No. 21-1446

IN THE

Supreme Court of the United States

SIMIN NOURITAJER, *et al.*,

Petitioners,

v.

UR M. JADDOU, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

THOMAS E. MOSELEY
Counsel of Record
One Gateway Center, Suite 2600
Newark, New Jersey 07102
(973) 622-8176
moselaw@ix.netcom.com

Counsel for Petitioners

316598

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Page

Page

STATUTES AND OTHER AUTHORITIES:

Cited Authorities

Cited Authorities

PRELMINARY STATEMENT

Simin Nouritajer and the Razi School submit this reply in support of their petition for certiorari. Far from denying the existence of a Circuit split, the government opposes certiorari largely on the merits of the issue about which the split exists. See Brief for the Respondents in Opposition ("Opp.") at 6-16. As this reply will demonstrate, that split, albeit lopsided in the government's favor, is of such significance as to merit certiorari for resolution, whatever the government's arguments on the merits.

ARGUMENT

The demonstrated split among the circuits on 8 U.S.C. §1155 and §1252(a)(2)(B)(ii) strongly supports certiorari as does the conflict with decisions of this Court.

1. A consequential intercircuit conflict exists in this case warranting certiorari. Indeed, the impact of this split has demonstrably broader significance than that in other cases where, despite an unbalanced split, this Court granted certiorari. See Nasrallah v. Barr, 140 S.Ct. 1683, 1684 (2020)("most Courts of Appeals have sided with the government . . ."); Pereira v. Sessions, 138 S.Ct. 2015, 2113 (2018)(conflict created by only one Court of Appeals not adopting the government's view). Unlike the issue of reviewability of claims under the Convention Against Torture at issue in Nasrallah or the "stop time" rule under 8 U.S.C. §1229b in Pereira, the construction and application of 8 U.S.C. §1155 and §1252(a)(2)(B)(ii) implicates the entire immigrant preference petition system under 8 U.S.C. §1154 from those based on marriage to United States citizens to those investing

in the United States to create jobs for Americans. See 8 U.S.C. §§1151, 1153. Some measure of the breadth of this impact can be seen in the numbers involved. For example in fiscal year 2021 alone, United States Citizenship & Immigration Services ("UCIS") received 290,000 family based applications for adjustment of status and 297,000 employment based applications for adjustment[1], all of which, as a matter of law, rested upon visa petitions that, in the government's view can be revoked without any judicial review. In short, the certiorari petition for consideration here is not "some small sideshow." Patel v. Garland, 142 S.Ct. 1614, 1636 (Gorsuch, J., dissenting).

Instead, the present petition ultimately poses the issue of whether Congress intended to create a system by which the denial of a visa petition is subject to judicial review but revocation is not, thus making that entire system subject to administrative whim. See, e.g., J.C. Penney & Co. v. CIR, 312 F.2d 65, 68 (2d Cir. 1962) (Friendly, J.) ("Congress is free, within constitutional limitations, to legislate eccentrically if it should wish, but courts should not lightly assume that it has done so."). The absurdity of such a result is underscored by the fact that approval and revocation are governed by the same legal standard. See Bernardo v. Johnson, 814 F.3d 481, 494-508 (1st Cir. 2016) (Lipez, J. dissenting), cert. denied, 579 U.S. 917 (2016). Moreover, this is not simply a policy argument, as the government incorrectly suggests, Opp. at 12-13, but rather one grounded in the settled rule that statutory interpretations producing an absurd result are to be avoided. Griffin v. Oceanic Contractors, Inc. 458 U.S. 564, 575 (1982).

1. USCIS, Annual Statistical Report FY 2021 at 25 (2022).

While the government does not dispute that this case squarely presents the issue over which there is a conflict, the government speculates that this conflict may dissipate because ANA Int'l Inc. v. Way, 393F.3d 886, 894 (9th Cir. 2004) is assertedly on shaky ground in the Ninth Circuit. Opp. at 14-15. Such conjuring should not deter a grant of certiorari. Thus Poursina v. USCIS, 936 F. 3d 868, 871-72 (9th Cir. 2019), on which the government relies to place ANA in hospice care, Opp. at 12, 14, took care to distinguish the standard for a national interest waiver under 8 U.S.C. §1153(b)(2)(B)(i) as one involving a "core example of a consideration that lacks a judicially manageable standard of review," from the standard governing revocation under 8 U.S.C. §1155. Furthermore, ANA gives every indication of being alive and well since Poursina, and, for example, was cited with approval in Perez v. Wolf, 943 F.3 853, 860 (9th Cir. 2019), which rejected the government's argument that 8 U.S.C.§1252(a)(2)(B)(ii) barred review of the denial of a U visa under 8 U.S.C. §1101(a)(15)(U) for crime victims.

