No. 23-583

In the Supreme Court of the United States

AMINA BOUARFA,

Petitioner,

v.

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

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ADMINISTRATIVE AND IMMIGRATION LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are law professors with deep expertise in administrative law and immigration issues who have a strong interest in proper interpretation and application of principles of administrative law and statutory construction. *Amici* are filing this brief to explain that those principles demonstrate that agency determinations such as the one challenged here are subject to judicial review.[1]

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no entity or person other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case requires the Court to address a narrow, but important, question regarding petitions for an immigrant visa. The decision whether to grant these petitions is critical for the families involved: spouses who either will be able to live together or be permanently separated; children—frequently U.S. citizens—who will learn whether they will be able to grow up nurtured by both of their parents.

In deciding whether to approve a visa petition, the Department of Homeland Security reviews the petition for compliance with certain statutory requirements in the Immigration and Nationality Act. That statute includes a section providing that "no petition shall be approved" if the petitioner previously entered into a marriage "for the purpose of evading the immigration laws." 8 U.S.C. § 1154(c). Lower courts have held, and the government agrees, that denial of a visa petition under that provision, often referred to as the "sham-marriage bar," is a non-discretionary determination subject to judicial review.

After a petition is approved under Section 1154, the government "may, at any time, for what [it] deems to be good and sufficient cause, revoke the" approval. 8 U.S.C. § 1155.

In this and many other cases in which the government granted the visa petition—and necessarily concluded that there was insufficient evidence of an immigration law-evading marriage—the government subsequently uses its Section 1155 authority to conclude that it got the Section 1154 "sham marriage" determination wrong. The government revokes the visa for the express reason that the petitioner entered into

a marriage for the purpose of evading the immigration laws, so the petition should never have been approved in the first place.

Given the stakes, judicial review of this determination is an essential check on arbitrary, unjustified agency action. But the ruling below bars judicial review if the decision is made in the revocation.

In other words, a decision that would have been reviewable if made at an earlier stage of the process becomes unreviewable because it comes later—even though the later decision reverses the earlier determination that Section 1154 did not bar issuance of the visa.

The question is whether judicial review of the sham-marriage determination made in the revocation context under Section 1155 is barred by 8 U.S.C. § 1252(a)(2)(B)(ii), which states that courts lack jurisdiction to review "any * * * decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security."

The Eleventh Circuit agreed with the government that, because Section 1155 grants discretion to revoke a visa, a sham-marriage determination that would have been reviewable if made under Section 1154 is not reviewable when made under Section 1155.

That interpretation produces multiple intolerable anomalies. It draws irrational distinctions between similarly situated visa petitioners based solely on the stage of the process at which the agency makes the sham marriage determination. It incentivizes the agency to defer investigations into sham marriages and related decisions until later in the process, to

insulate the agency from judicial review. And it yields the bizarre result that the agency's change in position and correction of a perceived error subjects it to less scrutiny than if it had initially denied the petition for the same reason.

Several long-settled principles of administrative law and statutory interpretation require clarity—in the statute's text and structure—in order to foreclose judicial review and accept these anomalous results.

First, this Court has repeatedly recognized the strong presumption in favor of judicial review. *Second*, the Court has consistently instructed that statutes should be construed in harmony rather than to displace one another. *Third*, courts consistently hold that an agency's exercise of discretionary authority is subject to judicial review when the agency expressly bases its decision on a non-discretionary standard.

Precedent holds that clear congressional intent is required to displace each of these principles. Here, where all three are applicable, they create a very high bar for finding preclusion of judicial review.

The text and structure of Section 1152(a)(2)(B)(ii) do not come close to satisfying that demanding standard. The text focuses on "decision[s] or action[s]" that are "in the discretion" of the agency—and here the relevant "decision" is the non-discretionary sham-marriage determination. The text therefore provides no basis for concluding that Congress intended to preclude review of that otherwise reviewable decision.

The decision below should be reversed.

ARGUMENT

Long-Settled Administrative Law Principles Demonstrate That A Section 1155 Revocation Decision Expressly Based On Section 1154(c)'s Non-Discretionary Standard Is Subject To Judicial Review.

The decision below acknowledges that judicial review is available when the agency denies a visa petition on the ground that a noncitizen entered into a sham marriage. But, according to the court of appeals, if the very same determination is the stated basis for revoking a previously-granted petition, the agency's determination is insulated from judicial oversight.

