No. 23-583

In the Supreme Court of the United States

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

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Government's brief underscores the irrational and incoherent system of judicial review reflected by the Eleventh Circuit's decision—in an area where irrationality and incoherence can separate families, sometimes for life.

The judicial review bar at issue, 8 U.S.C. § 1252(a)(2)(B)(ii), is intended to insulate the Executive's "exercise of discretion" from judicial review. U.S. Br. 24. It has no application to "decision[s] or action[s]" that involve no discretion. 8 U.S.C. § 1252(a)(2)(B)(ii). But, as the Government's brief ultimately confirms, there is no actual discretion to exercise here. The Government claims (at 14) that the relevant discretion is the agency's discretion to not "revoke [the] approval of a visa petition," even after a sham-marriage finding. But the approval of a visa petition is simply a means by which the agency determines that a person is eligible for substantive immigration relief, such as a visa or adjustment of status. Once the agency makes a sham-marriage finding, it unquestionably lacks discretion to provide that relief. Any exercise of "discretion" to not revoke the petition would thus be wholly illusory: in reality, the approved visa petition *has* effectively been revoked—the approval is no longer worth anything, because what it signifies (*i.e.*, a beneficiary is eligible for the subsequent steps in the immigration process) is no longer true. Whatever the Government has given, it has already taken away.

The only purported discretion remaining is whether to formalize that finding, and inform the petitioner of the decision. Unsurprisingly, the Government points to no instance where it has *ever*

exercised "discretion" to decline to revoke the approval upon making a sham-marriage determination. To the contrary, it admits that it "strives to revoke" under these circumstances. U.S. Br. 22. That is for an obvious reason: once the agency has determined that a petition is not actually "approved," it lacks discretion to pretend otherwise. And, even if it did, such meaningless discretion would be a nonsensical basis to render the underlying eligibility decision—the one that actually injures the beneficiary—unreviewable. The decision below is thus incorrect for two independent reasons.

First, revocation is mandatory upon a sham-marriage finding. Importantly, the Government no longer defends the Eleventh Circuit's position that *all* visa petition revocations under 8 U.S.C. § 1155 are "discretionary—no matter the basis for revocation." Pet. App. 7a. To the contrary, the Government recognizes (at 19) that where Congress imposes "limits on discretionary decisions"—as it has in Section 1154(h), for example—the Secretary of Homeland Security "lacks discretion to violate th[ose] limit[s]," thereby conceding that the decision is subject to judicial review notwithstanding Section 1252(a)(2)(B)(ii). Here, Congress imposed just such a limit by stating that "no petition shall be approved" if the agency makes a sham-marriage finding. 8 U.S.C. § 1154(c). In context, the word "approved" refers not just to agency's initial determination, but to the petition's *status* as an "approved petition." And Section 1154(c) prohibits a petition from being deemed "approved" following a sham-marriage finding. Accordingly, the agency must "revoke the approval." 8 U.S.C. § 1155.

Second, even if the agency had some nominal discretion to not revoke a petition following a sham-marriage determination, that only underscores why the underlying determination must be reviewable. Nothing in the text or purpose of Section 1252(a)(2)(B)(ii) indicates that Congress sought to withdraw review of nondiscretionary eligibility decisions that culminate in an exercise of discretion. That longstanding principle of underlying reviewability should apply with even more force here, where all agree that there is no meaningful discretion at play.

The Government also has no remotely satisfactory response to the statutory mismatch its position creates: while the agency's denial of a visa petition on sham-marriage grounds would be nondiscretionary and reviewable, the agency's substantively identical revocation on sham-marriage grounds would not. The Government's only hypothesized reason for this mismatch is that Congress could have wanted to avoid "parallel and duplicative proceedings in two tribunals" if the visa petitioner were to file a second visa petition. U.S. Br. 12. But that makes no sense. The only reason a visa petitioner would file a new petition is to obtain judicial review that the Government insists is unavailable here. If judicial review of a revocation were available, there would be no reason for an additional visa petition—and no "parallel and duplicative proceedings." Thus, although the touchstone of the inquiry is "congressional intent to preclude review," *Lindahl v. OPM*, 470 U.S. 768, 779 (1985) (citation omitted), the Government offers literally no reason *why* Congress could have intended the regime here. Instead, the Government is left defending a pure statutory

anomaly in a prison of its own formalism. This Court need not follow that senseless path.

