No. 23-583

In the Supreme Court of the United States

AMINA BOUARFA,
Petitioner,
v.
SECRETARY, DEPARTMENT OF HOMELAND SECURITY, DIRECTOR, U.S. CITIZENSHIP & IMMIGRATION SERVICES (USCIS),
Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When considering whether to approve a petition for an immigrant visa, the Government must adhere to certain nondiscretionary criteria. *See, e.g.*, 8 U.S.C. § 1154(c) (providing that "no petition shall be approved" if the individual seeking a visa has previously entered a marriage "for the purpose of evading the immigration laws"). When a visa petition is denied based on a petitioner's failure to satisfy such a nondiscretionary requirement, it is generally understood that the petitioner has a right to judicial review of that decision.

Once a visa petition has been approved, the Government has the power to revoke approval of the visa petition for "good and sufficient cause" pursuant to 8 U.S.C. § 1155. The circuits are in open conflict over whether judicial review is available when the Government revokes an approved petition on the ground that it initially misapplied nondiscretionary criteria during the approval process. The Sixth and Ninth Circuits hold that judicial review is available under these circumstances, but the Second, Third, Seventh, and now the Eleventh Circuit hold that all revocations are "discretionary" decisions for which there is no right to judicial review, even when they are based on a misapplication of the same nondiscretionary criteria that would be reviewable if the petition had originally been denied.

The question presented is:

Whether a visa petitioner may obtain judicial review when an approved petition is revoked on the basis of nondiscretionary criteria.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

Bouarfa v. Secretary, Department of Homeland Security, No. 22-12429, United States Court of Appeals for the Eleventh Circuit, judgment entered July 28, 2023 (75 F.4th 1157).

Bouarfa v. Mayorkas, No. 8:22-cv-224-WFJ-AEP, United States District Court for the Middle District of Florida, motion to dismiss granted June 8, 2022 and docketed June 9, 2022 (2022 WL 2072995), judgment entered September 19, 2023, Dkt. No. 16.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

ADDENDUM

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTORY AND REGULATORY PROVISIONS

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 75 F.4th 1157 (11th Cir. 2023). Pet. App. 1a-11a. The district court's order dismissing the case is unreported, and available at No. 8:22-cv-224-WFJ-AEP, 2022 WL 2072995 (M.D. Fla. signed June 8, 2022, and filed June 9, 2022). Pet. App. 12a-26a.

JURISDICTION

The Court of Appeals entered its judgment on July 28, 2023. Pet. App. 1a. On October 18, 2023, Justice Thomas extended the time to file a petition for a writ of certiorari through November 27, 2023. Petitioner timely sought certiorari on November 27, 2023, and this Court granted the petition on April 29, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the addendum to this brief.

INTRODUCTION

This case presents a stark choice between a rational and coherent system of judicial review for a narrow class of critically important immigration decisions and an irrational and perverse system that rewards an agency's professed error with insulation from judicial scrutiny.

The first step on the long path to naturalization for close family members of U.S. citizens is the filing of an immediate relative visa petition with the Department of Homeland Security. The Immigration and Nationality Act (INA) sets forth specific, nondiscretionary criteria the agency must apply in deciding whether to grant this petition. The agency "shall … approve" petitions that satisfy certain statutory requirements. 8 U.S.C. § 1154(b). And the statute mandates that "no petition shall be approved" if certain findings are made—including, as relevant here, that the noncitizen previously entered into a marriage "for the purpose of evading the immigration laws." *Id.* § 1154(c).

It is common ground that the agency's denial of a visa petition on the basis that the noncitizen has entered into a sham marriage is subject to judicial review. *See* Pet. 25; BIO 2. Such review is paramount given what is at stake: once a noncitizen is found to have entered a sham marriage, they "can *never* become a citizen of the United States or even reside permanently in this country." *Ghaly v. INS*, 48 F.3d 1426, 1436 (7th Cir. 1995) (Posner, C.J., concurring) (emphasis added).

The question presented in this case is whether the agency's application of Section 1154(c)'s nondiscretionary criteria becomes insulated from

judicial review when the agency revokes a previously approved visa petition on the ground that it should have denied the petition originally. Under this Court's "strong presumption" of judicial review, the Government bears the "heavy burden" of showing that Congress unambiguously foreclosed review of the agency's decision. *Salinas v. U.S. R.R. Ret. Bd.*, 592 U.S. 188, 197 (2021) (citation omitted). Here, nothing in the statutory text, context, or structure of the INA reflects Congress's unambiguous intent to create a senseless and arbitrary distinction between initial approvals and reconsideration of those approvals resting on the same nondiscretionary criteria.

The judicial review bar at issue, 8 U.S.C. § 1252(a)(2)(B)(ii), is specifically limited to "decision[s] or action[s]" that are "in the discretion of" the agency. This case involves the agency's decision that a beneficiary has engaged in a sham marriage and the agency's action revoking approval of a visa petition on that basis. Those determinations are not "in the discretion" of the agency. The agency is statutorily prohibited from allowing a noncitizen it determines to have engaged in a sham marriage to hold an "approved petition" that entitles them to move forward in the immigration process. Whether the determination is made when first adjudicating the petition, or at a later point in the immigration process, the determination is the same: that a petition *cannot* be "approved"—and a noncitizen thus *cannot* obtain the benefits they seek—based on application of nondiscretionary statutory criteria.

In making such determinations, the agency does not purport to exercise any discretion. When it determines that it has "approved" a petition "in error" because the record "warrants a denial," JA12, it

revokes the petition, because to do otherwise is barred by statute. *See, e.g.*, *Matter of Ortega*, 28 I. & N. Dec. 9, 10-11 (B.I.A. 2020). Accordingly, because the agency cannot—and does not—exercise any discretion in these circumstances, Section 1252(a)(2)(B)(ii)'s review bar does not apply.

Even if the agency could decline to revoke a petition in the event of a sham-marriage determination, the underlying decision concluding that the beneficiary has entered into a sham marriage would still be reviewable. This Court, the Courts of Appeals, and the Government have long recognized that review of nondiscretionary decisions—like the sham-marriage decision—remains available, even if those decisions are subsidiary to an ultimate exercise of discretion.

Any other result would "create a profound mismatch" in the statutory scheme: a noncitizen could obtain judicial review of the agency's nondiscretionary determination denying a visa petition, but could not obtain review of the *identical* nondiscretionary determination when made to correct the agency's purportedly mistaken approval. *Maslenjak v. United States*, 582 U.S. 335, 345 (2017). Congress did not insulate a later, but identical agency determination from judicial review simply because the agency believes it made a mistake—and Congress certainly did not do so unambiguously. Indeed, when Congress actually sought to prohibit review of other immigration-related revocations, it did so expressly. *See* 8 U.S.C. § 1201(i). Congress's decision to use "particular language in one section of a statute but omit[] it in another section of the same Act" indicates it acted "intentionally and purposely in the disparate

inclusion or exclusion." *Nken v. Holder*, 556 U.S. 418, 430 (2009) (citation omitted).

The Eleventh Circuit's contrary holding gives the agency a get-out-of-judicial-review-free card any time it claims that it misapplied mandatory statutory criteria in approving a visa petition. But Congress could not have intended that an agency's purported error would be inexplicably rewarded with protection from judicial oversight. And insulating the agency's nondiscretionary reconsiderations from review would "open[] the door to a world of disquieting consequences," *Maslenjak*, 582 U.S. at 346, including the disparate treatment of identically situated visa applicants. There is no unambiguous indication that Congress wanted judicial review of enormously consequential agency action to operate in such an arbitrary and unjust manner. This Court should reverse the judgment of the Eleventh Circuit.

STATEMENT OF THE CASE

A. Legal Background

1. Every year, thousands of family members of U.S. citizens and permanent residents immigrate to the United States. Many are immediate relatives—spouses, minor children, and parents—of U.S. citizens. *See* 8 U.S.C. § 1151(b)(2)(A)(i).

Recognizing the importance of family unification, Congress has enacted a detailed set of procedures for family-based immigration. In their path to citizenship, family-based immigrants must obtain an approved visa petition, use that approved petition either to obtain a visa or adjustment of status, and then, finally, request naturalization. At each step, the noncitizen bears "the burden of proof" of showing

entitlement to the immigration benefit he seeks. *Id.* § 1361.

This case focuses on the threshold step, in which the U.S. citizen files a visa petition with U.S. Citizenship and Immigration Services ("USCIS") on behalf of the noncitizen family member (the "beneficiary"). *Id.* § 1154(a). Known as an I-130, this form requires the petitioner to substantiate the relevant familial relationship and provide additional personal information.

At this threshold step, the INA requires USCIS to grant visa petitions that meet the relevant statutory requirements. If the agency "determines that the facts stated in the petition are true" and that the requirements are met, USCIS "shall … approve the petition." *Id.* § 1154(b). USCIS's discretion is limited to a few discrete areas, such as weighing credible evidence in determining whether a petitioner should be classified as a victim of domestic abuse. *Id.* § 1154(a)(1)(J), (a)(1)(B)(ii); *see also id.* § 1154(a)(1)(A)(viii)(I). Otherwise, it has no authority to deny petitions that satisfy the statutory criteria.

Conversely, the INA prohibits USCIS from permitting visa petitions to be "approved" in certain circumstances. This case involves one such prohibition, known as the sham-marriage bar. In pertinent part, the provision states:

> [N]o petition shall be approved if:
>
> (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent

> residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or
>
> (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

Id. § 1154(c). This provision precludes USCIS from allowing a visa petition to be approved where the beneficiary has entered into a sham marriage. When the agency finds evidence that the beneficiary may have entered into a sham marriage in the past, it affords the petitioner the opportunity to introduce evidence to rebut that charge. *See Matter of Singh*, 27 I. & N. Dec. 598, 605 (B.I.A. 2019); *see also* 8 C.F.R. § 103.2(b)(16)(i). If the petitioner cannot do so and the agency determines there is "substantial and probative evidence of [marriage] fraud," the agency will deny the petition. *Matter of Singh*, 27 I. & N. Dec. at 602. The consequences of such a finding are significant: once a noncitizen has been found to have entered into a sham marriage under this provision, they can never become a lawful permanent resident or citizen—raising the specter of permanent separation from their U.S. citizen family members. *Ghaly*, 48 F.3d at 1435-36 (Posner, C.J., concurring) (discussing effects of Section 1154(c) finding).

