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 OF *AMICI CURIAE* NORTHWEST IMMIGRANT RIGHTS PROJECT, THE NATIONAL IMMIGRATION LITIGATION ALLIANCE, AND AMERICAN IMMIGRATION COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae proffer this brief to assist the Court in considering whether § 242(a)(2)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(a)(2)(B), applies to executive agency decisions denying immigration benefits to applicants who are not in removal proceedings. The Court expressly reserved this question in *Patel v. Garland*, 596 U.S. 328 (2022). And yet the court of appeals simply assumed § 1252(a)(2)(B)(ii) applies outside the context of removal proceedings, without addressing this critical threshold question. Because this case has nothing to do with removal proceedings, a holding that § 1252(a)(2)(B) applies only to the removal context would resolve it. Amici respectfully submit that the Court should first resolve the question left unanswered in *Patel*—whether § 1252(a)(2)(B) applies outside of removal proceedings—before addressing whether the lower court correctly held that the agency determination in this case was a discretionary determination barred from judicial review.

Amici, Northwest Immigrant Rights Project (NWIRP), the National Immigration Litigation Alliance (NILA), and American Immigration Council are nonprofit organizations specializing in federal court litigation on behalf of noncitizens seeking to assert their statutory rights to immigration benefits. Amici NWIRP and NILA also regularly represent individuals, and advise practitioners who represent individuals, in removal

1. The parties' counsel did not author the brief in whole or in part, and no person or entity outside the organizations and attorneys listed on this brief has made a monetary contribution to its preparation or submission.

cases and cases before U.S. Citizenship and Immigration Services (USCIS). Amici thus have distinct insight into how a broad application of § 1252(a)(2)(B) runs counter to the statutory framework Congress established. The expansive interpretation adopted by the court of appeals threatens the rule of law by allowing an executive agency to deny applications for immigration benefits without any judicial oversight—often leaving noncitizens with lawful immigration status in jeopardy of being separated from their families, homes, and employment.

SUMMARY OF ARGUMENT

The text of § 1252 and traditional tools of statutory construction demonstrate that § 1252(a)(2)(B) applies only to applications submitted by persons who have been placed in removal proceedings. The lower court altogether failed to address this antecedent issue, let alone engage with either the text or context of the statute. Section 1252's text and structure are focused on one issue alone: judicial review *of removal orders*. The section's title, subtitles, and various provisions all demonstrate that Congress intended to limit and/or channel review of removal orders. Every subpart of § 1252, including (a)(2)(B), is oriented around this purpose. The relevant legislative history also evinces Congress's focus on judicial review of removal orders.[2]

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2. Amici's brief explains that § 1252(a)(2)(B)(ii) is not at issue in this case because the agency decision here did not concern a case in removal proceedings. However, Amici agree with Petitioner that, by its plain terms, § 1252(a)(2)(B)(ii) does not encompass nondiscretionary determinations, and that a visa revocation based on a statutory eligibility finding constitutes a nondiscretionary determination.

Section 1252(a)(2)(B)'s phrase "regardless of whether the judgment, decision, or action is made in removal proceedings," which some courts have relied on to broaden the reach of the provision, is consistent with Congress's focus on the removal context. Noncitizens in removal proceedings regularly submit applications to USCIS that directly bear on removability. These applications are inextricably linked to removal proceedings, and thus are what Congress intended to cover by the "regardless" clause in § 1252(a)(2)(B).

Incorrectly applying § 1252(a)(2)(B) outside of the removal context will eliminate all judicial review for many lawful and longtime residents of this country. This presents grave constitutional concerns, as the deprivation of all judicial review in many circumstances would violate the separation of powers by handing to the executive the judicial power to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Administrative schemes which deprive federal courts of their judicial power may run afoul of the Constitution. This is particularly true where the noncitizens affected by such a broad interpretation are lawfully present and have been in this country for decades. Longstanding precedent demonstrates that such individuals are protected by the Due Process Clause. A reading eliminating all Article III court review would affect the fundamental rights of these individuals and thus violate their right to due process.

Finally, Amici present the examples of three cases pending before or already addressed by federal courts of appeals. Each involves a longtime resident of this country who is lawfully present. And for each, ruling that § 1252(a)(2)(B) applies outside removal proceedings would

permanently eliminate judicial review over the denial of their applications for lawful permanent residence—threatening them with the loss of status, removal, and separation from their families.

ARGUMENT

I. TRADITIONAL STATUTORY CONSTRUCTION RULES DEMONSTRATE THAT § 1252(a)(2)(B) IS LIMITED TO DISCRETIONARY DECISIONS REGARDING PERSONS IN REMOVAL PROCEEDINGS.

Congress's intent to apply § 1252(a)(2)(B) to cases involving removal proceedings is readily ascertainable through application of standard statutory construction principles. Read in context, § 1252(a)(2)(B) is properly understood to encompass only applications for discretionary relief filed by individuals placed in removal proceedings—whether those applications are filed before the immigration court or before USCIS.

A. The Text of § 1252(a)(2)(B) Demonstrates It Is Limited to the Removal Context.

Section 1252's language, title, and context establish that it only addresses judicial review of removal orders and agency determinations made in connection to cases in removal proceedings.

