No. 23-583

In the Supreme Court of the United States

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

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government's response acknowledges that this Court's certiorari criteria are met. The government agrees that there is a "circuit split on the question presented," BIO 14, as numerous courts and commentators have noted, Pet. App. 4a-5a; Pet. 21. The government does not identify any vehicle problem or other obstacle to this Court's review. And the government does not dispute that the petition raises a recurring question, implicating the right to judicial review for thousands of visa petitioners every year. Based on those concessions, this case is a straightforward grant.

The government nonetheless claims that "[d]espite [the] divergent decisions" in the courts of appeals, this Court's review "is not warranted at this time," because the conflict may "dissipate" on its own. BIO 16. That rote defense is simply not credible here. The Ninth Circuit has been faithfully applying its interpretation for two decades without any hint that it will change course. And it is even less likely to do so now that the Sixth Circuit has joined its side of the conflict. The split here is as real and entrenched as they come.

The only other ground the government offers (at 18) for denying certiorari is that the issue is "insufficiently important," because revocation decisions are already "subject to review in the administrative process." But this Court routinely grants certiorari on questions regarding the availability of judicial review, precisely because judicial review serves the unique and "essential" purpose of "correct[ing] agency mistakes and provid[ing] authoritative, consistent guidance" to

agency decisionmakers. Former EOIR Judges *Amici* Br. 4. The fact that these perfunctory responses are the government's only stated reasons to deny the petition reinforces that this case is a clear grant.

Ultimately, the government is forced to devote the vast majority of its opposition to the merits. Those arguments are flawed, but, regardless, they are best addressed on plenary review. If the government is wrong, four circuits are applying a harsh and restrictive rule that is at odds with settled principles of statutory construction and common sense. And if the government is *right*, then two circuits—covering 20% of the national immigration docket—are applying a rule that "[l]ack[s] a foothold in the INA's text." BIO 13. Either way, the rights afforded under the federal immigration laws differ markedly based on geographic happenstance. That is precisely the kind of conflict this Court must resolve. The petition should be granted.

ARGUMENT

I. The Acknowledged Circuit Conflict Requires This Court's Intervention

The government recognizes that the circuits "disagree[]," BIO 18, and it offers no serious argument for letting this split persist.

1. The government concedes that there is a "circuit split on the question presented." BIO 14. It admits that the decision below squarely conflicts with the Sixth Circuit's "divergent decision[]" on identical facts. BIO 16. It likewise recognizes that the Ninth Circuit has long applied a rule "contrary" to the decision below. BIO 15. And while the government suggests these decisions are "not persuasive," BIO 15-16, it does not attempt to *distinguish* them. The

government thus does not deny that the 4-2 circuit split is real. Nor could it, given courts' and commentators' recognition that the circuit courts remain "divided on whether the decision to revoke visa petitions is discretionary." 14A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Jurisdiction* § 3664 (4th ed., Apr. 2023).

2. The government says the split is "lopsided." BIO 14. But that does not cut against review. To start, the conflict is not nearly as one-sided as the government suggests. The government seeks to add six circuits to its side, but *none* of these cases addressed the argument that the Sixth Circuit found persuasive in *Jomaa v. United States*, 940 F.3d 291 (6th Cir. 2019)—namely, that the *nondiscretionary* determination underlying a revocation decision is reviewable.[1] *See* BIO 14-16; Pet. 19 n.4, 20 n.6. Those courts are thus in a similar position to the Sixth Circuit before *Jomaa*, and are free to adopt a similar approach. By contrast, the four circuits identified in the petition have considered and rejected the Sixth Circuit's rule.

In any event, this Court routinely grants certiorari to resolve "lopsided" splits.[2] And here, the

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[1] One case identified by the government, *Polfliet v. Cuccinelli*, did not even involve a nondiscretionary condition of obtaining a visa and instead turned on a provision barring "persons convicted of any 'specified offense against a minor" from filing a visa petition unless the Secretary "determines 'in [his] sole and unreviewable discretion' that the petitioner poses 'no risk' to the beneficiary." 955 F.3d 377, 379 (4th Cir. 2020) (quoting 8 U.S.C. § 1154(a)(1)(A)(viii)).