Equally without merit is the government's reliance upon other instances where this Court has denied certiorari involving 8 U.S.C. §1155 and 8 U.S.C.§1252(a)(2)(B)(ii). Opp. at 7. The denial of certiorari, of course, has no legal significance and is not an approval of the decision from which certiorari was sought. See, e.g., Missouri v. Jenkins, 515 U.S. 70 (1995). Moreover, none of those cases presented the added issue of 8 U.S.C. §1155 and 8 U.S.C.§1252(a)(2)(B)(ii) being advanced to shield a pretextual denial from review or a conflict with 8 U.S.C. §1152(a)(1), a concern heightened by the unexplained failure of USCIS to take any action on the adjustment applications by Simin Nouritajer and her family members

for ten years after the initial approval of the I-140 petition[2] as well as the involvement of the Federal Bureau of Investigation, which government avoids. Furthermore, none of those cases advanced the Stellas litigation as supporting certiorari. Petition for Writ of Certiorari ("Pet.") at 13.

Similarly, this case presents in sharp focus an instance where petitioners had challenged the revocation of the I-140 for the failure to follow the governing standards for revocation mandated by administrative precedent, namely their eligibility for this immigrant preference in the first place. See, e.g., Matter of Tawfik, 20 I&N 166 (BIA 1990)(standard for revocation is whether the petition met the criteria for approval when filed). In other words, the petitioners had alleged that Simin Nouritajer met the experience requirement for the position and the Razi School had satisfied the ability to pay requirement and that th e contrary conclusion reached in revocation was contrary to law. Pet. at 6-7. In short, despite the government's contrary argument, Opp. at 10, the petitioners plainly identified how revocation departed from governing statutory standards and raised clear legal challenges to revocation including that the regulations underlying revocation were invalid. Petitioners' Appendix at 19a-20a.

2. The government's arguments on the merits should not defeat certiorari. While the government devotes the

2. At the time the I-140 was filed, Simin Nouritajer and her derivative family members filed applications for adjustment of status since the quota for their preference category was current. Pet. at 4. Accordingly, this not a case where the quota explains the failure of USCIS to act on the adjustment applications.

bulk of its opposition to arguments on the merits as noted above, that cannot obscure the existence of an intercircuit split. Moreover, those arguments on the merits are subject to challenge at every stage. First, the government makes much of the word "any" as denoting discretion, Opp. at 7, yet that word merely leads into the controlling language in 8 U.S.C.§1252(a)(2)(B)(ii) that "any" decision must be one "specified" to be in the discretion of USCIS. By contrast the government's argument virtually ignores "specified," which, as this Court held in Kucana v. Holder, 558 U.S. 233, 243n.10 (2010) requires more than that discretion be "merely assumed or contemplated" and, instead, must be stated explicitly. See, e.g. Liu v. SEC, 591 U.S. ,140 S.Ct. 1936 (slip op. at 16)("cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of statute"); Soltane v. U.S. Department of Justice, 381 F.3d 143, 147 (3d Cir. 2004)(Alito, J.)("[W]e do not think . . . that the use of marginally ambiguous language, without more, is adequate to 'specif[y] that a particular action is within the Attorney General's discretion for purposes of §1252(a)(2)(B)(ii).")

