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IN THE SUPREME COURT OF THE UNITED STATES

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AMINA BOUARFA,)

Petitioner,)

v.) No. 23-583

ALEJANDRO MAYORKAS, SECRETARY)

OF HOMELAND SECURITY, ET AL.,)

Respondents.)

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Washington, D.C.

Tuesday, October 15, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:16 a.m.

APPEARANCES:

SAMIR DEGER-SEN, ESQUIRE, New York, New York; on behalf of the Petitioner.

COLLEEN R. SINZDAK, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(11:16 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-583, Bouarfa versus Mayorkas.

Mr. Deger-Sen.

ORAL ARGUMENT OF SAMIR DEGER-SEN

ON BEHALF OF THE PETITIONER

MR. DEGER-SEN: Mr. Chief Justice, and may it please the Court:

In Section 1154(c), Congress unequivocally stated that no petition shall be approved if the beneficiary engaged in a sham marriage. In context, that requirement applies not just to the day of approval but to the next day as well. In other words, the petition cannot remain approved if the agency reconsiders its initial decision and concludes that there was a sham marriage.

That's because an approved visa petition confers no substantive benefits. It is simply a piece of paper signifying that a beneficiary is eligible to apply for a green card. If Congress believed you shouldn't get that piece of paper saying that you're eligible

1 when you've been in a sham marriage, then --
2 then the agency has to take it away when it
3 determines that you're not, in fact, eligible.

4 That resolves this case. Because the
5 revocation here was non-discretionary, it is
6 reviewable. The government seeks to shield
7 itself from judicial review by claiming it has
8 discretion to not revoke the petition even after
9 a sham-marriage finding. Yet it identifies no
10 circumstance in which it has ever or would ever
11 exercise that purported discretion.

12 Nor does it explain what purpose such
13 discretion could serve if, as the government
14 appears to believe, it's not actually allowed to
15 give the beneficiary a green card. The
16 discretion appears to simply be the discretion
17 to allow a person to hold on to a now
18 meaningless piece of paper that has been drained
19 of all of its value. That cannot be the kind of
20 discretion that Congress sought to protect.

21 The government's view also layers one
22 anomaly on top of another. Most significantly,
23 it creates a disparity in review between an
24 initial decision and a reconsideration of that
25 same decision based on the same criteria. And

1 the government concedes that a person could
2 obtain review if they filed a new -- a new
3 petition and had it denied.

4 But that gives the game away. That is
5 the exact same non-discretionary decision that
6 the government claims needs to be shielded from
7 review. The only difference is years of
8 additional delay where families and children
9 live under constant fear that they will be
10 separated.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Does the government
13 always revoke a decision when it discovers,
14 later discovers, a sham marriage?

15 MR. DEGER-SEN: Yes. We've identified
16 no case and the government has identified no
17 case where the government has ever exercised any
18 purported discretion to not revoke. So what the
19 government does in these situations is, when
20 they discover that there has been a sham
21 marriage, they -- as far as we can tell, their
22 uniform practice is to revoke.

23 And if you look at the actual
24 decisions, the decisions all read like decisions
25 that are non-discretionary. The decision to

1 revoke looks exactly like the decision to deny.
2 They apply the same criteria. They use the same
3 language. No one mentions discretion. That's a
4 stark contrast to the kinds of decisions on
5 adjustment of status, for example, where you see
6 people asking the agency, could you exercise
7 discretion? The agency says we're not going to
8 exercise discretion for these reasons.

9 We have not identified a single BIA
10 opinion where the -- the agency has ever talked
11 about the possibility of exercising discretion
12 in this situation. So it is treated as
13 automatic in practice.

14 JUSTICE THOMAS: Are there revocations
15 that you think are not reviewable?

16 MR. DEGER-SEN: Yes, absolutely. I
17 think any revocation --

18 JUSTICE THOMAS: What -- what would --
19 what would that look like?

20 MR. DEGER-SEN: So, for example, if --
21 if the agency, you know, determines that someone
22 is eligible and then says later on -- finds out,
23 you know, this person, you know, may be
24 affiliated with a terrorist organization or
25 something like that, you know, we're going to

1 revoke their petition. We don't want them to
2 even apply for a green card.

3 The agency has a lot of discretion.
4 There's a big universe of cases where the agency
5 absolutely can exercise discretion to come up
6 with additional reasons. But that's what
7 Section 1155 is. It's, once you've met your
8 eligibility criteria, the agency has discretion
9 to come up with more reasons. So it's a way of
10 saying the agency has flexibility to deny more
11 petitions.

12 What it's not is -- you know, gives
13 the agency the flexibility to ignore the
14 mandatory initial eligibility criteria and allow
15 -- I mean, what they're claiming is allow more
16 petitions through into the system that otherwise
17 should have been revoked if the agency had made
18 a mistake.

19 JUSTICE THOMAS: So you're saying it
20 has to be for a reason other than the initial
21 reason?

22 MR. DEGER-SEN: Right. It can't just
23 be a reconsideration. It can't be we made a
24 mistake and so, you know, now we have the
25 discretion to not revoke it.

1 JUSTICE THOMAS: So what do you --

2 CHIEF JUSTICE ROBERTS: Well --

3 JUSTICE THOMAS: -- rely on for that?

4 MR. DEGER-SEN: And -- and we rely on
5 1154(c), and that language says no petition
6 shall be approved. And we think in context --

7 JUSTICE THOMAS: But that's approval.
8 We're talking about revocation.

9 MR. DEGER-SEN: Right. I think that's
10 the question. You know, does that language --
11 does it end on the day of approval, or does it
12 create continuing obligations that the petition
13 can't maintain the status of being approved
14 after the first day?

15 And so -- and I think, in context, it
16 does mean the latter thing. And just to give
17 you an example that might help, we have a few
18 examples, but one example is no article shall be
19 approved for publication if there is evidence of
20 plagiarism. I think everyone would understand
21 that if you approve the article for publication
22 and then the next day you find out that there is
23 plagiarism, it would be very strange to say:
24 Well, the rule just says it shouldn't be
25 approved for publication. It's already been

1 approved for publication, so we're just going to
2 let it go ahead and get published. You would --
3 you would say: Well, we have to withdraw. We
4 can't publish.

5 And the reason I think that example is
6 helpful is the green -- the -- the -- the visa
7 petition is just a document saying you're
8 eligible. So it's just a document saying you're
9 approved for publication. It's not the
10 publication itself. That's getting the green
11 card.

12 And so, in a situation where, in
13 between those two times, approval of the
14 petition and then going to the agency and
15 getting the green card, the agency figures out
16 it's made a mistake, it's very strange to say,
17 well, the agency can just pretend it hasn't. It
18 can just let you have the document, and it can
19 go ahead and say you are, in fact, eligible for
20 a green card.

21 JUSTICE SOTOMAYOR: Counsel --

22 CHIEF JUSTICE ROBERTS: Well, but
23 that's --

24 JUSTICE SOTOMAYOR: Sorry.

25 CHIEF JUSTICE ROBERTS: I mean, I get

1 -- the government's position as far as I can
2 tell is that you -- you just won't take yes for
3 an answer. You want there to be review rather
4 than review after revocation.

5 And they're saying you can get that.
6 Just apply again, and you'll get exactly what
7 you would have -- you think you're entitled to,
8 which is judicial review of the decision.

