No._____

In the

Supreme Court of the United States

MARIA ELVIA SMITH,

PETITIONER,

v.

MERRICK B. GARLAND, *ET AL.*

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a U.S. citizen marries a foreign national, Congress requires the Attorney General to investigate the citizen's petition under 8 U.S.C. § 1154(b) and approve it if it contains true facts. The U.S. Citizenship and Immigration Services, in the agency's regulation, 8 C.F.R. § 103.2(b)(16), fleshes out the Attorney General's non-discretionary authority. USCIS permits petitioners to inspect their records unless the record contains classified information. § 103.2(b)(16)(iv). But if USCIS believes it has found derogatory information that warrants denial of the petition, the citizen petitioner loses the right to inspect USCIS's record. § 103.2(b)(16)(i). In that situation, USCIS's adjudicating officer can issue a notice of intent to deny (NOID) the petition under § 103.2(b)(8) and deny the petition if the petitioner fails to mount a successful rebuttal to USCIS's derogatory information. USCIS interprets the breadth of its authority, which courts have affirmed, to allow its adjudicating officers the discretion to choose the wording with which to summarize the derogatory information the citizen petitioner must rebut. When, as here, the agency does not file its administrative record, if the citizen petitioner sues, the reviewing court has no view of what USCIS believes is derogatory information and just accepts USCIS's word that what it believes is derogatory information is enough to deny the citizen's green card petition of his or foreign spouse.

The question presented is:

Did the agency violate Mrs. Smith's due process rights by requiring that she rebut what it asserted

was derogatory information but summarizing that information without allowing her to inspect it, giving her at best a shot in the dark framing her rebuttal?

PARTIES TO THE PROCEEDING

The Petitioner (plaintiff-appellant below) is Maria Elvia Smith.

Respondents (defendants-appellees below) are Merrick B. Garland, in his official capacity as Attorney General of the United States; David H. Wetmore, in his official capacity as Chief Appellate Immigration Judge, Board of Immigration Appeals; Alejandro Mayorkas, in his official capacity as Secretary of the U.S. Department of Homeland Security; Ur Mendoza Jaddou, in her official capacity as the Director of the United States Citizenship and Immigration Services; Mark Hansen, in his official capacity as the Director of District 14 of the United States Citizenship and Immigration Services; and John Pruhs, in his official capacity as the Director of the Milwaukee Field Office of the United States Citizenship and Immigration Services.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Smith v. Garland*, No. 23-2874 (7th Cir.), judgment entered on June 3, 2024;
- *Smith v. Garland*, No. 23-cv-0490-bhl (E.D. Wis.), judgment entered on September 15, 2023.

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PETITION FOR WRIT OF CERTIORARI

Maria Elvia Smith petitions this Court for a writ of certiorari to review the decision of the Seventh Circuit which affirmed the district court's dismissal of her complaint for lack of a plausible claim upon which the court could grant her relief.

OPINIONS BELOW

The Seventh Circuit's opinion affirmed the district court's opinion and order and is reported in the Federal Reporter as *Smith v. Garland*, 103 F.4th 1244 (7th Cir. 2024). It is reproduced in Appendix B, 3a-20a. The order and opinion of the district has not yet been published in the Federal Register but is available as *Smith v. Garland*, No. 23-0490-bhl, 23 WL 6048830 (E.D. Wis. Sep. 15, 2023). It is reproduced in Appendix C. 21a-37a.

JURISDICTION

The Seventh Circuit issued its opinion on June 3, 2024. The panel denied Mrs. Smith's timely petition for panel and *en banc* rehearing on August 5, 2024. Mrs. Smith has petitioned this Court for certiorari within 90 days of the Seventh Circuit's denial of rehearing and, thus, this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution's framers ordered that "[n]o person shall…be deprived of life, liberty, or property, without due process of law."[1]

For lawsuits challenging federal administrative agency action, Congress requires a "reviewing court [to] decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action…[on] the whole record or those parts of it cited by a party..."[2]

A spouse is an "immediate relative" of a U.S. citizen for purposes of classifying that immediate relative as an immigrant eligible to get a green card under the Immigration and Nationality Act (INA).[3]

Congress requires the Attorney General to adjudicate petitions and after "an investigation of the facts…if he determines that the facts stated in the petition are true…approve the petition…"[4]

When a citizen dies before the Attorney General has adjudicated his or her petition, Congress permits the foreign-born widow(er) to prosecute the petition as a self-petition.[5]

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[1] U.S. Const. amend. V.