USCIS's approval of a visa petition is only the first step in the process. An approved visa petition is a prerequisite for obtaining a visa from the Department of State or adjustment of status from USCIS, and, ultimately, naturalization. *See* 8 U.S.C. § 1204 (visa);

id. §§ 1186a, 1255 (adjustment of status); *id.* §§ 1427, 1429 (naturalization). At each subsequent stage, the facts relevant to the petition—including the possibility of a sham marriage—are reviewed and reassessed by the agency. *See, e.g.*, *id.* § 1255(a) (adjustment of status requires applicant to be "eligible to receive an immigrant visa"). And if, prior to a grant of adjustment of status or a lawful permanent resident's entry pursuant to issuance of an immigrant visa, USCIS or the State Department believes that the petition *should* have been denied based on Section 1154(c), USCIS revokes the petition under 8 U.S.C. § 1155. *See, e.g.*, *Matter of Arias*, 19 I. & N. Dec. 568, 568-69 (B.I.A. 1988) (explaining practice in which State Department, upon finding evidence of sham marriage, "return[s] the visa petition to [USCIS] for possible revocation"); U.S. Department of State, *Foreign Affairs Manual*, 9 FAM 504.2-8(A) (U) (West 2024) ("[I]f [State Department officials] know or have reason to believe that the beneficiary is not entitled to the status approved in the petition, [they] will return the petition to USCIS …."); *see also Matter of Ortega*, 28 I. & N. Dec. at 11 ("visa petition will be … revoked[] … where there is substantial and probative evidence" of "fraudulent marriage"). The revocation provision, Section 1155, states that "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title." 8 U.S.C. § 1155.

These revocation determinations are effectively reconsiderations of the initial approval—and the agency's adjudication operates in exactly the same way. "[T]he burden of proof in visa petition revocation

proceedings properly rests with the petitioner, just as it does in visa petition proceedings." *Matter of Ho*, 19 I. & N. Dec. 582, 589 (B.I.A. 1988); *see* 8 U.S.C. § 1361. The agency's sole test for determining whether revocation is required is whether "evidence of record … *would have warranted a denial* based on the petitioner's failure to meet his or her burden of proof" under Section 1154. *Matter of Estime*, 19 I. & N. Dec. 450, 451 (B.I.A. 1987) (emphasis added). And no regulation affords agency officials overarching discretion to *not* revoke when the petitioner fails to meet this burden because he is subject to a statutory bar, such as Section 1154(c). Indeed, failure to revoke would have anomalous consequences, because an "approved petition" is intended to reflect a person's actual qualification for a benefit or relief and is thus a precondition for applying for an immigrant visa or adjustment of status. *See* 3A Am. Jur. 2d Aliens & Citizens § 409 (2d ed., May 2024 update) ("[B]efore a consular officer may grant an immigrant visa to [a noncitizen] as an immediate relative or a family-sponsored preference immigrant, the [noncitizen] must be the beneficiary of a relative visa petition approved by the Attorney General." (citing 8 U.S.C. §§ 1153(f), 1154(b))); *supra* at 7-8. A failure to revoke would thus result in the agency considering the noncitizen for relief that Congress has dictated the noncitizen is statutorily ineligible to receive.

In cases involving Section 1154(c), the agency accordingly—and invariably—revokes the granted visa petition where it finds "substantial and probative" evidence of marriage fraud that the petitioner has not rebutted. *Matter of Tawfik*, 20 I. & N. Dec. 166, 167-68 (B.I.A. 1990). The petitioner may then appeal to the Board of Immigration Appeals

("the Board"), which reviews the revocation in precisely the same manner as it would the "denial of the visa petition" under Section 1154(c). *Id.*; *see Matter of Singh*, 27 I. & N. Dec. at 605-06 (confirming that *Tawfik*'s revocation standard applies in review of visa petition denial).

2. This case concerns the circumstances in which these sham-marriage determinations by the agency are judicially reviewable. The Administrative Procedure Act ("APA") generally provides that a person who is "adversely affected or aggrieved by agency action … is entitled to judicial review thereof." 5 U.S.C. § 702; *see also id.* § 704.

Numerous provisions of the INA place limits on agency action that can make the difference between the "harsh measure" of deportation and an opportunity to build a life in the United States. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Judicial review of an agency's compliance with such "restrict[ions on] eligibility" is vitally important. *Id.* at 450. Congress has drafted immigration laws that aim to ensure that "every" noncitizen receives "a fair opportunity to obtain judicial review." H.R. Rep. No. 109-72, at 174 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240, 299.

At the same time, Congress has sought to promote "order and common sense" in the "judicial review process." *Id.* To streamline review, Congress has limited federal courts' oversight of executive discretion, focused on matters of grace that are not constrained by statutory standards. *See Kucana v. Holder*, 558 U.S. 233, 247-48 (2010). One such provision, titled "Denials of Discretionary Relief," states:

> [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.

8 U.S.C. § 1252(a)(2)(B).[1]

Clause (i) identifies five decisions that ultimately turn on agency grace, not specific statutory standards: waivers of inadmissibility based on certain criminal offenses, (*id.* § 1182(h)), or based on fraud or misrepresentation (*id.* § 1182(i)); cancellation of removal (*id.* § 1229b); permission for voluntary departure (*id.* § 1229c); and adjustment of status (*id.* § 1255). "Each of the statutory provisions referenced in clause (i) addresses a different form of discretionary relief from removal …." *Kucana*, 558 U.S. at 246. As this Court held in *Patel v. Garland*, clause (i) broadly insulates review of "'*any* judgment *regarding*'" these defined forms of relief, which can include underlying subsidiary determinations "'relating to'" ultimate decisions about the specified

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[1] "[T]his subchapter" refers to Title 8, Chapter 12, Subchapter II, of the United States Code, codified at 8 U.S.C. §§ 1151-1382 and titled "Immigration."

forms of relief. 596 U.S. 328, 338-39 (2022) (citations omitted).

Outside of these five defined areas, judicial review is barred by clause (ii) only when a particular "decision or action" has been "specified" by statute to be "in the discretion" of the agency. 8 U.S.C. § 1252(a)(2)(B)(ii). The two clauses thus operate differently on different classes of agency determinations: clause (i) identifies a specific class of statutory provisions where the exercise of discretion is particularly essential, and broadly prohibits judicial review of even nondiscretionary determinations that underlie that exercise of discretion; clause (ii), by contrast, requires an inquiry into whether the particular agency decision or action at issue is specified as discretionary under the circumstances.

3. It is undisputed that neither clause of 1252(a)(2)(B) bars review of USCIS's decision to deny approval of a visa petition under Section 1154(c). As the Government has explained, "[i]f USCIS denies [a] visa petition, the petitioner may file an administrative appeal with the Board of Immigration Appeals, and if that appeal is unsuccessful, generally may seek judicial review." BIO 2 (citation omitted). That is because, as the Courts of Appeals have uniformly recognized, visa petition denials based on Section 1154(c) are not "judgments" enumerated in clause (i) and are nondiscretionary actions outside the scope of clause (ii). *See, e.g.*, *Ginters v. Frazier*, 614 F.3d 822, 827 (8th Cir. 2010). Courts thus routinely correct agency mistakes to ensure that noncitizens may pursue the immigration relief to which Congress entitled them. *See* Former EOIR Judges *Amici* Cert. Br. 23.

The question presented in this case is whether clause (ii) nevertheless shields the same sham-marriage determinations from judicial review when those decisions are made through a visa petition revocation.

B. Factual and Procedural Background

1. Petitioner Amina Bouarfa is a United States citizen. Pet. App 13a. In February 2011, she married Ala'a Hamayel, a noncitizen and Palestinian national. They have three young children together, all of whom are U.S. citizens.

On May 31, 2014, about three years after they married, Ms. Bouarfa filed an I-130 petition seeking to classify her husband as an immediate relative, which would make him eligible for adjustment to a permanent immigration status. *Id.* at 15a. On January 6, 2015, USCIS approved Ms. Bouarfa's petition. *Id.*

Over two years later, while considering Mr. Hamayel's application for adjustment of status, USCIS issued a Notice of Intent to Revoke its prior approval of Ms. Bouarfa's petition. The notice stated that USCIS had made an error in approving the visa petition. *Id.* According to USCIS, "it never should have approved [the] I-130 petition in the first place because there was substantial and probative evidence that Mr. Hamayel entered his first marriage for the purpose of evading immigration laws." *Id.* Had USCIS taken "into account a previous finding that Mr. Hamayel had entered into a sham marriage," USCIS would not have "initially granted the petition." *Id.* at 12a.

The evidence before USCIS followed an unfortunately common fact pattern: under severe

pressure from immigration officials, Mr. Hamayel's ex-wife gave an inculpatory statement to investigators, only to recant that statement under oath almost immediately. During interrogation, Mr. Hamayel's ex-wife told USCIS officers that she had asked Mr. Hamayel for $5,000 before filing a visa petition on his behalf. JA13. Less than two weeks later, Mr. Hamayel's ex-wife submitted a statement "authorized … under penalty of perjury" recanting her original statement because it "was made under coercion and duress" due to a threat of imprisonment. JA4-5.[2] Many noncitizens lawfully seeking family-based immigration status have recounted similar coercive tactics in their interactions with immigration officials. *See, e.g.*, *Boukhris v. Perryman*, No. 01 C 3516, 2002 WL 193354, at *1, *5 (N.D. Ill. Feb. 7, 2002) (considering due process claim based on INS agents' "coercive questioning," including threats of jail and fines outside the presence of attorney, causing petitioner to withdraw I-130 petition); *see also* Nina Bernstein, *Do You Take This Immigrant?*, N.Y. Times (June 11, 2010) (describing interviews testing the authenticity of a marriage as "a Kafkaesque version of 'The Newlywed Game'").

Following USCIS's investigation and Notice of Intent to Revoke, USCIS "revoke[d] the approval" of Ms. Bouarfa's petition under Section 1154(c), determining that Mr. Hamayel had entered into a prior marriage for the purpose of obtaining immigration benefits. Add. 9a (USCIS Decision is reproduced at Add. 8a-15a). USCIS explained that

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[2] Although the agency described the subsequent statement as "unsworn," JA14, the statement was authorized by Mr. Hamayel's ex-wife "under penalty of perjury." JA4-5 & n.2.

Section 1154 "applies" and "contains no statute of limitations." *Id.* at 13a. And it concluded that, notwithstanding the declaration recanting Mr. Hamayel's ex-wife's sworn statement to USCIS, there was "substantial and probative evidence to support a finding that the beneficiary … falls within the purview of [section 1154(c)]." *Id.* at 12a. Ms. Bouarfa therefore had "not met [her] burden of proof in demonstrating the beneficiary's eligibility for the benefit sought." *Id.* at 13a.

Ms. Bouarfa appealed to the Board, which upheld USCIS's determination. JA11-15. The Board stated that the "instant visa petition was approved in error because *the approval is prohibited* by section 204(c) of the Act, 8 U.S.C. 1154(c)." *Id.* at 12 (emphasis added). According to the Board, "[t]he record supports the Director's determination that the petitioner is barred from conferring benefits on the beneficiary under [section 1154(c)]" and "[t]he [section 1154(c)] bar applies because the record contains substantial and probative evidence of prior marriage fraud by the beneficiary." *Id.* at 13. Like USCIS, the Board refused to accept Mr. Hamayel's ex-wife's subsequent statement recanting the sworn statement she signed under duress. *Id.* at 14-15.