9 What -- what more can -- what more do
10 you want?

11 MR. DEGER-SEN: Well, I mean, I think
12 that underscores what's so senseless about the
13 government's position. From our perspective,
14 the harm is that it would be years of additional
15 delay. We did refile. It's been two years of
16 delay now.

17 CHIEF JUSTICE ROBERTS: Well, they
18 can't give you the years -- they can't give you
19 the years back, but you're asking for a
20 particular procedure and a particular level of
21 judicial review. That's your request for
22 relief. And they're saying you can get that.

23 MR. DEGER-SEN: You -- you can get
24 that --

25 CHIEF JUSTICE ROBERTS: Yeah, they

1 should have given you -- I mean, yeah, they made
2 a mistake in the first place, but they're
3 letting you go ahead and do what you say you
4 should have -- they should have done.

5 MR. DEGER-SEN: Well, but at a much
6 greater cost. They're saying you have to go
7 back, file another petition, wait years for that
8 to be adjudicated. And for us, for an immediate
9 family petition, that's harmful, but for other
10 kinds of petitions, it -- it could be really
11 devastating because, for other kinds of
12 petitions --

13 CHIEF JUSTICE ROBERTS: Well, we'll
14 worry about the other kinds of petitions in a
15 case where they're raised. It seems to me that
16 yours is pretty straightforward. And I'm sure
17 -- I'm sure the government is sorry for the
18 years, but it seems to me that that's the type
19 of relief you would get.

20 The relief is not going to be that
21 they approve your application, right?

22 MR. DEGER-SEN: No, the relief is to
23 get judicial review. But --

24 CHIEF JUSTICE ROBERTS: And --

25 MR. DEGER-SEN: -- for someone -- but,

1 for example, for someone who is in a
2 different -- like an employment-based or other
3 kind of family eligibility category, which this
4 -- the revocation rule governs every single kind
5 of revocation, those people lose their priority
6 date. And if you lose your priority date, as
7 this Court noted in Tesoro, that could be 10
8 years, 15 years, because the -- the -- the
9 number of green cards that are out there, the
10 number of available green cards, is far smaller
11 than the number of applicants. So there are
12 millions pending --

13 CHIEF JUSTICE ROBERTS: So that's
14 another -- another case that is not like yours,
15 right?

16 MR. DEGER-SEN: Well, I mean, I think
17 that the rule on the revocation absolutely
18 governs, and the government, I think, would
19 accept, absolutely governs that situation as
20 well. And, in our situation, we still lose two
21 years.

22 And I think -- but I think the key
23 point here is, if that's all true, why does the
24 government care about barring judicial review?
25 They think this exact decision was reviewable

1 yesterday when it was a denial. They think it's
2 going to be reviewable tomorrow if we go through
3 the process of refiling.

4 The only difference is clients like
5 mine have to live for years still not knowing
6 whether their family is going to be separated.
7 And that just shows there is no discretion here
8 to protect. There is no reason to deny review
9 of this exact decision.

10 CHIEF JUSTICE ROBERTS: Well, isn't
11 that -- isn't that the argument you're going to
12 make on the merits when you -- if you do
13 reapply?

14 MR. DEGER-SEN: I mean, if we do
15 reapply, I think the government's position is
16 they decided we're in a sham marriage and
17 they're going to deny. And, great, once you've
18 gone through that arduous process --

19 CHIEF JUSTICE ROBERTS: At that point,
20 you get judicial --

21 MR. DEGER-SEN: -- you'll get review.

22 CHIEF JUSTICE ROBERTS: Yeah.

23 MR. DEGER-SEN: Well, and that just
24 shows that why are they -- you know, there is --
25 I -- the why question, I think, just jumps off

1 the page here on the government's side. Why is
2 the government denying judicial review? What
3 possible reason is there to deny judicial review
4 of a revocation if they believe that this
5 decision is non-discretionary and is, in fact,
6 the kind of thing that should easily be subject
7 to judicial review?

8 JUSTICE JACKSON: Well, maybe they --
9 maybe they do think it's discretionary and they
10 just happen to exercise their discretion
11 consistently, which is what I think that we
12 would want.

13 I mean, the strange thing about your
14 argument to me is that it seems as though saying
15 that the agency has discretion not to revoke
16 would generally be more favorable to people who
17 are applying, right, that the agency makes a
18 mistake in the first instance, it does not
19 follow whatever the mandatory criteria are for
20 approval, and it gives the person approval, and
21 then they discover that that was a mistake.

22 I would think that the argument made
23 from people who are applying would be you have
24 discretion to -- to keep the approval in place.
25 You don't have to revoke it. You know, it was

1 your mistake. We've gotten past that stage, so
2 let me just keep going.

3 The implications of your argument is
4 that, no, if they make a mistake, then they
5 actually have to revoke their approval and that
6 that's non-discretionary. And that just seems
7 odd to me coming from your side of this
8 argument.

9 MR. DEGER-SEN: Right. But it's no
10 surprise that, you know, all the amici from
11 various organizations and immigration attorneys
12 that work in this field, they've all lined up on
13 our side because, in reality, the government
14 does not believe it has any discretion. It's
15 never exercised any discretion. And no one has
16 even made this request really to the government
17 because it doesn't exercise any discretion.

18 And I think maybe the more important
19 point is, as I understand the government's view
20 of what discretion it has to exercise, it is
21 just the discretion to not revoke. I think the
22 government thinks it still has to deny your
23 green card, and so I think that's probably why
24 --

25 JUSTICE JACKSON: Yeah, but that's at

1 later stages. I mean, they have these sort of
2 check-in points at later stages. As you
3 articulated, this is just the beginning of a
4 long process toward get -- getting you a green
5 card. And if things come up in that process --
6 whether they overlap with previous stages or not
7 seems to be neither here or there. The
8 government continues on and allows you to
9 continue on, and if those same factors come up,
10 that could be a reason to deny the green card.

11 It's just odd, I think, to suggest
12 that when we get to this stage, you -- you clear
13 the approval hurdle, which, in general, I think,
14 is positive from the standpoint of the person
15 who is applying, to -- to suggest that the
16 government has to keep going back and deciding
17 whether or not it was right to give you approval
18 to begin with seems to me to be less favorable
19 from your perspective.

20 MR. DEGER-SEN: But it's not because,
21 in practice, the government always denies -- I
22 think understands itself in every BIA decision
23 --

24 JUSTICE JACKSON: Isn't that better
25 than arbitrarily going back and forth? I mean,

1 the -- the -- if the government is consistent in
2 its practices with respect to how it exercises
3 its discretion, isn't that what one would want
4 in a rule of law kind of scenario?

5 MR. DEGER-SEN: It's consistent
6 because -- well, I don't think in a situation
7 where there's discretion. I think if -- I think
8 it would be problematic if you have -- you know,
9 you protect judicial review because there's
10 discretion for the government.

11 The government never exercises
12 discretion, doesn't conceive of itself as really
13 being capable of exercising discretion, and the
14 result of that, of course, is no one gets
15 judicial review.

16 JUSTICE JACKSON: Except for the --

17 JUSTICE BARRETT: Well, what if it
18 did? Oh, sorry.

19 JUSTICE JACKSON: Go ahead.

20 JUSTICE BARRETT: What if it did?
21 What if it started exercising discretion? Would
22 your case go away? Or what if it had been
23 conducting itself the way Justice Jackson is
24 positing, you know, sometimes revoking it,
25 sometimes not? Then do you have no case?