[2] Government Organization and Employees, Pub. L. 89-554, 80 Stat. 378, 393 (Sep. 6, 1966), *codified at* 5 U.S.C. § 706.

[3] Pub. L. 82-414, 66 Stat. 163, § 205 (Jun. 27, 1952), *codified at* 8 U.S.C. § 1151(b)(2)(A)(i).

[4] 8 U.S.C. § 1154(b).

[5] Department of Homeland Security Appropriations Act, 2010, Pub. L. 111-83, 123 Stat. 2142, 2186-87, Title V § 568(c), *et seq*. (Oct. 28, 2009), *codified at* 8 U.S.C. § 1154(l).

STATEMENT OF THE CASE

A. Introduction.

The agency insinuated that Mrs. Smith had a romantic relationship with her ex-husband, Francisco Javier Hernandez-Rico, while married to her late husband, Arlo Henry Smith, Sr. It is subtle.

For example, quoting and incorporating the NOID, Field Office Director Kay F. Leopold, writes: "*In spite of his marriage to a United States citizen, your former husband and you continued to maintain your relationship more than 11 years after your nominal divorce.*"[6]

But Mrs. Smith, rebutting the NOID, explained in her affidavit why she and Mr. Hernandez-Rico cohabited after he married Eloisa Canales, a U.S. citizen.[7] He, too, explained why in his own affidavit.[8]

Guilt by association seems the reason why the agency imported Mr. Hernandez-Rico's immigration and marital histories into Mrs. Smith's case. The suspicion seems to have begun with the agency, in the

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[6] 46a (italics in original).

[7] 65a ("Francisco lived at this address for about one year, before he married Eloisa. He continued to live there for a period of time even after he married her. He asked me to let him stay there while he located an apartment to rent, and I agreed to let him stay.").

[8] 69a ("After our marriage on 05/12/2005 Eloisa was living at 2036 S 92nd Street, West Allis, WI. During that time I resided part of the week at 528 N 62nd St in Wauwatosa, and I stayed with Eloisa just a few nights a week. Otherwise, Eloisa told me that the building manager told her, that he would raise the rent. Eloisa never stayed overnight at 528 N 62nd Street, because my son and my ex wife Maria were living there, and we considered it Maria's house.").

NOID, asserting that Mrs. Smith and Mr. Hernandez-Rico posed as a married couple twice before immigration and embassy officials after their 2001 divorce. They arrived together at Atlanta on May 13, 2002, and allegedly went to the American Consulate in Mexico City, Mexico on July 6, 2004. On both occasions, allegedly, they pretended to be married.

The premise of the agency's attack is "you tend to lie, and you cannot be believed." It is not clear why the agency believed that conduct predating Mrs. Smith's marriage to Arlo, Sr., by 10 years was relevant. Moreover, the agency found itself having to withdraw the charge that she and her ex-husband posed together as married while divorced in "Mexico City in 2004."

There is an element of Mrs. Smith's case that suggests that the agency may have merged two unrelated records. The denial decision carries this A- ("alien") number: A207-816-148.[9] But the decision of the Board of Immigration Appeals carries this A-number: A204-827-691.

Whenever the agency encounters a foreign national in circumstances beyond a visitor, student, or such non-immigrant situation, the agency assigns the foreign national an A-number. Each foreign national gets an A-number that is unique and follows him or her through a sojourn as a foreign national.

Thus, it is important to ask why Mrs. Smith has, apparently, two A-numbers. Beyond that, she explained herself as to the agency's concerns.

The agency ignored the explanations Mrs. Smith and Mr. Hernandez-Rico provided it. The affidavits explain why they cohabited with their child in

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[9] 41a.

common. The agency doubled down by pointing to their joint bank account and a home Mrs. Smith purchased but put in Mr. Hernandez-Rico's names because she had no social security number.[10]

The agency did not credit the rebuttal's counter-facts, insisting that Mrs. Smith and Mr. Hernandez-Rico gave false or misleading information to immigration officials.