2. On January 27, 2022, Ms. Bouarfa sought review of the agency's decision before the United States District Court for the Middle District of Florida. JA 1-8; *see* Pet. App. 16a.

The district court dismissed the case for lack of subject matter jurisdiction. The court recognized that the agency's decision was merely a correction of its purported error under Section 1154(c), and such determinations are subject to judicial review because they involve no "discretion[]." Pet. App. 21a. But the

court believed that Eleventh Circuit precedent foreclosed judicial review of all "revocations" under Section 1155—including those that purported to correct errors in the original approval under Section 1154. *Id.* at 24a, 19a-20a.

Even so, the district court was "troubled by the potential implications of this framework." *Id.* at 22a. The court noted that permitting agencies to "dodge judicial review" by revoking (rather than denying) petitions "would flout Congress's clear grant of subject matter jurisdiction over decisions to deny petitioners' visas because of marriage fraud." *Id.* at 22a-23a.

3. The Eleventh Circuit affirmed, holding that the INA foreclosed review of the agency's decision correcting its purportedly erroneous approval under Section 1154(c). *See* Pet. App. 4a-11a (citing 8 U.S.C. § 1252(a)(2)(B)(ii)).

The court held that agency revocations under Section 1155 are not reviewable. Section 1252(a)(2)(B)(ii), the court explained, bars judicial review over decisions or actions "'the authority for which is specified under this subchapter to be in the [agency's] discretion.'" Pet. App. 6a (quoting 8 U.S.C. § 1252(a)(2)(B)(ii)). The court reasoned that Section 1155 is "part of that subchapter," and the agency's authority under Section 1155 is "discretionary" because Section 1155 uses "the terms 'may,' 'at any time,' and 'what he deems to be good and sufficient cause.'" *Id.* (quoting 8 U.S.C. § 1155). This meant, in the Eleventh Circuit's view, that "the Secretary is free to exercise his authority to revoke the approval of a [visa] petition as he sees fit." *Id.*

The court rejected Ms. Bouarfa's argument that the agency's decision was not "insulate[d] … from judicial review" because it turned on the agency's nondiscretionary "'correction'" of its Section 1154(c) determination. *Id.* at 7a (citation omitted). Speaking in broad terms, the court stated that "[t]he Act makes clear that revocation is discretionary—no matter the basis for revocation." *Id.* The Eleventh Circuit reasoned that "nothing in the statute *requires* the Secretary to revoke the approval of a petition in any circumstance," noting its disagreement with the Sixth Circuit's contrary position that "revocation after the discovery of a mistake was a non-discretionary act of 'error correction.'" *Id.* (quoting *Jomaa v. United States*, 940 F.3d 291, 296 (6th Cir. 2019)). The Eleventh Circuit also acknowledged that courts ordinarily review claims that the agency "erred when [it] made a nondiscretionary determination that is a statutory predicate to [its] exercise of discretion." *Id.* at 8a. But the court found this rule inapplicable because it believed the challenge here was "to [the] exercise [of] discretion" itself. *Id.*

SUMMARY OF ARGUMENT

The question presented in this case is whether Congress unambiguously foreclosed judicial review of USCIS's determination that the sham-marriage bar in Section 1154(c) requires revocation of a visa petition under Section 1155.

I. Far from providing the "clear and convincing evidence" required to preclude judicial review of agency action, *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020) (citation omitted), the relevant statutory text, structure, and context unanimously favor review of the agency's determination that a

beneficiary has entered into a sham marriage, regardless of whether the agency makes that nondiscretionary determination in denying a visa petition at the outset or in revoking a previously approved visa petition.

A. Beginning with the text, the agency's sham-marriage revocation is not a "decision or action … the authority for which is specified under [the INA] to be in the discretion of the [agency]." 8 U.S.C. § 1252(a)(2)(B)(ii). This provision bars review only of *discretionary* determinations—*i.e.*, those decisions or actions left to the individual judgment of the agency, without congressionally imposed constraints; it does not bar review of nondiscretionary determinations for which Congress mandated specific statutory criteria. This case involves a decision that Section 1154(c)'s sham-marriage bar applies, and a revocation on that basis. Neither the underlying decision nor the revocation are discretionary under the circumstances, and so the review bar does not apply.

There is no dispute that the agency's sham-marriage finding under Section 1154(c) is a nondiscretionary decision that is ordinarily subject to judicial review. The agency's action of revoking a visa petition based on its sham-marriage finding is equally nondiscretionary. While Section 1155 may give the agency considerable latitude to revoke visa petitions, that does not mean every revocation is an act of discretion. To the contrary, Congress *prohibited* the agency from revoking a visa petition on the ground of legal termination of a marriage in some circumstances—underscoring that it did not intend the agency to have unfettered discretion in its revocation decisions. 8 U.S.C. § 1154(h). By the same token, revocation is *mandated* where failure to revoke

would render a noncitizen eligible for benefits or other relief that Congress has deemed him statutorily ineligible to receive. In either scenario, Congress has eliminated the agency's ability to use its "individual choice or judgment" to resolve whether to revoke. *Discretion*, *Merriam-Webster's Collegiate Dictionary* 332 (10th ed. 1999). So the relevant decision or action cannot be characterized as "discretion[ary]" within the meaning of Section 1252(a)(2)(B)(ii)'s review bar.

Indeed, the agency itself (including in this very case) has emphasized its discretionless obligation to revoke visa petitions once it has determined that Section 1154(c)'s sham-marriage bar applies. So just as judicial review is undisputedly available when statutory criteria mandate denial of a visa petition, it likewise is available when the same nondiscretionary criteria dictate revocation of a visa petition.

But even if the agency could theoretically decline to revoke a visa petition after making a sham-marriage determination, the agency's underlying, nondiscretionary sham-marriage determination would still be reviewable. The sham-marriage determination remains a nondiscretionary *decision* that turns on objective statutory criteria prescribed by Congress. And under longstanding immigration law principles, reflected in Section 1252(a)(2)(B)(ii), nondiscretionary decisions subsidiary to an exercise of discretion are subject to judicial review. *See INS v. St. Cyr*, 533 U.S. 289, 307 (2001). The Courts of Appeals and the Government alike have supported judicial review under Section 1252(a)(2)(B) of similar "nondiscretionary determinations—*i.e.*, determinations of law and fact"—underlying an ultimately discretionary action. *Patel* U.S. Br. 11 (No. 20-979).

B. Statutory context and structure confirm that Congress did not unambiguously foreclose review of sham-marriage revocations. Reading Section 1252(a)(2)(B)(ii) to bar review of sham-marriage revocations under Section 1155 when review is unquestionably available for sham-marriage denials would create an untenable statutory anomaly: the reviewable statutory determination that the beneficiary had entered into a sham-marriage becomes discretionary and unreviewable simply because the agency revokes on the basis that it erroneously overlooked that evidence when it initially approved the petition. This Court has rejected similar senseless statutory anomalies, including in the immigration context. *See, e.g.*, *Maslenjak v. United States*, 582 U.S. 335, 345-46 (2017).

Congress's decision not to utilize the all-encompassing bars on judicial review it employed elsewhere in the INA further confirms that judicial review is available here. Where Section 1252's removal-related provisions bar review of "*any judgment regarding* the granting of relief" under five specified provisions, 8 U.S.C. § 1252(a)(2)(B)(i) (emphasis added), the text here narrowly targets discretionary determinations. And Congress also used far more explicit and direct language to bar judicial review of visa revocations, while declining to include any such review bar for visa *petition* revocations. *Id.* § 1201(i). That significant and intentional difference in treatment must be given effect.

II. The Eleventh Circuit's and the Government's counterarguments are unavailing.

A. The Eleventh Circuit, joined by the Government, insists that *every* "revocation is

discretionary—no matter the basis for revocation." Pet. App. 7a; *see* BIO 12. That is obviously wrong, because Congress expressly prohibited the agency from revoking on delineated grounds. 8 U.S.C. § 1154(h). So there is no doubt that at least *some* revocation determinations are not discretionary. The Eleventh Circuit's logic is also flawed in equating discretion to revoke for reasons of its choosing with total discretion to *decline* revocation; but the second does not follow from the first. When a revocation is mandatory, the agency plainly lacks discretion as to *that* "decision or action," regardless of whether the agency has latitude in other circumstances to revoke a visa petition on grounds of its choosing.

And regardless, even if there were discretion to not revoke a petition following a sham-marriage determination, longstanding immigration law principles recognize that nondiscretionary decisions applying statutory criteria that underlie a subsequent discretionary action are reviewable. That makes particularly good sense here, because any purported exercise of discretion would have no practical effect on the noncitizen. It is the sham-marriage finding that makes the noncitizen ineligible for the immigration benefits he seeks—and whether the petition is formally revoked or not, his application will be stopped dead in its tracks. Distinguishing between a sham-marriage finding at the outset and one made to correct a purported error is illogical and perverse—it is the same decision with the same effects.

B. The Government (but not the Eleventh Circuit) has also invoked this Court's decision in *Patel*, which construed Section 1252(a)(2)(B)(i)'s preclusion of review of "any judgment regarding the granting of relief" under five specific provisions (not including

visa petition revocations). But *Patel* only underscores the availability of judicial review here. The Government's effort to twist Section 1252(a)(2)(B)(ii)'s terms to be as broad as Section 1252(a)(2)(B)(i) disregards the key differences between the statutory language driving the result in *Patel*, and the discretion-focused language in clause (ii). And the Government's argument would eviscerate judicial review for a wide range of important benefits under the immigration laws.

ARGUMENT

I. The Agency's Revocation Of A Visa Petition Under Section 1154(c) Is Subject To Judicial Review

"[T]his Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (citation omitted). "The rationale for this 'presumption' is straightforward enough: Our constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates or constitutional rights." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 44 (2000) (Thomas, J., dissenting); *see Corner Post Inc. v. Bd. of Governors of Fed. Rsrv. Bank*, 603 U.S. ___, 2024 WL 3237691, at *14 (2024) (invoking "APA's 'basic presumption' that anyone injured by agency action should have access to judicial review" (citation omitted)). It will be "rare[]" for Congress to intend for "its directives to [a] federal agenc[y]" to be enforced by the agency alone, free from judicial oversight. *Mach Mining*, 575 U.S. at 486. And in those rare circumstances, Congress "typically employs language" that is "unambiguous and

comprehensive." *Lindahl v. OPM*, 470 U.S. 768, 779-80 (1985).

Thus, any "ambiguity in the meaning" of statutory terms "must be resolved" in favor of judicial review. *Salinas v. U.S. R.R. Ret. Bd.*, 592 U.S. 188, 197 (2021). And the agency bears the heavy burden of showing "'clear and convincing evidence' of congressional intent to preclude judicial review." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020) (citation omitted). In determining whether the agency has met this burden, the Court examines "not only … [the statute's] express language, but also … the structure of the statutory scheme, its objectives," and "the nature of the administrative action involved." *Lindahl*, 470 U.S. at 778.

