No. _____

In the Supreme Court of the United States

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When considering whether to approve a petition for an immigrant visa, the government must adhere to certain nondiscretionary criteria. *See, e.g.*, 8 U.S.C. § 1154(c) (providing that "[n]o petition shall be approved" if the individual seeking a visa has previously entered a marriage "for the purpose of evading the immigration laws"). When a visa petition is denied based on a petitioner's failure to satisfy such a nondiscretionary requirement, it is generally understood that the petitioner has a right to judicial review of that decision.

Once a visa petition has been approved, the government has the power to revoke approval of the visa petition for "good and sufficient cause" pursuant to 8 U.S.C. § 1155. The circuits are in open conflict over whether judicial review is available when the government revokes an approved petition on the ground that it had initially misapplied nondiscretionary criteria during the approval process. The Sixth and Ninth Circuits hold that judicial review is available under these circumstances, but the Second, Third, Seventh, and now the Eleventh Circuit all hold that revocations are "discretionary" decisions for which there is no right to judicial review, even when they are based on a misapplication of the same nondiscretionary criteria that would be reviewable if the petition had originally been denied.

The question presented is:

Whether a visa petitioner may obtain judicial review when an approved petition is revoked on the basis of nondiscretionary criteria.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

Bouarfa v. Secretary, Department of Homeland Security, No. 22-12429, United States Court of Appeals for the Eleventh Circuit, judgment entered July 28, 2023 (75 F.4th 1157).

Bouarfa v. Mayorkas, No. 8:22-cv-224-WFJ-AEP, United States District Court for the Middle District of Florida, motion to dismiss granted June 8, 2022 and docketed June 9, 2022 (2022 WL 2072995), judgment entered September 19, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Amina Bouarfa respectfully asks this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 75 F.4th 1157 (11th Cir. 2023). App. 1a-11a. The district court's order dismissing the case is unreported, and available at No. 8:22-cv-224-WFJ-AEP, 2022 WL 2072995 (M.D. Fla. signed June 8, 2022, and filed June 9, 2022). App. 12a-26a.

JURISDICTION

The court of appeals entered its judgment on July 28, 2023. App. 1a. On October 18, 2023, Justice Thomas extended the time to file a petition for a writ of certiorari through November 27, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App. 27a-30a.

INTRODUCTION

This petition presents an important and recurring question over which the courts of appeals are in acknowledged disagreement: whether a citizen or lawful permanent resident can obtain judicial review when the Secretary of the Department of Homeland Security (the "Secretary") revokes approval of an immigrant visa petition on the basis of nondiscretionary criteria.

Under Section 242(a)(2)(B)(ii) of the Immigration and Nationality Act ("INA"), federal courts lack jurisdiction to review a "decision or action" for which "the authority is specified . . . to be in the discretion" of the Secretary. 8 U.S.C. § 1252(a)(2)(B)(ii). The Eleventh Circuit below held that this provision bars judicial review when the Secretary revokes approval of a visa petition pursuant to 8 U.S.C. § 1155—even where the ground for revocation was the application of *nondiscretionary* criteria that the agency should have evaluated when first approving the petition.

In this case, Petitioner Amina Bouarfa's application to have her husband, Ala'a Hamayel, classified as her immediate relative was approved. But two years later, the Secretary revoked that approval on the ground that it *should have* denied the application in the first place under 8 U.S.C. § 1154(c)'s "sham-marriage bar." *Id.* § 1154(c). It is undisputed that the Secretary's initial decision to deny the petition based on Section 1154(c) would have been judicially reviewable. But under the Eleventh Circuit's ruling, the fact that the Secretary (by his own estimation) erred in that initial decision means that Ms. Bouarfa lost her right of ever having the Secretary's decision—and the permanent separation

of her family—reviewed. That decision reflects a senseless and arbitrary distinction that cannot be reconciled with the text or purpose of the judicial review bar.

The Eleventh Circuit's holding deepened an acknowledged circuit split. As the panel itself recognized, its decision directly conflicts with the precedent of two other circuits: the Sixth Circuit, which has held that courts may review the Secretary's decision to revoke a visa petition after discovering its mistake about a nondiscretionary requirement such as Section 1154(c); and the Ninth Circuit, which holds that nondiscretionary criteria underlying a revocation, as well as the application of Section 1155 itself, are reviewable. By rejecting the Sixth and Ninth Circuits' positions, the Eleventh Circuit joined the Second, Third, and Seventh Circuits in holding that a citizen cannot obtain judicial review of the decision to revoke approval of a visa petition, even when the revocation is based on nondiscretionary criteria. This circuit conflict is as clear and entrenched as they come.

The conflict has far-reaching consequences in an area of the law with life-altering implications. Revocations implicate the fundamental rights of individuals who have built lives in this country in reliance on the government's approval of their petition. Without a uniform rule across the circuits, a citizen's access to the vital check of judicial review on an agency's decision to separate a family depends on the circuit in which an applicant resides—and on whether the immigration officer decides to apply the *same* nondiscretionary criteria after approving a petition, rather than beforehand, as they should have done. This Court's intervention is needed to ensure

that this issue of profound importance to thousands of claimants seeking lawful immigrant status does not turn on geographic or bureaucratic happenstance.

The decision below is also incorrect on the merits. The Eleventh Circuit found that revocation decisions are categorically unreviewable because the government is not "require[d]" to revoke approval of a visa petition, even upon finding that a necessary predicate for that petition's approval was lacking. App. 7a (emphasis omitted). But because Section 1252(a)(2)(B)(ii)'s text only bars judicial review of "decisions or actions" that are "in the discretion" of the Secretary, the fact that an agency's ultimate decision (such as a revocation) is discretionary does not preclude review of a nondiscretionary decision *underlying* that exercise of discretion. Accordingly, the decision here that Mr. Hamayel engaged in a "sham marriage" was reviewable, regardless of whether the Secretary was "required" to revoke the petition approval as a result. That rule makes good sense. The agency's nondiscretionary determination under Section 1154(c)'s marriage-fraud bar should not become discretionary and unreviewable simply because the agency uses that determination as the basis for a revocation rather than an initial denial. But under the Eleventh Circuit's arbitrary rule, the Secretary can insulate those underlying decisions from judicial review. That raises serious separation-of-powers concerns, and is not a result Congress could possibly have intended.

This case readily satisfies the Court's criteria for certiorari. The petition should be granted.

STATEMENT OF THE CASE

A. Legal Background

1. Every year, hundreds of thousands of citizens and lawful permanent residents seek immigration status on behalf of their spouses and other relatives, as do thousands of U.S. businesses on behalf of their employees. Under the Immigration and Nationality Act, noncitizens seeking legal immigration status in the United States may petition for a visa as a family-sponsored immigrant or an employment-based immigrant. 8 U.S.C. § 1153(a), (b). Family-sponsored immigrants may obtain visas through their spousal, parental, or other familial relationships with individuals who are United States citizens or lawful permanent residents. *Id.* § 1153(a). To seek lawful immigrant status based on a familial relationship, a citizen must first file a Form I-130 petition with the United States Citizenship and Immigration Services (USCIS), an agency within the Department of Homeland Security that exercises certain powers delegated by the Secretary of the Department of Homeland Security. *Id.* §§ 1151(a)(1), 1154(a)(1)(A)(i), (ii); 8 C.F.R. § 204.1(a)(1); *see* App. 2a.

Approval of an I-130 petition is just one step of a multi-stage process.[1] After USCIS approves a petition, the citizen seeking to secure their family member's right to live to in the country legally must, among other things, apply for an immigrant visa, file financial, medical, and legal documents, and

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[1] Bureau of Consular Affairs, U.S. Dep't of State, *Immigrant Visa Process*, https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/step-1-submit-a-petition.html (last visited Nov. 27, 2023).

interview with the agency.[2] Petitioners for employment-based immigration visas face parallel requirements and must file a Form I-140 petition. *See* 8 U.S.C. § 1153(b); 8 C.F.R. § 204.5.

2. USCIS's threshold evaluation of a visa petition is governed by mandatory requirements. Upon "an investigation of the facts," the agency "shall, if [it] 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." 8 U.S.C. § 1154(b).

USCIS must deny a visa petition if it fails to meet certain criteria. As relevant to the decision below, Section 1154(c) provides that "no petition shall be approved" for prospective visa-holders who previously sought immigration status "by reason of a marriage determined by [USCIS] to have been entered into for the purpose of evading the immigration laws." *Id.* § 1154(c). In other words, Section 1154(c) imposes a nondiscretionary requirement that the agency must consider and apply—and a visa petitioner must satisfy—before the petition is approved. This requirement applies to both family-sponsored and employment-based visa petitions. Petitioners must also meet criteria specific to the type of petition they are seeking. Eligibility for certain employment-based visas, as an example, turns on whether the prospective visa-holder satisfies applicable requirements for minimum work experience and qualifications. *See id.* § 1153(b); 8 C.F.R. § 204.5.

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[2] *Id.*

3. Even after a visa petition has been approved, USCIS may revoke that approval. Section 1155 provides that USCIS "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. Under administrative regulations, a petition is revoked automatically in certain circumstances—for instance, when the beneficiary dies, 8 C.F.R. § 205.1(a)(3)(i)(B)—or may be revoked with notice by an authorized officer "on any ground . . . when the necessity for the revocation comes to the attention" of the agency, *id.* § 205.2(a).

4. As a general matter, federal courts have jurisdiction to review any "final agency action for which there is no other adequate remedy," 5 U.S.C. § 704, except where "statutes preclude judicial review" or the "agency action is committed to agency discretion by law," *id.* § 701(a). As relevant here, Section 242(a)(2)(B)(ii) of the INA, 8 U.S.C. § 1252(a)(2)(B)(ii), precludes judicial review of a "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."[3] *Id.* § 1252(a)(2)(B)(ii).

In considering whether, and to what extent, a statute limits the availability of judicial review, this Court applies a "presumption favoring judicial review of administrative action." *Kucana v. Holder*, 558 U.S. 233, 251 (2010). The Court has "consistently applied

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[3] "[T]his subchapter" refers to Title 8, Chapter 12, Subchapter II, of the United States Code, codified at 8 U.S.C. §§ 1151-1382 and titled "Immigration."

th[is] interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Id.* Congress is understood to "legislate[] with knowledge of" the presumption, and the presumption applies unless there is "clear and convincing evidence" that Congress sought to limit federal courts' jurisdiction. *Id.* (first quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); then quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63-64 (1993)).

B. Factual and Procedural Background

1. Petitioner Amina Bouarfa is a United States citizen. App 13a. In February 2011, she married Ala'a Hamayel, a noncitizen and Palestinian national. *Id.* at 13a, 15a. Together they have three children, all of whom are U.S. citizens. *See id.* at 13a. About three years after they married, Ms. Bouarfa filed a Form I-130 petition seeking to classify her husband as an immediate relative, which would make him eligible for adjustment to a permanent immigration status. *Id.* at 15a. On January 6, 2015, USCIS approved Ms. Bouarfa's petition. *Id.*

2. More than two years later, on March 1, 2017, USCIS issued a Notice of Intent to Revoke ("NOIR") its approval of Ms. Bouarfa's petition. *Id.* In the NOIR, USCIS explained that "it never should have approved [the] I-130 petition in the first place because there was substantial and probative evidence that Mr. Hamayel entered his first marriage for the purpose of evading immigration laws." *Id.* Had USCIS taken "into account a previous finding that Mr. Hamayel had entered into a sham marriage," USCIS would not have "initially granted the petition."

