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 FOR FORMER EXECUTIVE OFFICE FOR IMMIGRATION REVIEW JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are forty-three former immigration judges (IJs) and members of the Board of Immigration Appeals (BIA or Board). A complete list of signatories can be found in the Appendix of *Amici Curiae*.

Amici have dedicated their careers to the immigration court system and to upholding the immigration laws of the United States. Each is intimately familiar with the immigration court system and its procedures. Together they have a distinct interest in ensuring that claims duly asserted in immigration cases are afforded the level of Article III judicial review required by law.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress passed a number of provisions that were intended to "protect[] the Executive's discretion from the courts." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999). One such provision is 8 U.S.C. § 1252(a)(2)(B)(ii), which eliminates judicial review of "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." *Id.* Circuit courts around the country have, for many years, almost uniformly interpreted this provision to strip federal

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[1] *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of *amici*'s intent to file this brief.

courts of jurisdiction to review *discretionary* decisions—but not nondiscretionary, predicate determinations. In *amici*'s experience, this approach recognizes the decisions that Congress committed to executive discretion while preserving Article III review for nondiscretionary determinations in immigration or visa-related proceedings.

SUMMARY OF ARGUMENT

Congress drew clear boundaries in IIRIRA. The statute shields executive-branch discretionary decisions in immigration cases from judicial review while preserving Article III court review of nondiscretionary determinations that underlie discretionary decisions.

This case illustrates what happens when that Congressional plan is disregarded. Two years after approving Amina Bouarfa's petition to have her husband classified as her immediate relative, the Secretary revoked that approval on the grounds that the Department of Homeland Security (DHS) lacked discretion to grant the petition in the first place. It is undisputed that a nondiscretionary denial of Ms. Bouarfa's petition when she first filed it would have been judicially reviewable. Here, because the Secretary denied the petition on a reassessment, it was classified as a revocation. The Eleventh Circuit concluded that Ms. Bouarfa had no right to judicial review of the visa petition denial even though it reflects a nondiscretionary determination based on the same law and facts as the initial visa petition grant. *See Bouarfa v. Sec'y, Dep't of Homeland Sec.*, 75 F.4th 1157, 1164 (11th Cir. 2023). In doing so, the Eleventh Circuit deepened a circuit split, as the Sixth

and Ninth Circuits would have allowed review of the revocation (just like an initial denial) because of the nondiscretionary criteria underlying it.

The Eleventh Circuit's view yields the absurd result that the denial of an immigrant visa petition is subject to judicial review but revocation a day after approval is not—even where both decisions are based on the same substantive grounds. This incongruity makes an immigrant's fate dependent on chance factors—the judicial circuit where the petition is filed and whether the agency determines it made an error before or after granting a visa petition.

Permitting judicial review of nondiscretionary determinations comports with the "well-settled" and "strong" presumption of judicial review that has "consistently" been applied to immigration legislation, "particularly to questions concerning the preservation of federal-court jurisdiction." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496, 498 (1991)); *Kucana v. Holder*, 558 U.S. 233, 251 (2010). And it avoids the "[s]eparation-of-powers concerns" created by further removing these cases from the judiciary's domain. *Kucana*, 558 U.S. at 237.

In *amici*'s experience, maintaining Article III review of predicate nondiscretionary determinations aids the proper functioning of the immigration adjudication system. Immigration adjudicators face heavy caseloads and are under significant pressure to complete cases rapidly, as *amici* have experienced firsthand. Indeed, U.S. Citizenship and Immigration Services (USCIS) officers face a backlog of over 9 million forms, immigration courts face a backlog of

nearly 3 million cases, and the BIA ended the last quarter with a near-record-high 112,907 pending appeals.[2] These severe and growing backlogs lead to errors and inconsistent results, as *amici* have also witnessed. In these circumstances, permitting Article III courts to correct agency mistakes and provide authoritative, consistent guidance on the application of nondiscretionary statutory criteria (as Congress intended) becomes all the more essential. Article III court review of nondiscretionary determinations—a checking function that Article III judges routinely perform—improves outcomes and builds confidence in the system. Indeed, there are numerous examples of federal courts—including in cases involving erroneous nondiscretionary determinations underlying denials of discretionary relief covered by § 1252(a)(2)(B)(ii)—correcting decisions of USCIS, IJs, and the BIA. When individuals like Ms. Bouarfa find that the grant of their visa petitions were revoked based on a nondiscretionary determination, IIRIRA does not block Article III court review.

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2 *See Adjudication Statistics: Pending Cases, New Cases, and Total Completions*, Exec. Off. for Immigr. Rev. (Jan. 18, 2024), https://www.justice.gov/eoir/media/1344791/dl?inline (through the first quarter of 2024); *All Appeals Filed, Completed, and Pending*, Exec. Off. for Immigr. Rev. (Jan. 18, 2024), https://www.justice.gov/eoir/media/1344986/dl?inline; *Number of Service-Wide Forms by Quarter: FY24 Q1 All Forms*, USCIS, https://www.uscis.gov/sites/default/files/document/data/quarterly_all_forms_fy2024_q1.xlsx.