"[A] fundamental canon of statutory construction" is "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803,

809 (1989); *see also Patel*, 596 U.S. at 338 (considering "§ 1252(a)(2)(B)(i)'s text and context" to ascertain the meaning of "judgment"). Courts must not "examine[] [the text] in isolation," as "statutory language cannot be construed in a vacuum." *Davis*, 489 U.S. at 809; *see also, e.g.*, *Dubin v. United States*, 599 U.S. 110, 118 (2023) (adopting "narrower reading" of "uses" and "in relation to" after analyzing these terms in the "statutory context, taken as a whole"); *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 275–76 (2023) (concluding that the meaning of statutory text is "overwhelmingly evident" when read "alongside its neighboring [statutory] provisions"). Here, the context of § 1252(a)(2)(B)(ii) confirms its proper scope.

First, the section is entitled "Judicial review of *orders of removal*." 8 U.S.C. § 1252 (emphasis added). "[S]ection headings . . . 'supply cues' as to what Congress intended." *Rudisill v. McDonough*, 601 U.S. 294, 309 (2024) (alteration in the original) (citation omitted). Subsection 1252(a)(2)(B)(ii) is located within subsection (a), which outlines the availability and scope of judicial review for various types of removal orders. Paragraph (a)(1) concerns "[g]eneral orders of removal" in proceedings before immigration judges (IJs). *Id.* § 1252(a)(1). The subparagraphs preceding and following § 1252(a)(2)(B) similarly address removal orders: § 1252(a)(2)(A) concerns expedited removal orders, and § 1252(a)(2)(C) concerns orders of removal against noncitizens who have committed certain criminal offenses. *Id.* § 1252(a)(2)(A), (C); *see also Patel*, 596 U.S. at 344 (looking to subparagraph (C) in analyzing the "[c]ontext" of subparagraph (B)).

Subparagraph (a)(2)(D) is particularly instructive in reaffirming that subparagraph (a)(2)(B) is limited to removal cases, as (a)(2)(D) is an exception to the jurisdictional bar in (a)(2)(B). *Compare* 8 U.S.C. § 1252(a)(2)(B), *with id.* § 1252(a)(2)(D). Subparagraph (a)(2)(D) expressly authorizes judicial review of "constitutional claims or questions of law raised upon a *petition for review*" notwithstanding the limitations on review found in § 1252(a)(2)(B) and (C), among others. *Id.* § 1252(a)(2)(D) (emphasis added). A petition for review is the vehicle for "judicial review of an *order of removal* entered or issued under any provision of this chapter." *Id.* § 1252(a)(5) (emphasis added).

The remaining subsections of § 1252 further underscore the section's limited scope. Subsection (b), entitled "Requirements for review of orders of removal," outlines the procedure for petitions for review. *See, e.g.*, *id.* § 1252(b)(2) (designating the proper venue for petitions for review of "completed" removal proceedings); *id.* § 1252(b)(3)(A) (requiring service on the Department of Homeland Security (DHS) officer in the district "in which the final order of removal . . . was entered"); *id.* § 1252(b)(4)(A) (requiring the court of appeals to "decide the petition only on the administrative record on which the order of removal is based"). And, as this Court has explained, § 1252(b)(9) "streamline[s] all challenges to a *removal order* into a single proceeding: the petition for review." *Nken v. Holder*, 556 U.S. 418, 424 (2009) (emphasis added).

Similarly, subsection (c) concerns a "petition for review or for habeas corpus of an order of removal," while subsection (d) discusses "[r]eview of final orders [of removal]." 8 U.S.C. § 1252(c), (d). Subsection (e) deals

with review of expedited orders of removal. *Id.* § 1252(e). Subsection (f) deals with injunctive relief and stays of removal for persons subject to detention and removal. *Id.* § 1252(f). Finally, subsection (g) addresses jurisdiction over decisions "to commence [removal] proceedings, adjudicate [removal] cases, or execute removal orders." *Id.* § 1252(g).

In sum, the language of § 1252 demonstrates the section is directed to judicial review of removal orders and determinations underlying those removal orders. Indeed, this Court recently affirmed the section's focus on the removal context, noting that "[s]ection 1252 generally grants federal courts the power to review final orders of removal. § 1252(a)(1). It then strips courts of jurisdiction for certain categories of removal order. § 1252(a)(2)." *Wilkinson v. Garland*, 601 U.S. 209, 218 (2024). Thus, when "read in their context and with a view to their place in the overall statutory scheme," § 1252(a)(2)(B)(ii)'s restrictions on judicial review are naturally limited to the removal context. *Davis*, 489 U.S. at 809; *see also, e.g.*, *Kucana v. Holder*, 558 U.S. 233, 245–46 (2010) (instructing courts to "not look merely to a particular clause" and analyzing § 1252(a)(2)(B)'s reach and scope in light of its "statutory placement" (citation omitted)).

Nonetheless, some courts have relied on the "regardless" clause in § 1252(a)(2)(B) in isolation to dramatically expand the scope of the statute. *See infra* Section I.D. As relevant here, that clause decrees that,

> except as provided in subparagraph (D), and *regardless of whether the judgment, decision, or action is made in removal proceedings*, no

> court shall have jurisdiction to review . . . (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 [their] discretion . . . .

8 U.S.C. § 1252(a)(2)(B) (emphasis added). Some courts have read this language to find that § 1252(a)(2)(B) encompasses *all* USCIS determinations, including those concerning persons who are not in removal proceedings. However, that reading disregards the context and similarly ignores USCIS's involvement in cases in removal proceedings. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *see also Pulsifer v. United States*, 601 U.S. 124, 152–53 (2024) (ascertaining "genuine[] ambigu[ity]" of statutory language by looking at its surrounding context against "the statute's . . . designs"). The "regardless" clause brings within its ambit those decisions regarding immigration benefits that are not made "in" a removal proceeding—that is, that are not made *by* an IJ or the Board of Immigration Appeals (BIA)—but that still relate to persons in removal proceedings and can affect whether they may be removed. Section 1252(a)(2)(B) thus instructs that noncitizens in removal proceedings cannot separately challenge the judgments, decisions, or actions specified in clauses (a)(2)(B)(i)–(ii) except through a petition for review of a final removal order, as specified in § 1252.