Id. at 12a. Ms. Bouarfa timely responded to the NOIR, offering evidence that her husband's previous marriage was legitimate. *Id.* at 15a.

On June 7, 2017, USCIS revoked approval of Ms. Bouarfa's petition, citing 8 U.S.C. § 1154(c). *Id.* at 15a, 20a. Its decision relied on the previous "sham marriage" finding. *See id.* at 15a-16a. Ms. Bouarfa timely appealed to the Board of Immigration Appeals (BIA). *Id.* at 16a. On December 1, 2021, the BIA dismissed her appeal. *Id.* The BIA upheld USCIS's determination that Section 1154(c) barred approval of the petition, crediting statements about Mr. Hamayel's prior marriage that were later retracted. *Id.* at 15a-16a.

At the time of the BIA's affirmance of the revocation decision, Mr. Hamayel had lived in the United States for well over a decade and his and Ms. Bouarfa's children had started enrolling in grade school. If Mr. Hamayel is removed, the family would be forced to move all three young children to Palestine, or have them live permanently separated from their father.

3. On January 27, 2022, Ms. Bouarfa filed a complaint in the United States District Court for the Middle District of Florida, seeking review of the BIA's decision under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *Id.* at 16a; CA11 App. 3-11. The district court dismissed her complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. App. 18a-24a.

The district court noted that USCIS had revoked Ms. Bouarfa's petition pursuant to Section 1155. *Id.* at 19a. But the court explained that Section 1155 is "not the only relevant provision here," because USCIS

"clearly stated it based its revocation on" Section 1154(c). *Id.* at 20a. Because Section 1154(c) "'impose[s] discretionless obligations,'" the district court reasoned, "[h]ad USCIS denied Plaintiff's visa petition in the first instance—as mandated by § 1154(c)—that denial would have been subject to judicial review." *Id.* at 21a (quoting *Lopez v. Davis*, 531 U.S. 230, 241 (2001)). But the case was "complicated" by the fact that USCIS first approved Ms. Bouarfa's petition and later revoked its approval. *Id.* The district court believed that it was "bound to follow" nonprecedential Eleventh Circuit cases indicating that the revocation of a visa petition is a "discretionary decision insulated from judicial review." *Id.* at 24a, 19a-20a (citing *Sands v. U.S. Dep't of Homeland Sec.*, 308 F. App'x 418, 419-20 (11th Cir.) (per curiam), *cert. denied*, 558 U.S. 817 (2009); *Karpeeva v. U.S. Dep't of Homeland Sec. Citizenship & Immigr. Servs.*, 432 F. App'x 919, 925 (11th Cir.), *cert. denied*, 565 U.S. 1036 (2011)). It thus dismissed the case for lack of subject-matter jurisdiction.

The district court was "troubled by the potential implications of this framework." *Id.* at 22a. In particular, the court noted that the "broad language" of the Eleventh Circuit's prior dispositions did "not account for different bases underlying USCIS's revocation decisions," including those based on "a nondiscretionary determination." *Id.* at 24a. It emphasized that "[s]everal courts" have "raise[d] similar concerns," and that the potential for agencies to "dodge judicial review" by revoking, rather than denying, petitions, "would flout Congress's clear grant of subject matter jurisdiction over decisions to deny petitioners' visas because of marriage fraud." *Id.* at

22a-23a (citing *Jomaa v. United States*, 940 F.3d 291, 296 (6th Cir. 2019); *Kucana*, 558 U.S. at 251).

4. A panel of the Eleventh Circuit affirmed. *Id.* at 1a-11a. The Eleventh Circuit's conclusion that it lacked subject-matter jurisdiction to review USCIS's revocation rested on two key holdings.

First, the court held that Section 1252(a)(2)(B)(ii) precludes judicial review of the revocation of a visa petition under Section 1155. *Id.* at 4a-7a. The panel recited the "presumption favoring judicial review of administrative action." *Id.* at 5a-6a (quoting *Kucana*, 558 U.S. at 251). It also acknowledged a circuit split and the presence of contrary authority from the Sixth Circuit and Ninth Circuit on the question. *Id.* at 4a-5a. The panel nevertheless held that "Section 1155 makes clear that the Secretary's authority to revoke the approval of a petition is discretionary." *Id.* at 6a. In its view, the "clear import" of the statute's language—including the words "'may,'" "'at any time,'" and "'what he deems to be good and sufficient cause'"—is that "the Secretary is free to exercise his authority to revoke the approval of a petition as he sees fit." *Id.* (quoting 8 U.S.C. § 1155). Because the court held that the statute unambiguously strips federal court jurisdiction, it found that the presumption in favor of judicial review "d[id] not come into play." *Id.* at 6a-7a.

Second, the panel went further in holding that *all* revocations made under Section 1155 are "discretionary—no matter the basis for revocation." *Id.* at 7a; *see also id.* at 7a-11a. It recognized that an initial denial of Ms. Bouarfa's petition under Section 1154(c) would have been "a non-discretionary decision that is subject to judicial review." *Id.* at 7a-8a. But the court reached the blanket conclusion that all

revocations are unreviewable because "nothing in" Section 1155 "*requires* the Secretary to revoke the approval of a petition in any circumstance" or to "make any finding of fact or conclusion of law" to support a revocation. *Id.* at 7a.

The Eleventh Circuit explained that under its precedent, Section 1252 does not strip jurisdiction for two types of challenges to discretionary decisions: (i) a claim that USCIS erred in a nondiscretionary determination that was a statutory predicate to the exercise of discretion or (ii) a claim that USCIS failed to follow the correct procedure in making the decision. *Id.* at 8a-9a. But the Eleventh Circuit held that visa revocation decisions did not fall within either of these categories of reviewable decisions. Ms. Bouarfa's claim, the panel asserted, was simply "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.

In the Eleventh Circuit's view, it was immaterial that Ms. Bouarfa's challenge rested on Section 1154(c) and that the agency itself had "articulated a standard to guide its evaluation of whether good and sufficient cause exists" for a revocation decision based on marriage fraud bar—*i.e.*, whether there was "substantial and probative evidence" that a beneficiary entered a marriage to evade the immigration laws. *Id.* at 10a-11a, 18a. In so holding, the Eleventh Circuit expressly departed from the Sixth Circuit's approach, which permits review of revocations based on "'non-discretionary act[s] of "error correction."'" *Id.* at 7a (quoting *Jomaa*, 940 F.3d at 296). And the Eleventh Circuit acknowledged that the Ninth Circuit would find that a revocation based on identical facts was "subject to judicial

review." *Id.* at 5a (citing *ANA Int'l Inc. v. Way*, 393 F.3d 886, 894 (9th Cir. 2004)).

REASONS FOR GRANTING THE WRIT

This case is an obvious candidate for certiorari. The Eleventh Circuit's decision deepens an entrenched circuit conflict that the courts below—and numerous other courts and commentators—have all acknowledged. The decision is deeply flawed and creates wholly illogical distinctions governing access to judicial review. And the question presented is of undoubted importance, implicating the uniform administration of the Nation's immigration laws in an area of profound significance—the separation of families who have made their lives in this country in reliance on the government's decisions. The petition should be granted.

I. The Courts Of Appeals Are Divided On The Question Presented

Certiorari is warranted in light of the acknowledged and well-developed circuit split over whether a citizen can obtain judicial review of the revocation of an approved visa petition on the basis of a nondiscretionary requirement, such as Section 1154(c)'s marriage-fraud bar. The Sixth Circuit permits judicial review of such revocations where the agency approved the petition despite its purported noncompliance with Section 1154(c) and later revoked approval of the petition to "correct" that error. The Ninth Circuit also permits judicial review of revocation decisions under Section 1155 when those decisions rest on the application of nondiscretionary criteria. But like the Eleventh Circuit in the decision below, the Second, Third, and Seventh Circuits all hold that courts lack subject-matter jurisdiction to

review decisions to revoke approval of visa petitions based on nondiscretionary requirements. This stark conflict over the reviewability of revocation decisions affects not just marriage-fraud determinations, but revocations based on a wide range of requirements the agency must consider when deciding whether to approve a petition. The Court's guidance is sorely needed.

1. In the decision below, the Eleventh Circuit held that USCIS's decision to revoke approval of a visa petition pursuant to a Section 1154(c) marriage-fraud finding is not subject to judicial review. It did not matter that the agency invoked Section 1154(c) as the basis for its revocation—a nondiscretionary provision that forbids approval of a petition upon the finding that the beneficiary had entered a fraudulent marriage. Pet. 7a-8a. In the panel's view, all revocation decisions are discretionary, "no matter the basis," and Ms. Bouarfa thus could not seek judicial review. *Id.* at 7a.

2. As the Eleventh Circuit recognized, this holding directly conflicts with decisions of the Sixth Circuit and the Ninth Circuit, which have reached the opposite result on the question presented when faced with identical facts.

a. In *Jomaa v. United States*, the Sixth Circuit held that it had jurisdiction to review the revocation of approval of a visa petition based on a finding that the petitioner was "ineligible for a visa under [Section] 1154(c)." 940 F.3d 291, 294-96 (6th Cir. 2019). As in Ms. Bouarfa's case, USCIS revoked approval of a visa petition on the ground that it mistakenly overlooked evidence that the beneficiary had allegedly entered a marriage to evade immigration laws. *See id.* at 294. And, as in Ms.

Bouarfa's case, the visa petitioner argued that the beneficiary had not engaged in marriage fraud proscribed by Section 1154(c). *Id.* But the Sixth Circuit reached the opposite result from the Eleventh Circuit here. The court explained that the "critical question" was whether the agency's "decision to revoke the visa petition after discovering its mistake" was subject to judicial review. *Id.* at 296. Emphasizing that "§ 1155 is not the only relevant provision here," the Sixth Circuit analyzed the language of Section 1154(c), concluding that the provision "impose[s]" a "discretionless obligation[]" on the reviewing agency to deny a visa petition in a case of marriage fraud. *Id.* at 295 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008)).