At bottom, the question in this case is whether revocation based on a sham marriage—a decision over which the agency has never exercised any discretion and where any exercise of discretion would be meaningless—is nonetheless insulated from judicial review in order to protect the Executive's "exercise of discretion." U.S. Br. 24. There is no "clear and convincing evidence" that Congress intended that wholly irrational result. *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020) (citation omitted).

ARGUMENT

I. Sham-Marriage Revocations Are Nondiscretionary Decisions Subject To Judicial Review

A sham-marriage revocation is not a discretionary "decision or action" under Section 1252(a)(2)(B)(ii) for two reasons. *First*, revocation is mandatory following a sham-marriage finding. And *second*, the underlying sham-marriage decision is reviewable, even if that decision underlies a subsequent exercise of discretionary authority.

A. Sham-Marriage Revocations Are Mandatory

1. The parties now appear to agree that Section 1252(a)(2)(B)(ii)'s limitation on judicial review of any "discretion[ary]" "decision or action" requires a *decision-specific* inquiry. While the Eleventh Circuit held that *all* revocations are "discretionary [and unreviewable]—no matter the basis for revocation," Pet. App. 7a, the Government now agrees that at least *some* revocations are nondiscretionary. It concedes

that when Congress "places … limits on discretionary decisions," as it has for visa petition revocations under Section 1154(h), the agency "*lacks discretion* to violate th[ose] limit[s]." U.S. Br. 19 (emphasis added).[1] And the Government appears to acknowledge that the agency's decisions are "nondiscretionary and reviewable" in such circumstances.[2] *Id.* It is now common ground, therefore, that if Congress has "place[d] some limit[]" on the agency's discretion to revoke following a sham-marriage finding, the revocation would be judicially reviewable. *Id.*[3]

2. The Government asserts that the circumstances here are different from a revocation under Section 1154(h) because there is no express statutory phrase barring or mandating revocation.

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[1] Section 1154(h) bars the Government from revoking a visa petition on the ground of legal termination of a marriage in certain cases involving domestic violence survivors. 8 U.S.C. § 1154(h).

[2] Though the Government's phrasing is somewhat elliptical, it states that the "existence of th[e] limit [in Section 1154(h)] does not render revocation nondiscretionary and reviewable in the numerous cases—including this one—in which that limitation on discretion is not implicated." U.S. Br. 19. The apparent implication is that where there is a "limitation on discretion," revocation is "nondiscretionary *and reviewable*." *Id.* (emphasis added). And the Government no longer presses any broader argument that all revocations are discretionary, focusing instead on whether the sham-marriage revocation was "required" or not. *Id.* at 10-11, 21-22, 25.

[3] This Court need not address whether the term "may" in Section 1155 is sufficient to trigger Section 1252(a)(2)(B)(ii)'s review bar on discretionary decisions, because the parties agree for purposes of this case that Section 1155 generally (although not always) affords the agency discretion to revoke a visa petition. Pet. Br. 30; U.S. Br. 17-19; *see* ACLU *Amici* Br. 18 n.6.

U.S. Br. 21. But Section 1154(c) provides a similarly unequivocal instruction: it states that "no petition shall be approved" once the agency has made a sham-marriage determination. The Government acknowledges this is a mandatory statutory limit that the agency must follow—and the agency's failure to do so can be subject to judicial review, as it is following denial of a visa petition. *See* U.S. Br. 12.

The Government asserts, however, that this bar applies just to the "*initial* decision to approve the petition," and places no limit on the agency following that initial approval. *Id.* at 25-26 (emphasis added). But it offers no textual defense of that assumption whatsoever. In context, the phrase "approved" reflects both an initial decision to "approve" a petition, and a *status* that the petition then carries through the immigration process. As the Government recognizes (at 3), an "approved" visa petition serves only one purpose—as a gateway eligibility requirement for future immigration benefits, such as a visa or adjustment of status. *See, e.g.*, *Perez-Vargas v. Gonzales*, 478 F.3d 191, 192 (4th Cir. 2007). And a visa petitioner does not simply need his petition to be "approved" on the front-end; he needs it to *remain* approved at the relevant time that the subsequent immigration benefits are adjudicated. *Id.*; *see* 8 U.S.C. §§ 1204, 1255(a); Pet. Br. 27-28. In the agency's words, a beneficiary "cannot claim to have a valid visa petition" to adjust status "if it failed to establish that it met the eligibility requirements at the time of filing and continued to meet such requirements through the date the beneficiary's status was adjusted." *In re Petitioner [Identifying Information Redacted by Agency]*, File No.

