter, and fatally undermine the government's argument. Resisting that conclusion, the government points to the catchall language in clause (ii) to suggest the two provisions mean the same thing. But the term "any other decision or action" in clause (ii) refers back to "the granting of relief" under specified subsections—not "any judgment regarding the granting of relief" under those subsections. The government's approach would rewrite the statutory text to bar judicial review in

vastly more cases than Congress intended, turning the presumption in favor of judicial review on its head.

### A. The Text of Clause (ii) Is Critically Narrower than That of Clause (i).

As the government concedes, BIO 17, the text of clause (i) differs from the text of clause (ii). That difference is fatal to the government's argument that clause (i) and clause (ii) should be interpreted in the same way.

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Kucana*, 558 U.S. at 249 (internal quotation marks omitted); *see also Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022) (where a statute employs "one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea") (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 170 (2012)) (discussing this "meaningful-variation canon"). Accordingly, the Court "must give effect to, not nullify, Congress' choice to include . . . language in some provisions but not others." *Gallardo ex rel. Vassallo v. Marstiller*, 596 U.S. 420, 431 (2022).

Here, Congress chose to use the phrase "any judgment regarding" in clause (i) but not in clause (ii). Clause (i) includes two phrases: (1) "any judgment regarding" and (2) "the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title." *Patel* held that the phrase "any judgment regarding" significantly expanded clause (i)'s scope because

clause (i) "does not restrict itself to certain kinds of decisions" but rather "prohibits review of *any* judgment *regarding* the granting of relief under" the enumerated provisions. 596 U.S. at 338 (emphasis in original). The Court explained that "the use of 'regarding' 'in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject.'" *Id.* at 338–39 (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 717 (2018)). The Court thus concluded that clause (i) "encompasses not just 'the granting of relief' but also any judgment *relating to* the granting of relief," including factual findings. *Id.* at 339.

In contrast, clause (ii) does not include the broadening phrase "any judgment regarding." Instead, Congress chose to bar judicial review of "any other decision or action"—that is, as explained below, other than the forms of discretionary relief enumerated in clause (i)—that Congress placed "in the discretion of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii). Juxtaposed against clause (i)'s "regarding" language, clause (ii) reaches only determinations that are discretionary in nature.

The "omission" of the broadening language from clause (ii) "is especially notable because Congress used" that language elsewhere in the same section of the statute. *Salinas v. U.S. R.R. Ret. Bd.*, 592 U.S. 188, 196 (2021); *see also Sandoz Inc. v. Amgen Inc.*, 582 U.S. 1, 20 (2017) (emphasizing absence of language found in an "adjacent provision"). And Congress's choice to vary language between clause (i) and clause (ii) carries even greater weight because the two clauses "were enacted as part of a

unified overhaul of judicial review procedures." *Nken v. Holder*, 556 U.S. 418, 430–31 (2009) (contrasting § 1252(b)(3)(B)'s use of the word "stay" with the fact that "the language of subsection (f) says nothing about stays").

Had Congress wanted clause (ii) to capture not only decisions that are discretionary but also all matters "regarding" discretionary choices, it could have instead placed the phrase "any judgment regarding" in clause (ii), or in the general text of § 1252(a)(2)(B), which scopes over both clause (i) and clause (ii). For example, Congress could have drafted the statute as follows (with changes from the enacted text noted in bold and strikethrough font):

> (B) . . . no court shall have jurisdiction to review **any judgment regarding** --
>
> > (i) ~~any judgment regarding~~ the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
> >
> > (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

But Congress chose not to do so.

The text governs: The Court must give effect to Congress's choice to include the language in clause (i) but not in clause (ii). *See Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341–42 (2005) (relying on Congress's choice to include language in one specific

subsection among several); *Kucana*, 558 U.S. at 248 ("If Congress wanted the jurisdictional bar to encompass decisions specified as discretionary by regulation along with those made discretionary by statute . . . Congress could easily have said so."); *Patel*, 596 U.S. at 341 (similar); *Gallardo*, 596 U.S. at 429–30 (similar); *see also United States v. Naftalin*, 441 U.S. 768, 773 (1979) (rejecting attempt to read additional requirement into a statutory provision when "[t]he short answer is that Congress did not write the statute that way").