Jomaa distinguished a prior Sixth Circuit decision holding that a Section 1155 revocation was unreviewable, *Mehanna v. United States Citizenship & Immigration Services*, 677 F.3d 312 (6th Cir. 2012). 940 F.3d at 295. Unlike the revocation in *Mehanna*, the court explained, the revocation at issue in *Jomaa* "made it abundantly clear that [USCIS's] decision to revoke the visa petition was primarily 'based on'" Section 1154(c), which lacks any "discretion-indicating language." *Id.* at 295-96. The court noted that "if USCIS had denied the visa petition here pursuant to § 1154(c) in the first instance[,] . . . that decision would have been nondiscretionary and thus subject to judicial review." *Id.* at 296. Because the "inquiry" into the availability of judicial review "is not formalistic," the Sixth Circuit held that a nondiscretionary determination under Section 1154(c) is subject to review, even if it "underlie[s]" an "ultimately discretionary" revocation decision. *Id.*

(quoting *Privett v. Sec'y, Dep't of Homeland Sec.*, 865 F.3d 375, 379 (6th Cir. 2017)).

To hold otherwise, the Sixth Circuit explained, would allow USCIS to "evade judicial review by granting a visa petition it should have denied outright and then immediately revoking it." *Id.* That result "would flout Congress's clear grant of subject-matter jurisdiction over decisions to deny petitioners visas because of marriage fraud." *Id.*

b. The Eleventh Circuit's rule also conflicts with Ninth Circuit precedent. In *ANA International, Inc. v. Way*, the Ninth Circuit held that, because "the authority of the Attorney General to revoke visa petitions is bounded by objective criteria," courts can review a decision to revoke approval. 393 F.3d 886, 894 (9th Cir. 2004). The court noted that the right or power to revoke an approved petition is subject to a "meaningful standard"—that is, whether there was "'good and sufficient cause'" for the agency's revocation. *Id.* (quoting *Matter of Tawfik*, 20 I. & N. Dec. 166, 167 (B.I.A. 1990)). The court emphasized that to construe the statute as providing limitless discretion would "render the words 'good and sufficient cause' meaningless." *Id.* at 893. Because "the right or power to" revoke an approved visa petition under Section 1155 was "not entirely within the Attorney General's judgment or conscience," the Ninth Circuit concluded that such revocation decisions can be subject to judicial review. *Id.* at 894 (citation omitted).

In holding that Section 1252(a)(2)(B)(ii) did not bar judicial review, the Ninth Circuit explained that the revocation decision at issue rested on a statutory provision separate from Section 1155 that, as here, supplied plainly objective criteria. *See id.* at 894-95.

In *ANA International*, the agency's revocation relied on 8 U.S.C. § 1101(a)(44)—a provision that defines when an individual is employed in a "managerial capacity" for purposes of immigration laws. *Id.* As the court noted, Section 1101(a)(44) "defines the notion of 'managerial capacity'" with reference to "detailed criteria." *Id.* The Ninth Circuit held that the agency's reliance on Section 1101(a)(44)'s "discrete legal classification[] . . . to reach a decision" rendered the "meaning of that particular legal classification . . . a reviewable point of law." *Id.* at 895. And the settled "rule," the court explained, is that "any purely legal, non-discretionary question that was a decision factor remains reviewable, whether or not the decision as a whole is discretionary." *Id.* The Ninth Circuit's reasoning on this point aligns with the Sixth Circuit's: both courts have recognized that even when a decision is committed to the agency's discretion, any *underlying* decision that is guided by "non-discretionary"—and thus judicially reviewable—criteria remains subject to review. *Id.*; *Jomaa*, 940 F.3d at 296.

As noted, *ANA International* concerned a challenge to a revocation of an employment visa, but the Ninth Circuit has also applied its holding to revocations to other nondiscretionary criteria, including to facts identical to those presented here. Since *ANA International*, courts within the Ninth Circuit have reviewed numerous revocation decisions that, like Ms. Bouarfa's petition, were made pursuant to Section 1154(c). *See, e.g.*, *Sandhu v. Sessions*, 856 F. App'x 74, 75 (9th Cir. 2021); *Naiker v. U.S. Citizenship & Immigr. Servs.*, 352 F. Supp. 3d 1067, 1072-74 (W.D. Wash. 2018); *Koth v. U.S. Dep't of Homeland Sec.*, 656 F. App'x 321, 323 (9th Cir. 2016);

Tandel v. Holder, No. C-09-1319, 2009 WL 2871126, at *3-5 (N.D. Cal. Sept. 1, 2009).

3. The Sixth Circuit's and Ninth Circuit's holdings are in direct conflict with the decision below, as well as decisions by the Second, Third, and Seventh Circuits. The Seventh Circuit's decision specifically involved Section 1154(c)'s sham-marriage bar, while the Second and Third Circuits considered revocations based on other nondiscretionary criteria. Like the Eleventh Circuit, these courts focused their analysis on the language of Section 1155 alone, neglecting the statutory requirements that the revocations were based on when determining whether judicial review is available.

a. In *El-Khader v. Monica*, the Seventh Circuit held that the district court lacked jurisdiction to review the revocation of a previously approved visa petition on the grounds of Section 1154(c)'s marriage-based prohibition. *See* 366 F.3d 562, 568 (7th Cir. 2004). The court asserted that decisions under Section 1155 are discretionary, and that the determination of whether "good and sufficient cause" exists to revoke an approved petition "necessarily is highly subjective." *Id.* at 567. It also rejected the plaintiff's contention that the nondiscretionary nature of Section 1154(c) rendered a revocation based on Section 1154(c) reviewable. *Id.* at 568. The court held instead that "the fact that the INS is required to deny petitions to those who have committed marriage fraud in no way limits" the agency's discretion to revoke an approval. *Id.* Like the Eleventh Circuit, the Seventh Circuit thus embraced a framework that treats the same substantive decision as reviewable in the context of an initial denial, but unreviewable thereafter—even when the visa is revoked simply

because approval "should have never have [happened] in the first instance." *Id.*[4]

b. The Third Circuit has likewise found that revocation decisions under Section 1155 are unreviewable, even when based on nondiscretionary criteria. In *Jilin Pharmaceutical USA, Inc. v. Chertoff*, an approved employment-based visa was revoked because the agency determined that the petitioner "had not established that he worked in an executive or managerial capacity." 447 F.3d 196, 198 (3d Cir. 2006). The Third Circuit held that revocations under Section 1155 are "committed solely to administrative discretion." *Id.* at 203. In so concluding, the Third Circuit rejected an argument "[t]racking the Ninth Circuit's logic" that nondiscretionary criteria underlying a revocation were reviewable. *Id.* at 203-04. The court stated that "although Congress may have defined the roles of a 'manager' and 'executive,'" the agency's "actual application of those definitions" is discretionary when the agency revokes a visa approval. *Id.* at 204. The Third Circuit recognized that insulating revocations based on nondiscretionary criteria from review "may be an inequitable result," but insisted it was "the system Congress has created." *Id.* at 205 n.11.

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[4] In cases involving revocations based on findings of marriage fraud, the Fifth, Eighth, and Tenth Circuits have held that revocations are discretionary and unreviewable. *See Ghanem v. Upchurch*, 481 F.3d 222, 224 (5th Cir. 2007); *Abdelwahab v. Frazier*, 578 F.3d 817, 821 (8th Cir. 2009); *Green v. Napolitano*, 627 F.3d 1341, 1347-48 (10th Cir. 2010). None of these circuits, however, directly addressed the implications of the fact that Section 1154(c) imposes a nondiscretionary requirement.

c. The Second Circuit has reached the same conclusion. In *Nouritajer v. Jaddou*, the Second Circuit considered a revocation based on a "finding th[at a] previous grant" of an employment visa petition "was in error" because the employer could not pay the proffered wage and the petitioner failed to establish their qualifications for the position.[5] 18 F.4th 85, 87 (2d Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022). The petitioner argued that in revoking approval, the agency's denial of an appeal constituted "a non-discretionary eligibility determination on the merits that [wa]s subject to judicial review." *Id.* at 90. But the Second Circuit held that review was barred. The court reasoned that even though the agency "outlin[ed] the eligibility requirements for an employment-based visa," it also made clear that approval could be revoked for "good and sufficient cause." *Id.* (citation omitted). Thus, under the Second Circuit's precedent, a revocation decision is insulated from judicial review, regardless of the reason for the revocation. *Id.*[6]

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[5] The plaintiff in *Nouritajer* unsuccessfully sought certiorari, but that petition neither cited the Sixth Circuit's decision in *Jomaa* nor addressed the circuit conflict at issue here. *See generally* Cert. Pet., *Nouritajer v. Jaddou*, 143 S. Ct. 442 (2022) (No. 21-1446), 2022 WL 1559618.

[6] Two other courts of appeals have held that a revocation under Section 1155 is not subject to judicial review without directly addressing whether nondiscretionary criteria underlying those revocations could be subject to judicial review. *See, e.g.*, *Bernardo ex rel. M&K Eng'g, Inc. v. Johnson*, 814 F.3d 481, 482-83, 494 (1st Cir.) (revocation based on failure to meet minimum experience requirements), *cert. denied*, 579 U.S. 917 (2016); *iTech U.S., Inc. v. Renaud*, 5 F.4th 59, 61, 68 (D.C. Cir. 2021) (revocation based on employer's inability to pay proffered

d. Courts within the Second and Third Circuits have applied the rules stated in *Nouritajer* and *Jilin* to reject efforts to obtain review of Section 1154(c) decisions that underpin revocations. *Agyapomaa v. Mayorkas*, --- F. Supp. 3d ---, 2023 WL 4205144, at *4-6 (D. Conn. June 27, 2023) (concluding that "the reasoning in *Nouritajer*" precluded review of marriage-fraud determination underlying revocation); *Vargas v. Lynch*, 214 F. Supp. 3d 388, 396 (E.D. Pa. 2016) ("[T]he *Jilin* rule is just that: a rule."). There is thus little doubt that in a case involving facts identical to Ms. Bouarfa's, the Second and Third Circuits would hold that they lacked jurisdiction to review a nondiscretionary Section 1154(c) decision that underlies a revocation.

5. In short, this Circuit conflict is open, acknowledged and undeniable. App. 4a-5a; *see also* 14A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Jurisdiction* § 3664 (4th ed., Apr. 2023) ("The courts of appeal also are divided on whether the decision to revoke visa petitions is discretionary."); 11 Thomas K. Ragland, *Business & Commercial Litigation in Federal Courts* § 123:10 (5th ed. Nov. 2022) (recognizing split). And there is

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wage and employee's lack of qualifications), *cert. denied*, 2022 WL 1611799 (U.S. May 23, 2022).