Mrs. Smith stumbled and gave a false answer when asked whether she and Mr. Hernandez-Rico ever traveled together post-divorce.[11] But that is a single false answer out of 48 questions in that section. The agency did not have to rely on her for the facts. The materiality of that answer is important only if the answer had the likelihood of shifting the outcome in her favor.[12] It is not likely that because Mrs. Smith said she had not traveled together with her ex-husband after they divorced the agency would have given her a green card. That false answer is immaterial to whether she and her late husband had a *bona fide* marital relationship.

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[10] 69a ("My name was on the title to the property at 528 N 62nd Street, but [Mrs. Smith] was the real owner. She paid for the property, she paid the mortgage and taxes, but I allowed my name to be on the title because [Mrs. Smith] did not have a SSN. [Mrs. Smith] received an inheritance, and had investments in USCY.").

[11] 82a (Q: Since your divorce from your first husband, have you and your first husband ever traveled together? A: No.).

[12] *Kungys v. United States*, 485 U.S. 759, 760 (1988) ("…the test of whether concealments or misrepresentations are 'material' is whether they can be shown by clear, unequivocal, and convincing evidence to have been predictably capable of affecting, *i.e.,* to have had a natural tendency to affect, the Immigration and Naturalization Service's decisions.").

The panel below ruled that "[t]hough [Mrs.] Smith had submitted some documents to establish a marriage, in light of the false and misleading information she provided to immigration officers in 2002 and in 2015, she was 'not considered to be credible.'"[13]

In a way, this was a self-fulfilling prophecy because USCIS expected to prove that Mrs. Smith lacked credibility and acted to make that a reality. It did not believe Mrs. Smith and went hunting for evidence to prove that Mrs. Smith lacked credibility.

The agency weaved together what it believed proved that she and Arlo, Sr., were not truly married, by setting a scene with Mr. Hernandez-Rico's immigration and marital histories at center. But Mr. Hernandez-Rico's immigration and marital histories have nothing to do with Mrs. Smith – the two divorced, ceasing their legal relationship other than their financial and parental relationship.

Yes, they cohabited post-divorce. Many people do in the 21st century. It may raise eyebrows, but raised eyebrows tend to settle down with time.

Moreover, the agency never proved that they were romantically involved. Moreover, as they swore, they cohabited for the benefit of their shared child. The agency pointed to nothing to prove otherwise. Either way, what was important was whether a relationship between two adults was probative of the question whether one of those adults had a *bona fide* marital relationship with a third party.

Marriage fraud has been a major issue in immigration petitions at least since the Immigration and Naturalization Service (INS) told Congress that about 30% of all marriage-based green card petitions were

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[13] 7a, *Smith*, 103 F.4th at 1251.

based on sham marriages,[14] prompting Congress to enact the Immigration Marriage Fraud Amendments Act (IMFA) of 1986.[15]

A settlement agreement in *Stokes v. INS*, 393 F.Supp. 24 (S.D.N.Y. 1975), foreshadowed IMFA's effect on the marriage-based petition process leading to the ubiquity of so-called "*Stokes* Interviews" whose main feature one reporter characterized as a *Kafkaesque* version of the "Newly Wed Game."[16]

Ms. Leopold's denial decision has this single line about Mrs. Smith's and her late husband's interview: "On August 15, 2013, you and the petitioner appeared for an interview in connection with your pending forms I-130 and I-485."[17] It is difficult to imagine that something was awry at that interview, which the charge of lack of *bona fides* leveled at them suggests, but nary a word about that in Ms. Leopold's decision.

Cases coming up to the circuits of the Court of Appeals in which § 103.2(b)(16)(i) was at issue have tended to be ones also involving the marriage fraud bar, § 1154(c). *See*, *e.g.*, *Mestanek v. Jaddou*;[18] *Ogbolumani v. Napolitano*;[19] *Ghaly v. INS*.[20]

Those courts deferred to the agency's denial of petitions and the right to inspect derogatory information. Other cases relied on knowledge of derogatory

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[14] Eileen P. Lynskey, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part*, 41 U. Miami L. Rev. 1087, 1088 (1987), https://repository.law.miami.edu/umlr/vol41/iss5/9.
[15] Pub. L. 99-639, 100 Stat. 3537 (Nov. 10, 1986).
[16] Nina Bernstein, *Do You Take This Immigrant?* N.Y. TIMES, June 11, 2010, https://www.nytimes.com/2010/06/13/nyregion/13fraud.html.
[17] 43a.
[18] 93 F.4th 164, 174 (4th Cir. 2024).
[19] 557 F.3d 729, 735 (7th Cir. 2009).
[20] 48 F.3d 1426, 1431 (7th Cir. 1995).

information because the agency confronted the foreign national with that information in prior proceedings. *See*, *e.g.*, *Hassan v. Chertoff*.[21]

This is Mrs. Smith's first green card petition, and it does not involve the § 1154(c) bar. Nor did the agency confront her with the derogatory information in question here before this petition.