Yet 8 U.S.C.§1155 does not explicitly state that revocation decisions are in the discretion of USCIS as the plain meaning of "specified" requires. Moreover, this is not an insistence upon "magic words," as the government erroneously contends, Opp. at 9, but rather a recognition that the plain meaning of "specified" is to state explicitly, which 8 U.S.C.§1155 does not do as to discretion. Moreover, as the dissent in Bernardo, 814 F.3d at 502-503 cogently concludes, the use of "may" or "deems" cannot "nullify the established meaning of 'good and sufficient cause' that the relevant agency has applied for almost three decades, and that formed the backdrop

against which Congress reenacted §1155." Furthermore, the use of "may" can suggest discretion but not necessarily unlimited discretion, Zadvydas v. Davis, 533 U.S. 678, 697 (2001), and even then can be defeated by other statutory indicia. United States v. Rodgers, 461 U.S. 677, 706 (1983). In this case, "the construct of .§1155 makes clear that what Congress 'may' do is restricted by the 'good and sufficient cause' standard." Bernardo, 814 F.3d at 504 (Lipez, J., dissenting). Likewise, the reference to "at any time," does not define revocation as discretionary but rather makes clear that there is no time limit on when revocation can be initiated, unlike other provisions of the immigration law. Compare, e.g., 8 U.S.C. §1256 (proceedings to rescind adjustment of status must be commenced within five years of approval).

In short, the government has not come close to satisfying the requirement that in the exercise of discretion be specified much less that §1155 provides sufficient clarity to overcome the presumption in favor of judicial review or that any doubt on reviewability be resolved in favor of review. See, e.g., Dep't of Homeland Security v. Regents of the Univ. of Cal., 140 S.Ct. 1891, 1905-06 (2020); Bernardo, 814 F.3d at 495 (Lipez, J. dissenting)(collecting cases). Equally without merit is the government's reliance upon the exception in §1252(a)(2)(B)(ii) for asylum decisions, Opp. at 10, for prior to the enactment of §1252(a)(2)(B)(ii) in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 both case law and applicable regulations had construed the "may" in 8 U.S.C. §1158 to mean discretion. See, e.g., INS v. Abudu, 485 U.S. 94, 106 (1988)(asylum a form of discretionary relief from removal); 8 C.F.R. §208.14(a) and

(b)(asylum officer or Immigration Judge may grant asylum in exercise of discretion). See Lorillard v. Pons, 434 U.S. 575, 581 (1978); Matter of Gomez-Giraldo, 20 I & N Dec. 957n3 (BIA 1995) (Congress is "presumed to be cognizant of existing law pertinent to the legislation it enacts").

In short, far from requiring "may" in all circumstances to mean discretion at the risk of a head on collision between exemption for asylum claims and the superfluity canon, the exemption for asylum can be seen as an understandable Congressional effort to avoid any result that asylum decisions were exempt from judicial review, especially given the fact that asylum claims may often be matters of life or death. Cf. Kawashima v. Holder, 565 U.S. 478, 488 (2012)(superfluity canon not violated where Congress specifically included tax evasion in aggravated felony definition under 8 U.S.C. §1101(a)(43)(M)(ii) though other tax offense included in (M)(i) when it appears more likely that Congress wanted to avoid any doubt that tax evasion was an aggravated felony).

Similarly the government's reliance upon language in Kucana that 8 U.S.C.§1252(a)(2)(B)(i) and (ii) encompass decisions of the same genre, merely begs the question of whether revocation under §1155 is such a decision, just as recognizing that a Siberian Husky and a Cavalier King Charles Spaniel are both pure bred dogs will not in and of itself tell you whether the dog on your doorstep is also a pure bred. Equally unpersuasive is the government's claim that the supposed evisceration of Montero-Martinez v. Ashcroft, 277 F.3d 1137 (9th Cir. 2002) in Patel, Opp. at 15, somehow undermines ANA. Yet the holding in Montero-Martinez that 8 U.S.C.§1252(a)(2)(B)(i) does not foreclose review of legal questions, an issue not reached in Patel,

which dealt with a question of fact, is not necessary to hold that revocation under §1155 is governed by recognized legal standards and thus not discretionary, as the dissent in Bernardo makes clear upholding reviewability without reference to Montero-Martinez . In short, Patel provides no invitation to undermine ANA.