The government must satisfy a heavy burden to establish that Congress intended these anomalous results. It cannot meet that burden. Well-settled principles of administrative law all militate in favor of judicial review. The text and structure of the statute point in the same direction—and they certainly do not clearly and unambiguously foreclose judicial review, as required to overcome the strong presumption in favor of judicial review of agency decisions.

A. Precluding judicial review here produces indefensible statutory anomalies.

Judicial review of agency action serves the essential role of preventing arbitrary agency decision-making and administrative determinations not rooted in the facts before the agency decision-maker. It also precludes unlawful and unconstitutional agency action. And the possibility of judicial review provides a strong incentive for agencies to conform their actions to the governing legal standards.

This Court has repeatedly recognized that judicial review is an important protection against the "legal lapses and violations" that inevitably occur in the administrative process—and that are "especially" inevitable "when they have no consequence." *Mach Mining LLC* v. *EEOC*, 575 U.S. 480, 489 (2015); accord *Weyerhouser Co.* v. *U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 22-23 (2018). Congress provides for judicial review "as an additional assurance that its policies" will be executed properly. *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475, 489 (1942).

That purpose is especially important here. The wrongful denial of a visa petition can have draconian consequences for noncitizens and their families—including separating spouses and separating parents from their U.S. citizen children. See Pet. Br. 2, 7. Moreover, a finding that a noncitizen has entered into a sham marriage means that the noncitizen is ineligible for an immigrant visa and can *never* become a U.S. citizen or even a permanent resident. See 8 U.S.C. § 1154(c)(2); *Ghaly* v. *INS*, 48 F.3d 1426, 1436 (7th Cir. 1995) (Posner J., concurring).

The court of appeals' holding that no judicial review is available for Section 1155 revocation decisions based on a sham-marriage determination under the Section 1154(c) standard produces bizarre, unjustifiable anomalies.

First, the court of appeals' interpretation generates irrational distinctions among visa petitioners depending on *when* the government makes an adverse determination under the Section 1154(c) standard.

If the government makes an adverse determination under Section 1154 at the threshold step of reviewing the petitioner's compliance with the statutory

requirements, that petitioner has recourse to the courts. But if the agency first approves a visa petition and only later corrects its perceived error by revoking the petition under Section 1155 on the basis of the Section 1154 standard, there is no judicial review.

That distinction makes no sense because it rests on the agency's own conduct and the timing of its decision, not on any differences between visa petitioners—who suffer the same severe consequences.

Assume that the government makes the same erroneous sham-marriage determination for two similarly-situated visa petitioners. The only difference is that the government makes the error at the initial review stage for the first petitioner, and at the revocation stage for the second petitioner. Under the court of appeals' interpretation, it is irrelevant that the government applied the same statutory test to the petitioners' identical circumstances, committed the very same error, and the two petitioners suffered the very same harms. Only the first petitioner may obtain judicial review and reversal of the erroneous determination; the second petitioner cannot obtain review.

This Court should not lightly conclude that the statutory scheme Congress created is subject to "profound mismatch[es]" of this kind. *Maslenjak* v. *United States*, 582 U.S. 335, 345-46 (2017); accord *Campos-Chaves* v. *Garland*, 144 S. Ct. 1637, 1648 (2024).

Second, the court of appeals' interpretation gives the government both the incentive and the means to circumvent judicial review. Under the government's view of the law, nothing stops the agency from approving a visa petition at the initial stage of Section 1154 review and then revoking the petition under Section 1155 by making a sham-marriage determination

under the Section 1154(c) standard—the same determination that would have required denying the petition had that determination been made at the first stage.

This concern does not require the Court to assume that the agency will defy its obligation to deny petitions on the basis of a sham-marriage determination under Section 1154(c)(2). Rather, the Eleventh Circuit's interpretation gives the agency an incentive not to *investigate* the possibility of or make an authoritative determination about a sham marriage until the revocation stage, in order to sidestep judicial scrutiny. And under the government's view of the law, there is nothing a petitioner can do to avoid that loss of her recourse to the courts.

The government's suggestion in its brief in opposition (at 18)—that a petitioner can file a new visa petition and seek judicial review of its inevitable denial—is no answer. The government's proposed solution instead underscores the irrational results that follow from its interpretation. The government has no explanation why Congress would design a system in which petitioners must proceed through a futile refiling and endure years of additional delay before a court can review the same sham-marriage determination that the agency has already made.