The question in this case is whether the Congress that intended judicial review of the agency's denial of a visa petition on sham-marriage grounds unambiguously foreclosed judicial review when that exact same determination—applying the *exact* "*same* nondiscretionary criteria," Pet. 3—is made later in the process, and results in a revocation of the visa approval. The answer is no. Nothing in the text, structure, or context of 8 U.S.C. § 1252(a)(2)(B)(ii) dictates that Congress would have intended a decision's reviewability to hinge on whether it was made as part of an initial approval or a reconsideration of that same approval.

A. The Text Of Section 1252(a)(2)(B)(ii) Does Not Bar Review Of Section 1154(c) Sham-Marriage Determinations Even When They Form The Basis For A Revocation

Section 1252(a)(2)(B)(ii) forecloses judicial review of any "decision or action … 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). Reviewability under this provision turns on whether the agency's specific "decision or action" is properly characterized as "discretion[ary]." A discretionary decision is one that is "left ... to" the "individual choice or judgment" of the Executive branch. *Discretionary*, *Merriam-Webster's Collegiate Dictionary* 332 (10th ed. 1999); *Discretion*, *id.*; *see also Discretion*, *Concise Oxford American Dictionary* 256 (2006) ("the freedom to decide what should be done in a particular situation").

A discretionary determination is thus a "matter of grace," over which Congress has placed no restrictions on "the considerations which may be relied upon" by the agency. *Jay v. Boyd*, 351 U.S. 345, 354 (1956). A nondiscretionary determination, by contrast, is one "governed by specific statutory standards" to which the agency must adhere. *Id.* at 353; *Wilkinson v. Garland*, 601 U.S. 209, 217-18 (2024) (applying a "statutory criterion" that is a "legal standard" "to a set of established facts" is "not discretionary").

This statutory distinction reflects Congress's effort to protect the agency's ultimate decisionmaking authority over matters of grace, such as "whether" noncitizens facing removal "can stay in the country," *Kucana*, 558 U.S. at 247 (citation omitted), while, at the same time, ensuring meaningful review of the agency's compliance with provisions of the law that it is *not* free to ignore. As explained above, *supra* at 11-12, the distinct language of clauses (i) and (ii) of Section 1252(a)(2)(B) implements this aim. Clause (i) identifies five particular provisions governing matters of agency grace and shields those ultimate exercises of discretion with sweeping language that

bars review of those decisions *and* subsidiary actions "regarding," *i.e.*, "relating to," those decisions. *Patel v. Garland*, 596 U.S. 328, 338-39 (2022) (citation omitted). Clause (ii), on the other hand, provides that outside of those five statutory provisions, only "decision[s] or action[s]" "specified" to be discretionary are unreviewable. Courts therefore ask "whether [clause (ii)] precludes review of a *particular decision*." *Ruiz v. Mukasey*, 552 F.3d 269, 275 (2d Cir. 2009) (emphasis added). If a denial of relief "depended" on a "specific and non-discretionary … ruling," that ruling is reviewable under clause (ii). *Cho v. Gonzales*, 404 F.3d 96, 100 (1st Cir. 2005).

Accordingly, to decide whether a specific agency determination falls within clause (ii), a court's task is to (1) identify the relevant "decision or action" and (2) resolve whether that decision or action is "discretion[ary]." 8 U.S.C. § 1252(a)(2)(B)(ii); *see Kucana*, 558 U.S. at 246-47.

In this case, the relevant "decision or action" under clause (ii) consists of (1) a "decision" that Section 1154(c)'s sham-marriage bar applies and (2) an "action" to revoke an approved visa petition based on that decision. All agree that a sham-marriage "decision" is *not* discretionary, because it involves application of a statutory mandate to a set of facts. *See Wilkinson*, 601 U.S. at 217-18. The revocation "action" is no more discretionary because revocation is mandated under these circumstances. And, even if revocation was not mandatory, the underlying sham-marriage decision would remain reviewable, because nothing in the text of Section 1252(a)(2)(B)(ii) purports to preclude review of nondiscretionary "decision[s]" by the agency, even when they underlie a discretionary determination.

1. The agency first applies Section 1154(c)'s sham-marriage bar when the petitioner files the visa petition. The provision mandates that "no petition shall be approved" if the beneficiary has entered into a marriage "for the purpose of evading the immigration laws." 8 U.S.C. § 1154(c). When the agency determines there is "substantial and probative" evidence of marriage fraud, it *must* deny the petition. *Matter of Singh*, 27 I. & N. Dec. 598, 603 (B.I.A. 2019). "[T]his statute leaves no discretionary wiggle room …." *Ogbolumani v. Napolitano*, 557 F.3d 729, 733 (7th Cir. 2009). "The use of the word 'shall'" establishes that "the Attorney General does not have discretion with regard to … denying [a visa petition] in the case of marriage fraud." *Ginters v. Frazier*, 614 F.3d 822, 829 (8th Cir. 2010); *Matter of Singh*, 27 I. & N. Dec. at 602, 603; *see also Jomaa v. United States*, 940 F.3d 291, 295 (6th Cir. 2019) (Section 1154(c) imposes a "discretionless obligation[]" to not permit participants that entered into sham marriages to obtain immigration benefits (citation omitted)).

There is no dispute that the denial of a visa petition under Section 1154(c) is subject to judicial review. *See* BIO 2. The Courts of Appeals have uniformly recognized that the Board's denial of a visa petition "constitutes final agency action subject to judicial review" under the APA because "'the agency has completed its decisionmaking process'" and "'the result of that process … will directly affect the parties.'" *Ruiz*, 552 F.3d at 274 n.2 (alteration in original) (citation omitted).[3] And the Government

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[3] *See also Ginters*, 614 F.3d at 827; *Ogbolumani*, 557 F.3d at 733; *Jomaa*, 940 F.3d at 295-96; *Ayanbadejo v. Chertoff*, 517

and the Courts of Appeals likewise agree that no provision of the INA bars review of such nondiscretionary determinations. BIO 2 (citing *Mendoza v. Sec'y, DHS*, 851 F.3d 1348, 1352 (11th Cir. 2017) (per curiam)).

But the agency's obligation to apply Section 1154(c) does not terminate with the initial approval. An approved petition is a prerequisite for a noncitizen's entitlement to benefits at the subsequent stages of the immigration process. As a result, the agency must—and does—continue to reassess whether Section 1154(c) bars the petition. *See supra* at 7-8. At any stage in that process, if the agency concludes there has been marriage fraud under Section 1154(c), the petitioner is no longer entitled to the "approved petition" that is the statutory prerequisite for further consideration.[4]

Thus, Section 1154(c)'s requirement that "no petition shall be approved" dictates not only that the agency cannot initially "approve" a petition when there is a sham-marriage finding, but also that a petitioner cannot continue to have an "approved petition" when such a finding is made later in the process. That is because an "approved petition" is an entitlement that triggers eligibility for further

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F.3d 273, 277-78 (5th Cir. 2008); *Mestanek v. Jaddou*, 93 F.4th 164, 174 (4th Cir. 2024).

[4] *See, e.g.*, *In re Petitioner [Identifying Information Redacted by Agency]*, File No. [Identifying Information Redacted by Agency], 2012 WL 8524575, at *2 (A.A.O. Aug. 16, 2012) (petitioner "cannot claim to have a valid visa petition" as required to adjust status "if it failed to establish that it met the eligibility requirements at the time of filing and continued to meet such requirements through the date the beneficiary's status was adjusted to that of a permanent resident").

benefits within the immigration process. *See* 8 U.S.C. § 1255(a) (requiring eligibility for "immigrant visa" and "availab[ility]" of "immigrant visa" to obtain adjustment of status); *id.* § 1204 (requiring immigrant to be "entitled to … immediate relative status" to obtain visa). Regardless of when the determination is made, the agency's conclusion that the beneficiary has engaged in a sham marriage means he is statutorily ineligible to possess the "approved" petition required to proceed to the next steps in the immigration process. *See id.* § 1255(a); *Ghaly v. INS*, 48 F.3d 1426, 1435-36 (7th Cir. 1995) (Posner, C.J., concurring).

That is precisely how the agency itself views revocations under these circumstances. As the agency has explained, because "[t]he provisions of [Section 1154(c)] are mandatory and do not permit the exercise of discretion," *Matter of La Grotta*, 14 I. & N. Dec. 110, 112 (B.I.A. 1972), approved petitions subject to the Section 1154(c) sham-marriage bar "*will* be … revoked." *Matter of Ortega*, 28 I. & N. Dec. 9, 11 (B.I.A. 2020) (emphasis added).[5] This precedent

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[5] *See also, e.g.*, *In re Shiwdat*, File AXXX XX4 607 – Vermont Service Center, 2009 WL 3817958, at *2 (B.I.A. Oct. 30, 2009) ("Visa petitions will be denied or revoked where there is substantial and probative evidence" of sham marriage); *In re Petitioner [Identifying Information Redacted by Agency]*, File No. EAC-00-028-54135, 2007 WL 5353167, at *6 (A.A.O. Sept. 14, 2007) (revocation required because petition was "not approvable" under Section 1154(c)); *In re Quiroz-Vilca*, File AXX XX6 200 – Laguna Niguel, 2006 WL 3088936, at *1 (B.I.A. Sept. 12, 2006) (same); *In re Deyanira Abreu*, File AXX XX4 072 – New York, 2005 WL 698384, at *1 (B.I.A. Mar. 7, 2005) (similar); *In re [Identifying Information Redacted by Agency]*, File No. [Identifying Information Redacted by Agency], 2014 WL

reflects the agency's position that "there is *never* discretion to grant an immigration benefit if the benefit requestor has not first met all applicable threshold eligibility requirements." 1 USCIS, *Policy Manual*, ch. 8.B.4 (current as of June 25, 2024), https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8 (emphasis added). The sham-marriage bar is thus a "ground" that creates a "*necessity* for the revocation," unless the petitioner can "offer evidence" sufficient to rebut "the grounds alleged for revocation." 8 C.F.R. § 205.2(a)-(b) (emphasis added). This is because a petition is not validly "approved," as required to proceed through the immigration process to obtain adjustment of status and other immigration benefits, "if it was filed on behalf of [a beneficiary] that was never 'entitled' to the requested visa classification" in the first place. *In re Applicant [Identifying Information Redacted by Agency]*, File No. WAC 02 282 54013, 2005 WL 1950775, at *6 (A.A.O. Jan. 10, 2005); *see also In re Petitioner [Identifying Information Redacted by Agency]*, File No. [Identifying Information Redacted by Agency], 2013 WL 8118218, at *4 (A.A.O. Nov. 27, 2013) (revoking petition because "beneficiary is *ineligible* for the benefit sought due to marriage fraud" under Section 1154(c) (emphasis added)).