The "regardless" clause is important because USCIS—an agency which is not a party to and does not

conduct removal proceedings—regularly makes decisions on immigration applications that directly influence the outcome of removal proceedings. Only USCIS—and not an IJ—has jurisdiction to adjudicate certain benefits applications which, for persons in removal proceedings, can provide relief from a removal order. These include I-130 family visa petitions filed by U.S. citizens or lawful permanent residents on behalf of family members, 8 C.F.R. § 204.1(b); I-360 self-petitions for victims of domestic violence, *id.*; I-360 Special Immigrant Juvenile Status petitions for children who have been abandoned, abused, or neglected, *id.*; I-918 U visa petitions for victims of certain crimes, 8 C.F.R. § 214.14(c); and I-914 T visa petitions for victims of trafficking, 8 C.F.R. § 214.11(d). Similarly, only USCIS can adjudicate an application for lawful permanent residence filed by a noncitizen classified as an "arriving alien." 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1).

If USCIS grants any of these applications, an IJ either will terminate removal proceedings because the noncitizen has been granted lawful status or will proceed to determine whether the noncitizen may apply for adjustment of status to lawful permanent residence, similarly resulting in the termination of removal proceedings. *See, e.g.*, USCIS, Policy Manual, vol. 3, pt. B, ch. 9 (last accessed June 14, 2024), https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-9 ("DHS may agree to the request of a person who is in [removal] proceedings . . . to file with the [IJ] or the . . . BIA[] a joint motion to administratively close or terminate proceedings without prejudice . . . while USCIS adjudicates an application for T nonimmigrant status.").

Additionally, both USCIS and IJs have authority to adjudicate certain applications encompassed by § 1252(a)(2)(B), such as I-485 adjustment applications, I-751 petitions to remove conditions of residency, and waivers of grounds of inadmissibility. Critically, in some cases, USCIS has original jurisdiction, meaning IJs do not have authority to adjudicate an application until after USCIS has denied it. *See* 8 C.F.R. §§ 209.1(e), 209.2(f), 216.4(d)(2).

Congress's inclusion of the phrase "regardless of whether the judgment, decision, or action is made in removal proceedings," 8 U.S.C. § 1252(a)(2)(B), is most logically read as a reference to these USCIS decisions. Such decisions are not "made *in* removal proceedings," *id.* (emphasis added), but are nonetheless integral to the removal process as they "relat[e] to the granting of relief" from removal, *Patel*, 596 U.S. at 339 (emphasis omitted). Moreover, there are "practical reasons why, for someone in removal proceedings, Congress would prevent judicial review of ancillary agency determinations," as such persons "have various alternative administrative avenues that, if successful, could terminate the removal proceeding in their favor." *Rubio Hernandez v. USCIS*, 643 F. Supp. 3d 1193, 1202 (W.D. Wash. 2022).

In sum, the text of § 1252 and statutory construction tools demonstrate that § 1252(a)(2)(B) is limited to the removal context. Reading the statute otherwise simply "construe[s] [this language] in a vacuum." *Davis*, 489 U.S. at 809.

B. Legislative History Reinforces the Fact That § 1252(a)(2)(B) is Confined to Removal Cases.

The legislative history also demonstrates that § 1252(a)(2)(B) is limited to removal proceedings.

First, Congress added the "regardless" clause to § 1252(a)(2)(B) in the REAL ID Act of 2005, Pub. L. No. 109-13, § 101(f), 119 Stat. 302, in a section entitled "PREVENTING TERRORISTS FROM OBTAINING *RELIEF FROM REMOVAL*." *See id.* (emphasis added). That placement underscores Congress's focus on the removal context.

That the REAL ID Act was responsive to *INS v. St. Cyr*, 533 U.S. 289 (2001), similarly supports reading § 1252(a)(2)(B) as confined to removal proceedings. As this Court recognized in *Patel*, "Congress added [§ 1252(a)(2)(D) in the REAL ID Act] after we suggested in *St. Cyr* that barring review of all legal questions *in removal cases* could raise a constitutional concern." 596 U.S. at 339 (emphasis added); *see also* H.R. Rep. No. 109-72, at 173–74 (2005) (Conf. Rep.). Subparagraph (D) was added to ensure circuit court review over constitutional claims and legal questions on review of a final *removal order*.

The conference report detailing these changes explains that the amendments to § 1252 were animated by Congress's desire to "preclude all district court review of any issue *raised in a removal proceeding*." *Id.* at 173 (emphasis added). The legislative history is replete with references to judicial review of removal orders. *See id.* at 172–76; *see also, e.g.*, *id.* at 175 (clarifying the amendments "would not preclude habeas review over challenges to

detention *that are independent of challenges to removal orders*. Instead, the bill would eliminate habeas review only over challenges to removal orders." (emphasis added)).