The Fourth Circuit has also held that a petitioner may not seek judicial review of the decision to revoke approval of his visa petition. *See Polfliet v. Cuccinelli*, 955 F.3d 377, 379, 383 (4th Cir. 2020) (revocation based on prior conviction for possessing child pornography). However, that case involved a revocation made pursuant to a provision granting "sole and unreviewable discretion" to the Secretary, and thus differs from the nondiscretionary requirements at issue in the other cited cases. *Id.* at 379 (quoting 8 U.S.C. § 1154(a)(1)(A)(viii)).

no reason to believe that this conflict will resolve itself without this Court's intervention. Perhaps before the Sixth Circuit's decision in *Jomaa*, the Ninth Circuit may have considered revisiting its rule to align with other circuits' precedent. But now that the Sixth Circuit has deepened the split, there is no reason to think that the Ninth Circuit will change course. Indeed, the Ninth Circuit's rule has endured for more than two decades. *See, e.g.*, *Herrera v. U.S. Citizenship & Immigr. Servs.*, 571 F.3d 881, 885 (9th Cir. 2009); *Love Korean Church v. Chertoff*, 549 F.3d 749, 753 (9th Cir. 2008); *see also Sandhu*, 856 F. App'x at 75; *George v. United States*, 694 F. App'x 600, 601 (9th Cir. 2017); *Koth*, 656 F. App'x at 323; *Wah Yuet (USA), Inc. v. Holder*, 370 F. App'x 785, 786 (9th Cir. 2010); *Top Set Int'l, Inc. v. Neufeld*, 318 F. App'x 578, 581-82 (9th Cir. 2009); *Woong Joo Yoon v. INS*, 236 F. App'x 270, 271 (9th Cir. 2007); *R.E.M. Int'l v. Neufeld*, 210 F. App'x 656, 657 (9th Cir. 2006).

The result is that visa petitioners will face different access to judicial review—and different ultimate outcomes—depending on where they reside.[7] This is exactly the kind of intractable conflict and

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[7] *Compare, e.g.*, *Ved v. U.S. Citizenship & Immigr. Servs.*, No. 22-cv-0088, 2023 WL 2372360, at *9 (D. Alaska Mar. 6, 2023) (finding revocation arbitrary and capricious and directing agency to reinstate petition), *and Zamana v. Renaud*, No. 21-cv-0125, 2022 WL 952739, at *5 (S.D. Ohio Mar. 30, 2022) (holding that court could review revocation based on nondiscretionary labor certification requirement), *with Agyapomaa,* 2023 WL 4205144, at *4-6 (concluding that court lacked jurisdiction to review underlying basis of revocation), *and Ahmed v. U.S. Citizenship & Immigr. Servs.*, No. 22-4406, 2023 WL 2431997, at *2 (E.D. La. Mar. 8, 2023) (dismissing revocation challenge for lack of subject-matter jurisdiction).

geographic inconsistency in the administration of federal law that this Court is obligated to resolve.

II. The Eleventh Circuit's Decision Is Wrong

Certiorari is also warranted because the decision below cannot be squared with text, precedent, or common sense.

1. Section 1252(a)(2)(B)(ii) strips courts of jurisdiction to review a "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." 8 U.S.C. § 1252(a)(2)(B)(ii). But courts retain jurisdiction to review decisions that are not "specified" to be "in the discretion" of the Secretary. *Id.* As this Court has explained, "Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General's discretionary authority in the statute." *Kucana v. Holder*, 558 U.S. 233, 247 (2010).

In construing this limit on jurisdiction, circuit courts have recognized that Section 1252(a)(2)(B)(ii) does not bar review of "non-discretionary decisions that underlie determinations that are ultimately discretionary." *Hosseini v. Johnson*, 826 F.3d 354, 358 (6th Cir. 2016) (citation omitted); *id.* at 359 (evaluating 8 U.S.C. § 1182(a)(3)(B)(iv)'s nondiscretionary definition of "Engage in terrorist activity"); *Ibrahimi v. Holder*, 566 F.3d 758, 763-64 (8th Cir. 2009) (rejecting argument that Section 1252(a)(2)(B) barred review of underlying, nondiscretionary "question of whether a marriage was entered into in good faith" that was a predicate to the denial of a waiver under 8 U.S.C. § 1186a(c)).

Put another way, the fact that a "vehicle for" a question's "presentment involves a discretionary determination" does not alter the character of a *nondiscretionary* decision underlying that exercise of discretion. *Velázquez v. Garland*, 82 F.4th 909, 914 (10th Cir. 2023) (construing 8 U.S.C. § 1252(a)(2)(D)'s exception to bar on judicial review). Such a nondiscretionary decision is still subject to review.

This Court's precedent supports this limit on the reach of Section 1252(a)(2)(B)(ii)'s judicial review bar. This Court has long "recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *INS v. St. Cyr*, 533 U.S. 289, 307-08 (2001). With respect to determinations "'governed by specific statutory standards,'" applicants had "a 'right to a ruling on their eligibility.'" *Id.* (citation omitted). This was so "even though the actual granting of relief was 'not a matter of right under any circumstances.'" *Id.* Accordingly, just as courts have separated underlying eligibility determinations from ultimate exercises of discretion, courts considering Section 1252(a)(2)(B)(ii)'s bar must separate underlying nondiscretionary decisions from ultimate discretionary decisions. The government itself draws the same line: it has long maintained that Section 1252(a)(2)(B) "bars review of discretionary determinations, but *not of underlying non-discretionary determinations*." Br. for Resp't Supporting Pet'r 11, 23, *Patel v. Garland*, 596 U.S. 328 (2022) (No. 20-979) (emphasis added).[8]

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[8] This Court held in *Patel v. Garland* that the specific (and expansive) language of the provision at issue there—Section

2. Section 1154(c) mandates that "no petition shall be approved if" USCIS determines the noncitizen previously entered a marriage to evade the immigration laws. 8 U.S.C § 1154(c). As this Court has repeatedly held, "[t]he word 'shall' generally imposes a nondiscretionary duty." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018); *see also Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020). Congress thus employed language that "clear[ly] grant[ed]" federal courts jurisdiction to review marriage-fraud determinations. *Jomaa*, 940 F.3d at 296. Indeed, as the Eleventh Circuit and the government recognized below, App. 7a-8a, every circuit to have considered the question agrees that the text of Section 1154(c) imposes a nondiscretionary duty on USCIS, which is subject to judicial review. *See, e.g.*, *Ginters v. Frazier*, 614 F.3d 822, 827 (8th Cir. 2010) ("[W]e long ago decided the district courts have jurisdiction to review a decision on the merits of an I-130 petition to classify an alien as a relative of a United States citizen"); *Ruiz v. Mukasey*, 552 F.3d 269, 275-76 (2d Cir. 2009); *Ogbolumani v. Napolitano*, 557 F.3d 729, 733 (7th Cir. 2009); *Ayanbadejo v. Chertoff*, 517 F.3d 273, 278 (5th Cir. 2008). Marriage-fraud determinations under Section 1154(c) therefore fall outside Section 1252(a)(2)(B)(ii)'s sweep, and

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1252(a)(2)(B)(i), which bars "review of *any* judgment *regarding* the granting of relief" under certain statutory provisions—encompassed underlying findings of fact. 596 U.S. 328, 338, 343 (2022). But that holding interpreting the language of Section 1252(a)(2)(B)(i) does not alter the general rule that the government acknowledged: an underlying nondiscretionary decision remains reviewable, even when made in the context of a decision that is ultimately discretionary.

courts retain jurisdiction to review them. *See Kucana*, 558 U.S. at 247-48.

The question in this case is whether the *same* nondiscretionary determination can be reviewed when it underlies a revocation decision, instead of an approval decision. The answer is yes: the agency's Section 1154(c) determination does not become discretionary and unreviewable simply because the agency invokes that determination as the basis for a revocation under Section 1155. Even if the ultimate decision to revoke a visa under Section 1155 is discretionary, a court retains jurisdiction to review the *underlying*, *nondiscretionary* determination of whether Section 1154(c)'s criteria for the marriage-fraud bar are satisfied. *See Jomaa*, 940 F.3d at 295; *supra* at 23-24. Under the well-recognized principle that limiting "review of discretionary determinations" does not bar review of "underlying non-discretionary determinations," *Patel* Br. for Resp't Supporting Pet'r 11, 23, the fact that ultimate revocation decisions are discretionary does not bar review of the underlying marriage fraud determination.

3. The text of Section 1155 further supports this conclusion. When USCIS explicitly and exclusively relies on an objective determination—like whether there was marriage fraud—as "good and sufficient cause" when invoking Section 1155, there is plainly an intelligible basis upon which to subject the government's action to judicial review. Here, as the panel recognized, "the agency *has* articulated a standard to guide its evaluation of whether good and sufficient cause exists." App. 10a (emphasis added) (citing *Matter of Ho*, 19 I. & N. Dec. 582, 589-90 (B.I.A. 1988)); *see, e.g.*, *Matter of Tawfik*, 20 I. & N. Dec. at 167. The agency relied on *Matter of Ho* to define "good

and sufficient cause," which it described as an inquiry into whether "the evidence in the record at the time of the Director's decision, including any explanatory and rebuttal evidence submitted in response to the NOIR, warrants a denial because the petitioner has not sustained his or her burden of proof." CA11 App. 15 (citing *Matter of Ho*, 19 I. & N. Dec. at 589). In these circumstances at least, "good and sufficient cause" provides a meaningful standard for review—namely, the same statutory criteria that regularly apply to the objective determination.[9]

4. "Any lingering doubt" about reviewability must be resolved under the strong "presumption favoring judicial review of administrative action." *Kucana*, 558 U.S. at 251; *see St. Cyr*, 533 U.S. at 298. This Court has "consistently applied that interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana*, 558 U.S. at 251; *see Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020). Under the presumption, "judicial review of executive action 'will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *De Martinez v. Lamagno*, 515 U.S. 417, 424-25 (1995) (citation omitted).

Here, there is no reason to believe Congress intended to cut off judicial review of Section 1154(c) marriage-fraud determinations—which Congress has

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[9] Moreover, as the Ninth Circuit has explained, "good and sufficient cause" itself arguably provides a "meaningful standard" for judicial review. *ANA Int'l, Inc.*, 393 F.3d at 894; *see Bernardo*, 814 F.3d at 496 (Lipez, J., dissenting) (explaining that "good and sufficient cause" has a "clear objective meaning" and collecting cases).

"clear[ly] grant[ed]" federal courts jurisdiction to review, *Jomaa*, 940 F.3d at 296—when that decision underlies a revocation. In fact, there is strong reason to believe the opposite: Congress knew how to employ language that would merge nondiscretionary with related discretionary decisions, and it did so in the neighboring Section 1252(a)(2)(B)(i). *See Patel v. Garland*, 596 U.S. 328, 339 (2022) (Congress' use of "regarding" expands Section 1252(a)(2)(B)(i) to "encompass[] not just 'the granting of relief but also any judgment relating to the granting of relief'" (emphasis omitted)). The statutory scheme thus provides no indication that Congress intended strip courts of jurisdiction to review Section 1154(c) determinations, much less the "clear and convincing evidence" required to override the longstanding presumption of judicial review. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63-64 (1993) (citation omitted).

5. The Eleventh Circuit ignored these settled principles. In the Eleventh Circuit's view, Section 1155 foreclosed review because "nothing in the statute *requires*" or "*prohibit*[*s*]" the revocation of "any petition" "in any circumstance." App. 7a. But that reasoning collapsed the well-settled distinction between unreviewable ultimate decisions and the reviewable nondiscretionary determinations *underlying* them. *See supra* at 23-24.[10] The Eleventh

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[10] *See also Lemuz-Hernandez v. Lynch*, 809 F.3d 392, 393 (8th Cir. 2015) ("We do not have jurisdiction to review the discretionary denial of cancellation of removal. We do, however, have jurisdiction to review 'the non-discretionary determinations underlying such a decision.'" (citations omitted)); *Nguyen v. Mukasey*, 522 F.3d 853, 854-55 (8th Cir. 2008) ("[W]e

Circuit defined discretion solely in terms of whether the agency had ultimate authority to revoke a visa on any grounds it chose. But, here, the agency's purported exercise of discretion depended solely on a concededly reviewable underlying decision. Under settled precedent, that underlying decision remains reviewable, even if the agency's ultimate decision was nominally discretionary.

