No. 23-583

In The

SUPREME COURT OF THE UNITED STATES

Amina Bouarfa,

Petitioner,

v.

Alejandro Mayorkas,
Secretary of Homeland Security, *et al.*,

Respondents.

Amicus Brief in Support of Respondent
Affirmance Warranted

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Interests of Amicus Curiae, Thomas Fuller Ogden

I know neither party nor have any financial stake. I am a member of this Court's bar and, since 2014, recognized by the California bar as one of less than two hundred lawyers designated as a Certified Appellate Law Specialist. I have been involved in numerous federal appellate matters, many involving issues pertaining to immigration. I file this brief to assist the Court.[1]

Summary of Argument

Petitioner, prominent amicus like the Former Immigration Judges, and the district court express concern over a fear-mongering hypothetical ("Hypo") that if the 11th Cir.'s opinion stands it will allow USCIS to knowingly approve a defective I-130 and, the next day, make a discretionary revocation as a deliberate ploy to prevent judicial review.[2] The Hypo is not well thought out, and should be ignored as an attempt to cloud straightforward legal analysis with emotion that baselessly impugns the integrity of a government agency. Petitioner resorts to this speculative egregious Hypo to bolster her unavailing facts.[3] Yet, case law already protects against the

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from Thomas Fuller Ogden, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] See, *Petitioner's Brief* at p. 16; *Fmr. IJ's Amicus Brief in Support of Cert. Petition* at p. 3; and US Dist. Ct. ruling at app'x p. 22a.

[3] The undersigned's use of "unavailing" is in the context of the narrow legal question presented as many, including the

conduct in the Hypo by allowing judicial review for that situation. Moreover, and probably most important, the newly revised Form I-130 makes it difficult for USCIS to engage in the Hypo's procedural gamesmanship.

Argument.

Case Law Already Protects Against the Hypo's Nefarious Conduct

Any reasonable person agrees the Hypo's conduct is nefarious, intentional, and amounts to procedural gamesmanship. The 11th Cir., itself, points out such conduct is not allowed and is already subject to judicial review:

> The Secretary does not have the discretion to ignore regulations and binding precedent when he carries out the process to reach a discretionary determination, so section 1252 does not prohibit judicial review of "the conduct of... administrative proceedings." (*Bourfa*, 75 F. 4th 1157, 1163, citing to, *Kurapati v. USCIS,* 775 F.3d 1255, 1262 (11th Cir. 2014).)

Petitioner's cert. petition, at pgs. 6-7, discusses the robust regulatory regime governing USCIS and its I-130 approval processes, and USCIS' discretionary revocation processes. If USCIS knows about a sham

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undersigned, are sympathetic towards petitioner. Petitioner's spouse is forever blacklisted for conduct almost 20 years ago, while he was rather young. Such Scarlet Letter does not seem fair, but it is the current law. At the same time, sham marriages are detrimental to the system and deterrence is necessary.

marriage prior to I-130 adjudication, and chooses to approve the I-130 anyways, USCIS would be ignoring laws and regulations. If USCIS did so to later revoke the I-130 to prevent judicial review, that would be inappropriate procedural conduct subject to judicial review as the 11th Cir. notes. Given existing law, USCIS will have a tough time avoiding judicial review based on the Hypo.

As to this matter, Petitioner explains nowhere how her situation is equivalent to the Hypo. Petitioner makes no claim USCIS engaged in actual nefarious procedural gamesmanship. Petitioner claims USCIS engaged in an erroneous (aka, negligent) inquiry that caused USCIS to miss making a sham marriage determination during the initial I-130 review process. There is a qualitative difference between an agency's scheme to game procedures to prevent judicial review, and an agency's honest oversight of a sham marriage that compels and agency's correction to occur afterwards via discretionary dismissal provisions. Current case law protects against the former by allowing judicial review. As to the latter, s.1252 allows discretion to be exercised, or not, to correct an agency error. Petitioner's situation fits within the latter.