Critically, Congress explained that the 2005 changes "do[] not eliminate judicial review" altogether, "but simply restore[]" it to the courts of appeals, for "all [noncitizens] who are ordered removed by an [IJ]." *Id.* at 174. It further affirmed that the section does not deprive any such noncitizen, "not even criminal [noncitizens], . . . of judicial review," and clarified that it "would give every [noncitizen] one day in the court of appeals, satisfying constitutional concerns." *Id.* at 174–75. This underscores that Congress never intended to eliminate judicial review altogether for any noncitizen, as would be the case should the Court hold that § 1252(a)(2)(B)(ii) reaches individuals completely outside the removal context. *See infra* Section III. It logically follows that Congress intended the "regardless" clause in § 1252(a)(2)(B) to be focused on the agency decisions which would impact removal proceedings. The REAL ID Act was focused on restoring and consolidating judicial review of legal questions and constitutional claims in removal proceedings. It would be quite odd to assume that Congress intended such a seismic shift—eliminating all judicial review for applications not related to removal proceedings—by tucking in the "regardless" clause in § 1252(a)(2)(B). Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

C. Longstanding Rules of Statutory Construction Further Underscore § 1252(a)(2)(B)'s Inapplicability Outside of Removal Proceedings.

First, there is a "strong presumption that Congress intends judicial review of administrative action," *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986). This Court has "consistently applied that interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana*, 558 U.S. at 251; *see also infra* pp. 19–20.

Second, the canon of constitutional avoidance, which the Court has long employed in the immigration context, *see, e.g.*, *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903), counsels against an overly-expansive construction of § 1252(a)(2)(B)'s scope. To hold otherwise would present serious constitutional concerns, as it would completely preclude judicial review of constitutional claims or questions of law for certain noncitizens entitled to due process under the Fifth Amendment. *See infra* Section II.B. This would represent a grave challenge to the constitutional order, as it would effectively allow the Executive unchecked power in the field of "legal interpretation"—something "that has been, 'emphatically,' 'the province and duty of the judicial department' for at least 221 years." *Loper Bright Enters. v. Raimondo*, 603 U.S. ---, 2024 WL 3208360, at *21 (2024) (quoting *Marbury*, 5 U.S. at 177); *see also infra* Section II.A.

D. *Patel* Did Not Decide the Scope of § 1252(a)(2)(B).

Relying on *Patel*, some courts have found that § 1252(a)(2)(B) extends outside the removal context.[3] But *Patel* does not compel such a conclusion. The Court specifically declined to decide the question of "[t]he reviewability of [] decisions" outside the removal context. 596 U.S. at 345. Notably, the Court's decision explained that "[s]ubparagraph (B) [of § 1252(a)(2)] bars review of only one facet of *the removal process* (consideration of discretionary relief)." *Id.* at 344 (emphasis added).

Indeed, while the Court has not directly addressed whether challenges to USCIS decisions that are entirely unrelated to removal proceedings fall outside of § 1252(a)(2)(B), it has previously exercised jurisdiction over challenges to USCIS's denial of adjustment of status applications outside of removal proceedings. *See, e.g.*, *Scialabba v. Cuellar de Osorio*, 573 U.S. 41 (2014) (examining question of law impacting eligibility for adjustment of status); *Sanchez v. Mayorkas*, 593 U.S. 409 (2021) (same). The Court exercised such review notwithstanding that "courts, including [the Supreme Court], have an independent obligation to determine

3. *See Shaiban v. Jaddou*, 97 F.4th 263, 266–67 (4th Cir. 2024); *Cheejati v. Blinken*, 97 F.4th 988, 992–94 (5th Cir. 2024); *Britkovyy v. Mayorkas*, 60 F.4th 1024, 1027–29 (7th Cir. 2023); *Abuzeid v. Mayorkas*, 62 F.4th 578, 583–86 (D.C. Cir. 2023). These decisions read the "regardless" clause in isolation, without considering § 1252's text, context, and history, or acknowledging that USCIS makes decisions affecting the removability of people in removal proceedings. They also do not consider that in some instances noncitizens will be denied all judicial review.

whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Thus, prior cases where this Court exercised jurisdiction are instructive. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962). Those cases belie the lower courts' conclusions that § 1252(a)(2)(B) clearly applies outside the context of removal cases. S*ee, e.g.*, *Cheejati*, 97 F.4th at 994 (declaring it "expressly state[d]"); *Britkovyy*, 60 F.4th at 1030 (noting that "the statute is clear"); *Abuzeid*, 62 F.4th at 584 (announcing "[t]he 'regardless' clause 'makes clear that the jurisdictional limitations . . . apply . . . outside of the removal context" (quoting *Lee v. USCIS*, 592 F.3d 612, 619 (4th Cir. 2010))).

II. THE CONSTITUTION REQUIRES JUDICIAL REVIEW WHERE NO OTHER MECHANISM TO ENSURE REVIEW IS AVAILABLE.

Interpreting § 1252(a)(2)(B) to apply outside of removal proceedings would bar all judicial review over many executive decisions for people who have lawful immigration status and who have lived in the United States for decades. *See infra* Section III. Such an outcome would violate the doctrine of separation of powers and the Due Process Clause of the Fifth Amendment, threatening the rule of law by allowing the agency complete impunity to commit flagrant violations of the law. As a result, should the Court conclude § 1252(a)(2)(B) applies here, it must also confront the grave constitutional question that such a conclusion forces.

A. Barring All Judicial Review of Questions of Law Violates the Separation of Powers.

Barring all judicial review upsets the basic structure of the Constitution. At a minimum, the "judicial [p]ower" in Article III, Section 1 of the Constitution provides the federal courts with the power to "to say what the law is." *Marbury*, 5 U.S. at 177; *see also Loper Bright*, 2024 WL 3208360, at *31 (Gorsuch, J., concurring) (discussing the "judicial power vested in [federal courts] by Article III to say what the law is"). Yet here, the lower court's reading of § 1252(a)(2)(B) hands the Executive the exclusive power both to "execute[]" *and* "construe[] the law." *Wayman v. Southard*, 23 U.S. 1, 46 (1825).

