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 *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Immigration Reform Law Institute[1] ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases before federal courts (including this Court) and administrative bodies, including: *Trump v. Hawaii*, 585 U.S. 667 (2018); *United States v. Texas*, 599 U.S. 670 (2023); *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Wash. All. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022); and *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016).

SUMMARY OF ARGUMENT

Congress has declared that no court shall have 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" either official. 8 U.S.C. § 1252(a)(2)(B)(ii). As demonstrated below, Congress conferred upon the agency discretionary authority to revoke an approved visa petition "at any time, for what [it] deems to be good and sufficient cause."

1. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus*, its members, or its counsel—contributed monetarily to its preparation or submission.

In this case, the agency revoked Petitioner's approved visa petition because it determined that her alien spouse had entered into a prior marriage for the purpose of evading the immigration laws. Petitioner argues that the agency's sham-marriage determination is a non-discretionary predicate determination and therefore reviewable. But because there is no statutory directive to revoke an approved visa petition based upon a sham-marriage determination (or for any other reason), the agency's discretionary revocation decision is not reviewable. Accordingly, the Court should affirm the judgment below dismissing this case for lack of jurisdiction.

ARGUMENT

I. Congress has specified that visa petition revocation decisions are discretionary and therefore unreviewable.

In order for an alien to establish eligibility for an immigrant visa based on his relationship to a United States citizen, lawful permanent resident, or U.S. national, the citizen, resident, or national must establish the qualifying relationship with the alien by filing a Petition for Alien Relative (Form I-130) with the U.S. Citizenship and Immigration Services ("USCIS"). Generally, USCIS must approve the petition if it determines that the qualifying relationship exists between the petitioner and the alien. 8 U.S.C. § 1154(b). If, however, USCIS determines that the alien entered into (or attempted or conspired to enter into) a marriage for the purpose of evading immigration laws (that is, a sham marriage), Congress has directed the agency to deny the petition. *Id.* § 1154(c). And it is

undisputed that such a denial is subject to judicial review because the decision to approve or deny such a petition is not specified to be in the discretion of the agency by statute.

Conversely, Congress has declared that the agency "may, at any time, for what [it] deems to be good and sufficient cause, revoke the approval of any petition…." 8 U.S.C. § 1155. As this Court has "repeatedly observed," a statutory provision declaring that an agency "may" take an action "*clearly* connotes discretion." *Biden v. Texas*, 597 U.S. 785, 802 (2022) (emphasis in original) (internal quotations omitted). Section 1155 clearly means that the agency's authority to revoke the approval of a petition is discretionary.

Congress has further barred judicial review of "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" either official. 8 U.S.C. § 1252(a)(2)(B)(ii). In *Kucana v. Holder*, this Court held that section 1252(a)(2)(B)(ii) precludes judicial review of any decision or action "made discretionary by legislation." 558 U.S. 233, 246-47 (2010); *id.* at 247 ("Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General's discretionary authority in the statute."). There is little dispute that by granting the agency the authority to revoke the approval of a visa petition "at any time, for what [it] deems to be good and sufficient cause," 8 U.S.C. § 1155, Congress specified that revocation decisions are discretionary and therefore fall within the jurisdictional bar of 8 U.S.C. § 1252(a)(2)(B)(ii).

In *Patel v. Garland*, this Court held that section 1252(a)(2)(B)(i)—which strips courts of jurisdiction to review "any judgment regarding the granting of [specified forms of] relief"—bars review of both the agency's discretionary denial and the nondiscretionary factual findings underlying the denial of discretionary relief. 596 U.S. 328, 337 (2022). In concluding that a "'judgment' does not necessarily involve discretion, nor does context indicate that only discretionary judgments are covered by § 1252(a)(2)(B)(i)," *id.* at 343, the Court declined to extend that holding to discretionary decisions covered by § 1252(a)(2)(B)(ii). *Id.* at 342-43. Nevertheless, this Court in *Kucana* declared that clauses (i) and (ii) should be read "harmoniously" and that "the words linking them—'any other decision'—sugges[t] that Congress had in mind decisions of the same genre, *i.e.*, those made discretionary by legislation." 558 U.S. at 246-247. The Court should follow *Kucana* and *Patel* and hold that the agency's decision to revoke an approved visa petition is discretionary and falls within the jurisdictional bar at 8 U.S.C. § 1252(a)(2)(B)(ii).

II. There is no non-discretionary statutory predicate for revocation decisions based on sham marriages.

Under section 1155, the only statutory predicate for revocation is that the agency "deem" that there is "good and sufficient cause," and nothing in the statute affirmatively directs or requires the agency to revoke an approved petition for any reason. Petitioner identifies the only statutory limitation on the agency's discretion to revoke an approved visa petition, 8 U.S.C. § 1154(h)—which *prohibits* the agency from revoking an approved petition based solely on the termination of a marriage

in certain circumstances to protect victims of domestic violence—and suggests that this limitation on the agency's discretion means that not *every* decision to revoke an approved petition is unreviewable.[2] Pet. Br. at 30-31. But even if there is a nondiscretionary statutory limitation on the agency's revocation authority, there is no dispute that that statutory limitation has no applicability in this case.

Indeed, Congress could have imposed, but did not see fit to impose, a limitation on the agency's discretionary revocation authority involving sham marriages. Congress could have required the revocation of approved petitions upon the discovery of a sham marriage, but did not. Congress could also have directed the agency to revoke any approved petition upon a determination that the initial approval was granted by mistake or because the petition should not have been approved in the first place. But Congress did not choose to limit the agency's discretion in this way. Instead, the only limitation Congress saw fit to impose is a *prohibition* on the agency's ability to revoke an approved petition based solely on a specific finding under certain circumstances. 8 U.S.C. § 1154(h).

Because there is no statutory limitation or predicate nondiscretionary determination that compels or even *triggers* the agency's authority to revoke an approved petition under section 1155, Petitioner's suggestion that the agency's sham marriage determination is a predicate or underlying nondiscretionary determination subject to judicial review amounts to nothing more than a dispute

2. The agency has adopted regulations providing for automatic revocations of visa petitions under certain circumstances, none of which are applicable here. 8 CFR § 205.1.

about whether the agency had, in its estimation, "good and sufficient cause" to revoke the approved petition. But that just begs the question of whether section 1155, which states that the agency "may, at any time" revoke an approved petition, confers discretionary authority upon the agency in the first place.

Because there is no statutory predicate for revocation decisions, Petitioner's challenge boils down to an assertion that the agency erred in "deem[ing]" that it had "good and sufficient cause" to revoke the approval of the petition in this case. The Court should reject petitioner's invitation to reach this question on the straightforward jurisdictional ground that Congress has prohibited courts from reviewing such discretionary decisions.

CONCLUSION

For the foregoing reasons and those argued by the government, this Court should affirm the judgment below.

Respectfully submitted,

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