ARGUMENT

I. IIRIRA § 1252(a)(2)(B)(ii) Does Not Block Article III Review Where The Same Finding Is Procedurally Classified As A Revocation Rather Than An Initial Denial.

"Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *INS v. St. Cyr*, 533 U.S. 289, 307 (2001). As such, "[e]ligibility that was 'governed by specific statutory standards' provided 'a right to a ruling on an applicant's eligibility,' even though the actual granting of relief was 'not a matter of right under any circumstances, but rather is in all cases a matter of grace.'" *Id.* at 307–08 (quoting *Jay v. Boyd*, 351 U.S. 345, 353–54 (1956)).

The statutory provision at issue here reflects that distinction. In 1996, Congress amended the Immigration and Nationality Act by enacting the Illegal Immigration Reform and Immigrant Responsibility Act. Pub. L. No. 104–208, 110 Stat. 3009. The "theme" of IIRIRA was "protecting the Executive's *discretion* from the courts." *Reno*, 525 U.S. at 486 (emphasis added).

One provision that provides such protection is 8 U.S.C. § 1252(a)(2)(B). This subsection, titled "Denials of discretionary relief," contains two subclauses. The second, at issue here, provides that "no court shall have jurisdiction to review"

> 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.

Id. § 1252(a)(2)(B)(ii) (emphasis added).

The Sixth and Ninth Circuit Courts of Appeals agree that, although the plain language of this provision limits judicial review of the Secretary's discretionary decisions, it does not strip jurisdiction when the Secretary revokes approval of an immigrant visa petition on the basis of *non*discretionary criteria. *See Jomaa v. United States*, 940 F.3d 291, 294–96 (6th Cir. 2019); *ANA Int'l Inc. v. Way*, 393 F.3d 886, 894 (9th Cir. 2004). Rightfully so. There is no dispute that Article III courts can review an *initial* denial of a § 1154(c) petition based on a nondiscretionary finding.[3] And as the government acknowledged in a

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[3] *See Bouarfa*, 75 F.4th at 1162 (noting the parties' agreement "that the denial of a petition based on section 1154(c) . . . is a non-discretionary decision that is subject to judicial review" and the court's previous review of the denial of an I-130 petition); *see also Soltane v. U.S. Dep't of Just.*, 381 F.3d 143, 146–47 (3d Cir. 2004) (holding that the denial of an employment-based visa petition is reviewable by a federal court despite § 1252(a)(2)(B)(ii) because the statute states that a visa "shall be made available" under certain conditions); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003) (same); *Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006) (presuming that denials of spousal visa petitions are reviewable under the Administrative Procedure Act); *Zemeka v. Holder*, 989 F. Supp. 2d 122, 127–32 (D.D.C. 2013) (reviewing the denial of a visa petition based on marriage fraud).

different case,[4] § 1252(a)(2)(B)(ii) does not bar judicial review of "non-discretionary decisions that underlie determinations that are ultimately discretionary." *Hosseini v. Johnson*, 826 F.3d 354, 358 (6th Cir. 2016) (quoting *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 711 (6th Cir. 2004)); *see also Rajasekaran v. Hazuda*, 815 F.3d 1095, 1099 (8th Cir. 2016) ("[S]till reviewable is . . . 'a nondiscretionary determination underlying the denial of relief.'" (quoting *Abdelwahab v. Frazier*, 578 F.3d 817, 821 (8th Cir. 2009)). Logically, the agency's nondiscretionary determination concerning the same relief should not become unreviewable just because it is procedurally classified as a revocation rather than an initial denial.

Although all Courts of Appeals agree that § 1252(a)(2)(B)(ii) does not strip courts of jurisdiction over nondiscretionary determinations,[5] the Eleventh

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[4] *See* Br. for Resp't Supporting Pet'rs 11, 14, 23, 31, *Patel v. Garland*, 596 U.S. 328 (2022) (explaining that § 1252(a)(2)(B) "bars review of discretionary determinations, but not of underlying nondiscretionary determinations," and noting that "nearly all of the courts of appeals" to address this issue have agreed).

[5] *See Cho v. Gonzales*, 404 F.3d 96, 99–102 (1st Cir. 2005) (finding that § 1252(a)(2)(B)(ii) did not bar review of the relevant decision because it was nondiscretionary); *Sharkey v. Quarantillo*, 541 F.3d 75, 86 (2d Cir. 2008) (finding that "[t]he jurisdictional bar in [8 U.S.C. § 1252(a)(2)(B)(ii)] does not apply" because the alleged rescission was not "in the discretion of the Attorney General"); *Pinho v. Gonzales*, 432 F.3d 193, 204 (3d Cir. 2005) ("Non-discretionary actions . . . remain subject to judicial review."); *Moore v. Frazier*, 941 F.3d 717, 725 (4th Cir. 2019) (finding that "the district court erred in dismissing the complaint for lack of jurisdiction" because the relevant decision was nondiscretionary); *Flores v. Garland*, 72 F.4th 85, 92 (5th Cir.