In reaching its conclusion about the scope of clause (i), *Patel* emphasized that Congress chose not to limit the term "any judgment regarding" to only discretionary judgments, instead simply referring to "any judgment." 596 U.S. at 342 (noting that "the absence of any reference to discretion in § 1252(a)(2)(B)(i) undercuts the Government's efforts to read it in" to limit the term "judgment"); *see id.* at 341 ("Had Congress intended instead to limit the jurisdictional bar to 'discretionary judgments,' it could easily have used that language . . . ."). But clause (ii) does the opposite. Unlike the phrase "any judgment" in clause (i), clause (ii) explicitly uses the term "discretion." *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (barring review of decisions or actions "the authority for which is specified . . . to be in the *discretion* of the Attorney General or the Secretary") (emphasis added). The contrast is sharp: Clause (i) employs the broadening term "regarding" without reference to discretion, while clause (ii) zeroes in on just those decisions in the "discretion" of the agency. Where, as here, Congress employed "broad language" in one provision of an act but used "limiting language" in another, the Court must give effect to that difference. *Gallardo*, 596 U.S.

at 429–30 (distinguishing between two provisions on this ground).

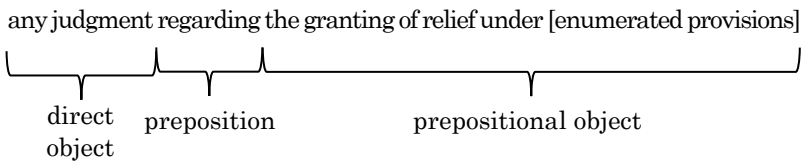
In sum, the critically different text employed in clause (i) and clause (ii) underscores that the two provisions have different meanings. Accordingly, *Patel*'s holding should not be applied to clause (ii).

### B. Clause (ii) Is a Catchall Provision for Clause (i)'s Forms of Relief, Not for Any Judgment Regarding Those Forms of Relief.

Despite these clear textual differences, the government contends that clauses (i) and (ii) should be interpreted identically because clause (ii) is a catchall provision. *See* BIO 17–18. In the government's view, because clause (ii) includes the phrase "any other," its scope must match that of clause (i). This argument misunderstands clause (ii)'s catchall language. In clause (ii), "any other decision or action" does not refer to "*any judgment regarding* the granting of relief" (the critical broadening phrase that *Patel* emphasized in construing clause (i)), but rather to discretionary decisions or actions other than the enumerated statutory forms of relief listed in clause (i). That conclusion follows from text, context, structure, canons of construction, and caselaw.

The structure of clause (i) is instructive. It begins with a direct object ("any judgment"), followed by a preposition ("regarding"), which is in turn followed by a prepositional object ("the granting of

relief") that lists five discretionary forms of relief. It can be diagramed as follows:




The government's view is that "any other" in clause (ii) refers to the direct object of clause (i). That is incorrect. It refers to the prepositional object, which is "the granting of relief under [the enumerated provisions]." Thus, the phrase "any judgment regarding," on which the Court relied in *Patel* to find that Congress had eliminated review over both discretionary and nondiscretionary determinations, has no application to clause (ii).

Indeed, the government's preferred reading of clause (ii) is at odds with this Court's interpretation in *Kucana*, which explained that the term "any other" refers back to the list of "statutory provisions referenced in clause (i)." 558 U.S. at 246–47. *Kucana* found "[t]he clause (i) *enumeration*" of specific forms of discretionary relief "instructive in determining the meaning of the clause (ii) catchall." *Id.* at 247 (emphasis added). Thus, the Court explained, "*other* decisions falling within § 1252(a)(2)(B)(ii)'s compass are most sensibly understood to include only decisions made discretionary by Congress." *Id.* at 247 n.14 (emphasis in original). The clear import of this analysis is that "any other" in clause (ii) refers to discretionary decisions or actions other than the enumerated provisions in clause (i).