Indeed, the government's concession that judicial review is available in this roundabout way wholly undermines its arguments that judicial review should be barred here.

Third, as a general matter the same decisionmaker's reversal of a prior decision should be a reason for *more* judicial scrutiny, certainly not less.

To be sure, this Court has held that the APA does not contain "a requirement that *all* agency change be subjected to *more* searching review" than initial agency decisions. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (emphasis added). But agency change generally is not *less* reviewable. Indeed, an agency must provide a "reasoned explanation" for its new action, and that sometimes requires "a more detailed justification than what would suffice" for initial agency action, especially if the agency's prior position or conferred benefit has "engendered serious reliance interests that must be taken into account." *Id.* at 515 (citing *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)); accord *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020).

The court of appeals' interpretation turns these principles upside down. It immunizes the agency's sham-marriage determination from judicial scrutiny *only* when the agency changes course by revoking a previously granted visa petition under Section 1155, and not when the agency initially denies a petition on the basis of the same sham-marriage determination.

As we next discuss, settled administrative law principles require extremely "clear and convincing" congressional intent—expressed in the statute's text—to support the government's "extreme position" and justify these bizarre results. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 680-81 (1986) (quotation marks omitted). There is no such clear intent here.

B. Three background principles of administrative law and statutory interpretation together weigh heavily in favor of judicial review.

Multiple background principles of administrative law and statutory interpretation are relevant here, and each requires clear and convincing evidence that Congress intended to bar judicial review. *First*, there is a strong presumption in favor of judicial review of agency decision-making. *Second*, there is also a powerful presumption that statutes should be harmonized rather than placed in conflict with one another. *Third*, in a variety of contexts courts hold that an agency's exercise of discretionary authority is subject to judicial review when the decision rests on non-discretionary grounds.

The combined effect of these three principles requires the government to satisfy an extraordinarily high bar to demonstrate preclusion of judicial review.

1. The presumption in favor of judicial review.

"Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining*, 575 U.S. at 486. That is because Congress does not lightly enact statutes as "'blank checks drawn to the credit of some administrative officer or board.'" *Bowen*, 476 U.S. at 671 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945) (legislative history of APA)).

For this reason, and given the critical safeguards provided by judicial review (see pages 5-6, *supra*), this Court has time and again emphasized the "strong presumption favoring judicial review of administrative action." *Mach Mining*, 575 U.S. at 486 (quotation

marks omitted); see also, *e.g.*, *Salinas* v. *United States*, 592 U.S. 188, 197 (2021); *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 229 (2020); *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1776 (2019); *Kucana* v. *Holder*, 558 U.S. 233, 247-48 (2010); *Bowen*, 476 U.S. at 670; *Lindahl* v. *OPM*, 470 U.S. 768, 779-80 (1985).

This Court has "consistently applied that interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana*, 558 U.S. at 251. And because the presumption in favor of judicial review is "well-settled," the Court has also assumed that Congress is aware of and legislates against the backdrop of the presumption. *Id.* at 251-52 (quotation marks omitted).

The presumption, while rebuttable, is hard to displace. The presumption can only be overcome by "'clear and convincing evidence'" of congressional intent to preclude judicial review of agency action. *Guerrero-Lasprilla*, 589 U.S. at 229 (quoting *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 64 (1993)). That means that Congress must speak clearly and unambiguously through the statute's "language or structure" (*Mach Mining*, 575 U.S. at 486); and any uncertainty must be resolved in favor of judicial review (*Salinas*, 592 U.S. at 197). The government bears the "heavy" burden of showing that Congress has satisfied this demanding standard. *Smith*, 139 S. Ct. at 1777 (quoting *Mach Mining*, 575 U.S. at 486).

2. The presumption favoring harmonization of statutes.

This Court has also repeatedly recognized a presumption "for harmony over conflict in statutory interpretation." *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497,

511 (2018). "Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work." *Ibid.*

As a result, "[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Epic Sys.*, 584 U.S. at 510 (quoting *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 533 (1995)); see also *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) (courts confronted with an alleged conflict between two statutes must strive "to give effect to both" unless Congress has expressed a "clear and manifest" contrary intent).

That presumption applies not only to safeguard against "repeals by implication" when a later enacted statute "touch[es] on the same topic" as an earlier one (*Epic Sys.*, 584 U.S. at 510), but also to give full effect to each section within the same statutory scheme. This Court has long recognized the common-sense principle of statutory construction that sections of a statute generally should be read "to give effect, if possible, to every clause * * * rather than to emasculate an entire section." *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (quotation marks and internal citation omitted); accord *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997).