Circuit ignored the fact that the sham-marriage bar underlying the revocation of Ms. Bouarfa's petition is a nondiscretionary statutory factor and erroneously concluded that courts lack subject-matter jurisdiction to review revocations of visa petitions, even when based on nondiscretionary criteria. *Bouarfa*, 75 F.4th at 1162–64 (citing *Nouritajer v. Jaddou*, 18 F.4th 85, 89–90 (2d Cir. 2021) (per curiam); *Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196, 203–05 (3d Cir. 2006); and *El-Khader v. Monica*, 366 F.3d 562, 568 (7th Cir. 2004)).

If this Court were to adopt the Eleventh Circuit's

2023) ("[A] court may have jurisdiction to review the agency's non-discretionary decision . . . ."); *Hussam F. v. Sessions*, 897 F.3d 707, 723 (6th Cir. 2018) (per curiam) ("The jurisdiction-stripping provision in 8 U.S.C. § 1252(a)(2)(B)(ii) does not extend to non-discretionary decisions upon which the discretionary decision is predicated." (internal quotation marks omitted)); *Cuellar Lopez v. Gonzales*, 427 F.3d 492, 493 (7th Cir. 2005) ("[A] non-discretionary question of statutory interpretation . . . falls outside § 1252(a)(2)(B)'s jurisdiction stripping rule."); *Rajasekaran*, 815 F.3d at 1099 ("[S]till reviewable is . . . a nondiscretionary determination underlying the denial of relief.") (internal quotation marks omitted); *Poursina v. USCIS*, 936 F.3d 868, 875 (9th Cir. 2019) ("§ 1252(a)(2)(B)(ii) allows us to review certain legal conclusions made on nondiscretionary grounds . . . .") (internal quotation marks omitted); *Estrada-Ortega v. Barr*, 824 F. App'x 559, 563 (10th Cir. 2020) ("[W]e have jurisdiction to hear appeals from nondiscretionary BIA decisions."); *Mejia Rodriguez v. U.S. Dep't of Homeland Sec.*, 562 F.3d 1137, 1144–45 (11th Cir. 2009) (per curiam) ("§ 1252(a)(2)(B)(ii) does not preclude . . . review[] . . . because . . . *non-discretionary* . . . decisions made by USCIS fall outside the limitations on judicial review in the INA.") (emphasis in original); *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1138–39 (D.C. Cir. 2014) (finding that § 1252(a)(2)(B)(ii) did not bar review of the relevant decision because it was nondiscretionary).

holding, it would lead to the absurd result that DHS's denial of an immigrant visa petition is subject to judicial review, but a DHS revocation of the same approved petition performed just a day after DHS approval is not—even where both decisions concern the same relief and are based on the same law and facts. *Cf. Kucana*, 558 U.S. at 252 ("If the Seventh Circuit's construction of § 1252(a)(2)(B)(ii) were to prevail, the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'").

II. ADOPTING THE ELEVENTH CIRCUIT'S RULE WOULD UPSET THE BALANCE THAT IIRIRA STRIKES BETWEEN EXECUTIVE DISCRETION AND ARTICLE III REVIEW.

"From the beginning," the Court has established that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986) (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140 (1967)).

As a result, there is a "well-settled" and "strong" presumption favoring judicial review of administrative action. *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quoting *McNary*, 498 U.S. at 496, 498). The Court has "consistently" applied this presumption to "legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana*, 558 U.S. at 251; *see also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[S]ince the stakes are considerable for the

individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."). To that end, the Court "assumes that 'Congress legislates with knowledge of' the presumption," and thus requires "'clear and convincing evidence' to dislodge" it. *Kucana*, 558 U.S. at 252 (quoting *McNary*, 498 U.S. at 496; *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993)).

Relatedly, "[s]eparation-of-powers concerns" also militate "against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Kucana*, 558 U.S. at 237. "Article III is an inseparable element of the constitutional system of checks and balances" and "preserve[s] the integrity of judicial decisionmaking." *Stern v. Marshall*, 564 U.S. 462, 482–84 (2011) (internal quotation marks omitted). Consequently, this Court has found that Article III "bar[s] congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other." *CFTC v. Schor*, 478 U.S. 833, 850 (1986) (second alteration in original) (internal quotation marks omitted). Accordingly, in the bankruptcy context, this Court has held that "Article I adjudicators" may decide claims without "offend[ing] the separation of powers" only "so long as Article III courts retain supervisory authority over the process." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 678 (2015). To allow otherwise risks upsetting the Framers' "solution to governmental power and its perils." *Seila Law LLC v.*

Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2202 (2020).

Against this backdrop, "it is most unlikely that Congress intended to foreclose *all* forms of meaningful judicial review" in § 1252(a)(2)(B)(ii). *McNary*, 498 U.S. at 496 (emphasis added). Doing so would leave an individual aggrieved by an incorrect nondiscretionary determination with "no remedy, no appeal to the laws of his country." *United States v. Nourse*, 34 U.S. 8, 29 (1835) (Marshall, C.J.). At the same time, it would deny Article III courts "supervisory authority" to check that nondiscretionary determinations are correct, and to provide administrative adjudicators consistent guidance on such determinations going forward. *Wellness Int'l*, 575 U.S. at 678. And it would do so in a particularly arbitrary manner, allowing judicial review of visa petitions denied outright on predicate nondiscretionary grounds like the sham-marriage bar but not visa petitions later revisited and revoked on the very same basis.