1 MR. DEGER-SEN: Well, I mean, I think
2 as long as what they would be able to do then is
3 to allow someone to be eligible for the green
4 card. I think what they're saying is we believe
5 that we can just still deny green cards. And we
6 don't believe that the government can do that
7 because the only place where this criteria
8 exists, 1154(c), is at the petition approval
9 stage.

10 So what the -- what -- what -- what
11 the -- what a valid petition says, what a
12 non-revoked petition says is it says you are
13 eligible for a green card. You have not engaged
14 in a sham marriage. That's something you've not
15 done. That's what it's signifying to the
16 agency.

17 So then I think, if the agency says,
18 well, you have that, so you've not engaged in a
19 sham marriage, even though it separately found
20 that you have, we're going to exercise our
21 discretion to allow you to go ahead into the
22 process and get a green card, that would be a
23 meaningful kind of discretion. But I don't
24 think that's what the government is suggesting
25 as the kind of discretion it has.

1 I think it's saying we -- we -- we
2 have a sham-marriage finding. We're
3 independently allowed to say we're going to stop
4 your green card. We're not allowed to say -- we
5 have to -- we have to stop you having a green
6 card as a result of that, but what you're
7 allowed to do is hang on to this piece of paper,
8 and this piece of paper now means nothing
9 because, even though the only significance of
10 the piece of paper is I'm eligible for a green
11 card, we actually don't think you're eligible
12 for a green card.

13 JUSTICE BARRETT: What if they don't
14 give a reason for revoking it? Do they have to?

15 MR. DEGER-SEN: They have to give --

16 JUSTICE BARRETT: I mean, how are we
17 supposed to know if it was because they
18 concluded it actually was a sham marriage?

19 MR. DEGER-SEN: Right. They have to
20 give a reason under their regulations. That's
21 at 8 C.F.R. 205(2)(c). So it would be a
22 violation of their own procedures if they didn't
23 give a reason.

24 I think, you know, if they abolished
25 all of their own procedures and BIA review, I

1 think we would still have an argument that that
2 was arbitrary and capricious.

3 JUSTICE BARRETT: But we're
4 interpreting the statute. I mean, the statute
5 doesn't itself require a reason, right?

6 MR. DEGER-SEN: The -- the statute
7 doesn't require a reason, but I think it would
8 be very hard for the government to avoid giving
9 a reason, and it might well be arbitrary and
10 capricious if the agency's path can't be
11 discerned.

12 And I'll also say that the government
13 has made this type of argument in other cases.
14 This Court has consistently rejected it. To --
15 to quote the language in this Court's Hawks'
16 decision, "such a count-your-blessings argument
17 is not an adequate rejoinder to the assertion of
18 a right to judicial review under the APA."

19 JUSTICE SOTOMAYOR: Counsel, I -- I --
20 you've conceded that 1155 doesn't say
21 mandatorily you have to revoke, correct?

22 MR. DEGER-SEN: That's correct.

23 JUSTICE SOTOMAYOR: So you're asking
24 us to say because of, as a matter of practice,
25 this is what they believe they must do. But I

1 don't even know if the agency has to bother,
2 meaning, if you posited that if they -- they
3 couldn't use the sham marriage later, but I
4 don't know why not. If the petition wasn't
5 revoked, they could just simply deny you a visa
6 or an adjustment of status because you're under
7 -- you're not admissible under 1182(a)(6)(C)(i)
8 because of the fraud bar.

9 MR. DEGER-SEN: But the fraud bar is
10 waiveable. You know, that --

11 JUSTICE SOTOMAYOR: Well, you think
12 the -- the fact that they didn't revoke makes it
13 waiveable? They could -- that makes no sense to
14 me.

15 MR. DEGER-SEN: Right. I -- I think
16 and what the lower courts have held is that
17 1154(c) is a non-waiveable perpetual restriction
18 on someone who has been found to be in a sham
19 marriage, i.e., in that situation, the agency
20 just loses -- and one of the very few
21 restrictions in the immigration code that looks
22 like this --

23 JUSTICE SOTOMAYOR: All right. So
24 what do you do with 11 --

25 MR. DEGER-SEN: -- loses all

1 discretion.

2 JUSTICE SOTOMAYOR: -- what do you do
3 with 1182(i), which allows the attorney general
4 to waive the fraud bar if the applicant is the
5 spouse of a U.S. citizen and refusing admission
6 would result in extreme hardship to the citizen?

7 It seems to me that if the government
8 chose -- it just hasn't, but that doesn't mean
9 much to me. If it chose, if someone was here,
10 let's say, 50 years, I suspect there's going to
11 be a lot of movement for the government not to
12 revoke on the basis of sham marriage.

13 MR. DEGER-SEN: So the 50-year thing,
14 you know, wouldn't happen because that -- this
15 is just that period of time between the petition
16 and getting --

17 JUSTICE SOTOMAYOR: And when the --

18 MR. DEGER-SEN: Right. So, you know,
19 there's obviously 1256 and there's all kinds of
20 rescission provisions.

21 JUSTICE SOTOMAYOR: But go ahead to my
22 1182.

23 MR. DEGER-SEN: Right. I mean, the
24 lower courts have held -- I think it's been the
25 government consistent position that 1154(c) is

1 non-waiveable, as in it doesn't fall under that
2 provision. Now they can obviously deny on the
3 basis of fraud if they want, but they're not
4 obligated to.

5 And our understanding or our argument
6 is that 1154(c) --

7 JUSTICE SOTOMAYOR: So, if they're not
8 obligated to, they can't waive either? Well,
9 your --

10 MR. DEGER-SEN: Right. They --

11 JUSTICE SOTOMAYOR: -- your opposing
12 counsel can answer my question. That's fine.

13 MR. DEGER-SEN: Right. And our
14 position is 1154(c), that what Congress intended
15 was that is a restriction that is not -- that
16 takes away discretion from the government, and
17 they accept that at the petition approval stage.

18 They can't say: Well, there's a lot
19 of equities here, we're going to --

20 JUSTICE SOTOMAYOR: Well, that's
21 because the law requires them not to give it.

22 MR. DEGER-SEN: Exactly. And so then
23 that --

24 JUSTICE SOTOMAYOR: But that says
25 nothing about what happens later.

1 MR. DEGER-SEN: And that -- but I
2 think that's the nub of the dispute. I mean, I
3 think there's a lot of common ground here. And,
4 really, the nub of the dispute is, does 1154(c)
5 apply just on the day of approval, or does it
6 extend to the day after?

7 And that's why I think the example I
8 gave is helpful. There are -- there are lots of
9 ordinary English contexts where you can -- you
10 know, the -- the -- an obligation on the day of
11 approval is logically understood --

12 JUSTICE SOTOMAYOR: All right,
13 counsel.

14 MR. DEGER SEN: -- to apply to the
15 next day.

16 JUSTICE ALITO: Why does it matter
17 whether the government, in fact, has been
18 exercising discretion? 1252(a)(2)(B)(ii) strips
19 jurisdiction over decisions Congress specified
20 to be in the agency's discretionary authority.
21 It uses the term "authority."

