No. 23-583

In the Supreme Court of the United States

AMINA BOUARFA, PETITIONER

v.

ALEJANDRO MAYORKAS,
SECRETARY OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether 8 U.S.C. 1252(a)(2)(B)(ii), which bars judicial review of decisions "specified * * * to be in the discretion" of the Secretary of Homeland Security, prohibits judicial review of the Secretary's decision to revoke the approval of an immigrant visa petition under 8 U.S.C. 1155.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 75 F.4th 1157. The order of the district court (Pet. App. 12a-24a) is not published in the Federal Supplement but is available at 2022 WL 2072995.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2023. On October 18, 2023, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 27, 2023, and the petition was filed on that date. The petition for a writ of certiorari was granted on April 29, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

1. a. For many noncitizens, the path to becoming a lawful permanent resident of the United States begins with the filing of a petition for an immigrant visa with U.S. Citizenship and Immigration Services (USCIS). See *Department of State* v. *Muñoz*, 144 S. Ct. 1812, 1818 (2024).[1] An immigrant visa petition may be filed by an American citizen or lawful permanent resident on behalf of a noncitizen spouse or qualifying relative, by an employer on behalf of a noncitizen employee, or—in certain circumstances—by the noncitizen. See 8 U.S.C. 1154(a) (Supp. IV 2022) and 8 U.S.C. 1154(b); see also 8 U.S.C. 1153(b).

Once a petition has been filed, USCIS exercises authority delegated from the Attorney General and the Secretary of Homeland Security to conduct an investigation. See 8 U.S.C. 1154(b). If USCIS determines that the statements in the petition are true and that the noncitizen either has a qualifying relationship with a U.S. citizen or lawful permanent resident or satisfies the requirements for an employment visa under Section 1153(b), then the agency "shall * * * approve the petition." *Ibid.* But "no petition shall be approved" if the agency finds that the noncitizen has ever "sought" or "been accorded" immigration benefits "by reason of a marriage determined by the Attorney General to have

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 590 U.S. 222, 226 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

been entered into for the purpose of evading the immigration laws." 8 U.S.C. 1154(c)(1).[2]

The approval of a visa petition "may" be revoked "at any time." 8 U.S.C. 1155. Section 1155 provides that "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154." *Ibid.* But the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, does not prohibit a new petition on behalf of the same noncitizen. Accordingly, if an approval is revoked under Section 1155, the original petitioner or another individual (or employer) may reapply on behalf of the same noncitizen under Section 1154.

When a visa petition has been approved under Section 1154, the noncitizen beneficiary may obtain an immigrant visa to enter the country and be admitted as a lawful permanent resident. 8 U.S.C. 1201(a), 1202(a). For a noncitizen who has already lawfully entered the United States, an approved visa petition may also satisfy one of the requirements for the adjustment of status to lawful permanent resident. See 8 U.S.C. 1255 (Supp. IV 2022); *INS* v. *Miranda*, 459 U.S. 14, 15 (1982) (per curiam).

b. This case concerns the availability of judicial review when USCIS has revoked its approval of a visa petition under Section 1155. The parties agree that, after the Secretary revokes his approval of a petition, the original petitioner may file a new petition and may ob-

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[2] Statutory references to the Attorney General that pertain to functions that have been transferred to the Secretary of Homeland Security are now deemed to refer to the Secretary. See 6 U.S.C. 251, 271(b), 542 note, 557; 8 U.S.C. 1551 note; see also *Nielsen* v. *Preap*, 586 U.S. 392, 397 n.2 (2019).

tain judicial review of any denial of the new petition. See Br. in Opp. 18; Cert. Reply Br. 9; Pet. Br. 40 n.10. The INA itself does not provide for such judicial review, but the courts of appeals have consistently held that the denial of a visa petition constitutes final agency action that may be reviewed through a proceeding in the district court under the Administrative Procedure Act (APA), 8 U.S.C. 701 *et seq.* See, *e.g.*, *Mendoza* v. *Secretary, DHS*, 851 F.3d 1348, 1352 (11th Cir.) (per curiam), cert. denied, 583 U.S. 1040 (2017).

The question here is whether a noncitizen may also obtain APA review of the decision to revoke the approval of a visa petition. In the INA, Congress has cabined the scope of judicial review of various agency decisions. As relevant here, it has specified as follows:

> **Denials of discretionary relief**
>
> Notwithstanding any other provision of law (statutory or nonstatutory), * * * and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B).

A decision under Section 1155 to revoke the approval of an immigrant visa petition is not among the enumerated statutes in clause (i), which govern various forms of discretionary relief from removal. But the government contends, and the court of appeals held, that a revocation decision is encompassed in the judicial-review bar in clause (ii) as a decision "the authority for which is specified * * * to be in the discretion of the Attorney General or the Secretary."

2. This case arises from petitioner's efforts to facilitate the adjustment of status of her spouse, Ala'a Hamayel. Pet. App. 2a. Hamayel is a stateless Palestinian. *Id.* at 13a. Department of Homeland Security (DHS) records show that Hamayel entered the United States on a student visa in 2006 and has remained physically present in the United States since then.[3]

a. Hamayel has been the subject of five spousal immigrant visa petitions—or "I-130 petitions," as they are typically called, based on the title of the USCIS form. Hamayel married his first wife, Adriana Muñoz, almost immediately after she became a naturalized U.S. citizen in February 2007, J.A. 13, and she then filed an I-130 petition on his behalf, Pet. App. 13a. But when USCIS investigated their marriage, the interview with Muñoz ended with her submitting a sworn statement withdrawing support for the visa petition. *Id.* at 14a. Muñoz said that "her marriage * * * was fraudulent and that

[3] Because the district court dismissed this case at the outset for lack of jurisdiction, the parties did not have an opportunity to develop a record. But DHS's records reflect that, in 2007, Hamayel conceded a charge of removability based on his failure to maintain his student status; in 2011, he was ordered removed; and in 2014, his removal proceedings were reopened and his removal order was terminated in light of petitioner's then-pending petition for an immigrant visa on his behalf.

she asked [Hamayel] for $5,000 before filing the visa petition on his behalf." *Ibid.* She also stated that "she married [Hamayel] in order to help him obtain an immigration benefit," and that "she did not tell anyone about" the marriage because she knew it was not true. Pet. Br. Addendum 11a.

A short time later, Muñoz provided another statement recanting her prior statement about the marriage and claiming that it had been made "under duress." Pet. App. 14a. Muñoz filed a second I-130 petition on Hamayel's behalf. *Ibid.* But that second petition was denied after the couple's divorce was finalized in February 2008. *Ibid.*; Pet. Br. Addendum 11a.

In May 2008, Hamayel married Clare Farmer, who filed a third I-130 petition on his behalf in July 2008. Pet. App. 13a; Pet. Br. Addendum 11a. That petition also came to nothing when neither Hamayel nor Farmer appeared for the required interview. Pet. Br. Addendum 12a. They were divorced in November 2009, and the petition was denied in May 2010. *Id.* at 11a; Pet. App. 14a-15a.

b. Petitioner married Hamayel in February 2011. J.A. 1, 3. About three years later, petitioner filed a fourth I-130 visa petition on Hamayel's behalf. J.A. 3. Petitioner's Form I-130 required her to list Hamayel's prior marriages, and she accurately did so. But the form did not request, and petitioner did not provide, information about the prior I-130 petitions filed on Hamayel's behalf.[4] On January 6, 2015, USCIS approved the petition. *Ibid.*

In March 2017, USCIS sent petitioner a Notice of Intent to Revoke its approval of the visa petition in light

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[4] Form I-130 has since been revised to request information about prior I-130 petitions filed on behalf of the same beneficiary.

of the sworn statement of Muñoz indicating that Hamayel's first marriage was entered into for the purpose of securing immigration benefits. See Pet. App. 15a; J.A 4. Under 8 C.F.R. 205.2(b), a Form I-130 petitioner "must be given the opportunity to offer evidence" in response to such a notice. Petitioner submitted evidence, including Muñoz's second statement attempting to recant her admission that the marriage was fraudulent, Pet. Br. Addendum 15a. USCIS nevertheless determined that there was "substantial and probative evidence" that Hamayel "falls within the purview of [Section 1154(c)]," *id.* at 12a—the provision stating that "no petition shall be approved if" the noncitizen beneficiary has ever "sought" to obtain immigration benefits "by reason of a marriage * * * entered into for the purpose of evading the immigration laws," 8 U.S.C. 1154(c)(1).