Indeed, the Eleventh Circuit itself acknowledged that "Section 1252 does not foreclose judicial review of all claims connected to a discretionary decision," including review of "predicate" nondiscretionary determinations and claims of procedural error. App. 8a-9a. Yet the panel treated such claims as ad hoc exceptions, rather than as examples that belong to a broader category of underlying nondiscretionary determinations governed by objective legal criteria that courts retain jurisdiction to review. When, as in this case, agreed-upon legal standards govern an assessment of nondiscretionary criteria, there is no reason to withhold review simply because the decision is styled as a revocation rather than a denial.

6. By ignoring those principles, the Eleventh Circuit's rule leads to untenable results. Under the Eleventh Circuit's holding, a petitioner can obtain judicial review if USCIS fulfills its obligation to assess nondiscretionary criteria when deciding whether to

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may also review the nondiscretionary determinations underlying the denial of relief . . . ."); *Sepulveda v. Gonzales*, 407 F.3d 59, 63 (2d Cir. 2005) ("[Section] 1252(a)(2)(B) does not bar judicial review of nondiscretionary, or purely legal, decisions . . . ."); *Pinho v. Gonzales*, 432 F.3d 193, 204 (3d Cir. 2005) ("Determination of *eligibility* for adjustment of status—unlike the *granting* of adjustment itself—is a purely legal question and does not implicate agency discretion.").

approve a petition. But a petitioner cannot obtain judicial review if USCIS mistakenly fails to consider the nondiscretionary criteria it was supposed to—and then later purports to "correct" its mistake through a revocation decision. In other words, when the agency correctly discharges its duty to consider the relevant criteria, review is available. And when the agency *errs* and ignores a statutorily imposed duty, review is barred. That makes absolutely no sense. Yet the decision below mandates this arbitrary result. *See supra* at 11-13, 18-19.

The arbitrariness of the Eleventh Circuit's rule does not end there. A petitioner denied review of a visa revocation could file a new application, which would necessarily *have to* be denied because the agency has already stated that the application fails to satisfy nondiscretionary criteria. But that new denial *would* be subject to review, even though it is substantively identical to the agency's revocation decision. The result is that the agency's decision would eventually become reviewable—but only after an arduous, complex process, requiring petitioners to re-apply and wait years for a (foreordained) resolution.[11] That Kafkaesque process underscores that the Eleventh Circuit's rule cannot be correct.

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[11] *See* U.S. Citizenship & Immigr. Servs., *Check Case Processing Times* (last visited Nov. 27, 2023), https://egov.uscis.gov/processing-times (select "I-130," "U.S. citizen filing for a spouse" and "All Field Offices" from dropdown selections, then click "Get processing time") (calculating that 80% of I-130 petitions filed across field offices by citizens on behalf of a spouse, parent, or child are adjudicated within 34.5 months); U.S. Citizenship & Immigr. Servs., *Number of Form I-130 Petition for Alien Relative* (July

Furthermore, as the district court in this case noted, the rule embraced by the Eleventh Circuit gives an executive agency the unfettered ability to prevent a visa petitioner from ever "obtain[ing] judicial review of a discretionary decision that is functionally equivalent to a mandatory denial." *Vargas*, 214 F. Supp. 3d at 396. It is no surprise that the district court here was "troubled" by this apparent "loophole through which agencies could dodge judicial review by collapsing the distinction between nondiscretionary/reviewable determinations and discretionary/unreviewable determinations," noting that the petitioners "could become stuck in perpetual cycles of unresolved, unreviewable petitions," with their only recourse being to "fil[e] yet another I-130 petition and hop[e] USCIS outright denies it this time." App. 22a; *Vargas*, 214 F. Supp. 3d at 396 (noting that, under the Third Circuit's rule, "USCIS and the BIA" could "trap [a visa petitioner] in a perpetual cycle of unresolved petitions"). The decision below thus "place[s] in executive hands authority to remove cases from the Judiciary's domain"—a result that raises significant "[s]eparation-of-powers concerns." *Kucana*, 558 U.S. at 237.

In short, the Eleventh Circuit's decision defies this Court's precedent, the text of the applicable statutes, and common sense. This Court's review is needed.

2023), https://www.uscis.gov/sites/default/files/document/data/i130_performancedata_fy2023_qtr3.pdf (noting that USCIS had a backlog of 1,912,805 pending unresolved I-130 petitions as of June 2023).

III. The Question Presented Is Exceptionally Important

1. There can be no serious doubt that the question presented is of profound importance. It implicates the uniformity of federal law in an area of the utmost personal significance—the unification of families who have lived in, contributed to, and come to depend on this Nation's protections, based on the government's approval of their petition. As this case demonstrates, revocation decisions can have devastating and life-altering consequences for applicants and their families. USCIS's decision to initially grant, and then revoke approval of, petitioner's application means that she will suffer the unconscionable choice between moving her U.S.-born children to Palestine, or forcing her children to live permanently separated from their father.

This Court has recognized that questions regarding the availability of judicial review in such circumstances are of significant "importance." *St. Cyr*, 533 U.S. at 293. Here, the BIA affirmed the denial of Ms. Bouarfa's petition based on testimony that was later retracted. App. 15a-16a. Judicial review is a vital safeguard in such circumstances, because the availability of review determines whether decisions that affect someone's right to live in the United States are subject to "meaningful" scrutiny, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991), or left solely to a "ministerial officer," *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (citation omitted). Accordingly, this Court regularly intervenes to resolve circuit conflicts over the scope and availability of judicial review of agency determinations under the Nation's immigration laws. *See, e.g.*, *Kucana*, 558 U.S. at 240-

41 (holding that judicial review was available for a decision declared discretionary by regulation, rather than statute); *Mata v. Lynch*, 576 U.S. 143, 147 (2015) (holding that denial of motion to reopen is reviewable); *Guerrero-Lasprilla*, 140 S. Ct. at 1068 (holding that agency decisions addressing "'questions of law,'" including "application of a legal standard to undisputed or established facts," are reviewable); *Patel*, 596 U.S. at 336 (granting certiorari to resolve a circuit conflict "as to the scope of § 1252(a)(2)(B)(i)").

2. The question presented is also frequently recurring. In the three-month period between April and June 2023 alone, USCIS received more than 230,000 Form I-130 petitions, with more than 1.9 million petitions pending further adjudication.[12] When such petitions are approved and subsequently revoked, visa petitioners frequently challenge those revocations in federal court. Indeed, in the four years since the Sixth Circuit's decision in *Jomaa* alone, numerous district courts have addressed cases in which a visa applicant has sought judicial review of a revocation involving nondiscretionary criteria.[13] The

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[12] U.S. Citizenship & Immigr. Servs., *Number of Form I-130 Petition for Alien Relative*, *supra* n.11.

[13] *See, e.g.*, *Ved*, 2023 WL 2372360, at *9 (under Ninth Circuit's rule, reviewing and finding arbitrary and capricious revocation based on nondiscretionary work-experience requirement); *Zamana*, 2022 WL 952739, at *5 (under Sixth Circuit's rule, reviewing revocation because it was based on "nondiscretionary determination" about legitimacy of employer); *Coniglio v. Garland*, 556 F. Supp. 3d 187, 196-99 (E.D.N.Y. 2021) (reviewing challenge to revocation because claims "hinge[d] on [a] determinate, nondiscretionary, and legal question"); *Tes v. U.S. Dep't of State*, No. 17-cv-0175, 2020 WL 885839, at *2-3 (W.D. Wash. Feb. 24, 2020) (under Ninth Circuit's rule,

fact that the question presented is regularly litigated underscores its importance and the need for a uniform answer.

3. This case is an ideal vehicle for resolving this conflict. The question presented was raised and passed upon below in reasoned opinions by the district court and the court of appeals. The Eleventh Circuit's ruling on this jurisdictional question was dispositive of petitioner's attempt to obtain review of USCIS's and the BIA's determination under Section 1154(c). And there is no reason to think that further percolation will dislodge the well-developed circuit conflict on this issue. No obstacles stand in the way of this Court's resolution of the question presented.

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reviewing revocation based on bona fide marriage requirement); *see also T & B Holding Grp., LLC v. Garland*, No. 6:22-cv-1398, 2023 WL 6049195, at *1-2 (M.D. Fla. Sept. 15, 2023) (denying review of challenge to "non-discretionary determinations" in revocation decision pursuant to circuit holding in *Bouarfa*), *appeal docketed*, No. 23-13385 (11th Cir. Oct. 16, 2023); *Agyapomaa*, 2023 WL 4205144, at *4-6 (denying review of revocation challenge despite underlying "non-discretionary" marriage-fraud determination because *Nouritajer* precluded extension of circuit precedent "sanction[ing] parsing [] rulings to separate reviewable, non-discretionary components from non-reviewable, discretionary ones"); *Arayi v. Mayorkas*, No. 21 CV 5373, 2022 WL 1198065, at *2 (N.D. Ill. Apr. 15, 2022) (denying review of revocation based on marriage-fraud bar).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 27, 2023

APPENDIX

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[75 F.4th 1157]

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

Amina BOUARFA, Plaintiff-Appellant,

v.

SECRETARY, DEPARTMENT OF HOMELAND SECURITY, Director, U.S. Citizenship & Immigration Services (USCIS), Defendants-Appellees.

No. 22-12429

Filed: 07/28/2023

Before William Pryor, Chief Judge, Jill Pryor, Circuit Judge, and Proctor,* District Judge.

William Pryor, Chief Judge:

This appeal requires the Court to decide whether the district court had subject-matter jurisdiction over a complaint about the revocation of the approval of a visa petition. *See* 8 U.S.C. § 1155. The Immigration and Nationality Act bars judicial review of certain discretionary immigration decisions. *Id.* § 1252(a)(2)(B)(ii). Amina Bouarfa filed a petition to have her husband classified as her immediate relative so that he would be eligible to adjust his immigration status. The Secretary of the Department of Homeland Security approved the petition but later

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* Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation.

revoked that approval because Bouarfa's husband had entered a previous marriage for the purpose of evading immigration laws. Bouarfa sought judicial review of the Secretary's marriage-fraud determination. The district court dismissed her complaint for lack of subject-matter jurisdiction because it determined that Bouarfa's complaint challenged a discretionary decision. We affirm.