22 So why does practice matter?

23 MR. DEGER-SEN: Oh, I think practice
24 only matters as it informs what the statute
25 requires. And we think that 1154(c) makes this

1 non-discretionary in this situation, i.e.,
2 because the agency has to revoke when it has
3 found a sham marriage. It's non-discretionary
4 and falls outside of the relief bar.

5 JUSTICE ALITO: Well, if you concede
6 that interpretation of the provision that I just
7 mentioned, then what do you do with a very
8 straightforward statutory argument, if you put
9 that together with 1255, you're in a lot of
10 trouble?

11 MR. DEGER-SEN: With 1155? Well, no,
12 I --

13 JUSTICE ALITO: 1155, yes.

14 MR. DEGER-SEN: No, I mean, I -- I
15 think 1155 gives the government a measure of
16 discretion to come up with additional reasons to
17 revoke, but it doesn't mean that they are
18 allowed to ignore the mandatory criteria. It
19 doesn't speak to the question of when they have
20 to revoke. And the government accepts this, by
21 the way, because -- you know, they accept that
22 1154(h) decisions are reviewable because, of
23 course, if you have -- you know, X statute says
24 you have discretion to do all of these things,
25 and then another statute says but you don't have

1 discretion to do this, then, clearly, that
2 second statute means you don't have discretion
3 to do that second thing.

4 And so the fact that 1155 gives a
5 measure of discretion doesn't mean that every
6 single revocation is discretionary. The
7 question is, is there a separate statutory
8 restriction that prohibits the government from
9 exercising discretion in this situation? And
10 that's why I think it all comes back to our
11 interpretation of 1154(c).

12 JUSTICE ALITO: Well, I know that's
13 the provision you want to talk about, but 1155,
14 it's perhaps an understatement to say that it
15 confers a measure of discretion. It confers
16 about the broadest measure of discretion that
17 you could imagine. The Secretary of Homeland
18 Security may at any time for what he deems to be
19 good and sufficient cause. Anything that he
20 deems to be good and sufficient cause seems to
21 fall under that.

22 MR. DEGER-SEN: Well, it allows the --
23 the agency to come up with lots of additional
24 reasons. It's -- it's a way of saying the
25 agency, even in situations where the eligibility

1 criteria have been satisfied, we can come up
2 with additional reasons. We can stop visa
3 petitions coming through.

4 But I think the -- the government's
5 way of reading it means that it allows more visa
6 petitions through. I mean, to use one example,
7 they use the example --

8 JUSTICE ALITO: Well, we would have to
9 -- wouldn't we have to say when it refers to
10 what he deems to be good and sufficient cause,
11 that doesn't govern because it is not good and
12 sufficient to -- well, anyway, all right. Never
13 mind. Go ahead. Continue.

14 MR. DEGER-SEN: Oh, I mean, I -- and
15 I -- I mean, to use the babysitter example we
16 gave in our -- in our hypothetical, you can have
17 a situation where the babysitter has -- for good
18 and sufficient cause, can take away the iPad, a
19 very broad array of discretion. But you can
20 also have a rule saying no iPad at the dinner
21 table. And --

22 JUSTICE ALITO: But it doesn't say --
23 you changed it. You said where the babysitter
24 says for good and sufficient cause, not what the
25 babysitter deems to be.

1 MR. DEGER-SEN: Yeah. For -- for what
2 the babysitter deems to be good and sufficient
3 cause, they have free discretion. And it can be
4 a terrible reason. They can say: Oh, you know,
5 you looked at me the wrong way, I'm going to
6 take away the iPad. And the -- and the parent
7 couldn't complain. But, if the parent said no
8 iPad at the dinner table and comes home and
9 finds that someone is at the dinner table with
10 the iPad, it would be very strange to say, well,
11 you said, for good and sufficient cause, I could
12 take away the iPad in other situations.

13 That's not the kind of discretion
14 that's being spoken to in that situation. And
15 that's what we have here, which, again, routes
16 us back to 1154(c) and --

17 JUSTICE ALITO: Thank you.

18 MR. DEGER-SEN: Thank you. I'm sorry.

19 JUSTICE KAGAN: If I understand the
20 argument, it's that we're supposed to ignore the
21 very discretionary language of 1255 because of
22 the very non-discretionary language of 1154(c).
23 But the non-discretionary language of 1154(c)
24 does not pertain to revocations. It applies --
25 it pertains instead to the initial approval or

1 denial of a petition.

2 And you're saying, well, how could it
3 be that you -- that that wouldn't also pertain
4 to revocations? But there might be good reasons
5 why Congress would have thought, no matter what
6 you do or no matter what we demand that you do
7 at the initial stage, once you've already given
8 a petition, there might be reasons to just keep
9 the status quo going. There might be -- it
10 might be costly to change. There might be
11 reliance interests. Whatever.

12 The -- the decision to revoke is just
13 different from the decision to approve or deny
14 in the first instance. So this language about
15 approving or denying in the first instance
16 doesn't really speak to the decision to revoke,
17 which is instead governed by 1255.

18 MR. DEGER-SEN: I think all of that
19 might be true in a situation where what's being
20 given is -- is something other than just that
21 piece of paper. But the government has been
22 very clear. Its longstanding position is
23 there's no reliance interest in this piece of
24 paper because it's just -- it confers no
25 substantive benefits. All it is is something

1 that says you met those criteria. It's all --
2 that's literally the entire value of the paper.
3 And you take it to the next -- and you take it
4 to the agency the next day and it says, I met
5 the criteria.

6 And if the government has now decided
7 you don't meet those criteria, then I think it
8 has to take the piece of paper away. And that's
9 why I think the examples are sort of helpful --

10 JUSTICE KAGAN: Yeah, I don't know
11 what the government will say to that, but it
12 does seem to me that under the statute, if you
13 have an approved petition, you're entitled to
14 certain benefits. So, if you have an approved
15 petition, you're entitled to those benefits even
16 though you might say, oh, the approval was --
17 was wrong in the first instance.

18 MR. DEGER-SEN: But the only benefit
19 you're entitled to is the fact that you have
20 that piece of paper that allows you to go apply
21 for the green card. That -- that's literally
22 what that approved petition means.

23 And if the government has said you're
24 in a sham marriage and we don't actually think
25 that you are able to apply for -- you know,

1 apply for the green card, we're going to deny
2 the green card probably, we have to deny the
3 green card. I think that's what they think,
4 that they have to deny the green card. Then the
5 discretion we're talking about in this case --

6 JUSTICE KAGAN: Well, they have to
7 deny the green card if they've revoked the
8 petition, but they don't have to deny the green
9 card if the person has an approved petition and
10 nothing's happened to it.

11 MR. DEGER-SEN: Well, that's an
12 interesting question. I think that -- that's a
13 question, I think, for the government. The
14 government's longstanding position has been the
15 -- the 1154(c) sham-marriage bar. Congress
16 enacted it. It's one of very few restrictions
17 like this that is non-waiveable. It was such a
18 fundamental thing that they said your petition
19 shouldn't even get off the ground. Your
20 application should -- and it's -- and it's, you
21 know, described as one of the most serious and
22 disabling judgments you can have against you.
23 You can -- it's perpetual. It's non-waiveable.
24 You can never become -- you can never get U.S.
25 status. So that's why it's so fundamental. And

1 the government's position, I think, is that,
2 yeah, we are not able to give you the ultimate
3 immigration benefit.