[Identifying Information Redacted by Agency], 2012 WL 8524575, at *2 (A.A.O. Aug. 16, 2012).

Section 1155 confirms this understanding of "approval" as a status, as well as an initial decision. That provision authorizes the agency to "revoke *the approval*" of a visa petition. 8 U.S.C. § 1155 (emphasis added). The "approval" that is being revoked is the status of having an approved visa petition—not a once-in-time event in the past. This follows from the ordinary understanding of the concept of revocation, which is to "cancel, rescind, repeal, or reverse" something that was conferred. *Revoke*, *Black's Law Dictionary* (12th ed. 2024). Here, the thing that was conferred—and thus the only thing that can be "revoked"—is the "approved" status the petition carried, *i.e.*, the status embodying the beneficiary's eligibility for subsequent benefits.

And if the word "approved" constitutes not just a once-in-time decision, but a status of the petition, then it follows inexorably from the text that the agency lacks discretion following a sham-marriage finding. Section 1154(c) commands that "no petition shall be approved" after such a finding: that creates a nondiscretionary obligation to initially deny the petition and an equally nondiscretionary obligation to withdraw the approved status of the petition.

In any event, even if the Government is correct that the word "approved" just refers to a once-in-time event, revocation would still be mandatory. Section 1155 makes revocation effective as of "the date of approval of any such petition"—thus turning back the clock to the time of the initial approval. This amounts to a statutory *nunc pro tunc* command, in which "retroactive legal effect" is given to the agency's revocation. *Black's Law Dictionary, supra*; *see*

Missouri v. Jenkins, 495 U.S. 33, 49 (1990). So, once the agency has made its sham-marriage determination, it is obligated to turn back the clock and change its "approval" decision.

3. The agency's obligation to revoke is also consistent with Congress's purpose. It is common ground that, once the sham-marriage determination is made, the visa petition *has* been revoked in substance—the beneficiary is not eligible for the immigration benefits afforded by the petition. Congress could not have contemplated that the agency would have "discretion" to allow a beneficiary to hold onto a now-meaningless piece of paper, once it has substantively withdrawn all of the benefits associated with approval.

Indeed, the agency itself recognizes that revocation is "automatic" when, for example, a petition is approved for a "qualified immigrant[]" who is an "unmarried" child of a lawful permanent resident, 8 U.S.C. § 1153(a)(2)(B), and the child is subsequently married. 8 C.F.R. § 205.1(a)(3)(i)(I). That is because the factual predicate for eligibility is no longer true, and the agency must give effect to this change via a revocation. The situation here is no different.

Unsurprisingly, the Government does not identify a single example of the agency *ever* having declined to revoke a visa petition after making a sham-marriage finding. Instead, the Government concedes (at 22) that it "strives to revoke" when it learns of evidence of a sham marriage. In other words, the agency tries to the very best of its ability to revoke *all* improperly approved petitions. That confirms that the agency does not believe it has any discretion once a sham-marriage determination has been made. And the

Government identifies no circumstance—even a hypothetical one—in which it would not revoke. That squarely aligns with the agency's precedents confirming that revocations are treated exactly like nondiscretionary denials.[4]

4. The Government offers three responses for why revocation is not mandatory despite a sham-marriage finding—but none works.

First, the Government argues that the INA does not require the agency to "continually reassess the bases for its initial approval." U.S. Br. 22. But that is a different issue entirely. The question is what happens once the agency determines from available evidence that a noncitizen *has* entered into a sham marriage. At that point, the visa petition no longer meets the criteria for "approval" by the agency, and so the beneficiary no longer has eligibility for any of the benefits that the visa petition exists to provide. So at that point, the agency lacks discretion to not revoke the approval.