Similarly flawed is the government's argument in reliance upon Kucana, Opp. at 12 that just as regulations or administrative precedent cannot make a decision discretionary when Congress has not adopted discretion so should regulations and administrative precedent not make a discretionary decision subject to review in the face of a legislative adoption of discretion. Again this begs the question of whether Congress has adopted discretion in the first place for the statute that assertedly falls within the preclusion of review provided by 8 U.S.C.§1252(a)(2)(B)(ii). As urged above, the language and history of §1155 do not provide the required clarity to oust judicial review under 8 U.S.C.§1252(a)(2)(B)(ii), while the "consistent agency application of 'good and sufficient cause' prior to the reenactments of §1155 was understood as a term of art in the immigration context . . .," making clear that revocation under §1155 is not simply a matter of discretion Bernardo, 814 F.3d at 499 (Lipez, J., dissenting).

Finally, the government's attempt to write off the Stellas litigation because there was no statute similar to 8 U.S.C.§1252(a)(2)(B)(ii) in place at the time this litigation occurred, Opp. at 11, overlooks the fact that 8 U.S.C.§1252(a)(2)(B)(ii) applies only when a decision is made under a statute where a decision is specified to be in the exercise of discretion. Accordingly, the focus is properly on the statute under which the decision at issue

was made in order to determine whether that statute falls within the ambit of 8 U.S.C.§1252(a)(2)(B)(ii). At the risk of repetition, the Stellas litigation illustrates that revocation, from the beginning, was not a matter simply of discretion but was subject to statutory standards. At issue in that litigation was a regulation by the then Immigration & Naturalization Service automatically revoking a visa petition withdrawn by the petitioner. The majority opinion in United States ex rel. Stellas v. Esperdy, 366 F.2d 266 (2d Cir. 1966), rev'd 388 U.S. 462 (1967) did not allow judicial review while the dissent reasoned that the power of revocation was not limitless and had to be exercised in accordance with the statutory standard of good and sufficient cause, thus viewing that language as importing statutory standards governing revocation. 366 F.2d at 272 (Moore, J., dissenting).

Later, in Pierno v. INS, 397 F.2d 949, 950 (2d Cir. 1968), the Second Circuit viewed this Court's reversal in Stellas as vindicating Judge Moore's earlier dissent, which was cited with approval. At issue in Pierno was the automatic revocation of a visa petition upon the death of a petitioner. There the Second Circuit held that "good and sufficient cause" was subject to judicial review, concluding that this language "should not be interpreted to authorize [the agency's] "wooden application of rules for automatic revocation," and noting that the Supreme Court reversal in Stellas had called for further proceedings on the invocation of automatic revocation under the revocation statute. 397 F.2d at 950-51. Accordingly the Stellas litigation confirms that virtually from the outset, revocation was viewed as governed by statutory standards and was not simply a matter of discretion with this Court's reversal in Stellas supporting this view. Thus, the government's reliance upon

Foti v. INS, 375 U.S. 217 (1963), Opp. at 11, is misplaced, for even if review of discretion was not foreclosed at the time of Foti, revocation itself was not a discretionary decision at that time but was governed by the statutory standards recognized in the Stellas litigation.

Similarly inapposite is the government's citation to Love Korean Church v. Chertoff, 549 F.3d 749 (9th Cir. 2008) and the unreported District Court decision Tandel v. Holder, 2009 WL 2871126 (N.D. Cal. Sept. 1, 2009), Opp. at 16. Indeed, the former precedential decision treats review of revocation the same as review of an initial denial and provided plenary review of the legal issues raised, while Tandel involved a marriage fraud determination where review either upon an initial denial or later revocation was quite limited, unlike the legal issues raised here. In short, if anything, Love Korean Church underscores the point that granting certiorari would not be a path to a Pyrrhic victory for the petitioners and others.

CONCLUSION

This case presents an undeniable split among the federal circuits with broad implications concerning the entire system for allocating immigrant preferences. Moreover, the government's arguments on the merits of the issue about which the split exists are subject to rebuttal at every stage and should not detract from the need to grant certiorari so that this conflict may be resolved in an area of federal law where uniformity is essential. Accordingly, the petition for certiorari should be granted.

Dated: Newark, New Jersey
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Respectfully submitted,

THOMAS E. MOSELEY
Counsel of Record
One Gateway Center, Suite 2600
Newark, New Jersey 07102
(973) 622-8176
moselaw@ix.netcom.com

Counsel for Petitioners