[2] *See, e.g.*, *Santos-Zacaria v. Garland*, 598 U.S. 411, 415 nn.2-3 (2023) (9-1 and 4-2 splits); *Intel Corp. Inv. Policy Comm.*

consequences of disuniformity are far-reaching: the Sixth and Ninth Circuits' rule affects the availability of judicial review for over 20% of the hundreds of thousands of family-based visa petitioners who apply each year.[3]

3. The government next speculates that this split may "dissipate on its own." BIO 16. But it offers no serious basis for that assertion.

a. The government argues that the Ninth Circuit may reconsider its rule because it has referred to *ANA International, Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004), as an "outlier." BIO 16-17 (quoting *Poursina v. U.S. Citizenship & Immigr. Servs.*, 936 F.3d 868, 875 (9th Cir. 2019)). But in *Poursina*, the panel rejected the plaintiff's reliance on *ANA International* because "the *statute* in [*Poursina*] differs from the one in *ANA International*." 936 F.3d at 874. The statute in *Poursina*—Section 1153(b)(2)(B)(i)—governs grants of national-interest waivers of labor certifications for employment-based visas. *Id.* at 869-70. Unlike a "good-cause determination[]" under Section 1155, Section 1153(b)(2)(B)(i)'s "'national interest' standard" "invokes broad[] economic and national-security considerations" that result in "determinations [that] are firmly committed to the discretion of the Executive Branch—not to federal courts." *Id.* at 874. The Ninth Circuit's dicta—in a

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v. Sulyma, 140 S. Ct. 768, 775 & n.3 (2020) (6-1 split); *Pereira v. Sessions*, 585 U.S. 198, 207 & n.4 (2018) (6-1 split).

[3] *See* USCIS, *Number of Form I-130 Petition for Alien Relative*, https://www.uscis.gov/sites/default/files/document/data/i130_performancedata_fy2023_q4.pdf (last visited Mar. 15, 2024).

case from five years ago—about whether "to extend" *ANA International* to a distinct statute does not diminish *ANA International*'s force as circuit law, *id.* at 875—and it does not remotely suggest the circuit is on the verge of going en banc to reverse decades-old (and routinely applied) precedent. *See, e.g.*, *Sandhu v. Sessions*, 856 F. App'x 74, 75 (9th Cir. 2021); Pet. 17-18, 22.

And that possibility is even more remote now given that—only five years ago, and after *Poursina* issued—the Sixth Circuit decided *Jomaa*. The government does not suggest there is any sign the Sixth Circuit will revisit *Jomaa*. All told, the idea that the split will disappear on its own is fantasy.

b. The government also asks this Court to "giv[e] the Sixth and Ninth Circuits an opportunity to reconsider their positions" in light of *Patel v. Garland*, 596 U.S. 328 (2022). BIO 17. But, as the government acknowledges, Section 1252(a)(2)(B)(i), the provision implicated in *Patel*, involves completely different language—and, as explained further below, this Court's decision *turned* on that distinct language. *Id.*

Tellingly, the Eleventh Circuit did not even mention *Patel* in resolving the issue in this case. *See* Pet. App. 1a-11a. It is unrealistic to think that the Sixth and Ninth Circuits would "abrogate [their] prior precedent" based on an opinion that "does not directly address" Section 1252(a)(2)(B)(ii)'s distinct statutory language. *Alzaben v. Garland*, 66 F.4th 1, 6 (1st Cir. 2023). Both circuits require intervening authority from this Court to be clearly irreconcilable with circuit precedent to warrant reconsideration. *See Lopez-Marroquin v. Garland*, 9 F.4th 1067, 1074 (9th Cir. 2021) (panel may overrule circuit precedent only where precedent "clearly irreconcilable" with

Supreme Court decision); *RLR Invs., LLC v. City of Pigeon Forge*, 4 F.4th 380, 390 (6th Cir. 2021) (similar), *cert. denied*, 142 S. Ct. 862 (2022).[4] A decision about a separate provision with different language comes nowhere close to meeting that exacting standard. Indeed, this Court recently "caution[ed]" *against* concluding that neighboring statutory provisions "necessarily travel together" when, as here, those provisions have "distinct language that warrants careful consideration." *Slack Techs., LLC v. Pirani*, 598 U.S. 759, 770 n.3 (2023).[5] The government's claim that the conflict will "dissipate" is just as unconvincing here as in the numerous cases where this Court has granted review over this objection. *See, e.g.*, BIO 14, *Niz-Chavez v. Garland*, 593 U.S. 155 (2021) (No. 19-863) ("circuits may resolve the conflict on their own"); BIO 13, *Kucana v. Holder*, 558 U.S. 233 (2010), 2009 WL 797590 (similar).

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[4] The government suggests that the Sixth and Ninth Circuits may reconsider their positions because *Patel* declined to apply the presumption in favor of judicial review. BIO 18. This argument is similarly far-fetched. The Court's decision not to apply the presumption based on "the text and context of § 1252(a)(2)(B)(i)," *Patel*, 596 U.S. at 347, does not unsettle all decisions citing the presumption when analyzing other provisions.