This case illustrates the point. USCIS revoked Ms. Bouarfa's petition because Section 1154(c) "applies" and "contains no statute of limitations." Add. 13a (USCIS Decision). The Board was even

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3951247, at *8 (A.A.O. Jan. 15, 2014) (similar); *In re Isaac*, File AXXX XX9 244 – Dallas, TX, 2009 WL 4639855, at *1-2 (B.I.A. Nov. 17, 2009) (similar); *In re Krasniqi*, File AXXX XX0 652 – California Service Center, 2009 WL 5443995, at *1 (B.I.A. Dec. 23, 2009) (similar).

clearer: Ms. Bouarfa's petition was "prohibited" by § 1154(c); the sham-marriage bar "applies because the record contains substantial and probative evidence of marriage fraud." JA13. Thus, the agency itself unequivocally recognized the mandatory and nondiscretionary nature of its revocation decision.

The fact that the statute the agency cited here, 8 U.S.C. § 1155, confers a measure of discretion on the agency does not mean that the relevant "decision or action" here was a discretionary one. Unlike numerous provisions of the INA, Section 1155 does not expressly "specif[y]" that the decisions it authorizes are in the agency's "discretion." *See Kucana*, 558 U.S. at 247 n.14 (noting that the Government identified "over thirty provisions in the relevant subchapter of the INA" that "explicitly grant the Attorney General … 'discretion' to make a certain decision"). Instead, Section 1155 states only that the agency "may" revoke approved visa petitions for reasons it deems to be "good and sufficient cause." 8 U.S.C. § 1155. This provision generally affords the agency ultimate authority to revoke a petition on grounds of its choosing. *See* Pet. 26.

But nothing in Section 1155 or the text of the INA supports the "blanket conclusion" that *every* revocation is necessarily an act of discretion. *Id.* at 11-12. To the contrary, the statute itself expressly bars revocation on certain grounds—in particular, Section 1154(h) bars the agency from revoking a petition on the ground of legal termination of a marriage in certain circumstances, in order to protect domestic violence survivors. 8 U.S.C. § 1154(h). It is thus beyond dispute that the agency lacks any discretion to revoke on those grounds.

Just as the agency lacks discretion to revoke on a ground that is statutorily prohibited, it lacks discretion to *decline* to revoke in circumstances where the statutory scheme *compels* it to do so. Indeed, the agency itself recognizes that many revocations are *automatic* and nondiscretionary because they directly implement an unambiguous statutory mandate. *Compare, e.g.*, *id.* § 1153(a)(2)(B) (allotting visas to "[q]ualified immigrants" "who are the *unmarried* sons or *unmarried* daughters … of an alien lawfully admitted for permanent residence" (emphasis added)), *with* 8 C.F.R. § 205.1(a)(3)(i)(I) (providing for "automatic revocation" of visa petition "[u]pon the *marriage* of a person accorded status as a son or daughter of a lawful permanent resident" (emphasis added)). When one of these necessary factual predicates for granting a visa petition changes, the visa petition is revoked because the noncitizen is no longer eligible. It is no different when the agency reconsiders its view of whether Section 1154(c)'s sham-marriage bar applies.

Thus, the fact that an agency invokes Section 1155 cannot alone resolve the reviewability question. Because clause (ii) keys in on the particular "decision or action" at issue, and because not all revocations are pure matters of discretion, reviewability turns on whether the *particular* revocation at issue is discretionary. That, in turn, depends on whether there are statutory limits on the exercise of discretion. For example, if the agency were to issue a revocation in violation of Section 1154(h), the agency could hardly claim that decision was an unreviewable discretionary action when Section 1154(h) eliminates the agency's discretion as to a particular kind of revocation. And just as a revocation prohibited by

statute must be reviewable, so must one *mandated* by statute. In either circumstance, Congress has limited the agency's ability to use its "individual choice or judgment," *Merriam-Webster's Collegiate Dictionary, supra*, as to a particular decision or action.

2. In any event, even if the "action" of revocation were discretionary, the text of clause (ii) does not extend to bar review of *underlying* eligibility "decisions" that culminate in discretionary actions.

It is a longstanding principle of immigration law that nondiscretionary determinations remain reviewable, even if they are subsidiary to an ultimate exercise of discretion. *See St. Cyr*, 533 U.S. at 307 ("Habeas courts … regularly answered questions of law that arose in the context of discretionary relief."). This principle is rooted in courts' traditional recognition of the "distinction between *eligibility* for discretionary relief," which was reviewable as an underlying nondiscretionary determination, and "the favorable *exercise of discretion*," which was treated as an unreviewable judgment. *Id.* at 307-08 (emphasis added). Consistent with that distinction, this Court has answered antecedent questions about decisions or "failure[s] to exercise … discretion" that are "contrary to existing valid regulations," while refraining from "reviewing and reversing the manner in which discretion was exercised." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *cf. INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (recognizing that agency can deny relief based on failure to satisfy eligibility criteria or as an exercise of discretion).

The Courts of Appeals adopted a parallel approach to the IIRIRA transitional rules, which stated that "there shall be no appeal of *any discretionary decision*

under section 212(c), 212(h), 212(i), 244, or 245" of the then-effective INA. Pub. L. No. 104-208, § 309(c)(4)(E), 110 Stat. 3009, 3009-626 (1996) (emphasis added). The circuits concluded that the transitional rules' "prohibition against the review of a discretionary decision need not extend to non-discretionary decisions upon which the discretionary decision is predicated." *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 711 (6th Cir. 2004); *see also Hernandez v. Ashcroft*, 345 F.3d 824, 833 (9th Cir. 2003) (similar); *Ikenokwalu-White v. INS*, 316 F.3d 798, 801-04 (8th Cir. 2003) (similar); *Bernal-Vallejo v. INS*, 195 F.3d 56, 59-60 (1st Cir. 1999) (similar).

The INA's limited review bar reflects this same principle. Though Congress specified that certain petitions for review may raise only "constitutional claims or questions of law," 8 U.S.C. § 1252(a)(2)(D), this Court explained that "[n]othing in that language precludes the conclusion that Congress used the term 'questions of law' to refer to the application of a legal standard to settled facts." *Guerrero-Lasprilla*, 589 U.S. at 227. By reading the limited review bar precisely, this Court recognized Congress's intent to permit review of antecedent determinations of eligibility to obtain a favorable exercise of discretion.[6]

As explained above, Section 1252(a)(2)(B)(ii) comports with this principle, in barring review only of

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[6] Outside of the agency adjudication context, it is likewise commonplace to consider antecedent nondiscretionary determinations that inform a decision on a discretionary issue. *See, e.g.*, *Marquez-Perez v. Rardin*, 221 F.3d 1139, 1141 (9th Cir. 2000) (courts "may not review the Parole Commission's discretionary judgments," but may consider "whether the Commission honored the limits on its decision-making processes imposed by Congress").

decisions or actions specified to be discretionary—leaving reviewable underlying nondiscretionary determinations. 8 U.S.C. § 1252(a)(2)(B)(ii). The Courts of Appeals have consistently drawn this distinction.[7] This principle makes good sense, because "eligibility only gets a noncitizen so far"; virtually all decisions in the immigration context culminate in some exercise of discretion. *Patel*, 596 U.S. at 332. But that does not mean that Congress intended the agency to be its own judge in the numerous instances where it imposed nondiscretionary criteria for the agency to apply. Indeed, the INA is replete with front-end criteria governing approval for benefits or eligibility for relief.[8] And, unless Congress specified to the contrary, the fact that review of an ultimate exercise of discretion is barred does not mean that review of all underlying nondiscretionary determinations is also barred. Indeed, such a rule would make

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[7] *See Yohannes v. Holder*, 585 F.3d 402, 405 (8th Cir. 2009) (holding that "[a]lthough the ultimate decision whether to grant [a hardship] waiver" under 8 U.S.C. § 1186a(c)(4) "is discretionary" and unreviewable under clause (ii), the court had "jurisdiction to consider the legal standard for a good faith marriage and to determine whether the credited evidence meets that standard"); *Cho*, 404 F.3d at 99 (reviewing a "specific and non-discretionary … ruling" that was basis for "discretionary decision to withhold a hardship waiver").

[8] *See, e.g.*, 8 U.S.C. § 1187(a) (only a noncitizen "who meets [specified] requirements" is eligible for discretionary visa waiver program); *id.* § 1254a(c) (noncitizen must satisfy mandatory criteria to be "eligible for temporary protected status," a discretionary benefit under § 1254a(a) (heading)); *see also id.* § 1158(b)(1) (providing that noncitizen must satisfy definition of "refugee" to be "eligib[le]" for discretionary grant of asylum).

unreviewable a vast swath of decisions where Congress has dictated that the agency *shall* or *shall not* make certain eligibility determinations—leaving individuals with no meaningful "remedy." *De Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) (quoting *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835) (Marshall, C.J.)). That is simply not the review bar Congress wrote in clause (ii).

This Court has rejected similar efforts to stretch precisely worded review bars beyond their intended reach. In *McNary v. Haitian Refugee Center, Inc.*, for example, this Court explained that the "critical words" in a jurisdiction-stripping provision applied to "review 'of a *determination* respecting *an application*' for" special agricultural worker status. 498 U.S. 479, 491-92 (1991). That language foreclosed review of "a single act," namely, denial of adjustment of status—but not of "a group of decisions or a practice or procedure employed in making decisions." *Id.* at 492. This Court refused to bar the latter category of challenges because it was "most unlikely that Congress intended to foreclose all forms of meaningful judicial review" for applicants seeking special agricultural worker status. *Id.* at 496.

In keeping with these principles, the Government has "long taken the position that" Section 1252(a)(2)(B) "bars review of discretionary determinations, but not of *underlying* nondiscretionary determinations—*i.e.*, determinations of law and fact." *Patel* U.S. Br. 11 (emphasis added). As the Government has explained to this Court, a nondiscretionary decision remains reviewable, even when it "go[es] into forming a discretionary

judgment."[9] *Id.* at 18. That distinction is essential to the sensible administration of the immigration laws because it ensures the agency's compliance with the nondiscretionary "eligibility criteria" for the subsequent exercise of agency discretion. *Perez Perez v. Wolf*, 943 F.3d 853, 867 (9th Cir. 2019) (holding that U visa petition determinations are not "'wholly discretionary'" (citation omitted)).

Accordingly, an underlying decision to reconsider nondiscretionary approval criteria is reviewable, even if the agency had the freedom to decline to take the action of revoking an approved visa petition. As every Court of Appeals (and the Government itself) agrees, the underlying sham-marriage determination here is nondiscretionary, because it is an application of a mandatory legal requirement to a set of facts. *See supra* at 24-25. Review of that "decision" is not unambiguously barred by the text of Section 1252(a)(2)(B)(ii).