In addition, when the agency issued the NOID, its summary of derogatory information included some but not all information the agency would ultimately assert warranted denial because it was derogatory. It was a moving target with some derogatory information in the NOID and the rest in the agency's final decision to which she could not file a rebuttal.

The idea that a married couple's intent at the time they marry is indicative of the *bona fides* of their marital relationship is settled.[22] The agency having doubts about a marriage's *bona fides* is well within its authority and considering the couple's conduct before and after the marriage to determine the marriage's *bona fides* is proper.[23]

But the agency perfected a sleight of hand in Mrs. Smith's case by saying it was considering conduct before and after the marriage to decide the *bona fides* of the Smiths' marriage, but then going as far back as 10 years before the Smiths married. The relevance of "Atlanta 2002" is elusive. It seems relevant, because it is alleged that Mrs. Smith and Mr. Hernandez-Rico lied that they were married after having divorced the year before. Even if true, which it is not, what they claimed a decade before she married Arlo,

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[21] 593 F.3d 785, 789 (9th Cir. 2008).
[22] *See*, *e.g.*, *Matter of Laureano*, 19 I. & N. Dec. 1, 3 (BIA 1983).
[23] *See Matter of Phillis*, 15 I. & N. Dec. 385, 386 (BIA 1975).

Sr., seems too remote to have any relevance to her marriage to her late husband.

The theory, of course, is that she lied back then and must be lying now. Trouble is that to decide the *bona fides* of a marital relationship, one must compare apples to apples. Without the administrative to examine what transpired during "Atlanta 2002" beyond the agency's cherry-picked parts, it is impossible to decide whether "Atlanta 2002" is at all relevant to the Smiths' marriage. It is a stretch at best, but a stretch that apparently worked out for the agency.

The court below affirmed the agency's finding that Mrs. Smith failed to prove that her marriage to her late husband was *bona fide*. To do so, that court had to fill a gap in Ms. Leopold's denial decision.

She does not mention or discuss four declarations. The panel plugged that gap with a *post hoc* rationalization: "The agencies did not discuss each of the six statements. But in light of the other record facts, it was not unreasonable for those statements to be given less weight.").[24] That is not proper for an appellate court.[25]

This Court ruled in *Ohio v. EPA* that an agency's action survives "arbitrary and capricious" review if it gives "a satisfactory explanation for its action, including a rational connection between facts found and choices made [and] an agency cannot simply ignore an important aspect of the [case]."[26]

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[24] *Smith*, 103 F.4th at 1253.

[25] *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.").

[26] 603 U.S. 279, 293 (2024).

The agency, saying it had reason to question the validity of the Smiths' marriage, served trigger for Mrs. Smith's evidence to prove the *bona fides* of her marital relationship with her late husband. Of the regulation's non-exhaustive list of evidence that proves the *bona fides* of a marriage, which includes proof of joint property ownership, a lease for joint tenancy, commingled financial resources, the birth certificates of the couple's offspring, and "[a]ffidavits of third parties with knowledge of the *bona fides* of the marital relationship,"[27] she marshaled proof of commingled financial resources and affidavits or declarations of individuals with knowledge of the *bona fides* of the Smiths' marital relationship.

To believe, as the court below seems to have believed, that it was more important for Ms. Leopold to highlight the agency's suspicion expressed in insinuations about Mrs. Smith's relationship with Mr. Hernandez-Rico, derailed the necessary inquiry. The agency did not say Mrs. Smith and her late husband participated in marriage fraud.

But it is difficult not to deduce that the agency believed that Mrs. Smith and her late husband were engaged in a sham or fraudulent marriage. That is a charge of marriage fraud, especially when hanging about is this constant pointing to her "close relationship" with her ex-husband.

The two remained friendly after their nominal divorce in 2001, it is true, but not something unusual in the 21st century. The agency adduced not a scintilla of evidence that their relationship was romantic, the only kind that would have undermined her marriage to her late husband.