4 If the government says, yes, we can
5 exercise discretion to just let you through the
6 system and get a green card, I think their
7 argument looks different. I don't think they've
8 said that anywhere in their briefs. And that
9 would be contradictory to their longstanding
10 position.

11 And that's all consistent with, in
12 fact, what happens in the real world, which is
13 that in over 50 -- you know, 50 years or maybe
14 even 70 years, there has just never been an
15 instance where this purported discretion has
16 ever been exercised.

17 So where this all cashes out is this
18 means nothing other than taking away judicial
19 review from people who, you know, have this --
20 you know, this very disabling judgment made
21 against them. And, in some instances, that
22 means getting kicked back in line and having to
23 wait 10 more years.

24 And the government cannot come up with
25 a single reason why that makes any sense. It

1 agrees that can be reviewed yesterday. It can
2 be reviewed tomorrow. It's the kind of decision
3 that's generally reviewed. Why does it not
4 allow review in this situation?

5 CHIEF JUSTICE ROBERTS: Thank --

6 MR. DEGER-SEN: I've never seen a case
7 quite like it.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas?

11 Justice Alito, anything? No?

12 Justice Barrett?

13 JUSTICE JACKSON: Can I just --

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: Yes. Can I just
17 quickly ask about -- your client is not in
18 removal, right?

19 MR. DEGER-SEN: No.

20 JUSTICE JACKSON: And we've never held
21 that 1252 applies in the non-removal context.
22 So isn't there at least a threshold issue that
23 -- I mean, the Northwest Immigrants' Rights
24 Project amicus raises that, so I didn't know if
25 you wanted to speak to that or --

1 MR. DEGER-SEN: No, absolutely. I
2 mean, that was the question this Court reserved
3 in Patel. It's a threshold issue that wasn't
4 raised in our case, so -- but I think it's
5 absolutely something that this Court can and
6 should reserve. It has enormous ramifications.

7 I mean, I think, if you -- if one were
8 to hold that -- that both underlying eligibility
9 determinations like this are reviewable and also
10 that this provision that the review bar applies
11 in the district courts, that applies to dozens
12 and dozens of provisions across the immigration
13 code, administering things like U visas and T
14 visas for victims of child trafficking, VAWA
15 self-petitions, adjustment of -- and various
16 benefits administrations, status adjustments,
17 all kinds --

18 JUSTICE JACKSON: So it wasn't -- it
19 wasn't briefed, though, in this case?

20 MR. DEGER-SEN: It wasn't briefed in
21 this case, so I -- I can't --

22 JUSTICE JACKSON: So any holding
23 against you would have to make clear that we're
24 reserving that issue?

25 MR. DEGER-SEN: Reserving that issue.

1 The same issue that was reserved in Patel.

2 Absolutely.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Ms. Sinzdak.

7 ORAL ARGUMENT OF COLLEEN R. SINZDAK

8 ON BEHALF OF THE RESPONDENTS

9 MS. SINZDAK: Mr. Chief Justice, and
10 may it please the Court:

11 There were more than 900,000 I-130
12 visa petitions filed last year, and USCIS
13 granted, denied, or revoked more than 800,000
14 such petitions. Given this volume, Congress had
15 every reason to streamline judicial review by
16 prohibiting litigation at the revocation stage.

17 And, to be clear, the government
18 believes that Congress did prohibit litigation
19 by making revocations discretionary, including
20 in the face of a sham-marriage determination.
21 The government does not view a revocation as
22 mandatory in that stage, and I am not aware of a
23 longstanding position of the kind that counsel
24 suggests.

25 The text is very clear on this.

1 Section 1252 bars review of actions, the
2 authority for which is specified to be in the
3 discretion of the Secretary of Homeland
4 Security. And Section 1155 specifies that the
5 Secretary's authority to revoke visa petitions
6 is discretionary at least three times over, as
7 Justice Alito was noting.

8 It uses the term "may," which connotes
9 discretion. It uses the term "deems," which
10 fairly exudes discretion. And it uses the
11 capacious term "good and sufficient cause,"
12 which calls for a discretionary judgment.

13 Now I -- I don't hear Petitioner today
14 to be advancing the secondary argument that I
15 think we saw in his briefing with respect to the
16 idea that a sham -- at least an underlying
17 sham-marriage determination might be reviewable
18 even if the revocation decision itself is not
19 because the revocation decision is clearly
20 discretionary under Section 1155, and I think
21 that's for good reason.

22 I don't think that this Court has ever
23 suggested that someone can evade a judicial
24 review bar on review of a decision by breaking
25 that decision into its constituent parts.

1 And, here, the text of Section
2 1252(a)(2)(B)(ii) is very clear because it says
3 that you -- it puts the focus on the nature of
4 the agency's authority. So it says: A
5 decision, the authority for which is specified
6 to be in the Secretary's discretion.

7 And any decision that the Secretary is
8 making using his discretionary revocation
9 authority is therefore covered.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: But don't you think
12 it's a bit odd that the underlying determination
13 initially was not discretionary and now it is
14 being disposed of after the fact in a
15 discretionary way?

16 MS. SINZDAK: I do think that you've
17 put your finger on perhaps the oddity of this
18 statute, which is that approval is banned, and
19 that's a mandatory decision, but revocation is
20 discretionary.

21 I think that, as Justice Jackson was
22 suggesting, that is to the benefit for the most
23 part of non-citizens because it allows some
24 discretion on the part of the agency to decide
25 not to revoke when it notices that it has made a

1 mistake in the past.

2 So I -- I agree that's a little bit
3 odd. It is the plain text of the statute. And
4 I think that in -- in the mine-run of
5 situations, it's going to be helpful to
6 non-citizens.

7 JUSTICE GORSUCH: Ms. Sinzduk, your
8 friend on the other side suggested that the
9 government has never exercised its discretion to
10 overlook a sham marriage. Is that correct?

11 MS. SINZDAK: We do not have a record
12 of the government overlooking a sham marriage.
13 We do not keep records with respect to times
14 that the government --

15 JUSTICE GORSUCH: Are you aware of any
16 case?

17 MS. SINZDAK: I -- I am not.

18 JUSTICE GORSUCH: Okay. The other
19 question I had is your friend on the other side
20 also suggests that this obligation of approval
21 is ongoing because you cannot grant a green card
22 either or any kind of visa relief in the end if
23 there is a sham marriage. Is that right?

24 MS. SINZDAK: No. So there is a --
25 the -- the -- the government has the discretion

1 whether or not to revoke. Then, at the green --
2 green card stage, I believe Justice Sotomayor
3 was alluding to another statute, which is 80 --
4 1182(a)(6).

5 JUSTICE GORSUCH: Six.

6 MS. SINZDAK: That says that if the
7 non -- the non-citizen has made a
8 misrepresentation in order to get immigration
9 benefits of any kind, then he has no
10 eligibility. But that, as Justice Sotomayor
11 pointed out, is waiveable. There can be a
12 waiver. So I think that's the way that the --
13 the statutes interact.