Regulations provide for an appeal of a revocation decision to the Board of Immigration Appeals (Board). 8 C.F.R. 205.2(d). Petitioner appealed, and the Board affirmed. J.A. 11-15. The Board explained that the Director of USCIS had revoked the previous approval based on the determination that the "visa petition was approved in error because the approval is prohibited under section [1154](c)." J.A. 12. Applying de novo review, the Board agreed that Section 1154(c) "bars approval of the instant petition" and that there was therefore "good and sufficient cause to revoke the approval." J.A. 13, 15.

The Board explained that the Director had "reasonably" rejected "petitioner's explanation for the derogatory information in the evidence"—that is, that Hamayel's ex-wife (Muñoz) was "under duress" when she made the first statement. J.A. 14. The Board also explained that it had "considered" and rejected "peti-

tioner's arguments on appeal that [Hamayel's] ex-wife's second statement is more persuasive than her first statement." *Ibid.* Based on its consideration of "both statements, and the record as a whole," the Board found "persuasive the details in [Hamayel's] ex-wife's original sworn statement to USCIS officials." J.A. 14-15.

The Board affirmed the revocation in December 2021. J.A. 11-15. USCIS records reflect that, in November 2022, petitioner filed another I-130 petition on Hamayel's behalf, which is currently pending before the agency and may be decided at any time.

3. Before petitioner filed the fifth petition with USCIS, she challenged the decision to revoke the approval of the fourth petition by filing this APA suit in district court. Pet. App. 16a. The government moved to dismiss the complaint for lack of subject-matter jurisdiction in light of the judicial-review bar in Section 1252(a)(2)(B)(ii). *Id.* at 13a.

In her response, petitioner agreed that "judicial review of a revocation under [Section] 1155 is barred by [Section] 1252(a)(2)(B)(ii)." D. Ct. Doc. 11, at 7 (May 13, 2022). Petitioner asserted, however, that she was not "seek[ing] review of the revocation" itself. *Id.* at 10. She explained that she was instead "disput[ing] the agency's legal determination that the record contains 'substantial and probative' evidence that Hamayel's marriage to [Muñoz] was a 'sham,' particularly when [Muñoz] provided a second statement" recanting her original description. *Ibid.*

The district court granted the government's motion to dismiss. Pet. App. 12a-26a. The court determined that it lacked subject-matter jurisdiction to review a revocation decision, *id.* at 23a-24a, and that petitioner had conceded as much, *id.* at 24a n.4. The court also

rejected petitioner's effort to "recharacterize the revocation as a reviewable legal inquiry" regarding the underlying sham-marriage determination. *Id.* at 26a.

4. The court of appeals affirmed. Pet. App. 1a-11a. It first recognized that petitioner had "concede[d] that the decision to revoke an approval is not subject to judicial review." *Id.* at 4a. But it went on to hold that petitioner's concession was correct, thereby "join[ing] most of [its] sister circuits" in the conclusion that Section 1252(a)(2)(B)(ii) prohibits judicial review of revocation decisions under Section 1155. *Id.* at 4a-5a (citing cases). The court observed that Section 1252(a)(2)(B)(ii) "bars 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' those officials." *Id.* at 6a (citation omitted). And the court explained that the text of Section 1155 "makes clear" that revocations of visa-petition approvals are discretionary. *Ibid.*

The court of appeals also rejected petitioner's contention that the "underlying basis" for the revocation decision in this case—the statutory prohibition on approving a visa petition where the beneficiary has previously engaged in marriage fraud—"involved non-discretionary decision-making that the district court may review." Pet. App. 7a (brackets omitted). The court explained that the INA "makes clear that revocation is discretionary—no matter the basis for revocation." *Ibid.* (citing 8 U.S.C. 1155). The court also observed that Section 1155's only predicate for revocation is "that the Secretary deems there to be good and sufficient cause." *Ibid.*; see *id.* at 10a. And "nothing in the statute *requires* the Secretary to revoke the approval of

a petition in any circumstance, even when the Department later determines that the approval was in error." *Id.* at 7a.

The court of appeals accordingly rejected petitioner's contention "that because the marriage-fraud determination would have been reviewable if her petition had been denied outright, it ought to remain reviewable regardless of the context in which it was made." Pet. App. 8a. The court explained that, in essence, petitioner's claim was that "the Secretary reached the wrong outcome when he determined that there was good and sufficient cause to revoke the approval of her petition." *Id.* at 10a. And "[a] complaint that the Secretary reached the wrong conclusion is nothing more than a claim that the Secretary should have exercised his discretion in a different manner"—a complaint that "is not subject to judicial review." *Ibid.*

SUMMARY OF ARGUMENT

A. In 8 U.S.C. 1252(a)(2)(B)(ii), Congress has barred judicial review of "any * * * decision or action" that is "specified under" Title II of the INA "to be in the discretion of the Attorney General or the Secretary of Homeland Security." A provision in Title II of the INA specifies that the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of" a petition for an immigrant visa. 8 U.S.C. 1155. The plain terms of those provisions foreclose judicial review of the Secretary's discretionary decision to revoke the previous approval of an immigrant-visa petition.

B. Petitioner barely disputes that conclusion, and contends instead that, while some revocations may be discretionary and unreviewable, a revocation based on a sham-marriage determination is not because the Sec-

retary is required to revoke his approval of a visa petition in those circumstances. That contention fails because no provision of the INA requires revocation in light of a sham-marriage determination. Petitioner relies on 8 U.S.C. 1154(c), but that provision states that "no petition shall be approved" in the face of a sham-marriage determination; it does not require the Secretary to reassess whether the noncitizen has entered into a sham marriage after the petition has been approved, nor does it require the Secretary to revoke his approval upon discovery of information to that effect.

Petitioner likewise fails in her attempt to rely on agency regulations and practice to demonstrate that revocation is mandatory after a sham-marriage determination. The plain text of Section 1252(a)(2)(B)(ii) makes its application turn on whether a decision is made discretionary "under" Title II of the INA, not under agency regulations or practice. And the Court's decision in *Kucana* v. *Holder*, 558 U.S. 233 (2010), confirms that Section 1252(a)(2)(B)(ii) bars judicial review of any decision or action "made discretionary *by legislation*," *id.* at 246-247 (emphasis added). In any event, the agency regulations and decisions cited by petitioner show only that revocation is appropriate, not that it is mandatory, when the evidence establishes that a noncitizen has entered into a sham marriage.