Second, the Government suggests that the agency can decline to revoke and instead "simply deny" subsequent immigration benefits "outright." *Id.* at 26. The Government's argument appears to be that, while Congress forbade the agency from exercising any discretion to afford a beneficiary immigration

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[4] The Government's attempts (at 25) to explain away the operative language from *In re Ortega*—that a "visa petition will be denied (or revoked) pursuant to [Section 1154(c)] where there is substantial and probative evidence [of marriage fraud]," 28 I. & N. Dec. 9, 11 (B.I.A. 2020) (first alteration in original)—miss this critical point. As the quoted language indicates, the agency consistently treats revocations in *exactly the same way* it treats denials: as nondiscretionary determinations subject to statutory limits.

benefits after a sham-marriage determination, the agency still has discretion about *when* to convey that finding—and this discretion as to timing is sufficient to insulate the decision from judicial review.

Beyond its simple irrationality, this approach makes a hash of the statutory scheme. The Government's argument would amount to treating a visa petition beneficiary as eligible for benefits to which they are unquestionably not entitled, solely to deny relief at a later stage in order to circumvent judicial review. But this Court has been clear that a noncitizen generally has "a right to a ruling on an applicant's eligibility" when "governed by specific statutory standards." *Jay v. Boyd*, 351 U.S. 345, 353 (1956). And here, Congress imposed the sham-marriage limitation as a matter of *eligibility*. Allowing the Government to recharacterize a subsequent denial of benefits on that basis as somehow discretionary would give the Government "a free hand to shelter its own decisions from … review" by labeling "those decisions 'discretionary'"—an approach this Court repudiated in *Kucana v. Holder*, 558 U.S. 233, 252 (2010).

Third, the Government mischaracterizes Petitioner's argument as "rely[ing] on agency regulations and practice to demonstrate that revocation is mandatory after a sham-marriage determination." U.S. Br. 11. But Petitioner's argument is that the agency's practice confirms—not creates—the agency's obligation to revoke in the circumstances here. If the agency had discretion to not revoke following a sham-marriage finding, it would surely be able to point to an example where it did so across many thousands of visa petition revocations. The agency's decades-long, unbroken

practice of treating sham-marriage revocations as nondiscretionary is good evidence that the agency is obligated to formalize its sham-marriage finding via a revocation. *Cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("consistency" of agency's interpretation may shed light on statutory meaning).

B. In Any Event, Sham-Marriage Determinations Underlying A Revocation Are Reviewable Nondiscretionary Determinations

If the Government is correct that the agency is not obligated to formalize its sham-marriage determination by revoking the approval, that only underscores the need for independent review of that underlying determination.

1. As Petitioner and her amici have explained, courts have long reviewed statutory eligibility for discretionary immigration relief, even when review of the subsequent exercise of discretion is barred. *See Wilkinson v. Garland*, 601 U.S. 209, 225 & n.4 (2024); *accord INS v. St. Cyr*, 533 U.S. 289, 307 (2001); *Jay*, 351 U.S. at 353; Pet. Br. 32-33; Admin. Law Profs. *Amici* Br. 13-15. That makes sense because immigration decisions frequently involve a first nondiscretionary step in which the agency determines "whether the noncitizen is eligible" for a benefit and a second step regarding whether the agency will "exercise [its] discretion favorably" to grant a benefit. *Wilkinson*, 601 U.S. at 212-13. Judicial review bars

are interpreted to respect this distinction unless the text unambiguously compels a contrary reading.[5]

The Government asserts that "nothing in the text" of Section 1252(a)(2)(B)(ii) "suggests that, in barring judicial of review of '*any* … decision or action' that a statute makes discretionary, Congress nevertheless intended to preserve judicial review of factual and legal determinations underlying that discretionary decision or action." U.S. Br. 27 (citation omitted). But this gets the inquiry backwards. Final agency action is reviewable here "except *to the extent* that … statutes *preclude* judicial review." 5 U.S.C. § 701(a)(1) (emphasis added).[6] The "agency bears a 'heavy burden' in attempting to show that Congress 'prohibit[ed] *all* judicial review' of the agency's compliance with a legislative mandate." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015)

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[5] This background principle is reflected in (but not limited to) Section 1252(a)(2)(D)'s preservation of review for legal and constitutional questions. *Contra* U.S. Br. 30-32. Courts have long reviewed underlying eligibility determinations as separate and apart from exercises of discretion—and such review is not restricted to legal and constitutional issues. *See Jay*, 351 U.S. at 353; Admin. Law Profs. *Amici* Br. 13-15. For that reason, the Government's argument (at 30) that Section 1252(a)(2)(D) does not apply in this APA case is beside the point. Section 1252(a)(2)(D)'s *preservation* of judicial review of certain questions that *do* fall within the statutory review bar confirms that reviewability is the default for decisions falling outside that bar.