This case illustrates why § 1252(a)(2)(B)(ii) should not be read to foreclose Article III review of agency determinations that in any way touch upon the forms of relief specified therein. Ms. Bouarfa's petition to have her husband, Ala'a Hamayel, classified as her immediate relative was approved. But two years later, the Secretary revisited that decision and revoked the approval on the ground that DHS *should have* denied her petition in the first place under 8 U.S.C. § 1154(c)'s "sham-marriage bar." There is no dispute that if DHS had denied the petition based on § 1154(c) Ms. Bouarfa could have obtained judicial review of that denial in *every* circuit.

But under the Eleventh Circuit's ruling, Ms. Bouarfa has no right to judicial review of the Secretary's later determination (by his own belated estimation) that the initial decision was wrong even though that later revocation is based on the very same law and facts as the initial (reviewable) decision.

The nondiscretionary issue embedded within the agency's ultimate conclusion—whether Mr. Hamayel entered into a previous "sham marriage"—is work that Article III courts regularly perform. *Cf. Nasrallah v. Barr*, 140 S. Ct. 1683, 1694 (2020) (holding that 8 U.S.C. § 1252(a)(2)(C)–(D) does not preclude judicial review of facts underlying Convention Against Torture orders). Section 1252(a)(2)(B) reflects "Congress' choice to provide reduced procedural protection for *discretionary* relief" only, *Patel v. Garland*, 596 U.S. 328, 345 (2022) (emphasis added), *not* nondiscretionary decisions like the application of the sham-marriage bar.

The Court should hold that these types of nondiscretionary decisions are judicially reviewable. Doing so would be entirely consistent with *Patel*, which addressed the distinct text of § 1252(a)(2)(B)(i). Because that provision is directed to "*any* judgment *regarding*" actions taken by the Secretary, the Court found it precluded judicial review of underlying nondiscretionary determinations. 596 U.S. at 338. The Court relied on the precise wording of subsection (i), noting that "the word 'any' has an expansive meaning," such that this provision "applies to judgments 'of whatever kind' under § 1255, not just discretionary judgments or the last-in-time judgment." *Id.* (citations omitted) (cleaned up). The Court noted that, "[h]ad Congress intended instead to

limit the jurisdictional bar to 'discretionary judgments,' it could easily have used that language—as it did elsewhere in the immigration code." *Id.* at 341. Here, in § 1252(a)(2)(B)(ii), Congress did just that: subsection (ii)'s jurisdictional bar is expressly limited to discretionary decisions. Unlike subsection (i), subsection (ii) limits the word "any" by referencing only decisions or actions "in the *discretion* of" the Secretary. 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added); *Mia v. Renaud*, 2023 WL 7091915, at *5 (E.D.N.Y. Oct. 26, 2023) (explaining that "the provision at issue in *Patel*, § 1252(a)(2)(B)(i), materially differs from § 1252(a)(2)(B)(ii)"). Moreover, *Patel* rejected the government's arguments "drawing the comparison between clauses (i) and (ii)," and addressed its ruling only to subsection (i). 596 U.S. at 343. Thus, subsection (ii) explicitly addresses only judicial review of discretionary decisions and does not speak to judicial review of *nondiscretionary* decisions, such as whether Mr. Hamayel engaged in a prior "sham marriage," regardless of whether the Secretary was "required" to revoke the petition approval as a result. *See also id.* at 353, 358–59 (Gorsuch, J., dissenting) (explaining that by labelling this subsection, "Denials of discretionary relief," "Congress left little doubt that subparagraph (B) and its accompanying clauses (i) and (ii) are designed to bar review of only those decisions invested to the Attorney General's discretion, not antecedent statutory eligibility determinations"); The Court should therefore find that Congress intended to allow for Article III judicial review under that provision, and embodied that decision in subsection (ii). *See Alzaben v. Garland*, 66 F.4th 1, 6 (1st Cir. 2023) (noting that *Patel* "does not directly address the scope"

of § 1252(a)(2)(B)(ii)).

For these reasons, the decision below conflicts with this Court's rulings, and cannot be squared with text, precedent, or common sense.

III. ARTICLE III REVIEW OF NONDISCRETIONARY DETERMINATIONS IS CRITICAL TO CORRECT UNAVOIDABLE ERRORS THAT OVERBURDENED IMMIGRATION ADJUDICATORS WILL MAKE.