C. Petitioner also errs in contending that she is at least entitled to judicial review of the agency's underlying determination that her husband previously sought an immigration benefit (adjustment of status) on the basis of a sham marriage. In both the INA and the APA contexts, this Court has held that a bar on judicial review of a discretionary decision covers the decision itself as well as underlying determinations. This Court's

precedents recognizing an exception for cases in which a noncitizen seeks review of a legal question decided in removal hearings do not apply here. Several of those precedents rely on an express exception for judicial review of "constitutional claims or questions of law *raised upon a petition for review filed with an appropriate court of appeals*." 8 U.S.C. 1252(a)(2)(D) (emphasis added). But that exception is inapplicable where (as here) review is sought in the district court under the APA. Other precedents rely on the general presumption of judicial review of legal questions, which is irrelevant because petitioner *can* obtain judicial review of any legal questions regarding the sham-marriage determination by filing a new petition with USCIS and then seeking judicial review if the new petition is denied. (Indeed, petitioner has such a petition pending now.) And in any event, petitioner's challenge to the sham-marriage determination presents a question of fact, not one of law, because it rests on the claim that the agency erred in crediting Hamayel's ex-wife's first statement, rather than her second statement.

D. At bottom, petitioner's argument for judicial review rests on her sense that it would be illogical for Congress to permit review of sham-marriage determinations in the context of visa-petition denials, while barring review of those determinations when they arise in the context of revocation decisions. But even if policy arguments of that kind could trump the plain text of the relevant statutory provisions, Congress had good reason to bar review in the revocation context and thereby reduce the possibility of parallel and duplicative proceedings in two tribunals. Under petitioner's interpretation of the statute, a court could be considering the validity of a sham-marriage determination through an

APA proceeding challenging a revocation at the same time that USCIS is considering the merits of the sham-marriage determination in processing a new visa petition. That result can be avoided by enforcing the plain text of Section 1252(a)(2)(B)(ii)'s judicial-review bar. Petitioner's invitation to deviate from that text should be denied.

ARGUMENT

SECTION 1252(a)(2)(B)(ii) BARS JUDICIAL REVIEW OF A DECISION TO REVOKE THE APPROVAL OF A VISA PETITION AND OF DETERMINATIONS UNDERLYING SUCH A REVOCATION

The decision to revoke the approval of an I-130 visa petition falls comfortably within the bar on judicial review of discretionary immigration determinations in 8 U.S.C. 1252(a)(2)(B)(ii), which provides that "no court shall have jurisdiction to review" "any * * * decision or action * * * the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." The plain text of 8 U.S.C. 1155 provides that the Secretary "may" revoke the approval of a visa petition "at any time" and may do so for "what he deems to be good and sufficient cause"—leaving no question that revocations are "in the discretion of the" Secretary for purposes of the judicial-review bar. Indeed, petitioner barely disputes that revocation determinations are generally not reviewable.

Instead, petitioner advances two limited contentions: (1) that a revocation decision prompted by a sham-marriage determination is mandatory and therefore reviewable and (2) that a court is at least permitted to review the agency's underlying determination that a sham marriage occurred. Both of those contentions lack

merit. Nothing in the INA requires the Secretary to revoke his approval of a visa petition based on a finding of a sham marriage, and this Court has repeatedly found that litigants may not circumvent a bar on reviewing discretionary decisions by purporting to challenge some underlying nondiscretionary determination.

A. Revocation Decisions Are Unreviewable Because Section 1155 Specifies That They Are Discretionary

1. a. The plain text of Section 1252(a)(2)(B) bars judicial review of any decision that is entrusted to the agency's discretion by certain provisions of the INA. The first clause prohibits judicial review of "any judgment regarding the granting of relief under" five enumerated statutes, 8 U.S.C. 1252(a)(2)(B)(i), each of which governs a form of relief from removal that the Attorney General or the Secretary of Homeland Security may grant to a noncitizen as a matter of discretion.

The second clause extends the judicial-review bar to "any other decision or action * * * 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" asylum under Section 1158. 8 U.S.C. 1252(a)(2)(B)(ii). The reference to "this subchapter" refers to Title II of the INA, which is entitled "IMMIGRATION" and codified (with a few more provisions) at Subchapter II of Chapter 12 of Title 8 of the U.S. Code, 8 U.S.C. 1151-1382. Under the plain meaning of the term "discretion," a statute entrusts a decision to the discretion of an official when it confers the "power of free decision or choice within certain legal bounds." *Webster's Third New International Dictionary* 647 (1993) (*Webster's*) (def. 3.b); see *Black's Law Dictionary* 466 (6th ed. 1990) (*Black's*) ("a power * * * of acting officially in certain circumstances, ac-

cording to the dictates of [one's] own judgment and conscience, uncontrolled by the judgment or conscience of others").

Accordingly, Section 1252(a)(2)(B)(ii) applies whenever a provision of Subchapter II entrusts a challenged action or decision to the agency's own judgment. A covered provision may do that by expressly providing that the decision or action is "in [an official's] discretion." *E.g.*, 8 U.S.C. 1181(b). Or a provision may specify that an action is discretionary by using a term such as "'may,'" which "clearly connotes discretion." *Biden* v. *Texas*, 597 U.S. 785, 802 (2022) (quoting *Opati* v. *Republic of Sudan*, 590 U.S. 418, 428 (2020)) (emphasis omitted). Indeed, Congress plainly had in mind that statutes could specify discretion through use of the term "may" when it enacted Section 1252(a)(2)(B) because two of the provisions that are enumerated in Section 1252(a)(2)(B)(i) use the term "may" to grant discretion. See 8 U.S.C. 1229b(a), 1229c(a)(1).

b. This Court's decision in *Kucana* v. *Holder*, 558 U.S. 233 (2010), confirms that Section 1252(a)(2)(B)(ii) bars judicial review of any decision or action "made discretionary by legislation," *id.* at 246-247, and—more specifically—by a provision in Subchapter II, *id.* at 239 n.3; see *id.* at 253 (Alito, J., concurring in the judgment). In *Kucana*, the Court held that Section 1252(a)(2)(B)(ii) did not preclude judicial review of an agency decision to deny a motion to reopen because that decision was made discretionary by a regulation rather than a statute. See *id.* at 237. But in reaching that conclusion, the Court made clear that the bar in clause (ii) *would* apply to any decision or action where "Congress itself set out the [agency's] discretionary authority in the statute." *Id.* at 247; see *Patel* v. *Garland*, 596 U.S. 328, 343 (2022) (rec-

ognizing that *Kucana* held that both clauses of Section 1252(a)(2)(B) bar review of decisions "entrusted to the Attorney General's decision *by statute*").

Kucana also recognized that the first and second clauses of Section 1252(a)(2)(B) should be interpreted "harmoniously." 558 U.S. at 247. The Court explained that "[t]he proximity of clauses (i) and (ii), and the words linking them—'any other decision'—suggests that Congress had in mind decisions of the same genre[.]" *Id.* at 246. That understanding of the link between the two clauses reinforces the conclusion that, just as the first clause precludes judicial review of statutes that grant discretion through the use of terms like "may," so does the second. Indeed, *Kucana* expressly recognized that Congress likely included a carveout for grants of asylum at the end of clause (ii) because the asylum provision's use of the term "may" might otherwise have triggered the review bar. *Id.* at 247 n.13.

2. Because Section 1252(a)(2)(B)(ii) applies whenever a provision of Subchapter II makes a decision or action discretionary, it bars judicial review of the Secretary of Homeland Security's decision to revoke a prior approval of a visa petition under Section 1155. That section appears in Subchapter II, and it provides that the Secretary "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title." 8 U.S.C. 1155. Multiple features of that text make clear that revocation is a discretionary decision.