Treating Section 1154(c) determinations as reviewable at the revocation stage is particularly appropriate because—unlike in, for example, the cancellation of removal context—the agency does not actually exercise any discretion to "not revoke" once the underlying determination is made. And, even if such discretion were permitted, it would be

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[9] Although this Court rejected the Government's argument regarding the specific text of Section 1252(a)(2)(B)(i) in *Patel*, nothing in *Patel* casts doubt on this general principle of reviewability. *See infra* Part II.B. And indeed, the Government noted at oral argument in *Patel* that "regardless of what" this Court "hold[s] about (B)(i), this type of parsing is indisputably required under (B)(ii)," because courts must "identify precise … criteria and then determine whether" they are "discretionary or not." *Patel* Oral Argument Tr. 59:11-15 (No. 20-979) (*Patel* Tr.).

completely hollow because the underlying sham-marriage determination will make the noncitizen ineligible for a visa or adjustment of status. So there is no "grace" for the agency to exercise. *St. Cyr*, 533 U.S. at 307-08 (citation omitted). Any purported discretion to "not revoke" would only delay the agency's eventual determination that the noncitizen cannot remain in the country. And the root of that determination will be the underlying "decision" that the noncitizen is *ineligible* based on an application of nondiscretionary criteria that Congress intended to be reviewable.

There is simply no basis—let alone a "clear and convincing" one—to find that Congress would have intended this eligibility decision to become unreviewable because it occurred in a revocation posture. *Guerrero-Lasprilla*, 589 U.S. at 229 (citation omitted).

B. Statutory Structure And Context Confirm That Section 1154(c) Determinations Are Reviewable Even When They Form The Basis For A Revocation

Statutory structure and context underscore that Section 1154(c) sham-marriage determinations are reviewable, regardless of the procedural vehicle through which they are made.

1. This Court has recognized that the immigration laws must be read to avoid creating a "mismatch in the statutory scheme." *Campos-Chaves v. Garland*, 144 S. Ct. 1637, 1648 (2024); *see also Maslenjak v. United States*, 582 U.S. 335, 345 (2017) (explaining that "statutory context" counseled against interpretation that would create a "mismatch" within the statutory scheme). And the Government has

likewise emphasized the importance of looking to statutory context to avoid generating a "structural anomaly" within the INA. *Patel* U.S. Br. 13, 25-27.

Here, though, the Eleventh Circuit's decision creates an obvious and senseless anomaly within the statutory scheme. It precludes review for revocations based on reconsideration of Section 1154(c)'s mandatory criteria, even though all agree the exact same determination is reviewable if made through an initial denial. And in doing so, it penalizes petitioners and noncitizens for the *agency*'s own purported failure to correctly apply the statute in the first instance. After all, an error that mars a purported "correction" of a Section 1154(c) sham-marriage determination causes the same (or greater) harm as the commission of that error in an initial visa petition denial. But in the Government's view, a petitioner has recourse to the courts in only the second of those circumstances. There is no reason to think Congress wanted to create a "profound mismatch" between the reviewability of sham-marriage denials and sham-marriage revocations. *Maslenjak*, 582 U.S. at 345.

At a minimum, if Congress intended such an anomalous result, it would have employed "far more unambiguous and comprehensive" language foreclosing review, *Lindahl*, 470 U.S. at 779-80, rather than relying on a general proscription on review of a "decision or action" that is "discretion[ary]," 8 U.S.C. § 1252(a)(2)(B)(ii).

This Court refused to allow similar incongruities in *Maslenjak*. There, the Court rejected the Government's proposed interpretation of a statute where "the Government's reading would create a profound mismatch between the requirements for naturalization on the one hand and those for

denaturalization on the other." *Maslenjak*, 582 U.S. at 345-46. As here, the "Government's theory" was that "some legal violations that do not justify *denying* [immigration relief] … would nonetheless justify *revoking* it later." *Id.* at 345. "[T]he Government could thus take away on one day what it was required to give the day before." *Id.* This Court explained that there would need to be "far stronger textual support to believe Congress intended" to "open[] the door to [the] world of disquieting consequences" such a mismatch would produce. *Id.* at 346.

The Court could have been writing about visa petitions under Section 1154. Under the Eleventh Circuit's position, Section 1155's discretionary "may" language would trump the mandatory "shall" language in two separate parts of Section 1154. First, as to Section 1154(c)'s sham-marriage *prohibition*, the agency could *allow* the continued approval of a visa petition that violates Congress's mandatory command that such petitions be denied by declining to revoke the petition. Second, as to Section 1154(b)'s mandatory *approval* language, which requires that the agency "*shall* … approve [a] petition" that satisfies the statutory requirements, the agency could *deny* such petitions with impunity, by approving and then revoking them. This turns the visa petition process on its head: petitions that Congress wanted approved can be revoked, and petitions that Congress wanted denied can be permitted. That cannot be the scheme Congress intended to enact when it required the agency to follow binding criteria in approving and denying petitions.

The mismatch is particularly troubling here, because it lets an agency "shelter its own decisions from" review. *Kucana*, 558 U.S. at 252. Allowing

agencies to circumvent judicial review in this way threatens "a [separation-of-powers] structure designed to protect [the people's] liberties, minority rights, fair notice, and the rule of law." *Gundy v. United States*, 588 U.S. 128, 156 (2019) (Gorsuch, J., dissenting).[10]

Indeed, if anything, when an agency is changing its position or revoking a benefit already conferred, *more* judicial scrutiny is warranted. The agency's "reasoned analysis" for its "change[in] course" generally must reflect consideration of alternatives "'within the ambit of the existing'" policy and cannot "'ignore'" "'serious reliance interests'" the policy has engendered. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (citations omitted). But under the Eleventh Circuit's rule, that heightened burden would be negated entirely for visa petition revocations, with the agency entirely immunized from scrutiny *because* it changed its position. Nothing in Section 1252(a)(2)(B)(ii) demands such an incoherent outcome.

2. The premise that Congress unambiguously intended all revocations under Section 1155 to be unreviewable is further undercut by the fact that Congress declined to utilize the all-encompassing

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[10] The Government's suggestion in its opposition to certiorari that the visa petitioner can simply refile a subsequent visa petition and then seek review from a subsequent denial (BIO 18) only underscores the senselessness of the Government's position. Requiring such a maneuver to obtain review of the substantively identical agency determination—which has *already been made*—would mean years of delay, mounting application fees, and duplicative work for the already overburdened immigration agencies, all with no gain to any purported interest in protecting Executive prerogative.

bars on judicial review it has utilized with numerous other immigration provisions.

a. Section 1252's removal-related provisions provide clear examples of sweeping bars on review. For example, Section 1252(a)(2)(A) precludes courts from reviewing "any individual determination" or "entertain[ing] any other cause or claim *arising from* or *relating to* the implementation or operation of" an expedited order of removal under Section 1225(b)(1). 8 U.S.C. § 1252(a)(2)(A)(i) (emphasis added). And Section 1252(a)(2)(B)(i) reaches "*any judgment regarding* the granting of relief under" five specified provisions offering discretionary relief from removal. *Id.* § 1252(a)(2)(B)(i) (emphasis added). As this Court explained in *Patel*, that language "'encompasses *any and all* decisions relating to the granting or denying' of discretionary relief." 596 U.S. at 337 (emphasis added) (citation omitted).

But in clause (ii), Congress eschewed the all-embracing language it employed in the removal-related provisions. Congress "certainly could have written something" unambiguous that bars review of all decisions subsidiary to revocations, *Smith v. Berryhill*, 139 S. Ct. 1765, 1775 n.11 (2019), but instead, clause (ii) applies only if the *particular* "decision or action" the court is being asked to review is itself "specified" to be discretionary. That provision does not extend to decisions "arising from," "relating to," or "regarding" a discretionary decision. The mere fact that a nondiscretionary decision is antecedent to a discretionary determination thus does not bar review under clause (ii).

b. Moreover, Congress elsewhere *did* include a sweeping bar on judicial review on a *different* kind of

revocation—revocations of visas under 8 U.S.C. § 1201.

Similar to Section 1155, Section 1201(i) provides that "[a]fter the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation." 8 U.S.C. § 1201(i). But unlike Section 1155, Section 1201 expressly bars review of visa revocations in the same provision:

> There shall be no means of judicial review (including review pursuant to section 2241 of Title 28 or any other habeas corpus provision, and sections 1361 and 1651 of such title) of a revocation under this subsection, except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 1227(a)(1)(B) of this title.

Id. § 1201(i). If Congress had intended that visa *petition* revocations were to be as unreviewable as visa revocations, it would surely have used this same language (or included petition revocations under this same bar). *See Nken v. Holder*, 556 U.S. 418, 430 (2009).

But Congress intended something different—and for good reason. Questions of who receives a visa and whether the visa holder may enter the United States involve "judgments" that "'are frequently of a character more appropriate to either the Legislature or the Executive'" rather than the judiciary. *Trump v. Hawaii*, 585 U.S. 667, 702 (2018) (citation omitted). A consular officer must confirm that a visa applicant

is not ineligible for a visa on grounds for inadmissibility related to "health risks, criminal history, … foreign policy consequences," or "'any other provision of law.'" *Id.* at 695. And "[a]s the Department [of State] has explained, when it adjudicates a visa revocation, it 'relies on all of the information available regarding the applicant's eligibility for a visa and employs the same thought processes as would be used for an initial issuance.'" *Soto v. U.S. Dep't of State*, Civil Action No. 14-604, 2016 WL 3390667, at *4 (D.D.C. June 17, 2016) (citation omitted). These are criteria that courts are generally ill-suited to review.

The opposite is true for visa *petition* revocations. Deciding whether a visa petition is approved in most cases does not call for the exercise of any discretion, but rather requires application of nondiscretionary statutory criteria: if "the facts stated in the petition are true" and satisfy Section 1154's requirements, then the Attorney General "shall … approve the petition." 8 U.S.C. § 1154(b). Because courts are well-suited to review visa petition denials based on nondiscretionary criteria, courts can just as easily review the nondiscretionary decision underlying a visa petition revocation. It is thus no surprise that Congress did *not* elect to include a specific and comprehensive ban on judicial review of visa petition revocations. Rather it anticipated that review of visa petition revocations (and denials) would be barred only when they reflected a truly discretionary decision. *See, e.g.*, *Privett v. Secretary, DHS*, 865 F.3d 375, 379, 382 (6th Cir. 2017) (federal court had jurisdiction to review "predicate legal issue" regarding offense of conviction but lacked jurisdiction to review Secretary's "'no risk'" determination, which

was dedicated to "'Secretary's sole and unreviewable discretion'" (quoting 8 U.S.C. § 1154(a)(1)(A)(viii)(I))).