[5] For the same reason, the government's argument (at 17-18) that *Patel* abrogated *Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002), is beside the point. *ANA International* cited *Montero-Martinez* for the proposition that underlying nondiscretionary determinations are reviewable, not its discussion of Section 1252(a)(2)(B)(i). 393 F.3d at 895. In addition, the court relied on other Ninth Circuit precedent that remains intact. *See id.* (citing *Nakamoto v. Ashcroft*, 363 F.3d 874, 878 (9th Cir. 2004)).

4. Finally, the government's assertion that the Court has denied petitions presenting "the same or similar questions" is incorrect. BIO 7-8. None of the petitions the government cites even *identified* the circuit conflict presented here. Four of the petitions cited by the government were filed *before* the Sixth Circuit's decision in *Jomaa*.[6] And the two petitions filed after 2019 did not even cite *Jomaa*.[7] This is the first petition presenting the question of whether a revocation decision *based on nondiscretionary criteria* is reviewable. The government acknowledges a "circuit split" on that "question presented," BIO 14, and previous denials based only on the Ninth Circuit's broader (and at the time outlier) rule do not counsel against review here.

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[6] *See* BIO 10-11, *Sands v. DHS*, 558 U.S. 817 (2009) (No. 08-1330), 2009 WL 2349300 (explaining that petitioner's complaint "did not seek judicial review of visa petition revocations" and petition asserted split between *ANA International* and unpublished decision below); Cert. Pet. 3-4, *Karpeeva v. U.S. DHS*, 565 U.S. 1036 (2011) (No. 11-365), 2011 WL 4400341 (asserting same purported conflict as *Sands*); Cert. Pet. i, *Bernardo v. Johnson*, 579 U.S. 917 (2016) (No. 15-1138), 2016 WL 1019599 (reviewability of decision finding "'good and sufficient cause' to revoke [visa] approval"); Cert. Pet. i, *Rajasekaran v. Hazuda*, 580 U.S. 1019 (2016) (No. 16-146), 2016 WL 4088377 (reviewability of USCIS compliance "with regulatory procedural requirements" for revocation).

[7] Cert. Pet. i, *iTech U.S., Inc. v. Renaud*, No. 21-596, 2022 WL 1611799 (U.S. May 23, 2022), 2021 U.S. S. CT. BRIEFS LEXIS 3303 (failing to present any question regarding reviewability of nondiscretionary determinations); Cert. Pet. i, *Nouritajer v. Jaddou*, 143 S. Ct. 442 (2022) (No. 21-1446) (same).

II. The Question Presented Is Exceptionally Important

Other than its claim that the split will simply disappear on its own, the government's only stated basis for denial is that the issue "lacks sufficient practical significance to warrant" resolution. BIO 7, 18. That claim is nothing short of astonishing. The government does not dispute that this recurring issue has the potential to affect thousands of visa petitioners each year, or that it is an issue of life-altering consequence for those applicants.

The main reason the government claims the issue is unimportant is because it believes "review in the administrative process" is sufficient. BIO 18. That self-serving assertion should carry no weight. Indeed, the government routinely argues that judicial review of its administrative determinations is "of little practical importance," but this Court regularly grants certiorari despite that objection. BIO 12-15, *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023), 2022 WL 12637797; BIO 7, *Guerrero-Lasprilla v. Barr*, 589 U.S. 221 (2020), 2019 WL 1310246; BIO 13, *Kucana v. Holder*, 558 U.S. 233 (2010), 2009 WL 797590. And, as amici explain, the scope of judicial review is particularly important in the immigration context, because an extreme backlog in the immigration courts creates significant "risk of error and inconsistency." Former EOIR Judges *Amici* Br. 18-20. The government does not even mention or respond to any of amici's arguments. The government's confidence in its own decision-making apparatus is not a reason to deem unimportant an issue affecting thousands of families.

The government also notes that petitioners like Ms. Bouarfa can reapply for a visa, allowing them to try again until they receive a decision which is appealable. BIO 18. But that possibility just shows the result below is senseless, not that it lacks importance. Sending a visa petitioner back to the start could lead to years of delay, mounting application fees, and duplicate work for already-overburdened immigration courts. *See* Pet. 9 (administrative review process lasted over four years); USCIS, *Instructions for Form I-130, Petition for Alien Relative* at 9 (July 20, 2021), https://www.uscis.gov/sites/default/files/document/forms/i-130instr.pdf ($535 filing fee).

Finally, the government contends that the question presented is not significant because any judicial review would be deferential. BIO 18. But even deferential review can be outcome determinative. *See, e.g.*, *Ved v. U.S. Citizenship & Immigr. Servs.*, No. 22-cv-0088, 2023 WL 2372360, at *9 (D. Alaska Mar. 6, 2023). Moreover, as amici point out, "judicial review is vital not just to correct error in individual cases, but also to ensure that agency adjudicators apply consistent, correct legal standards." Former EOIR Judges *Amici* Br. 23. The availability of review thus sweeps beyond the result in any individual case, and protects citizens and their immigrant spouses from ill-considered decisions that—as in Ms. Bouarfa's case—create "the impossible choice of either living in different countries or leaving the United States altogether." *Id.* at 16.