First, and most fundamentally, Section 1155 provides that the "Secretary of Homeland Security *may*," —rather than *shall* or *must*—use his authority to revoke his approval of a visa petition. 8 U.S.C. 1155 (emphasis added). The term "may" by itself establishes

that revocation is discretionary. *Biden* v. *Texas*, 597 U.S. at 802 (citation omitted). And Congress further emphasized the discretionary nature of the decision by immediately following it with the phrase "at any time," granting the Secretary unrestrained flexibility even with respect to timing.

Second, Section 1155 provides that a decision to revoke approval should be based on "what [the Secretary] *deems* to be good and sufficient cause." 8 U.S.C. 1155 (emphasis added). The verb "deems" also strongly connotes discretion. To "deem" means "to come to view, judge, or classify after some reflection," or to "hold" or "think." *Webster's* at 589 (capitalization omitted); see *Black's* at 415 ("To hold; consider; adjudge; believe; condemn; determine[.]"); 4 *The Oxford English Dictionary* 360 (2d ed. 1989) (def. 6: "To form the opinion, to be of opinion; to judge, conclude, think, consider, [or] hold."). The term therefore calls for the agency's own judgment or opinion, rather than its determination of an objective fact. This Court recognized as much in *Webster* v. *Doe*, 486 U.S. 592 (1988), where it held that, for purposes of the APA, the termination of CIA employees was a form of agency action that had been "committed to agency discretion by law," 5 U.S.C. 701(a)(2). See 486 U.S. at 600-601. The Court explained that the relevant statute "allow[ed] termination of an Agency employee whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States' * * * , not simply when the dismissal *is* necessary or advisable to those interests." *Id.* at 600. That word choice "fairly exude[d] deference to the Director" and "foreclose[d] the application of any meaningful judicial standard of review." *Ibid.* Congress's choice to use "deems" in Section 1155 has a similar effect. Cf.

Wilkinson v. *Garland*, 601 U.S. 209, 224 (2024) (recognizing that the phrase "in the opinion of the Attorney General" in a former INA provision was a grant of "discretion").

Third, the phrase "good and sufficient cause" further connotes discretion. This Court recently observed that Congress may confer discretion through the use of "a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'" *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2263 (2024) (citation omitted). The phrase "good and sufficient cause" qualifies because "good" and "sufficient" are capacious terms that leave the agency with flexibility in making revocation determinations. Cf. *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 582 n.5 (1986) (observing that, because a state statute permitted a liquor board to grant exemptions "for *good cause* shown," an exemption decision was "a matter left by the statute to the [board's] discretion") (emphasis added).

3. Petitioner appears to agree with much of the foregoing analysis. She agrees that the application of Section 1252(a)(2)(B)(ii) "turns on whether the agency's specific 'decision or action' is properly characterized as 'discretionary.'" Pet. Br. 24 (brackets omitted). She also agrees that an action is discretionary where it is left to the "'individual choice or judgment' of the Executive branch." *Ibid* (citation omitted). And she agrees that Section 1155 "generally affords the agency ultimate authority to revoke a petition on the grounds of its choosing." *Id.* at 30.

In her briefing before this Court, however, petitioner does not repeat the outright concession she made before the lower courts "that the decision to revoke an

approval is not subject to judicial review." Pet. App. 4a; see *id.* at 24a n.4. And at times she seems to suggest that Section 1252(a)(2)(B)(ii) is inapplicable to revocation decisions because not "*every* revocation is necessarily an act of discretion." Pet. Br. 30; see *id.* at 31 ("not *all* revocations are pure matters of discretion") (emphasis added). She repeatedly observes (Br. 30, 45), for example, that 8 U.S.C. 1154(h) limits the Secretary's ability to revoke his approval of a petition in certain cases involving victims of domestic violence. But to the extent petitioner means to suggest that Section 1252(a)(2)(B)'s judicial-review bar does not apply to a revocation because the Secretary's revocation discretion has some statutory limit, that is incorrect.

Congress often places some limits on discretionary decisions—including the indisputably discretionary decisions enumerated in Section 1252(a)(2)(B)(i). There is no question, for example, that cancellation of removal is "discretionary," even though the statute governing cancellation restricts the agency's authority to grant cancellation to cases where certain eligibility requirements are met. *Wilkinson*, 601 U.S. at 212 (describing 8 U.S.C. 1229b(a) and (b)). Thus, while petitioner is correct that the Secretary lacks discretion to violate the limit in Section 1154(h), the existence of that limit does not render revocation nondiscretionary and reviewable in the numerous cases—including this one—in which that limitation on discretion is not implicated.

Moreover, any attempt by petitioner to contest that Section 1155 revocations are generally unreviewable would conflict not only with her own prior position, but with the nearly unanimous holdings of the courts of appeals. The Ninth Circuit is alone in finding that Section 1155 revocations are "not specified by the statute to be

in the discretion of the Attorney General under the meaning of [Section] 1252(a)(2)(B)(ii)." *ANA Int'l, Inc.* v. *Way*, 393 F.3d 886, 894 (2004). And the court based that holding on the untenable premise that the subjective phrase "'good and sufficient cause'" provides a "meaningful standard" that overcomes the connotation of discretion established by the terms "'may, at any time,'" and "deems.'" *Id.* at 893-894 (quoting 8 U.S.C. 1155). Every other court of appeals to address the issue has rejected that proposition, concluding that Section 1155 "clearly indicates that the decision to revoke the approval of a visa petition is discretionary" and is therefore subject to Section 1252(a)(2)(B)(ii)'s review bar. *Bernardo* v. *Johnson*, 814 F.3d 481, 482 (1st Cir.), cert. denied, 579 U.S. 917 (2016).[5]

B. The INA Does Not Limit The Secretary's Discretion By Requiring Revocation Whenever There Is A Sham-Marriage Determination

Lacking any meaningful argument that Section 1252(a)(2)(B)(ii) is generally inapplicable to revocations of approved visa petitions, petitioner attempts to demonstrate (Br. 26-32) that any revocation based on a sham-marriage determination is mandatory and therefore reviewable. But nothing in the INA mandates rev-

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[5] See also *Nouritajer* v. *Jaddou*, 18 F.4th 85, 88 (2d Cir. 2021) (per curiam), cert. denied, 143 S. Ct. 442 (2022); *Jilin Pharm. USA, Inc.* v. *Chertoff*, 447 F.3d 196, 205 (3d Cir. 2006); *Polfliet* v. *Cuccinelli*, 955 F.3d 377, 383 (4th Cir. 2020); *Ghanem* v. *Upchurch*, 481 F.3d 222, 223 (5th Cir. 2007); *Mehanna* v. *United States Citizenship & Immigration Servs.*, 677 F.3d 312, 313 (6th Cir. 2012); *El-Khader* v. *Monica*, 366 F.3d 562, 563 (7th Cir. 2004); *Abdelwahab* v. *Frazier*, 578 F.3d 817, 821 (8th Cir. 2009); *Green* v. *Napolitano*, 627 F.3d 1341, 1343 (10th Cir. 2010); *iTech U.S., Inc.* v. *Renaud*, 5 F.4th 59, 68 (D.C. Cir. 2021), cert. denied, No. 21-596 (May 23, 2022).

ocation based on a sham-marriage determination (or any other reason). And petitioner's effort to rely on agency regulations or practice fails at the threshold because text and precedent make clear that the applicability of Section 1252(a)(2)(B)(ii) turns on whether discretion is conferred by statute. In any event, neither regulations nor agency practice supports petitioner's contention that USCIS treats a revocation as mandatory after any sham-marriage determination.