If this Court were to adopt the Eleventh Circuit's decision to foreclose all forms of meaningful review in § 1252(a)(2)(B)(ii), it would remove a critical check on immigration decisions made by overburdened agency adjudicators. Every year, USCIS, the immigration courts, and the BIA adjudicate literally hundreds of thousands of proceedings that involve ultimate exercises of discretion under § 1252(a)(2)(B)(ii). For example, in FY 2022, USCIS issued:

> 76,200 revocations of employment-based nonimmigrant visas;
>
> 528,548 advance parole decisions;
>
> 109,925 decisions on petitions to remove conditions on residence;
>
> 70,821 decisions on petitions to adjust asylees' and refugees' status;
>
> 9,492 denials of petitions for fiancée visas; and
>
> 6,064 decisions on petitions for provisional unlawful presence waivers.[6]

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[6] *Annual Statistical Report FY 2022*, at 10, U.S. Citizenship & Immigr. Servs. (2022),

When such decisions turn on nondiscretionary determinations, subsection (ii) contemplates that those nondiscretionary determinations will be subject to Article III review.[7] That review can provide critical guidance to agency decisionmakers so that "minimum standards of legal justice" are met in this flood of adjudications. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

In cases like this one, an erroneous agency determination could require families to make the impossible choice of either living in different countries or leaving the United States altogether. Because "[d]eportation is always 'a particularly severe penalty'" for individuals and their families, *Lee v. United States*, 582 U.S. 357, 370 (2017) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010)), review

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https://www.uscis.gov/sites/default/files/document/reports/FY2022_Annual_Statistical_Report.pdf; *Number of Service-Wide Forms by Quarter, Form Status, and Processing Time, July 1, 2022–September 30, 2022*, U.S. Citizenship & Immigr. Servs. (Dec. 16, 2022), https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2022_Q4.pdf.

[7] *See Hosseini*, 826 F.3d at 358 (finding decision on adjustment of asylee's status to permanent resident falls under § 1252(a)(2)(B)(ii), but reviewing predicate nondiscretionary determination); *Jilin Pharm.*, 447 F.3d at 205 (finding revocation of an employment-based nonimmigrant visa falls under § 1252(a)(2)(B)(ii)); *Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 156 (3d Cir. 2004) (decisions on petition to remove conditions on residence); *Samirah v. O'Connell*, 335 F.3d 545, 547 (7th Cir. 2003) (decisions on advance parole); *Dehrizi v. Johnson*, 2016 WL 270212, at *1 (D. Ariz. Jan. 21, 2016) (adjustment of asylee's status to permanent resident); *Beeman v. Napolitano*, 2011 WL 1897931, at *2 (D. Or. May 17, 2011) (denial of petition for fiancée visa).

of predicate nondiscretionary determinations is essential to preventing adjudicators from categorically barring discretionary relief or making a discretionary decision—with severe consequences—based on an incorrect underlying determination. And, where courts do find and correct errors in the application of nondiscretionary statutory factors, agencies can look to those decisions for clear guidance going forward.

Reading § 1252(a)(2)(B)(ii) in the manner advocated by Petitioner, and followed by the Sixth and Ninth Circuits, would allow Article III judges to perform a review function with which they are completely familiar. Indeed, federal courts have stepped in to address significant nondiscretionary errors underlying visa revocations and to offer clear directives for avoiding future errors of that nature. *See, e.g.*, *Ved v. U.S. Citizenship & Immigr. Servs.*, 2023 WL 2372360, at *6, *9 (D. Alaska Mar. 6, 2023) (finding USCIS's revocation of an employment-based visa after ten-plus years, based on the agency's finding that visa's issuance was mistaken, was "not adequately explained or supported" and relied on "an inaccurate representation of the record"); *Doe I v. U.S. Dep't of Homeland Sec.*, 2022 WL 1212013, at *7 (N.D. Cal. Apr. 25, 2022) (reversing revocation of an employment visa where USCIS failed to follow notice requirements); *Coniglio v. Garland*, 556 F. Supp. 3d 187, 204, 207 (E.D.N.Y. 2021) (cautioning that "agencies [must] adhere to circuit precedent," reviewing nondiscretionary legal decisions underlying visa revocation, and finding that USCIS erroneously "separate[d] a family to satisfy a rule of bureaucratic convenience").

Practically speaking, Article III judicial review would provide the relevant administrative actors—USCIS officers, IJs, and the BIA—with the guidance needed to manage their burgeoning dockets. First, USCIS officers face a backlog of over 9 million forms, including 2 million I-130 petitions to classify a non-citizen as a relative of a U.S. citizen.[8] In 2022, USCIS received more I-130 visa petitions than it had in the previous five years, but adjudicated fewer.[9] Compounding the risk of error and inconsistency, only a fraction of USCIS decisions are published.[10]

Immigration courts likewise face a growing national backlog of around 2.8 million cases.[11] That calculates to an average backlog of nearly 3,800 cases for each of the approximately 725 IJs.[12] One judge

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8 *Number of Service-Wide Forms by Quarter: FY24 Q1 All Forms*, *supra* note 2; *see also Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year*, U.S. Citizenship & Immigr. Servs., https://egov.uscis.gov/processing-times/historic-pt (last updated May 31, 2024) (showing increase in I-130 processing times over past five years, albeit with a slight dip in 2024 to date).

9 *Annual Statistical Report FY 2022*, *supra* note 6.

10 8 C.F.R. § 103.3(c) (providing for publication only of precedential decisions selected by higher-level officials).

11 *Adjudication Statistics: Pending Cases, New Cases, and Total Completions*, *supra* note 2.