The core question in this matter regards USCIS' intent concerning the legal procedures taken to get to the ultimate revocation of petitioner's I-130 approval. Yet, the briefing so far mainly asks the Court to focus on notions of generalized fairness. However, judicial review does not seem concerned with general notions of fairness petitioner presents. Rather, it is a narrow backstop to prevent the most egregious, arbitrary, and capricious conduct from

executive agencies. As petitioner's fact pattern is not that compelling, for purposes of judicial review, petitioner resorts to her speculative Hypo to suggest if this matter does not resolve in her favor, it will embolden USCIS to behave nefariously.

If one follows *Kurapati*, that legal research trail makes abundantly clear it expresses well-settled law, across the circuits, that agency discretionary decisions that do not follow the proper procedures are subject to judicial review. Stated differently, if nefarious procedural conduct occurred petitioner would have had grounds to properly petition the district court for judicial review. Nothing, however, suggests anything but negligence occurred on USCIS' part in this matter. USCIS approved the I-130 petition and two years later realized it missed a prior sham marriage.

The I-130's New Required Disclosures Should Eviscerate Fear of the Hypo.

It is noteworthy, the government takes time to concede Petitioner did disclose all her spouse's prior marriages in petitioner's I-130 application in existence at the time of filing (i.e., circa 2014). Resp. Brief p. 6. The suggestion is petitioner's version of the I-130 did not require disclosure of the beneficiary's previous I-130s filed on his behalf. The government implies the lack of disclosing previous I-130s explains why USCIS did not immediately figure out the sham marriage before approving petitioner's I-130.

The government's brief, at 6 fn. 4, points out "Form I-130 has since been revised to request information about prior I-130 petitions filed on behalf

of the same beneficiary." The government, however, does not elaborate on this important development. It seems the four-corners of the new I-130, going forward, will adequately apprise the USCIS reviewing officer of where to look concerning possible sham marriages. The I-130's new required disclosures all but eviscerates concerns inferred from the Hypo.

If it turns out a beneficiary's prior I-130 was omitted from the I-130, thereby concealing a sham marriage, USCIS could make a discretionary revocation. As such revocation is based on concealment, and not a sham marriage determination, it would not be subject to judicial review.

On the other hand, if USCIS misses a fully disclosed sham marriage, then a later discretionary revocation should be subject to judicial review. To miss a fully disclosed sham marriage on the I-130 impugns the conduct of the I-130 review process. If USCIS has all the facts to determine a sham marriage, but fails to deny the I-130 as mandated by law, then a later revocation is patently suspect and of the type judicial review aims to address. Such a situation indicates the agency's gross negligence or willfulness in the conduct of the I-130 review process, as opposed to the negligence that occurred here. As the law and regulations do not allow a grossly negligent or willful I-130 review, judicial review is appropriate to assess a later attempt by USCIS of discretionary revocation.

The new required disclosures on the I-130 will also make it easier for a district court to determine if judicial review is warranted in a situation involving discretionary dismissal. It will be a simple task to

show the district court all sham marriage information was adequately disclosed on the face of the I-130, but USCIS ignored it in violation of express procedures to deny the I-130.

Conclusion

The reality, in petitioner's situation, is that even if judicial review is allowed it will not cure the sham marriage determination that occurred. The revocation here was factually correct whether judicial review is allowed or not. The most petitioner can claim is USCIS was negligent. That is why petitioner resorts to incorporating the Hypo to bolster her unavailing facts. The Hypo's problem, however, is case law already subjects the fact pattern of nefarious procedural conduct to judicial review.

Additionally, the new required disclosures on the I-130 form eviscerates any of the concerns inferred from the Hypo. USCIS will have no excuse, going forward, to miss a sham marriage prior to deciding on an I-130. If USCIS misses that fact, in a fully disclosed I-130, then existing case law subjects USCIS to judicial review for that procedurally inadequate initial I-130 review. Affirmance is warranted here.

Respectfully Submitted,

Thomas Ogden, Esq.