1. Petitioner contends (Br. 25) that revocation "is mandated" by the INA whenever the agency makes a sham-marriage determination after an I-130 petition has been approved. Petitioner does not, however, cite any statutory text that requires revocation in that or any other circumstance. To the contrary, other than Section 1155, petitioner cites only a single provision of the INA that references revocation—Section 1154(h), which restricts the Secretary's ability to revoke approval of a petition in certain cases involving domestic violence. That provision obviously does not establish that the agency is required to revoke a prior approval whenever information about a sham marriage comes to light.

Petitioner therefore attempts to rely on a provision that makes no mention of revocation, 8 U.S.C. 1154(c). The text of Section 1154(c) provides that "*no petition shall be approved* if" (1) the noncitizen has ever "sought" or "been accorded" immigration benefits "by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purposes of evading the immigration laws." 8 U.S.C. 1154(c) (emphasis

added). The plain meaning of those terms is that the government cannot "approve[]" a petition if the Attorney General (or the Secretary, see p.3 n.2, *supra*) "determine[s]" that there has been a sham marriage or an attempt or conspiracy to enter into one.

Section 1154(c) says nothing to indicate that the government is required to revisit the sham-marriage question after the petition has been approved. Nor does Section 1154(c) establish that, if information about a sham marriage comes to the government's attention, it is required to revoke under Section 1155. Section 1154(c) does not, for example, cross-reference Section 1155 or indicate its applicability at any stage in immigration proceedings other than when the visa petition itself is to "be approved." 8 U.S.C. 1154(c).

Petitioner attempts to fill that statutory gap by observing (Br. 27) that "[a]n approved petition" may be used to obtain immigration benefits such as adjustment of status under 8 U.S.C. 1255. Petitioner appears to believe that, because the government may rely on an approved visa petition in later proceedings, it should continually reassess the bases for its initial approval and issue a revocation whenever it decides that the requirements for approval are no longer met. That might be good practice, and USCIS strives to revoke when information comes to its attention indicating that the noncitizen is not a qualified beneficiary of a visa petition because of a sham marriage or otherwise. But Congress did not *mandate* reassessment or revocation in any circumstances, and doing so would impose heavy administrative burdens on the agency. If petitioner believes that those burdens are appropriate, she may seek an amendment to that effect from Congress. But this

Court should decline petitioner's invitation to read the statute as if such an amendment has already occurred.

2. a. Petitioner alternatively suggests (Br. 28) that revocation of the approval of a petition is mandatory after a sham-marriage determination because that is "how the agency itself views revocations under these circumstances." That contention lacks merit because the text of Section 1252(a)(2)(B)(ii) establishes that its application turns on whether a decision is designated as discretionary "under this subchapter"—*i.e.*, under a statutory provision within Subchapter II, not just under agency regulations or practice.

This Court already recognized as much in *Kucana*, when it rejected the proposition that a decision could be deemed unreviewable under Section 1252(a)(2)(B)(ii) based on a regulation's specification that the decision was "within the discretion of the" agency. 558 U.S. at 239 (quoting 8 C.F.R. 1003.2(a) (2009)). The Court agreed with the parties that clause (ii) "precludes judicial review only when the statute itself specifies the discretionary character" of the decision. *Id.* at 244. In reaching that conclusion, the Court observed that the adjacent judicial-review bars—the "admissibility bar" in Section 1252(a)(2)(A) and the "criminal alien bar" in Section 1252(a)(2)(C)—are both "dependent on statutory provisions, not on any regulation, to define their scope." *Id.* at 246. And the Court observed that the first clause of Section 1252(a)(2)(B) is similarly focused on forms of relief "made discretionary by legislation." *Id.* at 246-247.

Reading the provisions "harmoniously" therefore required the Court to find that the scope of Section 1252(a)(2)(B)(ii) is also defined by statutory provisions rather than regulations. *Kucana*, 558 U.S. at 247. That

was particularly so, the Court explained, because Congress frequently references regulations within the INA when it wishes to make them relevant. *Id.* at 248-249 (citing examples of provisions that reference both statutes and regulations).

If a regulation that designates a provision as discretionary cannot trigger Section 1252(a)(2)(B)(ii)'s judicial-review bar, then regulations that purportedly render a decision mandatory cannot be used to evade the bar either. Nor can agency practice that is not even codified in regulations affect the scope of agency discretion for purposes of Section 1252(a)(2)(B)(ii).

Moreover, allowing the judicial-review bar to be relaxed on the basis of agency regulations or other evidence of agency practice would have perverse consequences. When discretion has been statutorily vested in the Attorney General or the Secretary, they should be able to dictate how their subordinates will exercise that discretion, thus promoting more uniform treatment and allowing like cases to be treated alike. Agency efforts to standardize the exercise of discretion across many officers and employees should not come at the cost of exposing their decisions to the burdens of litigation when those decisions would otherwise be insulated from judicial review.

b. In any event, petitioner is wrong to assert (Br. 27-30) that the agencies view a revocation as mandatory whenever there has been a sham-marriage determination. Regulations provide that revocation is "automatic" in some enumerated circumstances, such as the death of the beneficiary or of certain petitioners. 8 C.F.R. 205.1(a)(3)(i)(B) and (C) (emphasis omitted). But a sham-marriage determination is not included on the list.

Petitioner therefore attempts (Br. 28-29) to rely on decisions in which the Board affirmed a revocation that was based on a finding that the noncitizen engaged (or attempted to engage) in a sham marriage. In those decisions, the Board has sometimes explained that Section 1154(c) bars a visa petition's "approval" in the face of a sham marriage and that Section 1154(c)'s bar on approval is "mandatory." *In re La Grotta*, 14 I. & N. Dec. 110, 112 (B.I.A. 1972). But those statements merely meant that it was appropriate for the agency to use its statutory discretion to revoke an approval after it found there had been a sham marriage. They did not suggest that the revocation decision itself was mandatory.

Petitioner's citation (Br. 28) of *In re Ortega*, 28 I. & N. Dec. 9 (B.I.A. 2020), is particularly far afield because she quotes excerpts from a sentence that, read in full, merely explained that a "visa petition will be denied (or revoked) pursuant to [Section 1154(c)] where there is substantial and probative evidence in the record that the beneficiary previously attempted or conspired to enter into a fraudulent marriage." *Id.* at 11. In other words, the Board was describing the standard of review the agency will use when deciding whether a revocation based on a sham marriage was appropriate. It was not holding that such revocations are mandatory.

Petitioner also attempts to rely on the general statement in a USCIS policy manual that "there is *never* discretion to grant an immigration benefit if the requestor has not first met all applicable benefits requirements." Br. 29 (citation omitted) Petitioner suggests that recognition of that tautology somehow equates to recognition that the agency is required to revoke a prior approval whenever it discovers a sham marriage. But the lack of discretion to *grant* an immigration benefit correlates

with the initial decision to approve the visa petition, not the decision about whether a mistaken approval must always be revoked. And to the extent petitioner means to suggest that the agency *must* revoke to ensure that the noncitizen cannot use the approved petition to obtain additional benefits (such as adjustment of status) in the future, the agency could simply deny the additional benefits outright, without first revoking the visa approval.

Petitioner fares no better in her effort (Br. 29-30) to use her own case to show that sham-marriage revocations are mandatory in the eyes of the agency. Petitioner suggests that the agency has recognized that revocation is required in the circumstances of her case because the Board stated that her "petition was 'prohibited' by [Section] 1154(c)." Pet. Br. 30 (quoting J.A. 12). In fact, the Board was explaining that it was appropriate to revoke the approval of the petition because "*approval* is prohibited under [S]ection [1154(c)]." J.A. 12 (emphasis added). That was a correct statement of the law: Section 1154(c) bars the approval of a petition where the Attorney General has determined that the beneficiary has entered into a sham marriage, and that is a more-than-adequate basis for a discretionary revocation under Section 1155. But because the decision to issue such a revocation remains "in the discretion of the * * * Secretary of Homeland Security," the judicial-review bar in Section 1252(a)(2)(B)(ii) applies.