Doing so imperils the rule of law, as the Framers explained when urging the states to ratify the Constitution. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison). As Chief Justice Marshall stated, "[i]t would excite some surprise if, in a government of laws and of principle . . . a department whose appropriate duty it is to decide questions of right . . . between the government and individuals," leaves such individuals with "no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust." *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28–29 (1835); *cf. Patel*, 596 U.S. at 365 (Gorsuch, J., dissenting) (warning that eliminating judicial review in this context would "turn[] an agency once accountable to the rule of law into an authority unto itself").

To prevent this result, Article III guarantees that federal courts will act as an "essential safeguard" to the Republic by allowing the courts to exercise their "proper and peculiar province": "[t]he interpretation of the laws." The Federalist No. 78 (Alexander Hamilton). Under the system of checks and balances, "[t]he 'check' the judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review." *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 76 (2015) (Thomas, J., concurring in judgment); *see also United States v. Nixon*, 418 U.S. 683, 704–05 (1974) (the "judicial Power of the United States" is the power "to say what the law is" (quoting U.S. Const. art. III, § 1, and *Marbury*, 5 U.S. at 177)). Critically, "the 'judicial Power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can[not] be shared with the Executive Branch." *Nixon*, 418 U.S. at 704. This Court has repeatedly reaffirmed that basic principle, *see Loper Bright*, 2024 WL 3208360, at *10; *Miller v. Johnson*, 515 U.S. 900, 922 (1995), which underlies "[t]he very structure of the articles delegating and separating powers under Arts. I, II, and III," *INS v. Chadha*, 462 U.S. 919, 946 (1983); *see also Kisor v. Wilkie*, 588 U.S. 558, 612–15 (2019) (Gorsuch, J., concurring) (drawing on history and founding era writings to explain why the Founders guaranteed judicial independence and entrusted the courts with interpreting the law).

Notwithstanding this constitutional structure, the lower court's ruling assumes that Congress eliminated this fundamental constitutional safeguard. Yet when Congress expanded the administrative state nearly a century ago, this Court repeatedly looked to the availability of judicial review over agency actions to uphold the administrative

schemes Congress devised. For example, in *NLRB v. Jones & Laughlin Steel Corp.*, the Court explained that the National Labor Relations Act did "not offend against the constitutional requirements governing the creation and action of administrative bodies," largely because the agency decisions were "subject to review by the designated court." 301 U.S. 1, 46–47 (1937). Notably, the Court observed that such review included "all questions of constitutional right or statutory authority." *Id.* at 47.

A few years later, the Court upheld the authority of the Interstate Commerce Commission (ICC) where it exercised its powers to reorganize a bankrupt railway company. *Reconstruction Fin. Corp. v. Bankers Tr. Co.*, 318 U.S. 163 (1943). The Court rejected a constitutional challenge to the ICC's structure because the governing act left "the [federal district] court free to decide upon the basis of the Commission's report *all questions of law*." *Id.* at 170 (emphasis added).

Against this backdrop, and in light of Congress's efforts to ensure review of agency action through the Administrative Procedure Act (APA), *see, e.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48–51 (1950), *superseded by statute as stated in Ardestani v. INS*, 502 U.S. 129 (1991), this Court constructed the modern presumptions against reading statutes to deprive federal courts of jurisdiction to review agency action, *see, e.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 136, 149 (1977); *Barlow v. Collins*, 397 U.S. 159, 166–67 (1970). Because of these presumptions and the APA, the dangers the Founders warned against did not arise. Instead, this Court concluded that Congress had heeded the Court's

warnings and had not eliminated judicial review. *See Abbott*, 387 U.S. at 139–41; *see also Barlow*, 397 U.S. at 165–67.

The separation of powers concerns underlying those earlier cases apply with equal force in the immigration context. For example, in *McNary v. Haitian Refugee Center, Inc.*, the Court rejected the government's argument that no judicial review was available over the noncitizens' claims that the agency "routinely and persistently violated the Constitution and statutes in processing [Special Agricultural Worker (SAW) program] applications." 498 U.S. 479, 491 (1991). The Court recognized that denying jurisdiction over those claims would result in "the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* at 497. For that reason, the Court employed the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action" to ensure that review of those claims was available. *Id.* at 496.

Notably, since *McNary*, the Court has "consistently applied the presumption of reviewability to immigration statutes," recognizing that the grave constitutional concerns that animate the presumption apply equally in this context. *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020) (internal quotation marks omitted)); *accord Kucana*, 558 U.S. at 251 (same).[4] Thus, the separation of

4. That immigration is a matter of "public rights" does not alter this analysis. *SEC v. Jarkesy*, 603 U.S. ---, 2024 WL 3187811, at *11 (2024). In immigration cases, the Constitution does not require a judicial determination of all issues and executive officers can issue decisions. *See id.*; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 343 (1909). But even in public

powers makes judicial review necessary when the agency applies and interprets federal statutes or issues decisions affecting the due process rights of noncitizens who often are lawfully present or have lived here for decades. *See, e.g.*, *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993) (employing canon to avoid interpretation that would bar certain noncitizens from obtaining judicial review of lawfulness of applicable regulation); *St. Cyr*, 533 U.S. at 298 ("For the INS to prevail it must overcome . . . the strong presumption in favor of judicial review of administrative action . . . .").