14 JUSTICE GORSUCH: Can you explain that
15 to me a little bit more?

16 MS. SINZDAK: Sure. So 1182 -- again,
17 1182(a) --

18 JUSTICE GORSUCH: That's
19 non-discretionary as well, (a)(6), right?

20 MS. SINZDAK: It -- it is -- it -- it
21 says that the -- the non-citizen is
22 inadmissible. But the way in which it becomes,
23 I -- I suppose you could say, discretionary, in
24 that there is a discretionary waiver under
25 1182(i), which says that in an instance where

1 there has been extreme hardship, where -- on --
2 where there would be extreme hardship to a U.S.
3 citizen --

4 JUSTICE GORSUCH: U.S.

5 MS. SINZDAK: -- then the government
6 has the discretion to waive 1182(a)(6)'s
7 admissibility bar.

8 JUSTICE GORSUCH: But, other than that
9 carveout for an effect on a U.S. citizen, the
10 bar is mandatory?

11 MS. SINZDAK: That's correct.

12 JUSTICE GORSUCH: So I think that's
13 your friend's point, is that throughout the
14 process, a sham marriage is, in many cases, an
15 absolute non-discretionary bar to relief.

16 MS. SINZDAK: And that's simply
17 incorrect.

18 JUSTICE GORSUCH: And -- and you --
19 and you put that together with the fact the
20 government's unable to point to a single
21 circumstance in which it's ever waived the
22 sham-marriage requirement, and it's starting to
23 look pretty non-discretionary.

24 I think that's the nature of the
25 argument.

1 MS. SINZDAK: The question under
2 (b)(2) is whether Congress has specified that a
3 decision is in the discretionary authority of
4 the Secretary.

5 JUSTICE GORSUCH: Right. But
6 that's -- that's the question.

7 MS. SINZDAK: There's just no --

8 JUSTICE GORSUCH: I mean, you're
9 stating the question rather than giving the
10 answer. So help me with the answer.

11 MS. SINZDAK: Sure. The answer is
12 that Section 1155 makes the decision whether to
13 revoke discretionary. So, because the statute
14 makes it discretionary, the fact that the agency
15 has always exercised it in one particular
16 direction doesn't have anything to do with the
17 applicability of the review bar.

18 JUSTICE GORSUCH: Got it. Next --

19 JUSTICE SOTOMAYOR: Can you imagine --
20 I'm sorry.

21 JUSTICE GORSUCH: I'm sorry. I'll
22 finish real quick.

23 JUSTICE SOTOMAYOR: Go ahead.

24 JUSTICE GORSUCH: The -- the case --
25 cases below which you cite and rely on have this

1 broad reading of the bar. But many of them,
2 including the Eleventh Circuit, also permit
3 review on an allegation of procedural error,
4 including, it seems, procedural error of
5 regulations that the -- the agency's adopted
6 itself.

7 Where do you stand on whether those
8 decisions are reviewable?

9 MS. SINZDAK: That's right. There is
10 something of a circuit dispute. It's not
11 implicated here. I -- I -- I think that we
12 think that procedural errors are similarly
13 foreclosed by the discretionary relief bar.

14 JUSTICE GORSUCH: So, even if the
15 government completely abandons its existing
16 procedures, ignores them willy-nilly, that's not
17 reviewable in the government's view?

18 MS. SINZDAK: If we're talking about a
19 procedural error. And --

20 JUSTICE GORSUCH: Yes.

21 MS. SINZDAK: -- here, I'm setting
22 aside constitutional claims --

23 JUSTICE GORSUCH: Yes.

24 MS. SINZDAK: -- which I think go at
25 least into a different basket, then --

1 JUSTICE GORSUCH: I'm talking about
2 procedural errors.

3 MS. SINZDAK: -- yes. I think a
4 judicial review bar, the way that it works is to
5 bar claims that the government has made a
6 mistake, including in that way.

7 JUSTICE GORSUCH: So, if the
8 government makes a mistake by throwing all the
9 papers up in the air and say, we're going to --
10 we're going to revoke the pile that lands over
11 there, despite all of our fine-tuned regulations
12 --

13 MS. SINZDAK: I --

14 JUSTICE GORSUCH: -- that the bar on
15 judicial review applies?

16 MS. SINZDAK: I think that when
17 Congress enacts judicial review bars, it assumes
18 that the agency is not going to behave like a
19 monster or --

20 JUSTICE GORSUCH: I would have
21 thought. But you're -- you're telling me that
22 they can.

23 MS. SINZDAK: I'm telling you that
24 Congress has made the decision that it does not
25 think that kind of behavior is going to happen,

1 or at least that it's going to be such a fringe
2 case that the benefits of barring judicial
3 review are going to be worth it.

4 JUSTICE GORSUCH: Got it. Thank you.
5 I'm sorry.

6 JUSTICE KAGAN: You said that you
7 didn't know of a case in which revocation wasn't
8 the decision, but you -- but you also said you
9 didn't know of a policy that made revocation
10 automatic. Is that what you said?

11 MS. SINZDAK: Yes. So I think there's
12 a couple of things here.

13 First of all, USCIS does not keep
14 records of times that it decided not to revoke.
15 So I'm not sure that I would be aware if there
16 were these non- --

17 JUSTICE KAGAN: Okay. I was really
18 asking about the second half of that. You said
19 you were not aware of any policy that revocation
20 was automatic.

21 MS. SINZDAK: That's right. It is not
22 --

23 JUSTICE KAGAN: So, in all your
24 conversations, which I imagine you -- you had,
25 with the people who are implementing this law,

1 they said, we -- we don't have a policy that
2 revocation is automatic. We think that we have
3 discretion.

4 MS. SINZDAK: I want to be clear.
5 They believe that they have statutory
6 discretion. Sham-marriage -- the sham-marriage
7 bar is not one of the reasons for automatic
8 revocation. Those reasons are set out --

9 JUSTICE KAGAN: I -- I understand.
10 We're talking about, in practice, do they think
11 of themselves as having a policy of yes, of
12 course, we would always revoke? Or do they
13 think of themselves as having something like:
14 Well, of course, we would usually revoke, but we
15 retain the right to not revoke in certain
16 circumstances?

17 MS. SINZDAK: I think that it's
18 exactly what we said in our brief, which is that
19 they do strive to revoke when they determine
20 that there has been a sham-marriage
21 determination.

22 They're not required to do so by
23 statute. And that's dispositive with respect to
24 the application of the judicial review bar. But
25 I do think that they are -- where they find

1 sufficient evidence, they are revoking.

2 JUSTICE KAGAN: So what you're saying
3 is that there really are no set of circumstances
4 in which they would say, in this case, because
5 of the peculiarities of this case, we're not
6 going to revoke?

7 MS. SINZDAK: I can't say that there
8 would never be that circumstance. They have
9 not -- they -- when I have spoken to them, what
10 they have said is that, in general, if they do
11 find sufficient evidence, they will revoke.

12 But let me just, again --

13 JUSTICE KAGAN: Well, I guess, you
14 know, the "in general" in that sentence, is it
15 in general, or is it always?

16 Like, when you talk to them, do they
17 say: Of course, we always revoke?

18 MS. SINZDAK: Well, I think, quite
19 honestly, the problem is that this is being done
20 by individual adjudicators who have been given
21 discretion under the statute. And so what they
22 are telling -- telling me is that, to their
23 knowledge, where there are -- the evidentiary
24 burden is satisfied, the agency generally is
25 going to revoke if it determines that there has

1 been a sham marriage but not that the statute
2 requires it. And that's the key -- that's the
3 key question.