12 *Id.*; *Adjudication Statistics: Immigration Judge (IJ) Hiring*, Exec. Off. for Immigr. Rev. (Jan. 2024), https://www.justice.gov/eoir/media/1344911/dl?inline. An estimated 1,349 IJs would be needed to clear the backlog by 2032. Holly Straut-Eppsteiner, Cong. Rsch. Serv., R47637, *Immigration Judge Hiring and Projected Impact on the*

described her experience as "nightmarish," explaining that to tackle her "pending caseload [of] about 4,000 cases"—a staggering number, yet one that falls below the current average—she had only "about half a judicial law clerk and less than one full-time legal assistant to help [her]."[13] While IJs are not involved in decisions to revoke visas issued under Form I-130 like Ms. Bouarfa's—USCIS makes those decisions, and the BIA handles appeals from them, *see* 8 U.S.C. § 1155; 8 C.F.R. § 1003.1(b)(5)—IJs do adjudicate other applications and proceedings that courts have held fall under § 1252(a)(2)(B)(ii).[14]

The BIA—which currently has 22 out of a statutorily capped 23 members, plus three temporary members—is swamped.[15] At the end of the first quarter in 2024, it had 112,907 pending appeals, up 14.6 percent from the end of 2022 and 217 percent

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Immigration Courts Backlog 6–7 (2023), https://crsreports.congress.gov/product/pdf/R/R47637.

[13] *Amid "Nightmarish" Case Backlog, Experts Call for Independent Immigration Courts*, ABA News (Aug. 9, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/amid-_nightmarish-case-backlog--experts-call-for-independent-imm.

[14] *See, e.g.*, *Alzaben*, 66 F.4th at 6–8 (analyzing hardship waiver under 8 U.S.C. § 1186a(c)(4)); *Malik v. Att'y Gen.*, 2022 WL 1024623, at *3 n.4 (3d Cir. Apr. 6, 2022) (noting the denial of a hardship waiver under 8 U.S.C. § 1186a(c)(4)).

[15] *See* 8 C.F.R. § 1003.1(a)(1); *Board of Immigration Appeals*, Exec. Off. for Immigr. Rev. (last visited June 19, 2024), https://www.justice.gov/eoir/board-of-immigration-appeals#board. The number of temporary members can vary.

from 2018.[16] As a result, each BIA member spends just one hour adjudicating each appeal.[17] The BIA publishes only 0.001% of its decisions each year, leaving thousands of unpublished, nonprecedential decisions where errors and inconsistencies lurk unseen.[18]

In *amici*'s respectful view, these docket pressures further heighten the risk that USCIS, IJ, and BIA errors will go unseen and uncorrected, and that they will repeat themselves across future cases. For all of these agency adjudicators, "[c]onsistency and accuracy across this staggering number of decisions may be impossible to achieve."[19] Congress recognized as much in IIRIRA, cutting off judicial review in some circumstances (discretionary decisions) but preserving Article III courts' ability to provide authoritative oversight and guidance over nondiscretionary decisions. Although agency adjudicators may have a better sense of the "overall . . . landscape" than federal judges, "the time and resource shortfalls that afflict agency decision-making may make its adjudicators more error-prone, while federal judges' comparative surfeit of both improves

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16 *All Appeals Filed, Completed, and Pending*, *supra* note 2 (tallying "[a]ppeals from completed removal, deportation, exclusion, asylum-only, and withholding-only proceedings").

17 Faiza W. Sayed, *The Immigration Shadow Docket*, 117 Nw. U.L. Rev. 893, 945 (2023).

18 *Id.* at 926. Around 13 percent of federal circuit court decisions are published, and those unpublished decisions are far more easily accessible and citable by parties. *Id.* at 900.

19 *Id*. at 944.

their relative capacity to decide cases accurately."[20] Indeed, social science research confirms that "[t]he accuracy of human judgments decreases under time pressure."[21] The pressures on the immigration adjudication system have already produced significant factual errors and oversights, which Article III courts have corrected and set guardrails for avoiding in future cases.[22] And the federal reporters are replete with decisions of Article III courts

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[20] Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 Tex. L. Rev. 1097, 1111 (2018).

[21] Anne Edland & Ola Svenson, *Judgment and Decision Making Under Time Pressure: Studies and Findings*, in *Time Pressure and Stress in Human Judgment and Decision Making* 29, 35–36 (Ola Svenson & A. John Maule eds., 1993); *see also* Eberhard Feess & Roee Sarel, *Judicial Effort and the Appeals System: Theory and Experiment*, 47 J. Legal Stud. 269, 270–71 (2018) (concluding from a laboratory experiment that penalizing reversals prompts greater trial-level effort compared with systems with no appeals and systems where reversals are not penalized).

