IRA KURZBAN - FOUNDER
JED KURZBAN - PARTNER
HELENA TETZELI - PARTNER
JOHN PATRICK PRATT - PARTNER
EDWARD RAMOS - PARTNER
KEVIN A. GREGG - PARTNER

KURZBAN KURZBAN TETZELI & PRATT
ATTORNEYS AT LAW

131 MADEIRA AVENUE
CORAL GABLES, FL 33134
TELEPHONE (305) 444-0060
FACSIMILE (305) 444-3503
WWW.KKTPLAW.COM

Practice Advisory on the Impact of the Eleventh Circuit's En Banc Decision in *Patel v. U.S. Att'y Gen.*: Obtaining Judicial Review Despite the Decision

In August, the Eleventh Circuit issued *Patel v. U.S. Att'y Gen.*, 971 F.3d 1258 (11th Cir. 2020), an important en banc decision that substantially limits judicial review for certain forms of immigration relief. This advisory is intended to guide practitioners who are litigating petitions for review involving cases potentially affected by *Patel*.

What *Patel* Held

The Eleventh Circuit convened en banc in *Patel* to decide the scope of the jurisdiction-stripping statute at INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i). This statute bars review of "any judgment regarding" five specified forms of immigration relief:

(1) inadmissibility waivers under INA § 212(h);

(2) "consent to reapply" waivers under INA § 212(i);

(3) cancellation of removal under INA § 240A;

(4) voluntary departure under INA § 240B; and

(5) adjustment of status under INA § 245.

Before *Patel*, the consensus among the circuits was that this jurisdictional bar applies only to *discretionary aspects* of relief covered under these sections. Under this settled interpretation, judicial review remained available for any challenge to non-discretionary threshold eligibility criteria. For example, if an immigration judge denied cancellation of removal because the applicant failed to show seven or ten years of continuous residence, challenges to that denial remained reviewable. Similarly, if an applicant for adjustment of status was denied on the ground that she was inadmissible, that inadmissibility determination was fully reviewable on petition for review, even if the inadmissibility ground was not charged on the NTA. Review remained available because the denial of relief was based on the applicant's failure to satisfy a non-discretionary eligibility requirement, and such denials involve no "judgment" or discretion.

In *Patel*, the Eleventh Circuit rejected that settled understanding in favor of an "expansive" interpretation of § 242(a)(2)(B)(i). Under *Patel*, no review is available for *any* decision regarding the relief specified above—including threshold eligibility criteria. The only exception is for legal or constitutional claims, which remain reviewable under INA § 242(a)(2)(D).

In short, *Patel* bars review for any factual challenge to any denial of the relief specified above, even if the challenge is to a finding that objective threshold eligibility criteria were not satisfied.

Practice Pointers

The petitioners in Patel will be filing a petition for certiorari in the United States Supreme Court. In the interim, we offer the following practice pointers for litigators in the Eleventh Circuit:

1. **Frame arguments regarding the denial of specified relief as legal or constitutional claims.**

Because of the INA § 242(a)(2)(D) savings clause, the Court retains jurisdiction to review any "constitutional claims or questions of law raised upon a petition for review." Thus, if you have colorable claims that the immigration judge ("IJ") or Board of Immigration Appeals ("BIA") committed legal or constitutional errors in denying relief, those arguments should be raised and the § 242(a)(2)(D) savings clause invoked. With creative lawyering, legal and constitutional errors can often be identified:

- For example, if the IJ or BIA failed to follow binding precedent, or violated regulations, those are legal errors.

- Likewise, as the *Patel* majority itself notes, "to the extent that an immigration judge's factual conclusions reflect a lack of 'reasoned consideration' (or lack any reasoning . . .), those rulings are subject to legal and constitutional challenges *Patel*, 971 F.3d at 1279 n.25 (slip op. at 39 n.25).

- Finally, as the Supreme Court recently held, mixed questions of fact and law—*i.e.*, the application of settled facts to a legal standard—remain reviewable under the § 242(a)(2)(D) savings clause. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020).

2. **Preserve factual challenges in case the Supreme Court reverses *Patel*.**

If you have a solid factual challenge to the denial of discretionary relief covered by INA § 242(a)(2)(B)(i), we encourage you to raise the claim despite *Patel* so that the issue is preserved if *Patel* is reversed by the Supreme Court.

Our firm was appointed counsel in *Patel*, and we are currently working on a certiorari petition to obtain Supreme Court review. We believe there is a good chance the Supreme Court will grant review and ultimately reverse the Eleventh Circuit. If that happens, jurisdiction would be restored to review all challenges to findings that threshold eligibility criteria for relief were not satisfied. But if you fail to raise the factual issue in Eleventh Circuit briefing in your case, the challenge will likely be deemed abandoned. You should therefore raise those issues now despite *Patel* to ensure they are preserved.

3. **If your petition for review is denied or dismissed based on *Patel*, consider seeking Supreme Court review and contact us.**

If the Court denies your petition based on *Patel*'s jurisdictional holding, you should strongly consider joining us in filing a petition for certiorari with the Supreme Court. If the Supreme Court

takes up *Patel*, it will likely consolidate other pending certiorari petitions with *Patel* or hold them until *Patel* is decided. And if the Supreme Court grants review and reverses the Eleventh Circuit, it will likely grant all related certiorari petitions and remand to the Eleventh for new decisions on the merits.

If your petition for review is denied or dismissed based on *Patel*, we ask that you please contact Edward Ramos (eramos@kktplaw.com).