[6] *See* U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 95 (1947) (recognizing that prior version of this "important" preface meant a statute may "prevent[] the application of some" of the APA's review provisions "while not precluding review altogether"), https://www.regulationwriters.com/downloads/AttorneyGeneralsManual.pdf.

(emphasis added) (citation omitted); *Lindahl v. OPM*, 470 U.S. 768, 779 (1985) ("read[ing statute] as precluding review only of OPM's *factual* determinations," not "as imposing an absolute bar to judicial review"). The question therefore is not whether Section 1252(a)(2)(B)(ii) "*preserve[s]* judicial review" of underlying eligibility decisions, U.S. Br. 27 (emphasis added), but whether that provision clearly *precludes* such review.

It does not. The text covers only a "decision or action" that is "specified … to be in the discretion of" the agency, and that language does not extend to all underlying nondiscretionary determinations. 8 U.S.C. § 1252(a)(2)(B)(ii). The Courts of Appeals have recognized that Section 1252(a)(2)(B)(ii) limits review only of those decisions that Congress specified as "discretion[ary]," and thus does not bar review of nondiscretionary "matter[s] antecedent to" an "exercise" of "unreviewable discretion." *Bremer v. Johnson*, 834 F.3d 925, 929-30 (8th Cir. 2016) (predicate legal questions underlying 8 U.S.C. § 1154(a)(1)(A)(i) and (viii) reviewable); *see* Pet. Br. 25, 33-34 & n.7; Former Executive Off. Immigration Review Judges *Amici* Br. 7-8 & n.5. And the Government too has long recognized that clause (ii) "indisputably require[s]" review of nondiscretionary determinations underlying the exercise of discretion. *Patel* Oral Arg. Tr. 59:11-15 (No. 20-979); Pet. Br. 19, 35-36 & n.9, 50.

2. Against this backdrop, the Government now invokes APA principles, this Court's decision in *Patel*, and statutory purpose in support of its argument that the agency's underlying nondiscretionary sham-marriage decision is unreviewable. None of these arguments is persuasive.

a. Relying on cases interpreting Section 701(a)(2)'s bar on review of decisions "committed to agency discretion," the Government insists that the substantive basis for the agency's decision cannot control the extent of its reviewability. U.S. Br. 28 (citing *Interstate Com. Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987)). That misunderstands the governing principles.

The Government's cited authority is inapposite because it has never argued that sham-marriage revocations fall within Section 701(a)(2)'s separate review bar. For good reason: Section 701(a)(2) applies in the "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.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (citation omitted). This high bar has only been met in a "few cases" involving "decisions that courts have traditionally regarded as unreviewable." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 23 (2018). It is no surprise that such decisions may be "entirely 'nonreviewable.'" U.S. Br. 28 (citation omitted). When there is truly "no law to apply," parties cannot argue that there is a nondiscretionary determination amenable to review. *Dep't of Com. v. New York*, 588 U.S. 752, 772-73 (2019) (citation omitted). Giving an ostensibly "'reviewable' reason for otherwise unreviewable action" does not change the fact that a court lacks any meaningful standard to determine the agency's compliance with the law. *Locomotive Eng'rs*, 482 U.S. at 283.

By contrast, when a case involves "the sort of routine dispute that federal courts regularly review," Section 701(a)(2) and the principles the Government draws from it do not apply. *Weyerhaeuser*, 586 U.S.

at 23-24. Here, the Government recognizes that courts "regularly review" (*id.*) identical determinations in APA actions challenging visa petition denials—in effect conceding that there is law to apply. U.S. Br. 3-4, 36.