[22] *See, e.g.*, *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 248 (4th Cir. 2017) ("[T]he IJ and BIA failed to appreciate, or even address, critical evidence in the record."); *Makwana v. Att'y Gen.*, 611 F. App'x 58, 61 (3d Cir. 2015) (per curiam) (remanding case because of a factual error by the BIA regarding the date that the visa was revoked); *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (BIA was "not aware of the most basic facts of [the petitioner's] case" and ruling lacked "a rational basis"); *Niam v. Ashcroft*, 354 F.3d 652, 656 (7th Cir. 2004) (IJ's opinion "is riven with [factual] errors" that "were not noticed by the [B]oard"); *Berishaj v. Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004) (BIA's summary affirmance "shirked its role and duty of ensuring that the final agency determination in an immigration case is reasonably sound and reasonably current"), *abrogated on other grounds by Nbaye v. Att'y Gen.*, 665 F.3d 57 (3d Cir. 2011).

concluding that agency adjudicators followed deficient legal reasoning, and outlining the correct standards to apply going forward.[23] Indeed, since 2014, the circuit courts have remanded over 10,000 BIA decisions.[24] Last year, the circuit courts issued remands in around 20 percent of all BIA appeals.[25]

To be sure, as *amici* are familiar, "the large number of cases" on their dockets "imposes practical limitations on the length" of written opinions. *Voci v. Gonzales*, 409 F.3d 607, 613 n.3 (3d Cir. 2005). IJs and BIA members may have spent more time

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[23] *See, e.g.*, *Argueta-Hernandez v. Garland*, 87 F.4th 698, 703 (5th Cir. 2023) ("[T]he BIA misapplied prevailing case law, disregarded crucial evidence, and failed to adequately support its decisions."); *Arita-Deras v. Wilkinson*, 990 F.3d 350, 358 (4th Cir. 2021) (criticizing numerous IJ and BIA decisions in the case as "err[oneous] as a matter of law," "flawed," with "no plausible basis . . . in violation of the Board's precedent"); *Quinteros v. U.S. Att'y Gen.*, 945 F.3d 772, 791 (3d Cir. 2019) (McKee, J., concurring) ("There are numerous examples of [the BIA's] failure to apply the binding precedent of this Circuit," including "in the two years since we explicitly emphasized its importance"); *Lockhart v. Napolitano*, 573 F.3d 251, 260 (6th Cir. 2009) (finding USCIS's interpretation of the statue "creates an arbitrary, irrational and inequitable outcome" (quoting *Robinson v. Napolitano,* 554 F.3d 358, 371 (3d Cir. 2009) (Nygarrd, J., dissenting))); *Freeman v. Gonzales*, 444 F.3d 1031, 1041 (9th Cir. 2006) (remanding because USCIS followed an "untenable interpretation" of the statute).

[24] *Adjudication Statistics: Circuit Court Remands Filed*, Exec. Off. for Immigr. Rev. (Jan. 18, 2024), https://www.justice.gov/eoir/media/1344996/dl?inline.

[25] *Id.*; *Federal Judicial Caseload Statistics 2023*, U.S. Courts, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 (noting that BIA appeals accounted for 79 percent of the 4,450 administrative agency appeals in 2023).

evaluating a case than the length of an opinion alone would suggest. At the same time, "[e]very judge must learn to live with the fact he or she will make some mistakes; it comes with the territory." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020). In that context, Article III courts play a crucial role in ensuring that executive-branch productivity mandates do not override the obligation to give due attention to a case; and that "crowded dockets or a backlog of cases" do not "allow an IJ or the BIA to dispense with an adequate explanation . . . merely to facilitate or accommodate administrative expediency." *Valarezo-Tirado v. U.S. Att'y Gen.*, 6 F.4th 542, 549 (3d Cir. 2021). Moreover, judicial review is vital not just to correct error in individual cases, but also to ensure that agency adjudicators apply consistent, correct legal standards in future cases as they wade through their backlogs.[26] This judicial review (and the attendant checks it provides) should be available to petitioners nationwide, instead of only to those living in a jurisdiction that, under the current circuit split, permits Article III review.

The Court should read § 1252(a)(2)(B)(ii) to permit Article III courts to continue to correct the underlying nondiscretionary determinations that can be critical in requests for ultimate discretionary relief like Ms. Bouarfa's.

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[26] *See* Sayed, *supra* note 17, at 921, 925 (noting "the well-documented inconsistencies in the application of immigration law" by agency adjudicators and finding that "precedent is crucial for creating uniformity in immigration law"); *see also id.* at 947 (observing that "restrictions on judicial review" make it "likely that BIA errors will go unchecked," with "profound consequences on the lives of noncitizens and their families").

CONCLUSION

For the reasons stated above and in Petitioner's brief, the Court should reverse the Eleventh Circuit's judgment.