I. BACKGROUND

Amina Bouarfa is a United States citizen. Her husband, Ala'a Hamayel, is not. In 2014, Bouarfa submitted Form I-130 to the Department of Homeland Security to petition to have Hamayel classified as her immediate relative for purposes of the Immigration and Nationality Act. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(a)(1)(A)(i); 8 C.F.R. § 204.1(a)(1) (2022).

The Secretary has delegated many powers under the Act to United States Citizenship and Immigration Services within the Department. *See* 8 C.F.R. §§ 2.1, 100.1 (2022); 6 U.S.C. § 271. The parties do not dispute the legal authority of the officials who dealt with Bouarfa's petition. References in this opinion to the Secretary encompass all officials relevant to Bouarfa's petition.

The Secretary approved the petition in 2015. Two years later, the Secretary notified Bouarfa of an intent to revoke the approval of the petition. *See* 8 U.S.C. § 1155 (permitting the Secretary to revoke the approval of a petition). The Secretary stated that the Department had determined that Hamayel entered into one of his previous marriages solely for the purpose of evading immigration laws. The Act

prohibits the approval of a petition to benefit an alien who has entered a sham marriage. *Id.* § 1154(c)(2).

Bouarfa responded to the notice and attempted to rebut the evidence the Secretary cited. Unpersuaded, the Secretary revoked the approval of Bouarfa's petition. Bouarfa unsuccessfully appealed to the Board of Immigration Appeals.

Bouarfa filed a complaint in the district court against the Secretary and the Director of Citizenship and Immigration Services. She challenged the officials' actions as arbitrary and capricious and stated that "[w]ere the agency to vacate its decision," she would seek injunctive relief and a writ of mandamus compelling the agency to adjudicate her Form I-130. She alleged that the administrative record compels the conclusion that Hamayel's previous marriage was not a sham.

The Secretary and Director moved to dismiss the complaint for lack of subject-matter jurisdiction. *See* FED. R. CIV. P. 12(b)(1). They argued that Bouarfa was "seeking . . . to review an unreviewable revocation decision." They cited a provision of the Act that bars judicial review of certain discretionary decisions. *See* 8 U.S.C. § 1252(a)(2)(B)(ii). They also cited unpublished decisions by this Court, as well as published decisions by our sister circuit courts, that state that the revocation of a visa under section 1155 is a discretionary decision.

The district court granted the motion to dismiss. It determined that a revocation under section 1155 is a discretionary action to which the section 1252 jurisdictional bar applies. It agreed with the officials that "[a]lthough [Bouarfa] attempts to distinguish the basis of the revocation decision from the revocation

decision itself, the relief she seeks betrays that there is no true difference between the two." But it also stated that an initial *denial* of a petition based on a marriage-fraud finding would be a reviewable, non-discretionary decision and expressed concern that there was a "loophole" through which the Department "could evade judicial review by granting a visa petition it should have denied outright and then immediately revoking its approval."

II. STANDARD OF REVIEW

"We review subject matter jurisdiction *de novo*." *Mejia Rodriguez v. U.S. Dep't of Homeland Sec.*, 562 F.3d 1137, 1142 (11th Cir. 2009).

III. DISCUSSION

We divide our discussion into two parts. First, we explain that judicial review of a revocation decision under section 1155 is barred. Second, we explain that judicial review of the cited basis for the revocation decision—the determination that Hamayel had committed marriage fraud and that the marriage fraud served as good and sufficient cause to revoke the approval—is also barred.

A. Courts Lack Jurisdiction over a Section 1155 Revocation

The threshold issue is whether section 1252 bars judicial review of the revocation of a petition approval under section 1155. Bouarfa concedes that the decision to revoke an approval is not subject to judicial review. Although the district judge erroneously treated our unpublished opinions as precedential, we now join most of our sister circuits in holding that a section 1155 revocation is a discretionary decision not subject to judicial review.

See Bernardo ex rel. M & K Eng'g, Inc. v. Johnson, 814 F.3d 481, 482 (1st Cir. 2016); *Nouritajer v. Jaddou*, 18 F.4th 85, 88 (2d Cir. 2021); *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. U.S. Citizenship & Immigr. 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). *But see Jomaa v. United States*, 940 F.3d 291, 295–96 (6th Cir. 2019) (holding that although revocation can be discretionary, a revocation primarily based on discovery of a mistake was "a nondiscretionary act of error correction"); *ANA Int'l Inc. v. Way*, 393 F.3d 886, 894 (9th Cir. 2004) (holding that the authority to revoke the approval of a petition is bounded by objective criteria and therefore subject to judicial review).

The Administrative Procedure Act provides that a person adversely affected by final agency action is entitled to judicial review. 5 U.S.C. §§ 702, 704. "Although the [Administrative Procedure Act] independently does not confer subject-matter jurisdiction, 28 U.S.C. [section] 1331 confers jurisdiction on federal judges to review agency action under federal-question jurisdiction." *Perez v. U.S. Bureau of Citizenship & Immigr. Servs.*, 774 F.3d 960, 965 (11th Cir. 2014). Where a statute bars judicial review or agency action is committed to agency discretion by law, the Administrative Procedure Act does not permit judicial review. *Id.*; *see* 5 U.S.C. § 701(a). "When a statute is reasonably susceptible to"

multiple interpretations, we apply a "presumption favoring judicial review of administrative action." *Kucana v. Holder*, 558 U.S. 233, 251, 130 S.Ct. 827, 175 L.Ed.2d 694 (2010) (citation and internal quotation marks omitted). But that presumption may be rebutted by "clear and convincing evidence." *Id.* at 252, 130 S.Ct. 827 (citation omitted).

Two statutory provisions govern this jurisdictional issue. The Immigration and Nationality Act 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. 8 U.S.C. § 1252(a)(2)(B)(ii). Section 1155 is part of that subchapter. *See id.* ch. 12, subch. II. Section 1155 states 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." *Id.* § 1155.

Section 1155 makes clear that the Secretary's authority to revoke the approval of a petition is discretionary. The clear import of the terms "may," "at any time," and "what he deems to be good and sufficient cause" is that the Secretary is free to exercise his authority to revoke the approval of a petition as he sees fit. *Cf. Brasil v. Sec'y, Dep't of Homeland Sec.*, 28 F.4th 1189, 1192–93 (11th Cir. 2022) (explaining that the provision that "[t]he Attorney General may, when the Attorney General deems it to be in the national interest, waive" certain requirements clearly specifies that the waiver decision is discretionary). Because section 1155 is unambiguous, the presumption in favor of judicial review when a statute is "reasonably susceptible to" multiple interpretations, *Kucana*, 558 U.S. at 251,

130 S.Ct. 827 (citation omitted), does not come into play.

B. Courts Lack Jurisdiction over the Basis for a Section 1155 Revocation

Bouarfa contends that although the decision to revoke the approval of her petition was discretionary, "the underlying basis for the agency's action involve[d] non-discretionary decision-making" that the district court may review. In particular, she cites the "application of [section] 1154(c)," the marriage-fraud bar, to her petition. She frames the issue as whether the revocation "insulates the agency from judicial review of agency action that is otherwise subject to review." We disagree.

The Act makes clear that revocation is discretionary—no matter the basis for revocation. *See* 8 U.S.C. § 1155. The only statutory predicate for revocation is that the Secretary deems there to be good and sufficient cause. *Id.* The statute does not require that the Secretary make any finding of fact or conclusion of law to support that determination. Indeed, 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. *See El-Khader*, 366 F.3d at 568; *contra Jomaa*, 940 F.3d at 296 (holding that a revocation after the discovery of a mistake was a non-discretionary act of "error correction"). Neither does anything in the statute *prohibit* the Secretary from revoking the approval of any petition.

The parties agree that the denial of a petition based on section 1154(c), which provides that "no petition shall be approved" if the alien previously

committed marriage fraud, is a non-discretionary decision that is subject to judicial review. We have previously reviewed the denial of an I-130 petition, although our decision did not explicitly discuss the non-discretionary nature of that decision. *See Mendoza v. Sec'y, Dep't of Homeland Sec.*, 851 F.3d 1348, 1353–56 (11th Cir. 2017). Bouarfa contends 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.

The fundamental flaw in Bouarfa's argument is that it goes to the Secretary's decision how to exercise his discretion, unlike the types of claims we have held are subject to judicial review. Section 1252 does not foreclose judicial review of all claims connected to a discretionary decision. We have identified two types of claims that are not subject to the jurisdictional bar even when the challenged action relates to a discretionary decision. Bouarfa's claim is not within those categories but is instead analogous to a claim that we have held falls under the jurisdictional bar.

The first type of claim courts may review is a claim that the Secretary erred when he made a non-discretionary determination that is a statutory predicate to his exercise of discretion. In *Mejia Rodriguez*, we explained that although the ultimate decision whether to grant an alien temporary protected status is discretionary and not subject to judicial review, the Secretary's determination about the alien's statutory eligibility for that discretionary relief is a non-discretionary decision. *See* 562 F.3d at 1143. By statute, the Secretary cannot grant temporary protected status unless he first determines that the alien is statutorily eligible. *Id.* at 1140 & n.5

(citing 8 U.S.C. § 1254a(c)). So, when the Secretary denied temporary protected status because he determined that the alien was statutorily ineligible, the district court had subject-matter jurisdiction to review the eligibility determination. *Id.* at 1144.

Second, courts may review a claim that the Secretary failed to follow the correct procedure in making a discretionary decision. In *Kurapati v. United States Bureau of Citizenship & Immigration Services*, we determined that the district court had jurisdiction over a claim that the Secretary failed to follow the correct procedure when he revoked his approval of a petition. 775 F.3d 1255, 1262 (11th Cir. 2014). The Secretary does not have the discretion to ignore regulations and binding precedent when he carries out the process to reach a discretionary determination, so section 1252 does not prohibit judicial review of "the conduct of . . . administrative proceedings." *Id.*

Regarding that second category of reviewable claims, we have explained that *Kurapati* does not stand for the proposition that all assertions of procedural error necessarily subject the Secretary's actions to judicial review. When the Secretary has exercised his discretion to deny relief and determined that an earlier procedural error was immaterial to that denial, "[a] petitioner may not sidestep the jurisdictional bar in [section] 1252(a)(2)(B) by reframing a challenge to the agency's denial of relief as a claim of procedural error." *Blanc v. U.S. Att'y Gen.*, 996 F.3d 1274, 1280 (11th Cir. 2021) (applying section 1252(a)(2)(B)(i), which bars review of "any judgment regarding the granting of relief under" enumerated provisions). In such a circumstance, "there is nothing left for us to correct." *Id.*

A claim that the Secretary reached the wrong outcome when he decided how to exercise his discretion stands in stark contrast to a claim of error in determining statutory eligibility or a claim of procedural error. We recently held that section 1252 bars judicial review of a claim that the Secretary erroneously applied his own standard for determining how to exercise his discretion. In *Brasil*, we explained that when a petitioner does not contend that the Secretary failed to follow his own procedures or failed to apply the correct standard from his binding precedent, there is nothing for a court to review. 28 F.4th at 1194. 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. *Id.* at 1191–92, 1194; *see Nouritajer*, 18 F.4th at 89–90.