III. The Eleventh Circuit's Decision Is Wrong

Because it cannot deny the split, identify any vehicle problems, or credibly question the issue's

importance, the government's opposition largely focuses on the merits. BIO 7-14. Those arguments supply no basis to decline to resolve an acknowledged circuit conflict. But, in any event, the government's merits arguments are unpersuasive.

The government defends the Eleventh Circuit's conclusion that *every* revocation under Section 1155 is unreviewable, "regardless of the decision's underlying basis," on the ground that Section 1155's "'good and sufficient cause'" language is "the only statutory standard for revocation" and it is "unambiguously discretionary." BIO 10-11.

As the Sixth and Ninth Circuit have recognized, however, the decision below incorrectly applies Section 1252(a)(2)(B)(ii) by examining Section 1155 in a vacuum. By focusing only on Section 1155, the government collapses underlying nondiscretionary Section 1154(c) decisions into ultimate discretionary decisions. *See Hosseini v. Johnson*, 826 F.3d 354, 358 (6th Cir. 2016); Pet. 23-24. But Section 1155's language connoting discretion does not alter the character of underlying Section 1154(c) decisions. Nondiscretionary requirements do not suddenly become "specified . . . to be in the discretion of . . . the Secretary," 8 U.S.C. § 1252(a)(2)(B)(ii), because they serve as the basis for a revocation. The distinction between underlying nondiscretionary determinations and ultimate exercises of discretion has deep roots, *see INS v. St. Cyr*, 533 U.S. 289, 307 (2001); Pet. 23-24, and it informs the analysis of Section 1252(a)(2)(B)(ii). *See* Former EOIR Judges *Amici* Br. 7-9 & n.5.

The government ultimately offers no response to that distinction. That silence is striking, given its longstanding position that Section 1252(a)(2)(B) "bars

review of discretionary determinations, but *not of underlying nondiscretionary determinations*." Br. For Resp't Supporting Pet'r 11, 23, *Patel v. Garland*, 596 U.S. 328 (2022) (No. 20-979) (emphasis added).

This Court's analysis in *Patel* does not compel a different conclusion, but rather demonstrates how Section 1252(a)(2)(B)(ii) *preserves* that distinction. In *Patel*, this Court interpreted Section 1252(a)(2)(B)(i)'s broad language barring review of "*any* judgment *regarding* the granting of relief" under certain statutory provisions, and found that language extended "*not just [to] discretionary judgments*," 596 U.S. at 338 (third emphasis added), but "to any judgment 'regarding' [the] ultimate decision" to grant relief, *id.* at 344. In other words, this Court construed the language in Section 1252(a)(2)(B)(i) to apply to *non*discretionary determinations. By contrast, Section 1252(a)(2)(B)(ii), by its terms, applies only to "decision[s]" or "action[s]" "specified" by statute "to be in the [Secretary's] discretion." 8 U.S.C. § 1252(a)(2)(B)(ii). This language limits the reach of (B)(ii)'s bar to discretionary decisions—but that does not upset the long-standing principle that *underlying* nondiscretionary decisions remain reviewable. Indeed, the government itself asserted in *Patel* that "regardless of what" the Court held "about (B)(i)['s]" distinct text, "this type of parsing" between discretionary and nondiscretionary determinations "is indisputably required under (B)(ii)." Transcript of Oral Argument 57-59 (No. 20-979) (Dec. 6, 2021).

The government also dismisses the harsh consequences of its rule as "policy concerns" to be disregarded. BIO 13-14. But, as amici explain, USCIS faces crushing backlogs, and the absence of judicial review increases the risk that "errors will go

unseen and uncorrected, and that they will repeat themselves across future cases." Former EOIR Judges *Amici* Br. 20; *id.* at 18-20. The district court and Sixth Circuit were thus rightly "troubled" by a rule that makes it easier for USCIS's errors to "evade judicial review," either through intentional manipulation, Pet. App. 22a; *see also Jomaa*, 940 F.3d at 296, or mere inattention, BIO 14 (USCIS "overlooked" evidence).

These possibilities not only raise serious separation-of-powers and equitable concerns, but also underscore that the government's interpretation makes no sense as a matter of congressional intent. While the executive branch may prefer a rule that insulates even its nondiscretionary decisions from review, that is not the regime Congress enacted. This Court should grant the petition, and restore uniformity on this important question of federal immigration law.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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