C. Section 1252(a)(2)(B)(ii) Bars Judicial Review Of Determinations Underlying A Discretionary Decision

Petitioner contends (Br. 32-37) that, even if the ultimate revocation decision is discretionary and unreviewable, the underlying sham-marriage determination should be subject to APA review. That contention is at

odds with the text and precedent governing the application of Section 1252(a)(2)(B)(ii) and with fundamental limits on APA review.

1. In petitioner's view, Section 1252(a)(2)(B)(ii)'s judicial-review bar does not extend to any nondiscretionary "determinations of eligibility" underlying the agency's exercise of statutory discretion. Pet. Br. 33. But nothing in the text suggests that, in barring judicial review of "*any* * * * decision or action" that a statute makes discretionary, 8 U.S.C. 1252(a)(2)(B)(ii) (emphasis added), Congress nevertheless intended to preserve judicial review of factual and legal determinations underlying that discretionary decision or action. Such an interpretation of Section 1252(a)(2)(B)(ii)'s judicial-review bar would render it largely nugatory, at least where the agency specifies its basis for exercising discretion, because discretionary decisions are almost inevitably predicated on some nondiscretionary findings, such as the facts of the noncitizen's case. Judicial review of discretionary decisions would therefore become the rule, with applicants simply framing their suits as challenges to the underlying determinations rather than the agency's ultimate exercise of discretion.

This Court has repeatedly rejected such a reading of statutory bars on the review of discretionary decisions, including the bar in Section 1252(a)(2)(B). In *Patel*, *supra*, this Court held that the first clause of Section 1252(a)(2)(B) bars judicial review of both the agency's discretionary denial of a form of relief referenced in that provision *and* the factual underpinnings for such a denial. The Court explained that Section 1252(a)(2)(B)(i) is best read as barring review of "any and all decisions relating to the granting or denying of discretionary relief" not merely the ultimate exercise of discretion it-

self. 596 U.S. at 337 (citation and internal quotation marks omitted).

Similarly, the Court has held that the APA's bar on judicial review of agency actions "committed to agency discretion by law," 5 U.S.C. 701(a)(2), covers nondiscretionary determinations underlying those discretionary actions. In *Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), the Court rejected the "principle that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Id.* at 283. The Court explained that "the falsity of the proposition" is fully demonstrated by the fact that "a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction." *Ibid.* In many contexts the question of whether a law will sustain a conviction is "an eminently 'reviewable' proposition," but that same proposition is nevertheless unreviewable in the context of a challenge to a refusal to prosecute because the refusal itself "cannot be the subject of judicial review." *Ibid.* The Court therefore concluded that a discretionary decision is entirely "nonreviewable," even when the agency specifies legal or factual bases for its decision. *Id.* at 284.

Moreover, the Court has recognized several kinds of agency decisions that are unreviewable under the APA because they are "committed to agency discretion by law," 5 U.S.C. 701(a)(2), without ever suggesting that some judicial review might be available for the factual and legal premises underlying those decisions. See, *e.g.*, *Doe*, 486 U.S. at 600; *Brotherhood of Locomotive Eng'rs*, 482 U.S. at 282. Petitioner does not reconcile such cases with her argument that she is entitled to

APA review of underlying nondiscretionary determinations. Nor, for that matter, does she explain how she can satisfy the APA's requirement of "final agency action," *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (citation omitted), when the final agency action in question—revocation—is itself unreviewable. Cf. *Franklin* v. *Massachusetts*, 505 U.S. 788, 796 (1992) (holding that, because the final action of approving the census was taken by the President and therefore not subject to APA review, the intermediate agency determinations informing the President's approval were likewise unreviewable).

2. Petitioner attempts (Br. 32-33) to evade those difficulties by relying on cases holding that there is judicial review of questions of law decided in removal proceedings. That effort, which is focused exclusively on the preservation of *legal* determinations, fails many times over.

To begin, several of the cases on which petitioner relies (Br. 24-25, 33-34) involved the application of Section 1252(a)(2)(D), an exception that preserves judicial review of questions of law exclusively as they arise from a petition for court of appeals' review of an order of removal—not an APA action like the one petitioner has brought. Thus, in *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221 (2020), *Patel*, *supra*, and *Wilkinson*, *supra*, this Court recognized that courts may review questions of law (including mixed questions of law and fact) underlying decisions that would otherwise be unreviewable under Section 1252(a)(2)(B)(i) and Section 1252(a)(2)(C). But the Court did so based on Section 1252(a)(2)(D)'s express statement that "[n]othing in subparagraph (B) or (C) * * * shall be construed as precluding review of constitutional claims or questions of law *raised upon a*

petition for review filed with an appropriate court of appeals." 8 U.S.C. 1252(a)(2)(D) (emphasis added).

By its plain terms, the exception for questions of law in subparagraph (D) applies only when such questions are raised upon a "petition for review" in the "court of appeals," 8 U.S.C. 1252(a)(2)(D)—the procedural mechanism for challenging a removal order, see 8 U.S.C. 1252(a)(1) (explaining that "[j]udicial review of a final order of removal" must occur through a petition for review with the court of appeals under the Hobbs Act, 28 U.S.C. 2341-2351). The exception in subparagraph (D) therefore has no application to APA proceedings—like petitioner's—that are initiated in district court. At the same time, the judicial-review bar in subparagraph (B) *does* extend to a discretionary decision by USCIS that is not reviewable under the Hobbs Act, because that bar applies "regardless of whether the judgment, decision, or action is made in removal proceedings." 8 U.S.C. 1252(a)(2)(B).

Petitioner's reliance on cases decided before Section 1252(a)(2)(D) was enacted is equally misplaced because those cases relied on the proposition that courts should not lightly assume that Congress has precluded all judicial review of questions of law, particularly in the context of habeas proceedings. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001). But this is an APA suit, not a habeas proceeding, and there *is* a mechanism for judicial review if the agency revokes a petition based on a legal error regarding the beneficiary's eligibility: The petitioner may file a new petition on her spouse's behalf and then, if the agency does not correct the alleged legal error in the course of denying the new petition, she may obtain judicial review through an APA proceeding challenging that denial. Indeed, petitioner herself may soon

be able to pursue that course because she filed a new petition on Hamayel's behalf in November 2022, while the instant APA proceedings were on appeal. If that new petition is denied based on the sham-marriage bar or other grounds, she can challenge that denial, and any alleged legal errors underlying it, through an APA suit. Accordingly, the concern about unreviewable legal errors that motivated the Court in cases like *St. Cyr* is not present here.

Moreover, the Court has recently emphasized that the presumption in favor of judicial review that was invoked in *St. Cyr* may be overcome by "a jurisdiction-stripping statute" like Section 1252(a)(2)(B)(i). *Patel*, 596 U.S. at 347. And it has done so while recognizing the possibility that, as a result, certain decisions in the immigration context might be "wholly insulated from judicial review"—at least "until removal proceedings are initiated." *Id.* at 345-346. Without definitively resolving whether that result would follow, the Court recognized that it "would be consistent with Congress' choice to reduce procedural protections in the context of discretionary relief." *Id.* at 346.