The textual differences between the provisions governing visa revocations and visa petition revocations undercut any argument that Congress spoke clearly to preclude review of all visa petition revocations. Congress would not have intended to enact identical, sweeping bars on review of visa revocations and visa petition revocations, yet adopted express language accomplishing that goal only for the former, while relying solely on Section 1252(a)(2)(B)(ii)'s more limited language for the latter.

II. The Eleventh Circuit's And The Government's Counterarguments Are Wrong

The Eleventh Circuit and the Government have raised two overarching objections to judicial review here: first, that Section 1155's conferral of authority to revoke for "good and sufficient cause" renders all revocations discretionary; and second, that this Court's decision in *Patel* forecloses judicial review. Both arguments lack merit.

A. The Discretionary Character Of Some Section 1155 Revocations Does Not Render A Revocation Under Section 1154(c) Discretionary

The Eleventh Circuit held that judicial review was barred here because, in its view, *all* Section 1155 revocations are discretionary—"no matter the basis for revocation." Pet. App. 7a. The court reasoned that "[t]he only statutory predicate for revocation is that the Secretary deems there to be good and sufficient cause." *Id.* And because "good and sufficient cause" is a discretionary standard that allows for revocations

at will, *id.* at 6a-7a, that means *all* revocations must be discretionary. The Government made a similar contention in opposing certiorari. BIO 11-13.

At the outset, the statutory scheme refutes the Eleventh Circuit and the Government's all-or-nothing position. As discussed above, Section 1154(h) prohibits the agency from revoking a petition in certain circumstances solely because of the "legal termination of a marriage." 8 U.S.C. § 1154(h). So the Eleventh Circuit's claim (reupped by the Government) that nothing "in the statute *prohibit*[s] the Secretary from revoking the approval of any petition" is demonstrably incorrect. Pet. App. 7a; *accord* BIO 11. This reality vitiates any claim that all revocations are discretionary. When Congress has barred revocation under a particular circumstance, the agency cannot claim to have discretion to revoke in that scenario.[11]

But the Eleventh Circuit's reasoning has a more basic logical problem: the fact that the agency *can* decide to revoke as a matter of discretion does not mean the agency *always* has discretion over whether to revoke. Just because a babysitter has the discretion to revoke a child's television privileges for what he deems good and sufficient cause (*i.e.*, for any reason he wants) does not mean the babysitter never is obligated to revoke the child's television privileges; for example, the child's parent may require the babysitter to revoke access when the child fails to finish their homework. The same is true here. To say

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[11] The same could likely be said of revocations on the basis of race, religion, or sex. In conferring discretion on the agency, Section 1155 does not give the agency discretion to revoke for unconstitutional reasons.

the agency may revoke when it believes it has a good reason—*i.e.*, "good and sufficient cause"—does not mean that the agency is never obligated by Congress to revoke.

Properly understood, then, the relevant question is not whether revocations in general are discretionary, but whether the actual "decision or action" at issue is discretionary. Here, as explained above, the agency's decision that the sham-marriage bar applies and its action revoking on that basis are not discretionary. The INA does not permit the agency to ignore a sham-marriage finding simply because a petition was already approved; the agency is required to revoke when the petitioner fails to meet their burden of proof under Section 1154(c). *See supra* at 7-10. This "nondiscretionary act of error correction" is therefore subject to judicial review. *Jomaa*, 940 F.3d at 296; *contra* Pet. App. 7a (refusing to follow *Jomaa*).[12]

Further undercutting the Eleventh Circuit's position was its (correct) recognition that underlying nondiscretionary determinations remain reviewable, even when they culminate in an exercise of discretion. The court explained that judicial review is available for "a nondiscretionary determination that is a statutory predicate to [the agency's] exercise of discretion." Pet. App. 8a. Here, the agency's sham-marriage finding *is* a nondiscretionary decision that

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[12] Nor does Section 1252(a)(2)(B)(ii)'s reference to the agency's "authority" under the INA change the analysis. As explained, Congress did not afford the agency discretion to revoke under any or all circumstances. And when a particular "decision or action" is either prohibited or (as here) mandated, the "authority" for that decision is, by definition, not "specified to be in the discretion of the agency." 8 U.S.C. § 1252(a)(2)(B)(ii).

warrants the same treatment as mandatory statutory predicates. After all, no one disputes that the agency's determination whether a beneficiary violated the sham-marriage bar is nondiscretionary. Even if the agency had discretion as to whether to subsequently revoke (which it does not, as explained above), that would be no reason to bar review of the nondiscretionary determination that formed the basis of the agency's revocation.

Ultimately, the Government and Eleventh Circuit's point appears to be that, because the agency *could* have hypothetically made a discretionary decision to revoke Ms. Bouarfa's petition on some ground other than Section 1154(c), that means the nondiscretionary determination the agency did make is in fact discretionary and unreviewable. But that conclusion does not follow. Agencies frequently have a wide variety of grounds on which to act—some discretionary, some less so. That circumstance is not enough to render nondiscretionary determinations immune from review.

Section 1154's provisions governing visa petition grants and denials, which may be either discretionary or nondiscretionary, confirm the point. For example, while the agency is generally required to grant visa petitions that satisfy the statutory requirements, the Attorney General is given "sole discretion" to determine "what evidence is credible and the weight to be given that evidence" in certain petitions involving domestic violence. 8 U.S.C. § 1154(a)(1)(J). But the mere possibility that the agency could have acted to deny a petition on discretionary grounds—*but did not do so*—does not make a denial on nondiscretionary grounds unreviewable. To the contrary, as the Government and the Eleventh

Circuit acknowledge, all nondiscretionary visa denials under Section 1154 are subject to judicial review.

B. *Patel* Underscores The Availability Of Judicial Review

The Government suggests that even if the revocation here were nondiscretionary, review is nonetheless foreclosed under Section 1252(a)(2)(B)(ii) because *Patel* interpreted clause (i)'s review bar to reach underlying nondiscretionary decisions. *See* BIO 12. That argument is atextual, renders meaningless critical distinctions between clause (i) and clause (ii), and would eviscerate access to judicial review over a wide range of benefits and relief under the immigration laws.

In *Patel*, this Court considered whether Section 1252(a)(2)(B)(i) bars review of "factual determinations made as part of considering a request for discretionary relief." 596 U.S. at 336. As discussed above, clause (i) bars review of five decisions that ultimately turn on agency grace. 8 U.S.C. § 1252(a)(2)(B)(i).

The Government argued that clause (i) did not bar review of underlying nondiscretionary determinations. *Patel*, 596 U.S. at 337-38. This Court held that clause (i) was not so limited, and instead reached "'any and all decisions relating to the granting or denying' of discretionary relief," including underlying nondiscretionary determinations. *Id.* at 337 (citation omitted). In so holding, the Court explained that "the absence of any reference to discretion in" clause (i) "undercut[]" the Government's argument that clause (i) applied only to *discretionary* judgments. *Id.* at 342. And together, the terms "*any*"

and "*regarding*" that modify "judgment" ensured that clause (i) "encompasses not just 'the granting of relief' but also any judgment *relating to* the granting of relief." *Id.* at 339.

The reference to discretion that was missing from clause (i) is, of course, present in clause (ii)—which precludes review of only those specific "decision[s] or action[s]" that are "in the discretion of the Secretary." 8 U.S.C. § 1252(a)(2)(B)(ii). The Government nevertheless has suggested that *Patel* somehow controls the question presented here. BIO 17. The Government notes that in *Patel*, this Court held that "any judgment" in clause (i) "'means that the provision applies to judgments "of whatever kind" under [the relevant INA provision], not just discretionary judgments or the last-in-time judgment.'" *Id.* at 12 (quoting *Patel*, 596 U.S. at 338). Based on that sentence in *Patel*, the Government argues that "[i]t follows, *a fortiori*," that clause (ii)'s reference "to 'any … decision' includes *any* decision under Section 1155 to revoke the previous approval of a visa petition," even if that decision is not discretionary. *Id.* (alteration in original).

That is a complete non-sequitur. The word "any" in clause (i) refers to "any judgment regarding" five specified forms of relief, 8 U.S.C. § 1252(a)(2)(B)(i), and therefore is not limited to "just discretionary judgments," *Patel*, 596 U.S. at 339. By contrast, the word "any" in clause (ii) refers to "any other decision or action … specified … to be in the discretion" of the agency, 8 U.S.C. § 1252(a)(2)(B)(ii). Moreover, no broadening term like "regarding" appears in clause (ii). As this distinct text demonstrates, *see Russello v. United States*, 464 U.S. 16, 23 (1983), clause (ii) obviously *is* limited to "just discretionary judgments,"

Patel, 596 U.S. at 338. Indeed, the *whole point* of clause (ii) is to distinguish between discretionary and nondiscretionary decisions. It makes no sense to suggest that Congress's choice to bar review of decisions "specified … to be in the discretion" of the agency somehow bars review of related or underlying nondiscretionary decisions; to the contrary, that elides the very distinction Congress was trying to enshrine.

And despite its latest position, the Government previously recognized this point at oral argument in *Patel*, telling this Court that "regardless of what you hold about (B)(i)," the Court will have to determine whether a decision is "discretionary or not" under "(B)(ii)." *Patel* Tr. 59:11-15. *Patel*'s analysis of clause (i)'s particular language did not reject the Government's longstanding position distinguishing between unreviewable exercises of discretion and reviewable nondiscretionary determinations or suggest that clause (ii) does not track that distinction.

Tellingly, the Government's reading of *Patel* appears nowhere in the Eleventh Circuit's decision below. In fact, the Eleventh Circuit did not even cite *Patel*, let alone suggest that *Patel* shields nondiscretionary determinations from review under Section 1252(a)(2)(B)(ii). To the contrary, the Eleventh Circuit has recognized that "Section 1252 does not foreclose judicial review of all claims connected to a discretionary decision." Pet. App. 8a. This is because clause (ii)'s text does not reach "every determination made by USCIS regarding [a noncitizen's] application for [a] benefit [that] is discretionary." *Mejia Rodriguez v. U.S. DHS*, 562 F.3d 1137, 1143 (11th Cir. 2009) (per curiam). Rather, clause (ii)'s text is "more precise" and

"requires [courts] to look at the *particular* decision being made and to ascertain whether *that* decision is one that Congress has designated to be discretionary." *Id.* (holding that eligibility for temporary protected status is reviewable).

Moreover, applying *Patel* to every nondiscretionary decision underlying exercises of discretion would have far-reaching and harmful consequences. If *Patel*'s holding applies to clause (ii), and clause (ii) in turn applies to cases outside of the removal context, then an exercise of agency discretion could preclude review of any underlying legal or constitutional questions in non-removal cases. This is because Section 1252(a)(2)(D)'s preservation of review of such questions in petitions for review would not apply.[13] Shielding a broad swath of administrative action from review would permit the Government to misinterpret statutory commands—or even systematically violate petitioners' and beneficiaries' constitutional rights—without any recourse. There is no indication Congress intended Section 1252(a)(2)(B)(ii) to have such extraordinary consequences.