4 And I just want to make clear, because
5 I think it's getting a little fuzzy, we're
6 looking at discretionary authority, and -- and
7 so if I can just give kind of my own child
8 hypothetical. If I tell my daughter that she
9 may have dessert after dinner every night, she
10 has discretionary authority to decide whether to
11 have dinner -- whether to have dessert.

12 As a practical matter, she is going to
13 eat dessert every single night.

14 (Laughter.)

15 MS. SINZDAK: I can assure you of
16 that. But I have given her discretionary
17 authority. And so, if there was a judicial
18 review bar, it would cover.

19 JUSTICE KAGAN: But -- but your
20 daughter would be able to tell you: I have a
21 policy of giving -- of having dessert.

22 (Laughter.)

23 JUSTICE KAGAN: So I'm asking, do they
24 have a policy of never -- of always revoking?

25 MS. SINZDAK: I -- I think what you

1 have seen is there is -- it's not an automatic
2 grounds for revocation. I -- I have not -- the
3 -- the agency could not point me to a case where
4 they have decided not to revoke.

5 I -- I -- what I'm concerned about,
6 and I don't want to misrepresent to you, is
7 whether there's some sort of unwritten policy.
8 I don't know whether the adjudicators all sort
9 of sit around and say, of course, because
10 1154(c) seemed to have been really, really
11 important to Congress, we really do --

12 JUSTICE KAVANAUGH: How --

13 MS. SINZDAK: -- always revoke. I
14 just don't know.

15 JUSTICE KAVANAUGH: How many
16 decisionmakers are there?

17 MS. SINZDAK: There are many. I do
18 not know the exact number.

19 JUSTICE JACKSON: Do you agree that
20 Bouarfa could obtain judicial review by refiling
21 a petition in this case? The government's not
22 going to pop up and say if he tries to do that,
23 no?

24 MS. SINZDAK: That's correct. He
25 might not need to if he does -- sorry, it's a --

1 Bouarfa is a she.

2 JUSTICE JACKSON: She. Excuse me.

3 MS. SINZDAK: She -- no, my --

4 JUSTICE JACKSON: Sorry.

5 MS. SINZDAK: She -- if she refiles
6 and the -- and the agency tooks a -- takes a
7 fresh -- since she has refiled, if the agency
8 takes a fresh look at the facts or if she were
9 to submit additional evidence, the agency could,
10 of course, change its mind. But, if it did not,
11 then, yes, judicial review would be available.

12 JUSTICE JACKSON: Then she could get
13 review judicial review at that point? All
14 right.

15 The applicability of the judicial
16 review bar in 1252 it seems to me is a threshold
17 determination that hasn't been briefed here.
18 So, if we agree with you that the discretionary
19 nature -- about the discretionary nature of the
20 revocation provision, would you have any problem
21 with a line that expressly preserves that
22 threshold question?

23 MS. SINZDAK: I don't think that it's
24 a threshold question because I think Congress
25 was quite clear here in terms of the language of

1 (b), which says that it applies regardless of
2 whether the judgment, decision, or action is
3 made in removal proceedings. I haven't been
4 able to think of another way to read that line.
5 I --

6 JUSTICE JACKSON: No, I mean, you --
7 you -- you -- you think the issue comes out in
8 the government's favor, but, clearly, it's a
9 threshold question. I mean, we have -- we -- we
10 -- we would have to decide whether 1252 applies.

11 And my concern is that by just jumping
12 to your conclusion -- let's say I, for the
13 purpose of this, agree with you that this is a
14 discretionary decision under 1154 or 1155. We
15 only get to precluding judicial review through
16 1252, correct?

17 MS. SINZDAK: Yes.

18 JUSTICE JACKSON: In other words, the
19 -- the -- the judicial stripping -- the -- the
20 jurisdiction stripping comes from 1252?

21 MS. SINZDAK: That's correct. Now I
22 don't want to hide the ball because there is
23 jurisdiction stripping in the APA context
24 because the APA bars review of decisions that --

25 JUSTICE JACKSON: Yes. Setting that

1 aside, the parties here have been assuming that
2 the jurisdiction stripping is coming from 1252?

3 MS. SINZDAK: Correct.

4 JUSTICE JACKSON: And 1252 says you
5 don't have jurisdiction of discretionary
6 decisions. And so the argument here has been
7 about whether or not this is a discretionary
8 decision. But there's a threshold issue because
9 it seems to me -- at least I haven't found a
10 case in which we have applied 1252 jurisdiction
11 stripping in the non-removal context. So, if we
12 were to suddenly say in agreement with you this
13 is discretionary and, therefore, there's
14 jurisdiction stripping under 1252, we would be
15 assuming that 1252 applies in this context.

16 And so I'm asking you -- you know,
17 your counsel on the other side says, yes, we're
18 all over here looking at the nature of this. Is
19 it discretionary? But you should at least make
20 clear that there is this threshold issue and
21 preserve it because we have not briefed it.

22 Is the government on board with at
23 least that little -- even though I know you
24 think you win.

25 MS. SINZDAK: Okay.

1 JUSTICE JACKSON: Okay.

2 MS. SINZDAK: I will happily take the
3 win in this case --

4 JUSTICE JACKSON: Yes.

5 MS. SINZDAK: -- with the knowledge
6 that in the future, I will win on this other
7 question.

8 (Laughter.)

9 JUSTICE JACKSON: Fine. Okay. Thank
10 you.

11 JUSTICE KAVANAUGH: But you don't
12 think we should reserve it, right?

13 MS. SINZDAK: I don't think there's
14 any --

15 JUSTICE KAVANAUGH: Because there's no
16 --

17 MS. SINZDAK: -- ambiguity in the
18 text.

19 JUSTICE KAVANAUGH: I don't --

20 JUSTICE JACKSON: But we have to
21 decide it. I mean, I'm just saying I don't want
22 the answer to this question to necessarily
23 decide -- and there's a -- there's a cert
24 petition, I understand, that's coming up that's
25 asking just this question. Amicus here says

1 this is a separate question. We don't have to
2 -- you all haven't briefed the answer to this
3 question, correct?

4 MS. SINZDAK: That's correct.

5 JUSTICE JACKSON: Okay.

6 JUSTICE SOTOMAYOR: Justice Gorsuch's
7 hypothetical would give rise to a constitutional
8 challenge, wouldn't it?

9 MS. SINZDAK: I --

10 JUSTICE SOTOMAYOR: That if -- if the
11 INS just decided to throw the pile of
12 applications on the floor?

13 MS. SINZDAK: I -- I suspect that the
14 non-citizen would raise a due process
15 contention. I think they would then have to
16 deal with Munoz. And I also want to be clear
17 here there is division in the circuits regarding
18 whether constitutional claims are reviewable in
19 the revocation context because there is judicial
20 review available after the denial of a visa
21 petition, so this isn't a situation --

22 JUSTICE GORSUCH: What's your view on
23 that?

24 MS. SINZDAK: The government has not
25 taken a position.

1 JUSTICE GORSUCH: The government has
2 no position on whether an individual can raise a
3 constitutional claim about a -- a -- a -- a
4 violation in revocation?