Although the Court subsequently interpreted clause (i) to reach not just the ultimate grant or denial of discretionary relief under the five enumerated statutes, but also "any judgment relating to" that ultimate exercise of discretion, *Patel*, 596 U.S. at 339 (emphasis omitted), nothing in *Patel*'s reading of clause (i)'s "any judgment regarding" term disturbs the Court's sound interpretation in *Kucana* of clause (ii)'s "any other decision or action" term. Indeed, the Court's analysis in *Patel* confirms *Kucana*'s explanation that "any other" refers to the prepositional object in clause (i)—namely "the granting of relief under [the enumerated provisions]." Specifically, *Patel* noted that *Kucana*'s "comparison between clauses (i) and (ii) . . . focused on the fact that each form of relief identified in clause (i) was entrusted to the Attorney General's discretion by statute." *Id.* at 343 (emphasis omitted). *Patel* thus explained that the comparison between clauses (i) and (ii) "focused on" the forms of relief enumerated in clause (i). *Id.*

Even apart from *Kucana* and *Patel*, the conclusion that "any other" refers to discretionary decisions or actions other than the enumerated statutory forms of relief is correct under canons of statutory interpretation. The nearest reasonable referent canon provides that a "modifier normally applies only to the nearest reasonable referent." Scalia & Garner, *supra*, at 152; *see also Mellouli v. Lynch*, 575 U.S. 798, 811 (2015) (applying canon). Under this canon, courts interpret a modifier to attach

to the closest noun it can reasonably modify, not one that is more grammatically distant.[4]

Scalia and Garner offer the following example: A statute "provided that 'the provisions of this act shall not be construed to prevent any person from manufacturing for his domestic consumption *at his home* . . . wine or cider from fruit of his own raising . . . .'" Scalia & Garner, *supra*, at 152. The question presented was: "Did this mean *manufacturing at his home* or *consumption at his home*—or both?" *Id.* Scalia and Garner explain that the answer must be "consumption" because it is the nearest reasonable referent. *Id.* at 152–53. "In the phrase 'manufacturing for his domestic consumption' both *manufacturing* and *consumption* are nouns," with consumption serving as part of a "prepositional phrase modifying" manufacturing. *Id.* at 153. In this kind of grammatical construction—namely noun, preposition, prepositional object, modifier—the modifier attaches to the prepositional object, not the more distant noun. *Id.*

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[4] This canon applies when a statute's "syntax involves something other than a parallel series of nouns or verbs." Scalia & Garner, *supra*, at 152. A parallel series is "a list of verbs [or nouns] followed by a modifying clause," *Facebook, Inc. v. Duguid*, 592 U.S. 395, 402–03 (2021), where "the listed items are simple and parallel" and "readers are used to seeing [them] listed together," *Lockhart v. United States*, 577 U.S. 347, 352 (2016). The Court applies a different canon in that circumstance: the series-qualifier canon, which applies a modifier to each word in the list. *See id.* (applying the series-qualifier canon to the phrase "the laws, the treaties, and the constitution of the United States"). Here, the relevant text of clause (i)—"any judgment regarding the granting of relief"—is not a parallel series, so the series qualifier canon is inapplicable.

In this case, § 1252(a)(2)(B) has a closely related structure. As in Scalia and Garner's example, clause (i) contains an initial noun followed by a preposition and a prepositional object. And, like that example, the prepositional object is followed by a phrase in search of a referent: the "any other" catchall language of clause (ii). *See Arcadia v. Ohio Power Co.*, 498 U.S. 73, 78–79 (1990) (analyzing different possible referents for the phrase "any other subject matter"). The ordinary rules of language and the rules of statutory interpretation both indicate that "any other" refers to the closest reasonable referent. That referent is the prepositional object immediately preceding it: "the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title." Clause (ii) thus refers to "any" discretionary decision or action "other" than the decision to grant relief under the enumerated provisions.[5]

Under the government's interpretation, the term "any other decision or action" refers all the way back to "any judgment." But this Court has previously rejected interpretations because they "stretch[] the

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[5] The nearest reasonable-referent canon's "close cousin," the rule of the last antecedent, supplies a similar rule. *See United States v. Davis*, 961 F.3d 181, 188 (2d Cir. 2020). Specifically, that rule provides that "qualifying words or phrases," like the catchall clause, "modify the words or phrases immediately preceding them and not words or phrases more remote." *Lockhart*, 577 U.S. at 351 (cleaned up); Scalia & Garner, *supra*, at 144–46. As several courts of appeals have recognized, "the substance of the rule is the same" regardless of which of these canons applies. *Hall v. U.S. Dep't of Agric.*, 984 F.3d 825, 838 (9th Cir. 2020); *see Grecian Magnesite Mining, Indus. & Shipping Co., SA v. Comm'r of Internal Revenue Serv.*, 926 F.3d 819, 824 (D.C. Cir. 2019) (same).

modifier too far." *Jama*, 543 U.S. at 342. The Court should do the same here.