Respectfully submitted,

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Counsel for Amici Curiae

July 10, 2024

APPENDIX

Table of Contents

LIST OF *AMICI CURIAE*

1. **The Honorable Steven Abrams** served as an Immigration Judge at the New York, Varick Street, and Queens Wackenhut Immigration Courts in New York City from 1997 until 2013.
2. **The Honorable Terry A. Bain** served as an Immigration Judge in New York from 1994 until 2019.
3. **The Honorable Sarah M. Burr** served as an Immigration Judge, and then as Assistant Chief Immigration Judge, in New York from 1994 until 2012.
4. **The Honorable Esmerelda Cabrera** served as an Immigration Judge in New York, Newark, and Elizabeth, NJ from 1994 until 2005.
5. **The Honorable Jeffrey S. Chase** served as an Immigration Judge in New York City from 1995 until 2007.
6. **The Honorable George T. Chew** served as an Immigration Judge in New York from 1995 until 2017.
7. **The Honorable Joan V. Churchill** served as an Immigration Judge in Washington DC-Arlington VA, including 5 terms as a Temporary Member of the BIA, from 1980 until 2005.
8. **The Honorable Bruce J. Einhorn** served as an Immigration Judge in Los Angeles from 1990 until 2007.
9. **The Honorable Cecelia M. Espenoza** served as a Member of the BIA from 2000 until 2003.

10. **The Honorable Noel A. Ferris** served as an Immigration Judge in New York from 1994 until 2013. Previously, she served as Chief of the Immigration Unit at the U.S. Attorney's Office for the Southern District of New York from 1987 until 1990.

11. **The Honorable James R. Fujimoto** served as an Immigration Judge in Chicago from 1990 until 2019.

12. **The Honorable Annie S. Garcy** served as an Immigration Judge in Newark and Philadelphia from 1990 until 2023.

13. **The Honorable Alberto E. Gonzalez** served as an Immigration Judge in San Francisco from 1995 until 2005.

14. **The Honorable John F. Gossart, Jr.** served as an Immigration Judge in Baltimore from 1982 until 2013.

15. **The Honorable Miriam Hayward** served as an Immigration Judge in San Francisco from 1997 until 2018.

16. **The Honorable Sandy Hom** served as an Immigration Judge in New York from 1993 until 2018.

17. **The Honorable Charles M. Honeyman** served as an Immigration Judge in Philadelphia and New York from 1995 until 2020.

18. **The Honorable Rebecca Jamil** served as an Immigration Judge in San Francisco from 2016 until 2018.

19. **The Honorable William P. Joyce** served as an Immigration Judge in Boston from 1996 until 2002.

20. **The Honorable Edward F. Kelly** served as an Assistant Chief Immigration Judge at the headquarters of the Executive Office for Immigration Review from 2011 until 2013, as a Deputy Chief Immigration Judge from 2013 until 2017, and as an Appellate Immigration Judge on the BIA from 2017 until 2021.

21. **The Honorable Samuel Kim** served as an Immigration Judge in San Francisco from 2020 until 2022.

22. **The Honorable Carol King** served as an Immigration Judge in San Francisco from 1995 until 2017. She served as a Temporary Member of the BIA for six months between 2010 and 2011.

23. **The Honorable Christopher M. Kozoll** served as an Immigration Judge in Memphis from 2022 until 2023.

24. **The Honorable Elizabeth A. Lamb** served as an Immigration Judge in New York from 1995 until 2018.

25. **The Honorable Dana Leigh Marks** served as an Immigration Judge in San Francisco from 1987 until 2021.

26. **The Honorable Margaret McManus** served as an Immigration Judge in New York from 1991 until 2018.

27. **The Honorable Steven Morley** served as an Immigration Judge in Philadelphia from 2010 until 2022.

28. **The Honorable Charles Pazar** served as an Immigration Judge in Memphis from 1998 until 2017.

29. **The Honorable Laura L. Ramirez** served as an Immigration Judge in San Francisco from 1997 until 2018.

30. **The Honorable John W. Richardson** served as an Immigration Judge in Phoenix from 1990 until 2018.

31. **The Honorable Lory D. Rosenberg** served as a Member of the BIA from 1995 until 2002.

32. **The Honorable Susan G. Roy** served as an Immigration Judge in Newark from 2008 until 2010.

33. **The Honorable Paul W. Schmidt** served as an Immigration Judge in Arlington from 2003 until 2016. He previously served as Chairman of the BIA from 1995 until 2001, and as a Member of the BIA from 2001 until 2003. He served as Deputy General Counsel of the former INS from 1978 until 1987, serving as Acting General Counsel from 1979 until 1981 and 1986 until 1987.

34. **The Honorable Patricia M. B. Sheppard** served as an Immigration Judge in Boston from 1993 until 2006.

35. **The Honorable Ilyce S. Shugall** served as an Immigration Judge in San Francisco from 2017 until 2019.

36. **The Honorable Helen Sichel** served as an Immigration Judge in New York from 1997 until 2020.

37. **The Honorable Andrea Hawkins Sloan** served as an Immigration Judge in Portland from 2010 until 2017.

38. **The Honorable Gita Vahid** served as an Immigration Judge in Los Angeles from 2002 until 2024.

39. **The Honorable Robert D. Vinikoor** served as an Immigration Judge in Chicago from 1984 until 2017.

40. **The Honorable Polly A. Webber** served as an Immigration Judge in San Francisco from 1995 until 2016.

41. **The Honorable Robert D. Weisel** served as an Immigration Judge, and then as an Assistant Chief Immigration Judge, in New York from 1989 until 2016.

42. **The Honorable Mimi Yam** served as an Immigration Judge in San Francisco and Houston from 1995 until 2016.