Nor does the Government square its argument with Section 1154(h). As noted above, Section 1154(h) forbids the agency from revoking certain visa petitions in the case of a lawful termination of marriage involving victims of domestic violence. And the Government does not dispute that courts *could* review a revocation that violates Section 1154(h). *See supra* at 2, 5 & n.2. But that means that the reviewability of a particular revocation *can* turn on the "reason" the agency gave for "otherwise unreviewable [agency] action"—exactly what the Government claims *Locomotive Engineers* forbids. U.S. Br. 28 (quoting 482 U.S. at 283).[7]

The Government also suggests in passing (at 29) that the sham-marriage determination may not constitute final agency action under *Franklin v. Massachusetts*, 505 U.S. 788 (1992). That argument, which the Government did not make below or in opposing certiorari, is off-base. In *Franklin*, an agency's "tentative recommendation" was itself unreviewable because it was nonfinal, and the President's subsequent action was unreviewable because the President is "not an agency." *Id.* at 796-98. Here, by contrast, one decisionmaker, the Board,

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[7] *Locomotive Engineers* also addressed a class of decisions for which there was a "tradition of nonreviewability" and it was "impossibl[e to] devis[e] an adequate standard of review"—"refusals to reconsider for material error." *Locomotive Eng'rs*, 482 U.S. at 282. It does not govern decisions like this one.

made the sham-marriage determination that forecloses immigration benefits and requires revocation on that basis. Indeed, the decision is exactly the same—and just as reviewable—as the initial denial that the Government concedes is final agency action under the APA.

b. The Government next turns to this Court's decision in *Patel v. Garland*, 596 U.S. 328 (2022). But the Government does not identify any textual reason why *Patel*'s reading of clause (i) should control the interpretation of clause (ii)'s distinct language.

The Government baldly asserts that "[n]othing in the text of clause (ii) suggests that Congress intended to permit judicial review of factfinding underlying discretionary decisions, even though—as *Patel* held—such review is foreclosed under clause (i)." U.S. Br. 32-33. But something "in the text" plainly does "suggest" such an intent: unlike clause (i), clause (ii) is expressly limited to "*discretion[ary]*" decisions or actions, 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). As the Government observes, *Patel* held that Section 1252(a)(2)(B)(i)'s bar on review of "'any judgment regarding the granting of relief' under five enumerated statutes" is not limited to "the ultimate exercise of discretion itself." U.S. Br. 14, 27-28 (citation omitted). But the Government is forced to acknowledge that *Patel* addressed a provision that "uses different phrasing from the second clause that is at issue in this case." *Id.* at 32. The Government never engages with that "different phrasing."

Instead, the Government asserts that to read Section 1252(a)(2)(B) "'harmoniously,'" both clause (i) *and* clause (ii) must be read to bar "judicial review of factfinding underlying discretionary decisions." U.S. Br. 32-33 (quoting *Kucana*, 558 U.S. at 247). But

courts do not "harmonize" statutes by construing disparately worded provisions to mean the same thing. *See, e.g.*, *Sandoz, Inc. v. Amgen, Inc.*, 582 U.S. 1, 20 (2017) (emphasizing contrast in structure of one subparagraph with "the immediately following" subparagraph (citation omitted)); *accord INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Textual differences are given effect, not ignored.[8]

Consistent with their distinct text, the two provisions of Section 1252(a)(2)(B) have different coverage. Clause (i) broadly bars review of decisions concerning five statutory forms of relief by using the phrase "*any judgment regarding* the granting of relief"; for the five provisions at issue, this language bars challenges to both any ultimate exercise of discretion and underlying nondiscretionary factual findings. *Patel*, 596 U.S. at 336-37 (emphasis added) (quoting 8 U.S.C. § 1252(a)(2)(B)(i)); *Kucana*, 558 U.S. at 247-48. Clause (ii), by contrast, covers "any other decision[] or action[]" that is "in the discretion of" the agency; the bar applies to a broader range of statutory provisions not enumerated in clause (i), but only

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[8] *Nasrallah v. Barr*, 590 U.S. 573 (2020), does not help the Government. There, the Court put a stop to a "slippery slope" argument by noting that even if Convention Against Torture orders could be reviewed for factual errors, Section 1252(a)(2)(B) would limit "factual challenge[s]" to decisions concerning certain forms of discretionary relief. *Id.* at 586. That statement aligned with the result in *Patel*, which later barred factual challenges to decisions regarding the enumerated forms of relief in clause (i) such as "adjustment of status." 596 U.S. at 340 (quoting *Nasrallah*, 590 U.S. at 586). But by its own terms, *Nasrallah* has "no effect" on "judicial review of … discretionary determinations," 590 U.S. at 586, and *Patel*'s reference to *Nasrallah* when analyzing clause (i) does not dictate the scope of review under clause (ii).