Petitioner's arguments about the availability of judicial review of questions of law are, in any event, beside the point because petitioner's APA challenge raises a question of fact, not of law. Specifically, petitioner alleges that the agency erred in finding that there was sufficient "evidence that Hamayel's marriage to [Muñoz] was a 'sham,' particularly when [Muñoz] provided a second statement" recanting her original admission to that effect. D. Ct. Doc. 11, at 10; see J.A. 6 (Compl. ¶ 24) ("[Petitioner] submits that the agency does not have 'substantial and probative' evidence that [the marriage] was a 'sham' entered solely for the purpose of evading

the immigration law."). In other words, petitioner contends that the agency should have credited Muñoz's second statement rather than her first. See Pet. Br. 14 (suggesting that Muñoz's first statement should not been credited because it was made "under coercion and duress") (citation omitted). Petitioner apparently views that as a question about the "application of a legal standard to settled facts." *Id.* at 33 (quoting *Guerrero-Lasprilla*, 589 U.S. at 227). But this Court has already recognized that the validity of agency "factfinding on credibility" is unreviewable, even when that factfinding is subordinate to an application of law to fact that would otherwise be reviewable under Section 1252(a)(2)(D). *Wilkinson*, 601 U.S. at 225.

3. Petitioner likewise errs in asserting (Br. 35-36, 50) that the government's brief and argument in *Patel* support the contention that *all* nondiscretionary determinations underlying a discretionary revocation are reviewable under Section 1252(a)(2)(B)(ii). Petitioner is correct that the government argued in *Patel* that Section 1252(a)(2)(B)(i) did not bar review of nondiscretionary determinations underlying discretionary denials of relief. But the government lost. And the Court expressly rejected the government's contention "that review of nondiscretionary decisions is allowed" under Section 1252(a)(2)(B)(i). *Patel*, 596 U.S. at 342.

Petitioner cannot salvage her argument through the observation (Br. 48-51) that *Patel* involved the first clause of Section 1252(a)(2)(B), which uses different phrasing from the second clause that is at issue in this case. Nothing 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). See *Kucana*, 596 U.S. at 328 (recognizing that the two clauses should be read "harmoniously"). And much of *Patel*'s reasoning applies equally to both clauses.

Patel observed, for example, that Section 1252(a)(2)(D)'s exception for questions of law would leave the judicial-review bars in Section 1252(a)(2)(B)(i) and (C) with little work to do if underlying "questions of fact" were reviewable. 596 U.S. at 339. That is no less true for Section 1252(a)(2)(B)(ii). In this case, for example, the Board's decision affirming USCIS's discretionary revocation order consists primarily of the factual finding that Hamayel's ex-wife's initial statement should be credited over her recantation, and the legal determination that sham marriages are a basis for denying approval of a petition under Section 1155. See J.A. 12-15. In its final sentence, the Board observed that those factual and legal premises provided "good and sufficient cause to revoke the approval of the instant visa petition." J.A. 15. If petitioner's position were correct, only that final sentence of the Board's decision would be unreviewable. It is unlikely that Congress intended to do so little when it enacted Section 1252(a)(2)(B)(ii).

Patel also relied on a passage in *Nasrallah* v. *Barr*, 590 U.S. 573 (2020), describing the unavailability of judicial review for factual findings underlying discretionary determinations. See 596 U.S. at 340. That passage of *Nasrallah* explained that "a noncitizen may not bring a factual challenge to orders denying discretionary relief, including cancellation of removal, voluntary departure, adjustment of status, certain inadmissibility waivers, *and other determinations 'made discretionary by statute*.'" 590 U.S. at 586 (quoting *Kucana*, 558 U.S. at 248) (emphasis added). The italicized language unmis-

takably refers to decisions covered by Section 1252(a)(2)(B)(ii). And in quoting and discussing *Nasrallah*, *Patel* also referred broadly to "'orders denying discretionary relief' under § 1252(a)(2)(B)," not merely the orders covered by the first clause. 596 U.S. at 340 (quoting *Nasrallah*, 590 U.S. at 586).

Petitioner similarly errs in asserting (Br. 50) that the government told the Court that a decision in *Patel* would not affect the reviewability of factfinding in the context of Section 1252(a)(2)(B)(ii). In the relevant exchange at oral argument, counsel explained that rejecting the government's interpretation of Section 1252(a)(2)(B)(i) would not entirely relieve courts of the obligation to "identif[y] discretionary determinations" because Section 1252(a)(2)(B)(ii) requires courts to draw that line. Oral Arg. Tr. at 58, *Patel*, *supra* (No. 20-979); see *id.* at 58-59. That is true because the plain text of clause (ii) makes it applicable to actions and decisions that are entrusted to the agency's "discretion," not because courts are required to look beneath those discretionary decisions to review findings of fact.

4. Petitioner's remaining arguments on this score are unavailing. Petitioner invokes (Br. 32–33) some circuits' cramped interpretation of a bar on the review of discretionary decisions in the transitional rules that applied after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. But even if circuit precedent on a different (now obsolete) statute were persuasive, the courts of appeals were not all in accord on the interpretation petitioner favors. See *Pilch* v. *Ashcroft*, 353 F.3d 585, 587 (7th Cir. 2003) (holding that underlying nondiscretionary determinations were unreviewable). And petitioner's reliance (Br. 35) on *McNary*

v. *Haitian Refugee Center*, 498 U.S. 479 (1991), is similarly unpersuasive. *McNary* held only that a judicial-review bar intended to apply to certain adjustment-of-status proceedings did not foreclose review of systemic procedural challenges that were collateral to the determinations that were the subject of the judicial-review bar. *Id.* at 492. That holding does not suggest that courts should gut an express bar on review of discretionary decisions by permitting review of underlying findings of law or fact.

D. Petitioner's Policy Arguments Lack Merit

Petitioner's argument that judicial review of revocation decisions is available despite the plain text of Section 1252(a)(2)(B)(ii) ultimately relies heavily on the contention (Br. 38) that a contrary reading would "create[] an obvious and senseless anomaly" because courts may review the denial of a visa-petition approval. In petitioner's view, there is no reason that Congress would want to permit judicial review of denials based on sham-marriage determinations, while foreclosing review of the same determinations in the context of revocation decisions. But this Court has cautioned that "policy concerns cannot trump the best interpretation of the statutory text." *Patel*, 596 U.S. at 346. And, in any event, petitioner's policy concerns are misguided.

Congress had good reason to permit APA review only in suits challenging I-130 petition denials, because that avoids the risk of parallel proceedings before the agency and the courts regarding the same question. Such parallel proceedings could occur if the Court accepts petitioner's position because the statutory scheme does not prevent a petitioner from filing a new I-130 petition as soon as the agency affirms a revocation. Accordingly, if revocations were judicially reviewable, a

noncitizen might (as petitioner does now) have a pending judicial challenge to her revocation at the same time that she has a new visa petition pending before the agency, which is likely to turn on the same factual dispute.

That scenario is likely to produce inefficiency and confusion. For example, if the approval of a visa petition is revoked based on a sham-marriage determination and the noncitizen immediately files a new petition with USCIS, the agency may reconsider the sham-marriage determination, developing new evidence or rationales, and potentially even changing its earlier determination. If a court is simultaneously reviewing the factual basis for the sham-marriage determination on the administrative record at the time of the revocation, that could lead to inconsistent results or, at a minimum, wasted judicial resources. It is more sensible to channel judicial review into a single proceeding that occurs after petitioner has exhausted all of her options for relief from the agency.[6]

Petitioner's objections lack merit. She suggests (Br. 40 n.10) that adjudicating a new petition will create duplicative work "for the already overburdened immigration agencies." But forcing those agencies to litigate every petition revocation would likely be more burdensome still. And even if revocation decisions are reviewable, that would not prevent the filing of new petitions

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[6] Certain determinations underlying I-130 visa denials are specified as discretionary and therefore unreviewable even in that posture. See, *e.g.*, 8 U.S.C. 1154(a)(1)(A)(viii)(I) ("Clause (i) shall not apply to a citizen of the United States who has been convicted of a specified offense against a minor, unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition described in clause (i) is filed.").

as well. As a result, the agency's work may simply be doubled.