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[13] In *Patel*, this Court reserved the question whether Section 1252(a)(2)(B)(ii) applies to cases other than those in removal proceedings, 596 U.S. at 345, and this Court need not resolve it to answer the question presented here.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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July 3, 2024

ADDENDUM

TABLE OF CONTENTS

Page

ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this addendum because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (filed November 27, 2023):

5 U.S.C. § 702

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 704

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

8 U.S.C. § 1154

§ 1154. Procedure for granting immigrant status

* * *

(h) Survival of rights to petition

The legal termination of a marriage may not be the sole basis for revocation under section 1155 of this title of a petition filed under sub-section (a)(1)(A)(iii) or a petition filed under subsection (a)(1)(B)(ii) pursuant to conditions described in subsection (a)(1)(A)(iii)(I). Remarriage of an alien whose petition was approved under subsection (a)(1)(B)(ii) or (a)(1)(A)(iii) or marriage of an alien described in clause (iv) or (vi) of subsection (a)(1)(A) or in subsection (a)(1)(B)(iii) shall not be the basis for revocation of a petition approval under section 1155 of this title.

* * *

8 U.S.C. § 1201

§ 1201. Issuance of visas

* * *

(i) Revocation of visas or documents

After the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. Notice of such revocation shall be communicated to the Attorney General, and such revocation shall invalidate the visa or other documentation from the date of issuance: *Provided*, That carriers or transportation companies, and masters, commanding officers, agents, owners, charterers, or consignees, shall not be penalized under section 1323(b) of this title for action taken in reliance on such visas or other documentation, unless they received due notice of such revocation prior to the alien's embarkation. There shall be no means of judicial review (including review pursuant to section 2241 of title 28 or any other habeas corpus provision, and sections 1361 and 1651 of such title) of a revocation under this subsection, except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 1227(a)(1)(B) of this title.

8 U.S.C. § 1252

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

* * *

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or,

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

* * *

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. § 1361

§ 1361. Burden of proof upon alien

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this chapter, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not inadmissible under any provision of this chapter. In any removal proceeding under part IV of this subchapter against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, but in presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Tampa Field Office
5629 Hoover Boulevard
Tampa, FL 33634

[Emblem Omitted] U.S. Citizenship and Immigration Services

Date Jun 07 2017

A089439134
LIN1490465664

Amina Bouarfa
8502 Queens Brooks Court
Temple Terrace, FL 33637

AMENDED DECISION

Dear Amina Bouarfa:

On March 31, 2014, you filed a Form I-130, Petition for Alien Relative, on behalf of Alaa Eid Hamayel (the beneficiary). You sought to classify the beneficiary as the spouse of a United States Citizen under section 201(b) of the Immigration and Nationality Act (INA). USCIS approved your Form I-130 on January 06, 2015.

However, on March 01, 2017, USCIS sent you a Notice of Intent to Revoke advising you that we intended to revoke approval of your petition because the beneficiary Alaa Eid Hamayel has previously entered into a fraudulent marriage for purposes of conveying immigration benefits. On March 28, 2017, you

responded to that notice. As explained below, USCIS is revoking approval of your Form I-130.

Generally, to demonstrate that an individual is eligible for approval as the beneficiary of a petition filed under INA, a petitioner must:

- Establish a bona fide relationship to certain alien relatives who wish to immigrate to the United States;
- Establish the appropriate legal status (i.e., U.S. citizenship or lawful permanent residence) to submit a petition on the beneficiary's behalf.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the requested immigration benefit sought under the INA. See Matter of Brantigan, 11 I&N Dec. 493, 495 (BIA 1966); Title 8, Code of Federal Regulations (8 CFR), section 103.2(b). You must demonstrate that the beneficiary can be classified as your spouse. See 8 CFR 204.2(a).

USCIS may, at any time, for good and sufficient cause, revoke the approval of any petition under section 204 of the INA. See INA 205.

USCIS may revoke the approval of a petition upon notice to the petitioner on any ground other than those specified in 8 CFR 205.1 when the necessity for the revocation comes to USCIS's attention. See 8 CFR 205.2.

Statement of Facts and Analysis, Including Ground(s) for Revocation

In your response to the Notice of Intent to Revoke on March 28, 2017, you submitted the following documentation:

- Memorandum of Law
- Affidavit from Alaa Eid Hamayel (the beneficiary)
- Copy of the July 20, 2007, Adriana Muñoz Record of Sworn Statement
- Copy of Unsworn Statement of Adriana Muñoz in the matter of Alaa Eid Hamayel in Removal Proceedings
- Copy of the Notice of Intent to Revoke Approval of Visa Petition

The documents received in support to the Notice of Intent to Revoke Approval of your Visa Petition does not provide clear and convincing evidence to refute the decision of USCIS that the marriage between Mr. Alaa Eid Hamayel and Mrs. Adriana Muñoz was entered fraudulently with the purpose of evading immigration laws.

Mrs. Muñoz unsworn statement recanting her previous sworn statement does not overcome the sworn statement taken by USCIS. The preponderance of evidence in the record shows that such marriage was entered solely for the purpose to obtain immigration benefits. The affidavit submitted by Mr. Hamayel does not present clear and convincing evidence that his marriage to Mrs. Muñoz was a bonafide marriage.

Evidence of file shows that Mrs. Muñoz stated, on her sworn statement taken by USCIS on July 20, 2007, that she asked Mr. Hamayel for $5,000.00 before sending the paperwork for immigration, however, she only got $4,600.00 from him. Mrs. Muñoz stated that she was told by a friend that Mr. Hamayel needed to get married and therefore she asked him into marriage. Mrs. Muñoz pursued citizenship in order to qualify as the I-130 petitioner for Mr. Hamayel and married Mr. Hamayel the same day that she obtained her citizenship on February 26, 2007, immediately after her citizenship ceremony. Mrs. Muñoz stated in her sworn statement that she married Mr. Hamayel in order to help him obtain an immigration benefit. Mrs. Muñoz stated that she did not tell anybody that she got married as she was embarrassed knowing that her marriage was not true.

Evidence on file shows that Mrs. Muñoz and Mr. Hamayel obtained a final judgment of divorce on February 13, 2008 and on May 13, 2008, Mr. Hamayel married Mrs. Clare Elizabeth Farmer in Hillsborough County, FL. On July 16, 2008, USCIS received Form I-130 receipt EAC0829110481, from Mrs. Farmer on behalf of Mr. Hamayel. On November 03, 2009, Mrs. Farmer and Mr. Hamayel obtained a final judgment of divorce. On December 27, 2009, Omar Alaa Hamayel, Mr. Hamayel and yours' son, was born in the USA, out of wedlock; a fact that shows, that your child was conceived while you were still married to Mr. Farid Isa (from whom you obtained your Legal Permanent Residence status and later your citizenship) and Mr. Hamayel was still married with Mrs. Clare Elizabeth Farmer. On May 27, 2010, USCIS denied the Form I-130 receipt EAC0829110481, filed by Mrs. Clare Elizabeth

Farmer, because both the petitioner and the beneficiary did not appear for the petition interview. On July 01, 2010 Mr. Hamayel filed a defensive I-589 Application for Asylum, while in immigration proceedings, however, such application was denied by the Immigration Judge at Orlando, FL, on February 16, 2011. On February 07, 2011, you and Mr. Hamayel married at Hillsborough County, FL. On March 18, 2014 you became a United States Citizen in Tampa, FL and on March 31, 2014 you submitted a stand-alone Form I-130 Petition for Alien Relative on behalf Mr. Hamayel. Such actions reflect a sequence of consecutive petitions and applications for Mr. Hamayel in order to obtain immigration benefits.

USCIS states on Section 204(c) of the Act that: Notwithstanding the provisions of subsection (b) no petition shall be approved if (1) the alien has previously been accorded or has sought to be accorded by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading immigration laws. It is the determination of USCIS that the findings in connection with the Form I-130 Petition for Alien Relative filed by Adriana Muñoz, on April 12, 2007, cumulatively constitutes sufficient substantial and probative evidence to support a finding that the beneficiary, Alaa Eid Hamayel, falls within the purview of Section 204(c) of the Act. The record establishes that the marriage entered into between Adriana Muñoz and the beneficiary, Alaa Eid Hamayel, was for the purpose of conveying immigration benefits to the beneficiary.

In Matter of Kahy, 19I&N Dec. 803 (BIA 1988), the Board of Immigration Appeals (BIA) found that Section 204(c) of the Act applies to aliens that has conspired to enter into a fraudulent marriage or who have sought to obtain an immigration benefit based on a fraudulent marriage.

The BIA has held that in order to support a conclusion that an alien has attempted or conspired to enter into a marriage for the purposes of evading the immigration laws, the evidence of such attempt or conspiracy must be documented in the aliens's immigration file and must be substantial and probative. Matter of Kahy, supra; Matter of Tawfik, ID #3130 (BIA 1990); 8 C.F.R. Section 204.1(a)(2)(iv)(1989).

Matter of Cabeliza 11 I&N Dec. 812 Section 204(c) contains no statute of limitations and applies to any subsequently filed visa petition.

Based on a review of the record, USCIS finds that you have not met your burden of proof in demonstrating the beneficiary's eligibility for the benefit sought. Therefore, USCIS revokes approval of your Form I-130.

This decision will become final unless you appeal it by filing a completed Form EOIR-29, Notice of Appeal to the Board of Immigration Appeals from a Decision of a USCIS Officer. Although the appeal will be decided by the Board of Immigration Appeals (BIA), you must send the Form EOIR-29 and all required documents, including the appropriate filing fee, to the Tampa Field Office at the following address:

Tampa Field Office
5629 Hoover Boulevard
Tampa, FL 33634

The Form EOIR-29 must be received within 30 days from the date of this decision notice. The decision is final if your appeal is not received within the time allowed.

If you, the petitioner, intend to be represented in your appeal, your attorney or accredited representative must submit Form EOIR-27 with Form EOIR-29.

If you or your attorney wishes to file a brief in support of your appeal, the brief must be received by the USCIS office where you file your appeal either with your appeal or no later than 30 days from the date of filing your appeal. Your appeal will be sent for further processing 30 days after the date USCIS receives it; after that time, no brief regarding your appeal can be accepted by the USCIS office.

For more information about filing requirements for appeals to the BIA, please see 8 CFR 1003.3 and the Board of Immigration Appeals Practice Manual available at www.usdoj.gov/eoir.

If you need additional information, please visit the USCIS Web site at www.uscis.gov or call our National Customer Service Center toll free at 1-800-375-5283.

Sincerely,

s/ Leslie A. Meeker

Leslie A. Meeker
Tampa Field Office Director

cc: Neil F. Lewis, P.A.
505 East Jackson Street Suite 213
Tampa, FL 33602