precludes review of a narrower subset of underlying determinations that are "discretion[ary]." 8 U.S.C. § 1252(a)(2)(B)(ii). In arguing that the two provisions mean the same thing, the Government effectively seeks to read the word "discretion" out of clause (ii)—the opposite error it made in *Patel*, where it had tried and failed to read the word "discretion" *into* clause (i). 596 U.S. at 341-42 (rejecting Government's argument that clause (i) is limited to "discretionary judgments").

Congress easily "could have" given the two review bars identical scope, "but did not" do so. *See Wilkinson*, 601 U.S. at 224. Congress might have placed the phrase "any judgment regarding" in the preface to both clauses or in clause (ii) itself. *See* ACLU *Amici* Br. 9. Or Congress could have written "[t]here shall be no means of judicial review" of visa petition revocations, as it wrote for visa revocations. 8 U.S.C. § 1201(i); Pet. Br. 41-42. It is "doubtful … that Congress sought to accomplish in a 'surpassingly strange manner' what it could have accomplished in a much more straightforward way." *Azar v. Allina Health Servs.*, 587 U.S. 566, 577 (2019) (citation omitted).

The Government's reading of clause (ii) would also render other review bars superfluous. Clause (i) and its expansive language would be unnecessary if clause (ii) already reached both discretionary decisions and every underlying nondiscretionary determination. And an all-encompassing reading of clause (ii) would make pointless several provisions that expressly bar review of underlying determinations. *See, e.g.*, 8 U.S.C. § 1254a(b)(5)(A) (providing that "[t]here is no judicial review of any determination of the Attorney General with respect to the designation … of a foreign state" for purposes of discretionary grant of

"temporary protected status" under Section 1254a(a) and (c)); *id.* § 1187(h)(3)(C)(iv) ("no court shall have jurisdiction to review an eligibility determination under" the criteria established for the Electronic System for Travel Authorization).

c. The Government also argues that if nondiscretionary determinations underlying exercises of discretion were reviewable, Section 1252(a)(2)(B)(ii)'s review bar would be "largely nugatory." U.S. Br. 27. But that is false. Numerous provisions of the INA are discretionary and do not involve underlying nondiscretionary determinations. Consider two of the classic examples of discretionary decisions subject to clause (ii) from *Kucana*: the agency's determination whether to admit a refugee "determined to be of special humanitarian concern to the United States," 558 U.S. at 248 (quoting 8 U.S.C. § 1157(c)(1)); and the agency's discretion to waive certain documentation requirements for "returning resident immigrants," 8 U.S.C. § 1181(b) (cited by 558 U.S. at 248). These types of decisions are in the heartland of clause (ii)'s preclusion of review of discretionary decisions or actions, and they are unaffected by the availability of review for underlying eligibility findings.[9]

Ultimately, the Government's argument is that although Section 1252(a)(2)(B)(ii) bars review of many entirely discretionary decisions, clause (ii)

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[9] The Government asserts that Petitioner's challenge "raises a question of fact." U.S. Br. 31. That is incorrect, but also beside the point, because Petitioner's argument does not proceed under Section 1252(a)(2)(D) and the Government does not dispute that any factual finding here would be nondiscretionary. *See id.* at 33.

would still do too "little" to effectuate Congress's intent if it did not *also* bar review of underlying nondiscretionary decisions. U.S. Br. 33. But that speculative account of how much review Congress "must" have intended to preclude is unmoored from statutory text, and defies common sense. Indeed, what would actually undermine statutory purpose is to read a judicial review bar designed for discretionary decisions to foreclose review of a decision that all agree involves no meaningful exercise of discretion. Yet, that is precisely the consequence of the Government's argument: it reads clause (ii) to "pursue[]" its jurisdiction-stripping "purpose[] at all costs," *Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 150 (2023) (citation omitted), contrary to text, precedent, and a much more plausible account of congressional intent.