B. Barring All Judicial Review Violates the Due Process Clause.

Eliminating all judicial review would violate the Due Process Clause for thousands of people similarly situated to the cases referenced below. *See infra* Section III. Due process demands that such noncitizens with significant ties to the United States receive a judicial hearing where an Article III court can consider their legal claims in agency cases affecting their life and liberty.

"[T]he Due Process Clause, like its forebear in the Magna Carta . . . was 'intended to secure the individual

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rights cases, the Court has never endorsed the constitutionality of adjudications by an "administrative agency without any sort of intervention by a court at any stage of the proceedings." *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455 n.13 (1977). Instead, since first creating the public rights doctrine, the Court has always assumed judicial review is available; indeed, even in *Oceanic Steam Navigation Co.*, the Court interpreted the immigration law at issue and ruled on the related constitutional questions. 214 U.S. at 332–43.

from the arbitrary exercise of the powers of government.'" *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)). "By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions." *Id.* What process is due an individual depends on the circumstances that a case or situation presents. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Noncitizens like those in Section III have significant due process rights as persons lawfully present who have lived here for decades. "[T]he Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."). That principle is particularly true where a person has "gain[ed] admission to [the United States]" and has "develop[ed] the ties that go with permanent residence." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

For many noncitizens, these due process rights guarantee judicial review of legal questions. Agency decisions can deprive noncitizens of the right to remain in this country, or they can impede noncitizens with lawful status from becoming lawful permanent residents, thus preventing them from obtaining U.S. citizenship, along with all its attendant rights, such as the right to vote. Agency decisions denying permanent resident status also

often severely limit the ability of noncitizens to travel, as many, like asylees, cannot travel without receiving special permission from USCIS. Furthermore, only U.S. citizens and lawful permanent residents can file family visa petitions. Finally, by denying adjustment of status applications, USCIS exposes many noncitizens to potential removal and separation from their families, homes, and careers.

These effects make clear that USCIS's decisions affect fundamental rights. And yet, for many, there would be no opportunity for judicial review if § 1252(a)(2)(B) applied outside the context of removal proceedings. *See infra* Section III. Absent judicial review, the agency could unlawfully bar a pathway to the right to vote, notwithstanding the fact that the vote is "a fundamental political right, . . . preservative of all rights." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (alteration in original) (citation omitted). There also would be no judicial review for agency decisions that may separate some noncitizens from their families, despite their many years of lawful status in this country. Such "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society.'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citation omitted).[5] In situations like these,

5. The Court's rejection of a challenge by a U.S. citizen and her noncitizen spouse to a consular officer's denial of the spouse's immigrant visa application is inapposite. *Dep't of State v. Muñoz*, 602 U.S. ---, 2024 WL 3074425 (2024) (holding a U.S. citizen did not have a fundamental liberty interest in "spousal immigration"). First, the right asserted here is procedural, not substantive. Second, even assuming no due process rights exist for unadmitted individuals outside the country, those who have

agency action threatens to cause a noncitizen to lose "all that makes life worth living." *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (citation omitted).

Given these weighty and fundamental interests, due process demands "the essential standards of fairness." *Id.* at 154. Those "essential standards of fairness," *id.*, guarantee the "opportunity to present [a] case effectively," *Plasencia*, 459 U.S. at 36. "The theme that 'due process of law signifies a right to be heard in one's defense'[] has continually recurred" in the Court's caselaw. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (quoting *Hovey v. Elliot*, 167 U.S. 409, 417 (1897)). "[T]here can be no doubt that at a minimum the[] [words of the Due Process Clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

Here, these principles guarantee judicial review as a matter of due process. For example, in *Boddie*, the Court held that similarly weighty interests—those regarding marriage and family—meant that due process required access to courts. 401 U.S. at 374, 376. In the immigration context, these same principles have led this Court to interpret statutes not to foreclose judicial review. For example, in *Heikkila v. Barber*, the Court held that while the Immigration Act of 1917 "preclud[ed] judicial intervention in deportation cases," federal courts

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lived in the United States lawfully and have developed ties to their communities have much greater rights, particularly as to the *process* they are due. *See, e.g.*, *Plasencia*, 459 U.S. at 32–33; *Yamataya*, 189 U.S. at 99–101.

could still review such cases "insofar as it was required by the Constitution." 345 U.S. 229, 234–35 (1953). At the time, that judicial oversight was accomplished via habeas corpus, *see id.*, which, at a minimum, guarantees review of legal questions, *see Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (holding that the Suspension Clause entitles a detained person "to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law" before an Article III court (citation omitted)). Moreover, since the earliest days of immigration regulation, this Court has ensured that noncitizens who enter this country lawfully receive due process in executive proceedings, and the Court has exercised jurisdiction to review executive interpretations that may flout the law and deprive noncitizens of the statutory rights Congress provided them. *See Yamataya*, 189 U.S. at 98–101.