Petitioner also speculates (Br. 40) that USCIS might seek to evade judicial review by repeatedly granting approvals and then revoking them. Petitioner does not, however, cite any evidence that USCIS has engaged in such a manipulative (and administratively burdensome) scheme. The presumption of regularity counsels against deciding this statutory-interpretation issue based on such speculation. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). Moreover, petitioner makes no claim of bad faith in this case, where the revocation happened two years after the approval and was based on a sworn statement made to immigration officials, which had been overlooked during USCIS's adjudication of the petition at issue, regarding the beneficiary's prior marriage fraud. See Pet. App. 15a-16a.

Nor can petitioner find support for her policy arguments in *Maslenjak* v. *United States*, 582 U.S. 335, 345 (2017). Petitioner contends (Br. 37-40) that *Maslenjak* stands for the proposition that the immigration laws cannot be read to create a "mismatch" in the statutory scheme. Br. 37 (quoting *Maslenjak*, 582 U.S. at 345). But in suggesting that *Maslenjak*'s holding was motivated by the Court's preference for a balanced statutory scheme, petitioner overlooks the first several pages of the opinion, in which the Court painstakingly set out the textual basis for its conclusion that the relevant statutory text did not produce a "mismatch." See 582 U.S. at 341-345. In this case, by contrast, the text offers no support for the understanding of the statute that petitioner prefers.

Moreover, the illogical consequences that the Court sought to avoid in *Maslenjak* bear no resemblance to

the consequences petitioner finds unacceptable in this case. In *Maslenjak*, the Court found that the government's reading would mean that "some legal violations that do not justify *denying* citizenship * * * would nonetheless justify *revoking* it later." 582 U.S. at 345. It was the substantive discrepancy between the denial and revocation stage that troubled the Court, not any mere procedural differences in the availability of judicial review for those two stages.

Finally, there is no merit to petitioner's contention (Br. 42) that Section 1252(a)(2)(B)(ii) should not affect judicial review of visa-petition-approval revocations because other statutory provisions are more direct in barring review of other forms of revocation. Congress often varies the verbal formulations it uses to accomplish similar results, but so long as its meaning is clear, that is no reason for overriding its statutory mandates. And in this case, it is hardly surprising that Congress did not enact a more express bar on judicial review of visa-petition-approval revocations because the INA does not reference judicial review of visa petition decisions *at all*. Such review is therefore available only when the agency action with respect to a petition satisfies all of the requirements for APA review *and* falls outside of the INA's express judicial-review bars. A decision to revoke the approval of a visa petition under Section 1155 does not meet those criteria and is therefore unreviewable.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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APPENDIX

1. 8 U.S.C. 1154 provides in pertinent part:

Procedure for granting immigrant status

(a) Petitioning procedure

(1)(A)(i) Except as provided in clause (viii), any citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 1153(a) of this title or to an immediate relative status under section 1151(b)(2)(A)(i) of this title may file a petition with the Attorney General for such classification.

(ii) An alien spouse described in the second sentence of section 1151(b)(2)(A)(i) of this title also may file a petition with the Attorney General under this subparagraph for classification of the alien (and the alien's children) under such section.

(iii)(I) An alien who is described in subclause (II) may file a petition with the Attorney General under this clause for classification of the alien (and any child of the alien) if the alien demonstrates to the Attorney General that—

(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

(II) For purposes of subclause (I), an alien described in this subclause is an alien—

(aa)(AA) who is the spouse of a citizen of the United States;

(BB) who believed that he or she had married a citizen of the United States and with whom a marriage ceremony was actually performed and who otherwise meets any applicable requirements under this chapter to establish the existence of and bona fides of a marriage, but whose marriage is not legitimate solely because of the bigamy of such citizen of the United States; or

(CC) who was a bona fide spouse of a United States citizen within the past 2 years and—

(aaa) whose spouse died within the past 2 years;

(bbb) whose spouse lost or renounced citizenship status within the past 2 years related to an incident of domestic violence; or

(ccc) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse;

(bb) who is a person of good moral character;

(cc) who is eligible to be classified as an immediate relative under section 1151(b)(2)(A)(i) of this title or who would have been so classified but for the bigamy of the citizen of the United States that the alien intended to marry; and

(dd) who has resided with the alien's spouse or intended spouse.

(iv) An alien who is the child of a citizen of the United States, or who was a child of a United States citizen parent who within the past 2 years lost or renounced citizenship status related to an incident of domestic violence, and who is a person of good moral character, who is eligible to be classified as an immediate relative under section 1151(b)(2)(A)(i) of this title, and who resides, or has resided in the past, with the citizen parent may file a petition with the Attorney General under this subparagraph for classification of the alien (and any child of the alien) under such section if the alien demonstrates to the Attorney General that the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's citizen parent. For purposes of this clause, residence includes any period of visitation.

(v) An alien who—

(I) is the spouse, intended spouse, or child living abroad of a citizen who—

(aa) is an employee of the United States Government;

(bb) is a member of the uniformed services (as defined in section 101(a) of title 10); or

(cc) has subjected the alien or the alien's child to battery or extreme cruelty in the United States; and

(II) is eligible to file a petition under clause (iii) or (iv),

shall file such petition with the Attorney General under the procedures that apply to self-petitioners under clause (iii) or (iv), as applicable.

(vi) For the purposes of any petition filed under clause (iii) or (iv), the denaturalization, loss or renunciation of citizenship, death of the abuser, divorce, or changes to the abuser's citizenship status after filing of the petition shall not adversely affect the approval of the petition, and for approved petitions shall not preclude the classification of the eligible self-petitioning spouse or child as an immediate relative or affect the alien's ability to adjust status under subsections (a) and (c) of section 1255 of this title or obtain status as a lawful permanent resident based on the approved self-petition under such clauses.

(vii) An alien may file a petition with the Secretary of Homeland Security under this subparagraph for classification of the alien under section 1151(b)(2)(A)(i) of this title if the alien—

(I) is the parent of a citizen of the United States or was a parent of a citizen of the United States who, within the past 2 years, lost or renounced citizenship status related to an incident of domestic violence or died;

(II) is a person of good moral character;

(III) is eligible to be classified as an immediate relative under section 1151(b)(2)(A)(i) of this title;

(IV) resides, or has resided, with the citizen daughter or son; and

(V) demonstrates that the alien has been battered or subject to extreme cruelty by the citizen daughter or son.

(viii)(I) Clause (i) shall not apply to a citizen of the United States who has been convicted of a specified offense against a minor, unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition described in clause (i) is filed.

(II) For purposes of subclause (I), the term "specified offense against a minor" is defined as in section 20911 of title 34.

* * * * *

(b) Investigation; consultation; approval; authorization to grant preference status

After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 1153(b)(2) or 1153(b)(3) of this title, the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 1151(b) of this title or is eligible for preference under subsection (a) or (b) of section 1153 of this title, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

(c) Limitation on orphan petitions approved for a single petitioner; prohibition against approval in cases of marriages entered into in order to evade immigration laws; restriction on future entry of aliens involved with marriage fraud

Notwithstanding the provisions of subsection (b) no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

* * * * *

2. 8 U.S.C. 1155 provides:

Revocation of approval of petitions; effective date

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

3. 8 U.S.C. 1252(a)(1)-(2) provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense cov-

ered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.