II. The Government Cannot Overcome The Structural Problems Its Position Creates

Statutory text and context are reason enough to reject the Government's argument, because it has not shown that Congress unambiguously made sham-marriage revocations discretionary and unreviewable. But the INA's structure eliminates any doubt because the Government cannot reconcile the untenable statutory anomaly created by its position.

The Government's argument would bar review for revocations based on reconsideration of Section 1154(c)'s mandatory criteria, even though all agree the exact same determination is reviewable when made through a denial of the visa petition. The result is that petitioners and beneficiaries are penalized for purposes of judicial review by the agency's "own

purported failure to correctly apply the statute in the first instance." Pet. Br. 38. Of course, the agency's purported error should make judicial review *more* important, not less. Admin Law Profs. *Amici* Br. 8-9. Yet the Government's rule would eliminate review entirely in that scenario.

In response, the Government (at 37) first derides the mismatch as a "policy argument[]" different in substance than the statutory inconsistency presented in *Maslenjak v. United States*, 582 U.S. 335 (2017). But statutory interpretation routinely requires this Court to reconcile the "specific context" of one provision with "the broader context of the statute as a whole"; searching for whole-act coherence is essential to that endeavor. *Fischer v. United States*, 144 S. Ct. 2176, 2183 (2024) (citation omitted). Courts do not lightly assume that Congress enacted a provision that generates inexplicable "[statutory] anomalies." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994). Here, the agency's sham-marriage denial and revocation are substantively identical decisions, and the agency has consistently treated them that way.

This anomaly is just as egregious as the mismatch at issue in *Maslenjak*. The Government's argument there would have meant that "some legal violations that do not justify *denying* citizenship … would nonetheless justify *revoking* it later." 582 U.S. at 345. The Government wants something similar here—unreviewable discretion to revoke a visa petition on grounds that could have been corrected on judicial review at the outset. The Government bears a heavy burden of explaining why Congress would have desired this anomaly, and it cannot do so.

When it gets around to trying to respond to the mismatch, the Government's argument only underscores the incoherence of its position. The Government claims that "Congress had good reason to permit APA review only in suits challenging" petition denials, because that "avoids the risk of parallel proceedings before the agency and the courts regarding the same question." U.S. Br. 35.

At the outset, the assumption underlying the Government's response is that the agency's sham-marriage determination is *nondiscretionary*. The Government agrees that courts can review sham-marriage determinations, including those driving a revocation, but simply says they must wait for the noncitizen to file a new visa petition and have that petition inevitably denied. *Id.* at 33-35. But if the decision is subject to review in the end, that can only mean it is nondiscretionary. This puts the Government in the untenable position of arguing for preclusion of review of a decision that admittedly involves no exercise of agency grace.

The Government's "parallel proceedings" argument is also make-weight, because it arises only as a result of the Government's attempt to preclude judicial review. Parties such as Ms. Bouarfa file additional visa petitions after a revocation to obtain the judicial review that the Government insists is unavailable from a revocation. Those petitions would be wholly unnecessary were judicial review of the revocation available.

And the Government's position would lead to incredible inefficiency. Rather than review a visa revocation in one proceeding after it occurs, the parties will proceed through years of unnecessary agency proceedings and appeals—filed for the sole

reason of trying to obtain eventual judicial review of a determination all agree should ultimately be reviewable. Thousands of petitions and agency adjudications could be avoided by upholding the standard rule of judicial review for nondiscretionary sham-marriage revocations.

The fairness consequences of the Government's argument are even more profound. The agency can take years adjudicating a single visa petition. Family members are left in limbo for long periods, hoping for some kind of certainty on their applications; employer-sponsored immigrants, who are generally subject to the same visa petition and revocation procedures, are forced to wait upwards of four years simply for the agency to adjudicate a (presumptively) futile visa petition. The cascading consequences for family immigrants who do not qualify as "immediate relatives" are even more severe—they will lose their "priority date" for obtaining a visa. *See* Am. Immigrant Investor Alliance *Amici* Br. 13-18. At best, this will mean additional years of delay; at worst, it will mean that the beneficiary's children will age out of eligibility, and thus be unable to join their parents in the United States. *See id.* Section 1252(a)(2)(B)(ii)'s judicial review bar does not erect such a senseless statutory scheme.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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