The court of appeals' interpretation conflicts with this presumption by substantially weakening Congress's directive in Section 1154(c)(2). In the government's view, Section 1252, as applied to Section 1155, erases the right to judicial review that applies to sham-marriage determinations based on Section 1154(c). For the reasons already discussed, that

creates anomalies that Congress could not have intended.

3. The principle that agency exercises of "discretion" are subject to judicial review when based on non-discretionary grounds.

Courts also routinely review agency actions based on non-discretionary grounds, even if the decision rests on statutory authority that permits the agency to exercise discretion.

As petitioner explains (at Br. 32-37), the distinction between an agency's non-discretionary determinations and the agency's ultimate exercise of discretion is well-settled in immigration law. See *INS* v. *St. Cyr*, 533 U.S. 289, 307 (2001).

The same is true outside of the immigration context. Courts applying the APA's provision precluding review when "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2), have consistently concluded that agency action based on non-discretionary grounds is subject to judicial review.

This Court has read the APA's Section 701(a)(2) exception "quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Dep't of Commerce* v. *New York*, 588 U.S. 752, 772 (2019) (quoting *Weyerhaeuser*, 586 U.S. at 23).

In keeping with that narrow reading, lower courts review non-discretionary determinations in a variety of contexts, even if it is only the agency's own regulations or policies that supply the relevant law to apply.

For example, in *Clifford* v. *Peña*, the D.C. Circuit held that it could review a challenge to the Maritime

Administration's decision to grant a waiver to an American carrier that allowed it to operate new foreign-flag vessels. 77 F.3d 1414, 1415 (D.C. Cir. 1996). The relevant statute said that "[u]nder special circumstances and for good cause shown, the Secretary of Transportation may, in his discretion" issue a waiver to any contractor. *Id.* at 1417 (quoting 46 U.S.C. app. § 1222(b)). Despite this "unrestricted and undefined" language, the court concluded that the waiver decision was reviewable because the agency had developed policies that listed factors to guide its waiver decision-making process. *Ibid.* These policies "provided standards rendering what might arguably be unreviewable agency action reviewable." *Ibid.*

Similarly, in *Trout Unlimited* v. *Pirzadeh*, the Ninth Circuit held that the Clean Water Act did not restrict the Environmental Protection Agency's ultimate discretionary determination to withdraw a proposed action. 1 F.4th 738, 752-53 (9th Cir. 2021). The agency's decision was nonetheless reviewable because the agency's implementing regulations supplied "a meaningful legal standard against which to measure the agency's action." *Id.* at 753. As the court noted, even undertaking "a wholly discretionary course of action" may give rise to "a resulting non-discretionary duty that is governed by a manageable legal standard." *Id.* at 756; see also, *e.g.*, *Smriko* v. *Ashcroft*, 387 F.3d 279, 292-94 (3d Cir. 2004) (agency's regulations provided a non-discretionary standard reviewable by courts); *Haoud* v. *Ashcroft*, 350 F.3d 201, 205-06 (1st Cir. 2003) (same).

Here, the agency's evaluation of the statutory criteria in Section 1154(c) is not discretionary. And the reviewability of the agency's decision should be even clearer when the statute itself—here, the sham-

marriage standard in Section 1154(c)—supplies the non-discretionary basis for the agency's decision. *Cf. Center for Auto Safety* v. *Dole*, 828 F.2d 799, 803 (D.C. Cir. 1987) (concluding that the standard set forth in the agency's regulations made the agency's action judicially reviewable but observing that "there could be no doubt" about the availability of judicial review if the same standard "had appeared in the Motor Vehicle Safety Act itself").

Massachusetts v. *EPA*, 549 U.S. 497 (2007), is also instructive. The Court held that EPA's denial of a petition for rulemaking was reviewable under the APA because it was based on an underlying determination—that EPA lacked statutory authority to regulate new vehicle emissions—that the Clean Air Act itself made judicially reviewable. *Id.* at 528.

In sum, the presumptions of judicial review and harmonizing statutes, and the principle that agency exercises of statutory authority are subject to judicial review when based on non-discretionary grounds together place a heavy weight on the scale in favor of judicial review.