Since these early years of immigration regulation, the Court has repeatedly reiterated the conclusion that the Constitution requires some form of judicial review in certain cases. Thus, in *St. Cyr*, the Court reaffirmed that "some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" 533 U.S. at 300 (quoting *Heikkila*, 345 U.S. at 235). With that principle in mind, the Court held that the INA's judicial review provisions at issue did not foreclose review of legal questions raised in challenges to removal orders through petitions for writs of habeas corpus. *Id.* at 300–14. And as noted above, in *McNary*, the Court interpreted the INA not to foreclose federal district court review where the agency "routinely and persistently violated the Constitution and statutes in processing SAW applications." 498 U.S. at 491. In so holding, the Court noted that concluding otherwise

would result in "the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* at 497; *see also Reno*, 509 U.S. at 64 (similar). Recently, the Court looked to the principles underlying these cases to hold that judicial review includes review of "mixed" questions of law and fact. *Guerrero-Lasprilla*, 589 U.S. at 229–30, 232–34. By contrast, an expansive interpretation of § 1252(a)(2)(B) holding that it applies outside the removal context would mean that many noncitizens who have lawfully resided in the U.S. for years or even decades could never receive judicial review of their legal claims. The Due Process Clause forbids that result and guarantees them more protection.[6]

III. PENDING CASES ILLUSTRATE THAT APPLYING § 1252(A)(2)(B) OUTSIDE THE REMOVAL CONTEXT WOULD ELIMINATE JUDICIAL REVIEW ALTOGETHER FOR MANY NONCITIZENS WITH LAWFUL STATUS AND DEEP TIES TO THE UNITED STATES.

In *Patel*, after expressly stating that the Court was not deciding the issue, this Court speculated that Congress may have intended to foreclose judicial review of denials of discretionary relief made outside of removal proceedings "unless and until removal proceedings are initiated." 596 U.S. at 345–46. This observation fails to appreciate the presumption of judicial review, and the grave constitutional consequences for the many

6. *Department of Homeland Security v. Thuraissigiam*, 591 U.S. 103 (2020), does not compel a different conclusion. That case addressed only the due process rights of noncitizens who were apprehended immediately upon their unlawful entry to the United States and had no lawful basis to remain in this country. *Id.* at 114.

noncitizens who affirmatively apply for discretionary forms of relief specified under § 1252(a)(2)(B) but may never be subject to removal proceedings. In such cases, USCIS's decisions are never subject to review by an IJ, and, by extension, judicial review through the petition for review process. Consequently, if § 1252(a)(2)(B) applies outside the removal context, certain USCIS denials will never receive judicial review—even when USCIS's actions plainly violate the law.

Such deprivation of judicial review impacts many longtime residents with deep ties to this country and those with compelling needs for protection under U.S. immigration law. For example, individuals who have previously been granted asylum, and thus granted the right to live and work indefinitely in the United States, are eligible to adjust status to become lawful permanent residents provided they meet certain physical presence and admissibility requirements. *See generally* 8 U.S.C. § 1159(b). Applicants for asylee adjustment must submit their applications to USCIS, unless they are in removal proceedings. 8 C.F.R. § 209.2(a), (c). Notably, USCIS's denial of an adjustment application does not terminate asylum status. And in many cases, DHS does not initiate removal proceedings after denying an asylee's adjustment application because there is no basis to terminate the prior grant of asylum. *See* 8 C.F.R. § 208.24(a), (e). Finding that § 1252(a)(2)(B) strips federal courts of jurisdiction over USCIS asylee adjustment denials outside the removal context—no matter how arbitrary, erroneous, or illegal—would deprive those asylees of any judicial review at all and thus of the opportunity to eventually gain U.S. citizenship.

A recent Fourth Circuit case illustrates this. **Saleh Shaiban** is a citizen of Yemen who has been living in the United States since 1999. *Shaiban v. Jaddou*, 97 F.4th 263 (4th Cir. 2024). In 2006, an IJ granted Mr. Shaiban's application for asylum in removal proceedings. *Id.* at 264. During those proceedings, Mr. Shaiban disclosed that he was a member of the Yemeni Socialist Party and had fought in Yemen's civil war in 1994. *Id.* In 2008, he filed an application for adjustment of status with USCIS. *Id.* A *decade* later, in August 2018, USCIS denied Mr. Shaiban's adjustment of status application on the ground that his participation in the Yemeni Socialist Party qualified as terrorist activities, rendering him ineligible to adjust. *Id.*

Mr. Shaiban challenged USCIS's denial before the district court, asserting that the immigration court had already found the terrorism bar inapplicable to him. *Id.* at 265. Citing *Patel*, the Fourth Circuit found that it lacked jurisdiction to review the merits of Mr. Shaiban's case. *Id.* at 266–67. Specifically, the Fourth Circuit found that this Court's interpretation of § 1252(a)(2)(B)(i) applies outside the removal context, and that § 1252(a)(2)(B)(ii) applied "with equal force" to USCIS denials of asylee adjustment. *Id.* at 267.

The same issue is also pending before the Second Circuit. **Ahmad Azatullah** is an Afghan asylee who seeks to adjust his status to become a lawful permanent resident. *Azatullah v. Mayorkas*, No. 23-7722 (2d Cir. argued June 11, 2024). In the 1980s, when Mr. Azatullah was still living in Afghanistan, he aided the mujahidin in fighting against Soviet occupation. Pet'r's Br. 5–7, *Azatullah v. Mayorkas*, No. 23-7722, Dkt 21.1 (2d Cir. Jan. 19, 2024). The mujahidin—which opposed the Soviet-backed Afghan

government—were funded in part by the United States and called "freedom fighters" by President Ronald Reagan for their struggle against the Soviets. *Id.* at 6 n.2. Mr. Azatullah fled Afghanistan in January 1991. *Azatullah v. Mayorkas*, No. 1:20-cv-01069-MKV, 2023 WL 5935028, at *1 (S.D.N.Y. Sept. 12, 2023). He was eventually granted asylum by an IJ in 2001. *Id.* at *2.