5 MS. SINZDAK: A non-citizen certainly
6 can raise a constitutional claim after the
7 denial of a -- such a petition.

8 JUSTICE GORSUCH: After the denial of
9 the visa at the end of this process, which, as
10 your friend points out, is a continuing process,
11 but not after the revocation decision itself?
12 That's the government's view?

13 MS. SINZDAK: No. The government has
14 not taken --

15 JUSTICE GORSUCH: Not taken a view.

16 MS. SINZDAK: -- a position on that.

17 JUSTICE GORSUCH: You're not going
18 to -- we don't know?

19 MS. SINZDAK: I'm not going to take a
20 position on that. I --

21 JUSTICE GORSUCH: Wait for coming
22 attractions?

23 MS. SINZDAK: -- I would note, Justice
24 --

25 JUSTICE GORSUCH: Don't you think

1 that's an important thing for us to know in
2 terms of interpreting the scope of this, to say,
3 if we're going to insulate substantive and
4 procedural determination -- questions,
5 arbitrary-and-capricious-type decisions, the
6 throwing the papers up in the air, and perhaps
7 that's what happened here, we don't know for all
8 we know, don't you think it's important for us
9 to understand whether you'd really even bar
10 constitutional questions?

11 MS. SINZDAK: Justice Gorsuch, the
12 Eleventh Circuit itself has treated these as
13 separate issues because it has actually held
14 that constitutional claims are reviewable. But,
15 of course, we're up on a -- defending a decision
16 in which it said that these claims are not
17 reviewable.

18 JUSTICE GORSUCH: If you agree that
19 it's reviewable at the end of the process, the
20 visa process, why wouldn't the same be true
21 here? This question of the sham-marriage
22 determination, would be -- would it be
23 reviewable at the end of -- at the end of the
24 process?

25 MS. SINZDAK: If the agency does not

1 --

2 JUSTICE GORSUCH: Mm-hmm.

3 MS. SINZDAK: -- reach a different
4 outcome, yes.

5 JUSTICE GORSUCH: Okay. So it's
6 reviewable at the beginning. It's reviewable at
7 the end. You're just saying this one's not
8 reviewable in the middle?

9 MS. SINZDAK: That's correct.

10 JUSTICE GORSUCH: And on
11 constitutional claims, we don't know? Wait?

12 MS. SINZDAK: That's correct.

13 JUSTICE GORSUCH: Okay. Got it.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 Justice Alito, anything further? No?

18 Justice Jackson -- oh, Justice
19 Barrett?

20 Thank you, counsel.

21 MS. SINZDAK: Thank you.

22 CHIEF JUSTICE ROBERTS: Rebuttal,
23 Mr. Deger-Sen?

24

25

1 REBUTTAL ARGUMENT OF SAMIR DEGER-SEN

2 ON BEHALF OF THE PETITIONER

3 MR. DEGER-SEN: Thank you, Your Honor.

4 Four quick points. So I think the key
5 thing that we heard again was that they strive
6 to revoke. And what "strive to revoke" I
7 understand means is we try to find everyone, and
8 when we find someone, we revoke. In the real
9 world, they are interpreting and administering
10 the statute in exactly the way we're describing.

11 So why -- and, again, that's not going
12 to be enough, but I think it's good evidence
13 that, in fact, this is the right way to read the
14 statute. And the right way to read the statute
15 is the way we've been describing, which is
16 1154(c) doesn't just apply on the first day; it
17 applies the day after.

18 And ordinary English often connotes
19 that. So, as I gave the example, no article
20 should be approved for publication if there's
21 evidence of plagiarism. I can give you a few
22 more examples. No person shall be approved for
23 TSA pre-check if they lie on the application.
24 No ballot proposition shall be listed if there
25 are less than a hundred signatories. No lawyer

1 shall be licensed if they've committed a felony.

2 In all of these situations, no one
3 seriously thinks that the obligation is on the
4 first day and no -- and no further, that if they
5 find out you lied on your TSA application, that
6 they don't have to revoke approval. You can
7 still go on and be approved, or that a lawyer
8 can just continue to be licensed, or that the
9 ballot proposition has to go ahead and, you
10 know, be voted on in the future even though, in
11 fact, there were not enough signatories.

12 Routine error correction that happens
13 the next day is subsumed within the idea that
14 something can't initially be approved. And
15 ordinary English reflects that. And, as this
16 Court said in Campos-Chaves, there's no -- you
17 know, there's no canon of construction against
18 reading, you know, and using common sense and
19 construing laws saying what they obviously mean.

20 That's what this obviously connotes.
21 That's why the government administers it this
22 way. The government believes that Congress
23 enacted a sham-marriage bar that was this
24 fundamental restriction that was so important it
25 couldn't even -- an application couldn't even

1 get off the ground. The idea that then the very
2 next day, Congress would have thought, actually,
3 it's optional, the agency has discretion, it can
4 get to do whatever it wants, and the thing which
5 triggers the agency's discretion is the agency
6 made a mistake. Because the agency made a
7 mistake, suddenly, it's important for the agency
8 to get discretion.

9 And if you think that reliance
10 interests are at stake, the government has
11 always said there are no reliance interests in
12 this document. And if you care about reliance
13 interests, then you want our results because, if
14 people have been in the system for a while, the
15 result here of -- of accepting the government's
16 view is that those are the people that are going
17 to have their revocations not judicially
18 reviewed and get kicked back to the beginning of
19 the process.

20 And I do think the question about the
21 fraud bar is important. The government is
22 basically saying, well, we can, we have
23 discretion to administer this at the back end,
24 but Congress never told us we have to. Congress
25 never said the sham marriage is -- is mandatory.

1 But its longstanding position has been
2 that the sham-marriage bar is mandatory, not for
3 revocations, they get to revoke, but we can't
4 give you benefits. In the real world, we can
5 never give you benefits because that's obviously
6 what Congress meant.

7 Congress thought this is the threshold
8 requirement. Of course, Congress would have
9 thought it would carry over to the day after
10 approval and would carry over further into the
11 process.

12 On the constitutional question issue,
13 there is -- the logic of the government's
14 position, because there is no preservation for
15 constitutional or legal claims, we're not in a
16 removal proceeding. So subparagraph (D) doesn't
17 apply.

18 So as -- as I understand the logic of
19 the government's position is that it is allowed
20 to violate the Constitution with impunity in the
21 context of revocation and that it's fine because
22 you can go ahead and refile later and that --
23 this is my final point -- refiling later is not
24 an adequate substitute. It is -- I -- I've
25 never known a situation where years of delay is

1 considered to just be equivalent, especially
2 when you're living under uncertainty of whether
3 you're family's going to be unified.

4 And for lots of people, that can be,
5 as this Court said in *Tesoro*, a decade, a decade
6 and a half, two decades of just not -- of -- of
7 -- of, you know, being waiting in line, suddenly
8 having your -- your petition revoked, going back
9 to the beginning and starting again. That is a
10 life-altering, life-destroying result. So there
11 are real stakes in this case, but there are no
12 stakes on the government's side. There's no
13 streamlining.

14 If, you know, the government -- the --
15 the -- the streamlining is a product of the
16 government's own view in this case. If there
17 was judicial review straight out, we never would
18 have had to file in the first place. So there
19 is literally no reason to support the
20 government's -- no logical reason to support the
21 government's view in this case.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 12:06 p.m., the case
25 was submitted.)

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