Bouarfa's complaint, like the one in *Brasil*, is not subject to judicial review. Bouarfa asserts that the Secretary reached the wrong outcome when he determined that there was good and sufficient cause to revoke the approval of her petition. To be sure, the agency has articulated a standard to guide its evaluation of whether good and sufficient cause exists. *See In re Ho*, 19 I. & N. Dec. 582, 590 (B.I.A. 1988) (explaining that there is good and sufficient cause to revoke an approval if the evidence in the record warrants denial). But as we could not review the petitioner's claim in *Brasil* that the Secretary erroneously applied the standard that guides his discretion, we cannot review Bouarfa's complaint that the Secretary reached the wrong conclusion in her case. The sole statutory predicate for revocation is that the Secretary deem that there is good and sufficient cause. 8 U.S.C. § 1155. That the Secretary

has, in his discretion, created additional standards to explain what constitutes good and sufficient cause and linked that determination in Bouarfa's case to the marriage-fraud provision does not alter the bar on judicial review of the Secretary's discretionary decision.

IV. CONCLUSION

We **AFFIRM** the judgment in favor of the Secretary and Director.

[2022 WL 2072995]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

AMINA BOUARFA,

Plaintiff,

v.

Case No: 8:22-cv-224-WFJ-AEP

ALEJANDRO N. MAYORKAS, Secretary, U.S. Department of Homeland Security; UR M. JADDOU, Director, U.S. Citizenship and Immigration Services,

Defendants.
_____/

WILLIAM F. JUNG, UNITED STATES DISTRICT JUDGE

ORDER

Plaintiff Amina Bouarfa filed an I-130 visa petition on behalf of her husband, Ala'a Hamayel. The United States Citizen and Immigration Services ("USCIS") initially granted the petition without taking into account a previous finding that Mr. Hamayel had entered into a sham marriage, making him ineligible for a future visa pursuant to § 204(c) of the Immigration and Nationality Act ("INA"). *See* 8

U.S.C. § 1154(c). Once USCIS discovered the error, it revoked Plaintiff Bouarfa's visa petition and explained that it never should have granted the petition in the first place. After an unsuccessful appeal to the Board of Immigration Appeals, Plaintiff filed the instant case to challenge the revocation.

Before the Court today is a Motion to Dismiss filed by Defendants Alejandro N. Mayorkas—the Secretary of the Department of Homeland Security— and Ur M. Jaddou—the Director of USCIS. Dkt. 8. Defendants argue this Court lacks subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) because the revocation was a discretionary agency decision not subject to judicial review. *Id.* Plaintiff filed a response. Dkt. 11.

After careful review of the record and relevant case law, the Court concludes that it lacks subject matter jurisdiction over this dispute. Defendants' Motion to Dismiss is granted.

BACKGROUND

Plaintiff Bouarfa is a United States citizen married to Ala'a Hamayel ("Mr. Hamayel"), a citizen of the Palestinian Authority. Dkt. 1 ¶¶ 1, 11. Plaintiff Bouarfa and Mr. Hamayel share two children, who are both citizens of the United States. Dkt. 11 at 2.

Mr. Hamayel was married twice before. He first married Ms. Adriana Munoz in March 2007—days after Ms. Munoz's naturalization ceremony to become a United States citizen. Dkt 1-4 at 4; Dkt. 11 at 2. Ms. Munoz filed a Form I-130 Petition for Alien

Relative[1] ("I-130 petition") seeking a spousal visa for Mr. Hamayel. Dkt. 11 at 2. USCIS conducted interviews with Mr. Hamayel and Ms. Munoz to determine whether their marriage was bona fide. *Id.* at 2–3. At the end of an interview, Ms. Munoz signed a sworn statement withdrawing her support for the Form I-130. *Id.* at 3. She stated her marriage to Mr. Hamayel was fraudulent and that she asked him for $5,000 before filing the visa petition on his behalf. Dkt. 1-4 at 4. Defendants accordingly denied Ms. Munoz's Form I-130 petition and initiated deportation proceedings against Mr. Hamayel. Dkt. 11 at 3.

A week later, Ms. Munoz submitted a second Form I-130 petition on Mr. Hamayel's behalf. *Id.* Ms. Munoz attempted to retract her previous admission that her marriage with Mr. Hamayel was fraudulent, saying she made those statements while under duress. *Id.* at 4; Dkt. 1-4 at 4. Nevertheless, Ms. Munoz and Mr. Hamayel divorced soon after, resulting in the denial of Ms. Munoz's second Form I-130 petition. Dkt. 11 at 4.

Just over a year later, in May 2008, Mr. Hamayel married his second wife, Clare Farmer. *Id.* Like Ms. Munoz, Ms. Farmer submitted a Form I-130 petition on Mr. Hamayel's behalf. *Id.* But the couple soon began experiencing marital discord, and they

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[1] "An I-130 beneficiary-petition allows a U.S. citizen to have a qualifying [noncitizen] relative classified as an 'immediate relative' under the [the Immigration and Nationality Act] so that the [noncitizen] relative may then file an application to adjust their immigration status." *Williams v. Sec'y, U.S. Dep't of Homeland Sec.*, 741 F.3d 1228, 1230 (11th Cir. 2014) (citing 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. § 204.1(a)(1)).

divorced. *Id.* at 4–5. USCIS accordingly denied Ms. Farmer's Form I-130 petition. *Id.* at 5.

Plaintiff Bouarfa and Mr. Hamayel married in February 2011. *Id.* About three years later, Plaintiff filed a Form I-130 petition seeking a spousal visa for Mr. Hamayel. Dkt. 1 ¶ 12. Defendant USCIS approved the Form I-130 petition on January 6, 2015. *Id.* at ¶ 13; Dkt. 8 at 3. However, on March 1, 2017, USCIS issued a Notice of Intent to Revoke ("NOIR") its approval of the visa petition. Dkt. 1 ¶ 14; Dkt. 8 at 3. USCIS stated it never should have approved Plaintiff Bouarfa's I-130 petition in the first place because there was substantial and probative evidence that Mr. Hamayel entered his first marriage for the purpose of evading immigration laws. Dkt. 1 ¶ 15. USCIS based this determination on Ms. Munoz's sworn statements that her marriage to Mr. Hamayel was fraudulent and that she asked him for $5,000 to file a Form I-130 petition on his behalf. *Id.*

Plaintiff timely responded to the NOIR, arguing that her husband's previous marriage to Ms. Munoz was bona fide. Dkt. 11 at 5. She attached documentary evidence to support this argument, including Ms. Munoz's later statements that she was under duress when she said her marriage was fraudulent. *Id.* at 5–6.

Defendants officially revoked the approval of Plaintiff's Form I-130 petition on June 7, 2017. Dkt. 1 ¶ 17. Defendants concluded that Ms. Munoz's statements about duress were unpersuasive and failed to undermine the probative value of her initial sworn statement that the marriage was fraudulent. *Id.* Defendants concluded that Mr. Hamayel's marriage to Ms. Munoz was a "sham" and that

Plaintiff's Form I-130 petition had been approved in error. *Id.*

Plaintiff timely appealed the revocation to the Board of Immigration Appeals (the "Board"). *Id.* ¶ 18. The Board dismissed the appeal on December 1, 2021, pursuant to a written opinion. *Id.* ¶ 19; Dkt. 1-4. The Board based its decision on Ms. Munoz's statements that the marriage was fraudulent, saying these statements were more persuasive than her later attempt to retract them. Dkt. 1-4 at 4.

Plaintiff filed the instant case seeking judicial review of Defendants' revocation of its prior acceptance of Plaintiff's Form I-130 petition. Dkt. 1. Plaintiff argues this revocation violated the Administrative Procedure Act, 5 U.S.C. § 706, because the administrative record lacked substantial and probative evidence that Mr. Hamayel fraudulently entered his prior marriage with Ms. Munoz to evade immigration laws. Dkt. 1 ¶ 24. Defendants now move to dismiss the case for lack of subject matter jurisdiction. Dkt. 8.

LEGAL STANDARDS

I. Subject Matter Jurisdiction

A party may bring a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). The plaintiff bears the burden of proving that subject matter jurisdiction exists. *Thompson v. McHugh*, 388 F. App'x 870, 872 (11th Cir. 2010). A Rule 12(b)(1) motion to dismiss may facially or factually challenge a plaintiff's complaint for lack of subject matter jurisdiction. *McElmurray v. Consol. Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). A facial attack requires the court to determine if the plaintiff has sufficiently

advanced a basis for subject matter jurisdiction. *Id.* Conversely, a factual attack challenges the existence of subject matter jurisdiction in fact, regardless of the basis that the plaintiff has alleged in the complaint. *Id.* When considering a factual attack, the court may consider matters outside the pleadings. *Id.*

II. I-130 Petition

The INA establishes the process through which a United States citizen may bring an alien who is a close relative, such as a spouse, to reside lawfully in the United States. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154. To do so, the United States citizen must file an I-130 petition on the alien relative's behalf requesting that USCIS formally recognize the relationship and classify the alien as an "immediate relative." 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. § 204.1(a)(1). The petitioner bears the burden of proving the validity of the claimed relationship by a preponderance of the evidence. 8 C.F.R. §§ 204.1(f), 204.2(a)(2); *Matter of Pazandeh*, 19 I. & N. Dec. 884, 887 (BIA 1989).

The INA prohibits USCIS from approving an I-130 petition if the beneficiary has at any time entered a marriage for the purpose of evading immigration laws:

> [N]o 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.

8 U.S.C. § 1154(c); *see Diaz v. U.S. Citizenship & Immigr. Servs.*, 499 F. App'x 853, 856 (11th Cir. 2012) ("Even if the current marriage is unquestionably bona fide, the visa petition cannot be approved if the beneficiary has previously had an I-130 petition filed on his behalf that was based on a fraudulent marriage."). The USCIS must determine whether there is "substantial and probative evidence" of such a fraudulent marriage. *See* 8 C.F.R. § 204.2(a)(1)(ii); *Matter of Samsen*, 15 I. & N. Dec. 28, 29 (BIA 1974).

ANALYSIS

I. This Court Lacks Subject Matter Jurisdiction To Review § 1155 Revocation Decisions.

Courts ordinarily have jurisdiction under the Administrative Procedure Act ("APA") to review final decisions made by federal administrative agencies. *See* 5 U.S.C. § 704. However, the APA expressly blocks such jurisdiction where "statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a); *see also Perez v. U.S. Bureau of Citizenship and Immigr. Servs.*, 774 F.3d 960, 965 (11th Cir. 2014).

The INA contains one such jurisdiction-stripping provision, which states:

> [N]o court shall have jurisdiction to review . . . any . . . decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter *to be in the discretion of 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)(ii) (emphasis added). Thus, the central inquiry in an INA jurisdiction analysis is whether the agency's decision was discretionary or nondiscretionary. If the decision is discretionary, then § 1252(a)(2)(B)(ii) bars judicial review of the decision. But if the decision is nondiscretionary, then courts have subject matter jurisdiction to review the decision under the APA.