The following year, Mr. Azatullah applied for adjustment of status to lawful permanent residence under § 1159(b). *Id.* USCIS interviewed him nearly two decades later, and in April 2019, denied Mr. Azatullah's application for adjustment of status on the basis that he was inadmissible under 8 U.S.C. § 1182(a)(3)(B) for having provided material support to the mujahidin, which the agency now deemed a terrorist organization. *Id.* Mr. Azatullah then filed an action in district court challenging USCIS's denial of his adjustment application. *Id.* The district court granted the government's motion to dismiss, finding that § 1252(a)(2)(B) applies outside removal proceedings. *Id.* at *7.

As with asylees, the INA also provides a pathway to lawful permanent residence for many noncitizens who have been granted temporary visas, such as a U visa, an immigration benefit that Congress created to protect victims of violent crimes who assist law enforcement. *See* 8 U.S.C. § 1255(m). Individuals who have held U status for three years may apply to adjust their status to lawful permanent residence. *Id.* Importantly, applications for U-based adjustment are "solely within USCIS's jurisdiction," 8 C.F.R. § 245.24(f), and cannot be filed or renewed before an IJ in removal proceedings, *see id.* § 245.24(k) ("USCIS shall have exclusive jurisdiction over

adjustment applications filed under [8 U.S.C. § 1255(m)]."). Federal regulations require applicants to appeal a denial of U-based adjustment only to USCIS's Administrative Appeals Office. *Id.* § 245.24(f)(2). Given this statutory and regulatory scheme, USCIS's denial of U-based adjustment is never at issue in removal proceedings and thus not addressed in a removal order—or in a petition for review of a removal order.[7] Expanding the application of § 1252(a)(2)(B) to USCIS decisions outside the removal context would thus leave U-visa holders without any means to challenge denials of their adjustment applications.

Linda Cabello Garcia, a citizen of Mexico who entered the United States in 1999 when she was only six years old, faces this very prospect. Pet'r's Br. 9, *Cabello Garcia v. USCIS*, No. 23-35267, Dkt. 11-1 (9th Cir. June 16, 2023). As a young woman, she became a victim of stalking and cooperated with the relevant criminal investigation. *Id.* On this basis, Ms. Cabello submitted a U visa application to USCIS in 2013, along with an application for a waiver of any applicable grounds of inadmissibility. *Id.* In October 2016, USCIS granted her U visa application and waived the inadmissibility grounds as requested. *Id.* In August 2020, Ms. Cabello applied for adjustment of status under § 1255(m), based on her status as a U-visa holder. *Id.* The following year, USCIS requested that Ms. Cabello submit Form I-693, Report of Immigration Medical Examination and Vaccination Record, a form that USCIS uses to determine whether an applicant for adjustment of status is inadmissible on public health grounds. *Id.* at 6–7, 9.

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7. Judicial review of orders of removal "encompass[es] only the rulings made by the [IJ] or [BIA] that affect the validity of the final order of removal." *Nasrallah v. Barr*, 590 U.S. 573, 582 (2020).

Ms. Cabello asserted that she was not required to submit the form because U-visa holders seeking to adjust under § 1255(m) are not subject to the public health grounds of inadmissibility. *Id.* at 9–10. Moreover, Ms. Cabello explained that she could not complete the exam due to her diagnosed anxiety and panic disorders, providing medical evidence in support. *Id.* at 10. In August 2022, USCIS denied Ms. Cabello's application for adjustment of status solely based on the failure to provide Form I-693. *Id.*

In December 2022, Ms. Cabello filed a district court complaint seeking review of USCIS's denial, asserting that the policy of requiring a Form I-693 from U-based adjustment applicants was unlawful. *Id.* She filed the lawsuit on behalf of herself and similarly situated individuals, seeking certification of a class of U-based adjustment applicants subject to the same policy. *Cabello Garcia v. USCIS*, No. 3:22-cv-5984, 2023 WL 2969323, at *1 (W.D. Wash. Apr. 17, 2023). Relying on *Patel*, the district court dismissed the action, finding that § 1252(a)(2)(B)(i) precludes judicial review over all forms of relief under § 1255. *Id.* at *2. Ms. Cabello's appeal is currently pending before the Ninth Circuit. *Cabello Garcia v. USCIS*, No. 23-35267 (9th Cir. filed Apr. 19, 2023).

As these cases demonstrate, USCIS regularly denies applications for discretionary relief filed by noncitizens who—like Mr. Shaiban, Mr. Azatullah, and Ms. Cabello—are not subject to removal proceedings. Notably, all three cases involve individuals with lawful status who have lived in the United States for over two decades and applied for adjustment of status to permanent residence based on that lawful immigration status. All have family members who are lawful permanent residents or U.S. citizens. *See*

Shaiban v. Mayorkas, No. 3:18-CV-00153-FDW-DCK, 2021 WL 2827299, at *1 (W.D.N.C. July 7, 2021) (wife and children granted lawful permanent residency); Pet'r's Br. 9, *Azatullah*, No. 23-7722, Dkt. 21.1 (three U.S.-citizen children); Pet'r's Br. 9, *Cabello Garcia*, No. 23-35267, Dkt. 11-1 (U.S.-citizen husband and sister). Applying § 1252(a)(2)(B) outside the removal context means that no judicial review would ever be available for such individuals, irrespective of the compelling nature of their claims or egregiousness of USCIS's errors.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court below as § 1252(a)(2)(B) does not apply outside the removal context, or, alternatively, dismiss this case as improvidently granted.

Respectfully submitted,

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