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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JORGE RIVERA LARIOS, Petitioner, v. SERGIO ALBARRAN, et al., Respondents.	Case No. 3:25-cv-08799-AMO **RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING JURISDICTION IN OPPOSITION TO PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION**

Congress has removed the federal courts' jurisdiction to review "any . . . 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." 8 U.S.C. § 1252(a)(2)(B)(ii). This provision applies to 8 U.S.C. 1231, which is in the same "subchapter" (Subchapter II) of Title 8, Chapter 12, of the United States Code.

Section 1231 governs the "Detention and removal of aliens ordered removed." 8 U.S.C. § 1231. As relevant here, § 1231(a)(6) provides that "[a]n alien ordered removed who is inadmissible . . . may be detained beyond the [initial 90-day] removal period and, if released, shall be subject to the terms of supervision in paragraph (3)."

Consistent with this statute (and corresponding delegations of authority), the Department of Homeland Security has promulgated regulations governing the "[c]ontinued detention of inadmissible, criminal, and other aliens beyond the removal period." 8 C.F.R. § 241.4. These regulations permit the government to release an individual (and impose conditions of release) following an evaluation of various factors. *See id.* §§ 241.4(d)-(f), (j). However, the regulations also provide that "[a]ny alien described in paragraph (a) or (b)(1) of this section who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody." *Id.* § 241.4(l)(1). More specifically, "[r]elease may be revoked in the exercise of discretion when, in the opinion of the revoking official: . . . The alien violates any condition of release." *Id.* § 241.4(l)(2).

As this framework makes clear, Congress has "specified" that DHS's decision whether to revoke a release based on a violation of the conditions of supervision is "in the discretion of" the agency itself, and therefore the Court lacks jurisdiction to review it under § 1252(a)(2)(B)(ii).

Start with the text of the statute itself. Section 1231(a)(6) provides that an "inadmissible" alien such as Petitioner "*may* be detained beyond the removal period." (Emphasis added.) The operative word is "may." The Supreme Court "has repeatedly observed the word 'may' *clearly* connotes discretion." *Bouarfa v. Mayorkas*, 604 U.S. 6, 13 (2024) (cleaned up; emphasis in original) (holding 1252(a)(2)(B)(ii) precludes review of visa revocation decisions). Because Congress has granted the Executive Branch discretion under § 1231(a)(6), § 1252(a)(2)(B)(ii) precludes judicial review of factual

determinations made by the Executive in the exercise of that discretion.[1]

Indeed, the Supreme Court has held that the adjacent clause in § 1252(a)(2)(B)(i) "precludes judicial review of factual findings that underlie a denial of relief" of the types specified in that provision. *Patel v. Garland*, 596 U.S. 328, 331 (2022). And the Ninth Circuit has recognized that, "[a]lthough *Patel* addressed § 1252(a)(2)(B)(i), its reasoning applies to the neighboring subsection § 1252(a)(2)(B)(ii)." *Zia v. Garland*, 112 F.4th 1194, 1200 (9th Cir. 2024). "*Patel* makes clear that any underlying eligibility determination made in support of the ultimate discretionary decision is beyond judicial review—'[f]ederal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings.'" *Id.* at 1200-01. Thus, § 1252(a)(2)(B)(ii) applies to factual findings that underlie any other decision made discretionary by the statute, such as the decision to detain an inadmissible individual beyond the 90-day removal period. *See Patel*, 596 U.S. at 331; 8 U.S.C. § 1231(a)(6).[2]

The agency's determination that Petitioner committed a crime and therefore violated the conditions of his release is the kind of pure factual determination underlying its detention decision that § 1252(a)(2)(B)(ii) makes unreviewable. *See Zia*, 112 F.4th at 1201. It is not a "mixed question of law and fact" over which a court of appeals might retain jurisdiction under § 1252(a)(2)(D). *See Wilkinson v. Garland*, 601 U.S. 209, 212 (2024). In *Wilkinson*, the Supreme Court explained that "[t]he application of a statutory legal standard (like the exceptional and extremely unusual hardship standard) to an established set of facts is a quintessential mixed question of law and fact," and therefore reviewable in a petition for review to a court of appeals. *Id.* But by its own terms § 1252(a)(2)(D) does not apply to this district-court habeas petition, and even if it did, the question whether Petitioner committed a crime did not require applying a legal standard; it simply required officials to make a

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[1] To be clear, the underlying source of discretion is Congress's provision that the government "may" detain inadmissible aliens after the 90-day removal period. 8 U.S.C. § 1231(a)(6). Although the implementing regulations provide a framework for how that discretion is to be exercised, the relevant discretion is derived from the statute itself. *Cf. Kucana v. Holder*, 558 U.S. 233, 236 (2010).

[2] Although the title of § 1252(a)(2)(B) is "Denials of discretionary relief," that language does not limit the plain text of § 1252(a)(2)(B)(ii) to denials of relief *from removal*, as opposed to other forms of discretionary relief provided in the INA, such as conditional release from detention pending removal. *See INS v. St. Cyr*, 533 U.S. 289, 308 (2001) ("The title of a statute cannot limit the plain meaning of the text.") (cleaned up) (superseded by statute on other grounds). Indeed, the Supreme Court has recognized the application of § 1252(a)(2)(B)(ii) to the "exercise of discretion" in bond hearings under § 1231(a)(6). *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001).

factual decision based on the evidence available to them at Petitioner's most recent check-in. Such "'factual question[s] raised in an application for discretionary relief' remain unreviewable." *Martinez v. Clark*, 124 F.4th 775, 782 (9th Cir. 2024) (quoting *Wilkinson*, 601 U.S. at 222).

Indeed, the Ninth Circuit has recognized that immigration enforcement officers must often make preliminary determinations in circumstances where "the pertinent facts may not be practically ascertainable"—and that Congress has protected such discretionary determinations from judicial review. *Vazquez Romero v. Garland*, 999 F.3d 656, 665 (9th Cir. 2021). For example, in evaluating whether a lawful permanent resident encountered at the border "has committed an offense" rendering them inadmissible, "[w]here the LPR has not yet been convicted and has not admitted to committing such an offense, the answer to the relevant question will most often be resolved in a prosecution that has not yet taken place." *Id.* But "[s]econd-guessing whether the immigration authorities properly paroled a returning LPR into the country would entail not only scrutinizing immigration authorities' evidence at the border but also interfering with the government's exercise of its parole discretion." *Id.* Through § 1252(a)(2)(B)(ii), however, "Congress expressed its intent to shield the Attorney General's discretionary decisions from judicial review." *Id.*

Similarly here, the evidence uncovered at Petitioner's most recent check-in appointment raised the possibility that he had violated the conditions of his release, and the government needed to make a decision whether or not to revoke his release based on the information available to it at that appointment. The statute and regulations protect the government's ability to make that discretionary determination at the time of that interaction, while also providing multiple opportunities for a detained individual to challenge the decision thereafter. *See* 8 C.F.R. § 241.4(l). Having determined based on the information available to it at that time that Petitioner violated the conditions of his release, the government was not required to nevertheless release him until additional corroborating evidence could be obtained. Rather, the government was entitled to exercise its discretion to revoke Petitioner's release and detain him, while providing him the opportunity to supply additional evidence regarding that decision thereafter.

The government's factual determination that Petitioner committed a crime—and therefore should have his conditional release revoked—was a discretionary determination that the Court lacks jurisdiction to review under 8 U.S.C. § 1252(a)(2)(B)(ii).

Respectfully submitted,

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Dated: October 30, 2025

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