Here, USCIS revoked Plaintiff Bouarfa's visa petition approval pursuant to 8 U.S.C. § 1155, which reads:

> 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.

The Eleventh Circuit has previously held that the Secretary's decision to revoke a visa petition under § 1155 qualifies as a discretionary act. *Sands v. U.S. Dep't of Homeland Sec.*, 308 F. App'x 418, 419–20 (11th Cir. 2009); *Karpeeva v. U.S. Dep't of Homeland Sec.*, 432 F. App'x 919, 925 (11th Cir. 2011). As such, the INA's jurisdiction-stripping provision precludes judicial review of visa revocation decisions made pursuant to § 1155. *Sands*, 308 F. App'x at 419–20; *Karpeeva*, 432 F. App'x at 925. Most other federal appellate courts have held the same, highlighting § 1155's use of discretionary language like "may," "at

any time," and "deems to be good and sufficient cause."[2]

According to Defendants, this ends the analysis in this case. Dkt. 8 at 6. USCIS revoked Plaintiff Bouarfa's visa petition pursuant to § 1155, which—under the Eleventh Circuit's holdings in *Sands* and *Karpeeva*—is a discretionary decision insulated from judicial review. This Court would therefore lack subject matter jurisdiction over Plaintiff Bouarfa's dispute.

But § 1155 is not the only relevant provision here. In its letter explaining why it revoked Plaintiff Bouarfa's visa petition, USCIS clearly stated that it based its revocation on § 1154(c). Dkt. 1-4 at 4 ("The visa petition was approved in error because the approval is prohibited under . . . 8 U.S.C. § 1154(c).").

As set forth above, § 1154(c) states:

> 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

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[2] *See Bernardo ex rel. M & K Eng'g, Inc. v. Johnson*, 814 F.3d 481, 482 (1st Cir.), cert. denied, 579 U.S. 917 (2016); *Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196, 200–05 (3d Cir. 2006); *Mehanna v. U.S. Citizenship & Immigr. Servs.*, 677 F.3d 312, 314–15 (6th Cir. 2012); *Green v. Napolitano*, 627 F.3d 1341, 1344–46 (10th Cir. 2010); *Abdelwahab v. Frazier*, 578 F.3d 817, 821 (8th Cir. 2009); *Ghanem v. Upchurch*, 481 F.3d 222, 223–24 (5th Cir. 2007); *El-Khader v. Monica*, 366 F.3d 562, 566 (7th Cir. 2004). *But see ANA Int'l, Inc. v. Way*, 393 F.3d 886, 894–95 (9th Cir. 2004).

> 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.

(emphasis added). Unlike § 1155, this section does not contain discretion-indicating language. Quite the opposite. Section 1154(c) contains the word "shall"—a word used by Congress to indicate an intent to "impose discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241 (2001). As such, USCIS is *required* to deny an I-130 visa petition if it determines the alien previously entered a fraudulent marriage in order to evade immigration laws. *See Rojas v. Sec'y, Dep't of Homeland Sec.*, 675 F. App'x 950, 953 (11th Cir. 2017) (stating that "federal law *prohibits* the USCIS from approving a visa petition" when the alien previously entered a sham marriage) (emphasis added); *see also Velez-Duenas v. Swacina*, 875 F. Supp. 2d 1372, 1377–78 (S.D. Fla. 2012) (stating that § 1154(c) "*requires* USCIS to deny an I-130 visa petition" under such circumstances) (emphasis added).

This case is therefore complicated by the fact that USCIS first approved Plaintiff Bouarfa's visa petition but later revoked that approval. Had USCIS denied Plaintiff's visa petition in the first instance—as mandated by § 1154(c)—that denial would have been subject to judicial review.[3] *See, e.g.*, *Rojas*, 675 F.

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[3] Plaintiff Bouarfa argues her case is akin to *Pelletz v. Dep't of Homeland Sec.*, No. 8:20-cv-200-MSS-JSS, 2022 WL 1619541 (M.D. Fla. Mar. 7, 2022). But *Pelletz* dealt with an outright *denial* of a Form I-130 petition. Plaintiff Bouarfa seeks judicial review of USCIS's decision to *revoke* its initial approval

App'x at 953–55 (evaluating whether USCIS violated the APA when it outright denied I-130 visa petition based on prior finding of sham marriage). But because USCIS made a mistake by initially approving the petition, its later revocation of the approval becomes insulated from judicial scrutiny.

The Court is troubled by the potential implications of this framework. What should be a reviewable mandatory denial under § 1154(c) has morphed into an unreviewable discretionary decision under § 1155. Theoretically, USCIS could evade judicial review by granting a visa petition it should have denied outright and then immediately revoking its approval. Visa applicants could become stuck in perpetual cycles of unresolved, unreviewable petitions. Their only avenue for judicial review would be filing yet another I-130 petition and hoping USCIS outright denies it this time. Such a framework creates a loophole through which agencies could dodge judicial review by collapsing the distinction between nondiscretionary/reviewable determinations and discretionary/unreviewable determinations.

This would flout Congress's clear grant of subject matter jurisdiction over decisions to deny petitioners' visas because of marriage fraud. *See* § 1154(c) (using the word "shall" to denote discretion-less obligation). It also conflicts with the U.S. Supreme Court's instructions to read the INA's jurisdiction-stripping provisions narrowly—in accord with the "traditional understandings . . . that executive determinations

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of her Form I-130 petition. The distinction between outright denials and revocations is crucial to the subject matter jurisdiction analysis because they are governed by different statutes that contain different discretion-indicating language.

generally are subject to judicial review." *Kucana v. Holder*, 558 U.S. 233, 251 (2010). Indeed, looming over this inquiry is a strong presumption in favor of judicial review. *Id.* at 251–52.

Several courts have begun to raise similar concerns. In *Jomaa v. United States*, 940 F.3d 291, 296 (6th Cir. 2019), the Sixth Circuit held that the revocation of a formerly approved I-130 visa petition is *not* a discretionary act, thereby giving courts the judicial authority to review such cases. Nondiscretionary decisions, the Sixth Circuit held, "are within our purview, even where they underlie determinations that are ultimately discretionary." *Id.* at 296 (citing *Privett v. Sec'y, Dep't of Homeland Sec.*, 865 F.3d 375, 379 (6th Cir. 2017)). Thus, the court had subject matter jurisdiction to review the § 1154(c) sham marriage determination (a nondiscretionary inquiry), even though that determination underlay the § 1155 revocation (a discretionary inquiry). The Sixth Circuit came to this conclusion despite its prior precedents broadly stating that "the Secretary's decision to revoke a visa petition under section 1155 is an act of discretion that Congress has removed from our review." *Mehanna v. U.S. Citizenship & Immigr. Servs.*, 677 F.3d 312, 315 (6th Cir. 2012).

The Eleventh Circuit has not yet squarely addressed this issue, thereby leaving *Sands* and *Karpeeva* as the leading precedent in this circuit. These cases plainly state that revocation decisions under § 1155 are discretionary and therefore not subject to judicial review. *See Karpeeva*, 432 F. App'x at 925 ("Given the statutory discretion conferred upon the Secretary to revoke approved visa petitions, we agree with the other circuits that have concluded that

§ 1252(a)(2)(B) precludes judicial review of visa revocation decisions made pursuant to § 1155."). The Eleventh Circuit's broad language does not account for different bases underlying USCIS's revocation decisions—all revocations under § 1155 are discretionary and unreviewable regardless of whether a nondiscretionary determination underlies the decision. This Court is bound to follow precedent as it stands today. *See Vargas v. Lynch*, 214 F. Supp. 3d 388, 393–96 (E.D. Pa. 2016) (raising concerns about the § 1155/§ 1154(c) framework but nevertheless holding the court lacked subject matter jurisdiction based on current Third Circuit precedent). The Court does not have subject matter jurisdiction over this dispute.

II. Plaintiff's Remaining Arguments Are Unavailing.

Recognizing the negative impact of *Sands* and *Karpeeva* on her case,[4] Plaintiff Bouarfa argues she is not seeking judicial review of the revocation *per se*, but rather the Defendants' application of a legal standard—namely, whether there was "substantial and probative" evidence in the record showing that Mr. Hamayel previously entered a sham marriage. Dkt. 11 at 9–10. According to Plaintiff, this Court has subject matter jurisdiction to review the legal determination underlying the revocation decision, even though the Court does not have subject matter jurisdiction to review the revocation decision itself. *Id.*

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[4] Plaintiff Bouarfa "concedes that the Secretary's decision to revoke the approval of a visa is barred from judicial review." Dkt. 11 at 9.

The Court disagrees. Plaintiff Bouarfa seeks a backdoor judicial review of an unreviewable agency decision. She requests relief that would ordinarily be afforded under the APA: a judicial finding that there was not substantial and probative evidence showing Mr. Hamayel previously entered a sham marriage. *See Rojas*, 675 F. App'x at 953 (stating that the APA allows courts to set aside USCIS's finding of a sham marriage when it is "unsupported by substantial evidence"). But, as previously explained, this Court lacks subject matter jurisdiction to review whether USCIS violated the APA when revoking approval of an I-130 petition pursuant to § 1155. Although Plaintiff attempts to distinguish the basis of the revocation decision from the revocation decision itself, the relief she seeks betrays that there is no true difference between the two. Dkt. 1 at 8 ("Plaintiff requests that this Court . . . [d]eclare Defendants [sic] actions in the proceedings below as arbitrary and capricious, an abuse of discretion and not in accordance with law pursuant to 5 U.S.C. § 706(2)."). Courts have rejected similar attempts to recharacterize a sham marriage determination as a reviewable legal question in § 1155 revocation cases. *See Schamens v. Sessions*, No. 17–4926, 2018 WL 2164497, at *4 (D. Minn. May 10, 2018) (rejecting argument that the determination of whether a marriage was entered into in good faith is a predicate legal question that is subject to judicial review despite the § 1155 revocation not being reviewable); *Wang v. Johnson*, No. 15–CV–358, 2015 WL 4932214, at *4 (E.D. Pa. Aug. 18, 2015) (same).

In sum, USCIS's decision to revoke Plaintiff's I-130 petition approval constitutes a discretionary decision that is not subject to judicial review. Plaintiff

cannot recharacterize the revocation as a reviewable legal inquiry. Because the Court does not have subject matter jurisdiction over the dispute, Plaintiff's claims must be dismissed.

CONCLUSION

Defendants' Motion to Dismiss, Dkt. 8, is **GRANTED** for lack of subject matter jurisdiction. The clerk is directed to close this case.

DONE AND ORDERED at Tampa, Florida, on June 8, 2022.

/s/ William F. Jung
WILLIAM F. JUNG
UNITED STATES DISTRICT JUDGE

8 U.S.C. § 1154

§ 1154. Procedure for granting immigrant status

* * *

(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.

* * *

8 U.S.C. § 1155

§ 1155. 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.

8 U.S.C. § 1252

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

* * *

(2) Matters not subject to judicial review

* * *

(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.

* * *