C. Section 1252 does not contain the required clear indication of congressional intent to preclude review.

The language and structure of Section 1252 do not demonstrate the clear and convincing evidence of congressional intent needed to foreclose judicial review of sham-marriage determinations.

The text of Section 1252(a)(2)(B)(ii) precludes judicial review only of particular "decision[s] or action[s]" that are "in the discretion" of the agency. Here the USCIS and BIA decisions both expressly apply the non-discretionary test under Section 1154(c). Pet. Br.

13-15. The particular "decision" at issue—the determination that petitioner entered into a sham marriage—is therefore not discretionary.

Given the principles discussed above, Congress would have to speak with far more clarity to bar judicial review of decisions in the revocation context that are reviewable when made at other points in the visa process.

In particular, nothing in the statute demonstrates an intent by Congress to displace the principle that review remains available when an agency makes a non-discretionary decision in connection with exercising discretionary authority. Indeed, the language of Section 1252(a)(2)(B)(ii) roughly parallels the APA provision barring review of discretionary actions. Compare 8 U.S.C. § 1252(a)(2)(B)(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"), with 5 U.S.C. § 701(a)(2) ("agency action is committed to agency discretion by law").

Section 1252(a)(2)(B)(ii) should therefore also be read "quite narrowly" (*Dep't of Commerce*, 588 U.S. at 772), and there is likewise no basis for concluding that Congress intended to preclude review of otherwise-reviewable non-discretionary decisions. That is especially true given the precedents requiring judicial review when an agency's exercise of discretionary authority rests on non-discretionary grounds, as here.

The government relies on *Patel* v. *Garland*, 596 U.S. 328 (2022), but *Patel*'s analysis *supports* this conclusion. The *Patel* Court found sufficiently clear intent to bar judicial review based on its conclusion that

Section 1252(a)(2)(B)(i)'s use of the phrase "*any* judgment *regarding* the granting of relief" under five specific sections of the INA not at issue here encompasses all subsidiary determinations, including factual findings. *Id.* at 338-39. Key to the Court's holding was that this expansive phrase "does *not* restrict itself to certain kinds of decisions," and instead covers all subsidiary determinations "*relating to* the grant of relief." *Ibid.* (first emphasis added)

In Section 1252(a)(2)(B)(ii), by contrast, Congress used a different formulation—"decision or action"—and barred review of only those "decision[s] or action[s]" for which the statutory "authority * * * is specified * * * to be in the [agency's] discretion." The *Patel* Court relied on this very distinction. 596 U.S. at 342-43.

"'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Salinas*, 592 U.S. at 196 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). The different, narrower text in Section 1252(a)(2)(B)(ii) compels a different conclusion here from the one the Court reached in *Patel*.

The government cannot rely on the use of "any" in Section 1252(a)(2)(B)(ii) as grounds for expanding the preclusion of review to reach agency decisions based on non-discretionary grounds. To the contrary: the phrase "any other decision or action" merely confirms the contrast between the narrower language of Section 1252(a)(2)(B)(ii) and the far broader jurisdiction-stripping language in Section 1252(a)(2)(B)(i) that immediately precedes it.

Section 1252(a)(2)(B)(ii) thus draws the same line as the APA, permitting review when a decision rests on non-discretionary grounds. There is certainly no basis for concluding that Congress intended broader preclusion of judicial review—even when a decision rests on non-discretionary grounds and in particular when it did not preclude judicial review with respect to the very same decision when made earlier in the visa application process.

That reading is also consistent with what the Court has recognized as the purpose of the judicial review exclusions throughout Section 1252: "protecting the Executive's discretion from the courts." *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 486 (1999). In *Reno*, for example, the Court recognized that Congress enacted other provisions of Section 1252 to preclude litigation over deferred action and similar discretionary determinations: such litigation "attempt[ed] to impose judicial constraints upon prosecutorial discretion." *Id.* at 485 & n.9. By contrast, there is no discretion in the sham-marriage determination under Section 1154(c) or in a decision to revoke a petition previously granted based on the application of that non-discretionary standard.

Finally, permitting judicial review is a particularly appropriate result because it precludes the irrational consequences detailed above (at 5-9). The government's position, if accepted, would deprive some applicants of judicial review based solely on the timing of a decision that, if made earlier, would be subject to judicial review; create a strong incentive for bureaucrats to move investigations and decisions later in the process to avoid judicial review; and provide less scrutiny of agency determinations reversing a

prior ruling. Nothing in the statutory text comes close to requiring those irrational results.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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