The same result obtains if one applies the canon of *ejusdem generis*, which instructs that, "[w]hen faced with a catchall phrase . . . , courts do not necessarily afford it the broadest possible construction it can bear." *Harrington v. Purdue Pharma L.P.*, 603 U.S. ---, 2024 WL 3187799, at *7 (2024). Rather, the catchall phrase "must be . . . read to 'embrace only objects similar in nature' to the specific examples preceding it." *Id.* (quoting *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 512 (2018)). Thus, under *ejusdem generis*, "the residual clause . . . should itself be controlled and defined by reference to the enumerated categories . . . which are recited just before it." *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001); *see Harrington*, 2024 WL 3187799, at *7 (defining catchall phrase based on the "detailed list" that appeared before it). Here, the residual clause is "any other decision or action," and the enumerated categories "just before it" are the enumerated provisions in clause (i). Thus, the general term "any other decision or action" should be defined in relation to the granting of relief under the enumerated provisions rather than the more distant expansionary phrase "any judgment regarding" such relief.

The related canon of *noscitur a sociis* is also instructive. That canon "avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates v. United States*, 574 U.S. 528, 543 (2015) (internal quotation marks omitted). Courts thus look to "[t]he words *immediately surrounding*" the language to be interpreted to ascertain the "more precise content" of

that language. *Id.* (emphasis added) (internal quotation marks omitted). For example, this Court recently held that a residual provision (employing the catchall term "otherwise") should be interpreted in light of the "offenses enumerated" in the immediately preceding provision. *Fischer v. United States*, 603 U.S. ---, 2024 WL 3208034, at *6 (2024). Similarly, in this case, the residual provision, clause (ii), should be interpreted in light of the statutes enumerated in clause (i). This interpretation is "[g]uided by the basic logic that Congress would not go to the trouble of spelling out the list . . . if a neighboring term swallowed it up." *Id.* Indeed, under the government's broad interpretation of clause (ii), that provision would encompass all the judgments covered by clause (i), rendering all of clause (i) superfluous. *Id.* (noting that, under government's interpretation, "the sweep of [the residual clause] would consume [the preceding clause], leaving that [] provision with no work to do").

Moreover, the remainder of clause (ii)'s text confirms that the term "any other decision or action" refers to the specified forms of relief, not to any judgment regarding the granting of relief. Consider the exception to clause (ii): The jurisdictional bar applies to decisions or actions "other than the granting of [asylum] relief under section 1158(a) of this title." *See Kucana*, 558 U.S. at 247 n.13 (discussing this exception). The granting of asylum is just one part of the asylum process—namely the ultimate, discretionary choice. *See id.* ("Absent the exception, asylum applicants might fall within § 1252(a)(2)(B)(ii)'s jurisdictional bar because a statutory provision, § 1158(b)(1)(A), specifies that 'the Attorney General *may* grant asylum.'"). And it is an example of a decision that fits with the prepositional object in

clause (i)—namely the "granting of relief" pursuant to discretionary statutes.[6] Because that exception identifies a discretionary decision whether to grant a specific form of relief (namely asylum) and uses language exactly parallel to the phrase "the granting of relief" in clause (i), it reinforces the conclusion that "any other" naturally refers to the enumerated provisions rather than the more distant phrase "any judgment regarding."

Another aspect of the text of clause (ii) bolsters the same conclusion. Clause (ii) uses different language at the outset, covering any "decision or action" rather than any "judgment" as in clause (i). The term "decision or action" appears in § 1252 in one additional place, § 1252(g), which strips jurisdiction over any "decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any [noncitizen]." In § 1252(g), "decision or action" refers to discrete choices made (or foregone) as a matter of executive prosecutorial discretion. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999) (holding that § 1252(g) "applies only to three discrete actions" that "represent the initiation or prosecution of various stages in the deportation process" over which the Executive has particular discretion). The term

[6] The parties have not addressed what kind of statutory language is necessary to trigger clause (ii). *See Kucana*, 558 U.S. at 248 (indicating that certain statutes including terms like "discretion" were covered by clause (ii)). In addressing the asylum exception, the Court reserved this question. *See id.* at 247 n.13 (reserving whether the statutory term "may" is sufficient, indicating only that it "might" be). Without the benefit of briefing on this issue, the Court should not opine on that question of what other decisions or actions—many of which are specified using different formulations than § 1155—may be covered by clause (ii).

"decision or action" has a similar meaning in clause (ii)—namely, capturing a set of discrete choices that involve agency discretion. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) ("Generally, identical words used in different parts of the same statute are . . . presumed to have the same meaning") (internal quotation marks omitted). This set is smaller than the set of all judgments covered by clause (i). *See Patel*, 596 U.S. at 337–38 (interpreting the term "judgment" broadly, to mean "any authoritative decision").

In sum, "any other decision or action" refers to a discretionary decision or action other than the granting of the enumerated statutory forms of discretionary relief in clause (i), such as the granting of other forms of discretionary relief. Congress was not referring to any nondiscretionary "judgment regarding" such a discretionary decision or action; indeed, it omitted that very phrase, which it used in the immediately preceding clause. Because the catchall clause does not refer to "any judgment regarding" discretionary decisions or actions, there is no reason to apply *Patel*'s holding to clause (ii).

### C. Any Doubts as to the Statute's Interpretation Should Be Resolved in Favor of Judicial Review.

As shown above, the text is clear and requires petitioner's reading, not that of the government. But even if the provision were ambiguous, the same result would be required. Under the "well-settled" and "strong" presumption favoring judicial review of administrative action, "when a statutory provision is reasonably susceptible to divergent interpretation," the Court will "adopt the reading that accords with . . .

basic principles: that executive determinations generally are subject to judicial review." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020) (internal quotation marks omitted); *see Kucana*, 558 U.S. at 251. "Congress is presumed to legislate with [this presumption] in mind." *Salinas*, 592 U.S. at 197. Accordingly, "when Congress intends to bar judicial review altogether, it typically employs language [that is] unambiguous and comprehensive." *Lindahl v. Off. of Pers. Mgmt.*, 470 U.S. 768, 779–80 (1985).

The government's strained reading is at odds with the presumption favoring judicial review. Its interpretation does violence to the text, and would completely cut off judicial review for a significant number of noncitizens. If accepted, the government's reading would bar review over all sorts of issues related to a potentially wide range of discretionary decisions and actions far beyond the specific visa revocation statute at issue in this case. *See Kucana*, 558 U.S. at 247 n.14 (noting that "over thirty provisions in the relevant subchapter of the INA . . . explicitly grant the Attorney General . . . 'discretion' to make a certain decision" such that clause (ii) applies) (internal quotation marks omitted).

If this Court adopts the government's reading, noncitizens pursuing petitions for review of their removal orders, who face the serious and potentially life-changing consequence of removal from the country, could be denied any opportunity for judicial review of indisputably nondiscretionary factual determinations—even in the case of flagrant errors. The implications are even more sweeping if the Court concludes that § 1252(a)(2)(B) applies to litigation in district court brought by individuals who are not in removal proceedings. For those challenging a removal

order, 8 U.S.C. § 1252(a)(2)(D) restores jurisdiction over constitutional claims and questions of law. But that provision is of no help outside of a petition for review. *Patel*, 596 U.S. at 345. So the government's reading could entirely preclude review in *any* forum of constitutional or legal errors—no matter how egregious—in matters that will not be litigated in a petition for review (and so will not be subject to § 1252(a)(2)(D)). Even a blatant constitutional violation, such as a conclusion expressly based on racial stereotyping, would be rendered entirely beyond the reach of courts. Congress gave no indication, much less an unambiguous one, that it intended such a drastic result.

Nothing in the text of clause (ii) supports—much less dictates—the government's interpretation. *Cf. id.* at 347 (presumption overcome only because "the statute [wa]s clear"). The government thus has not met the "heavy burden" required to rebut the presumption favoring judicial review of administrative action. *Salinas*, 592 U.S. at 197 (internal quotation marks omitted). To the contrary, the plain language of 8 U.S.C. § 1252(a)(2)(B)(ii), in contrast to its adjacent provision, clause (i), shows that Congress intended to preserve judicial review of nondiscretionary decisions.

## CONCLUSION

The Court should conclude that 8 U.S.C. § 1252(a)(2)(B)(ii) does not strip jurisdiction over nondiscretionary determinations.

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