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[27] 8 C.F.R. § 204.2(a)(1)(iii)(B).

But the record is barren of any proof of a continued relationship on the order of what the agency proved and what they admitted. Yes, her name was on the apartment mailbox together with her ex-husband's and their child's, and the lease had their signatures. The lease is dated August 10, 2012, four months before she and her late husband married, and at least a month and longer before Mr. Hernandez-Rico swears she moved out to go live with her late husband.[28]

B. Legal Framework.

The procedure for approving green card petitions is in the Immigration and Nationality Act (INA) of 1952.[29] Congress delegated authority to the Attorney General to approve petitions whose facts are true as shown by the Attorney General's investigation, and is not discretionary.[30]

A widow(er) can prosecute a deceased U.S. citizen spouse's Form I-130, Petition for Alien Relative, if the citizen dies before the Attorney General has completed investigating the citizen's petition.[31] Under § 1154(l), the I-130 converts automatically to an I-360, Petition for Amerasian, Widow(er) or Special

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[28] 71a.

[29] Pub. L. 82-414, 66 Stat. 163, § 205(c) (Jun. 27, 1952).

[30] 8 U.S.C. § 1154(b) ("…the Attorney General shall, if he determines that the facts stated in the petition are true…approve the petition.").

[31] Department of Homeland Security Appropriations Act, 2010, Pub. L. 111-83, 123 Stat. 2142, 2187 (Oct. 28, 2009), *codified at* 8 U.S.C. § 1154(l).

Immigrant Widow, making the foreign national a self-petitioner.[32]

During investigation of the facts of an I-130 or I-360, if the agency believes it has derogatory information warranting denial of the petition, it may issue a NOID to give the petitioner an opportunity to frame a rebuttal to the truth of the derogatory information, but the agency must "specify…the bases for the proposed denial sufficient to give the…petitioner adequate notice and sufficient information to respond."[33]

The petitioner's right to inspect the record under § 103.2(b)(16) dissipates if the agency asserts derogatory information warranting denial of the petition. The agency's adjudicating officer then chooses, of discretion, what to include in the NOID as the summary of derogatory information and, under § 103.2(b)(16)(i), the petitioner frames a rebuttal with that as the only guidance with which to work.

C. Factual Background.

Arlo Henry Smith, Jr., the son of Mrs. Smith's late husband, Arlo Henry Smith, Sr., made a declaration, saying that his father and stepmother, Mrs. Smith, met in the summer of 2012. 72a. Arlo, Jr., adds that he rested easy because Mrs. Smith was there for his father who had just had heart surgery.

Both his mother and his father's second wife had died of illness, wrote Arlo, Jr.[34] He describes a good relationship with Mrs. Smith, including multiple

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[32] 8 C.F.R. § 204.2(i)(1)(iv).
[33] § 103.2(b)(8)(iv).
[34] 73a.

visits, and says that Mrs. Smith knew his family well. He concludes,

> I'm really not sure what else I could say to prove my fathers [*sic*] and [Mrs. Smith's] relationship was real, I was around them, they were around me and my family and they seemed very happy being together. I have no reason to believe the [m]arriage between my father and Maria was not REAL [*sic*]. [35]

Laura Smith, Arlo, Jr.'s wife, issued her own declaration, saying, in part, "I have no reason to believe that the marriage with [Mrs. Smith] and my father-in-law Arlo Smith Sr. wasn't real. Knowing my father-in-law he wouldn't marry anyone he didn't care about and seeing them together proved that."[36]

Maria del Socorro Sandoval, a friend of Mrs. Smith for more than 10 years at the time, declared,

> I had the privilege to be invited to participate as a witness to [Mrs. Smith's] wedding on 12/12/2012. It gave me great joy to see the newly married couple completely in love and devoted to one another. I could see Mr. Smith bursting with joy and energy, both physically and mentally and extremely happy.[37]

Gustavo A. Ramirez and Lisbeth Soto, a married couple and friends of Mrs. Smith for fifteen years, wrote,

> Knowing Maria Elvia she wouldn't marry anyone she didn't care about. We have been fortunate enough to have share [*sic*] may life events with our good friend Mrs. Smith: our youngest son's

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[35] 73a-74a.
[36] 75a.
[37] 76a.

> birth, our eldest daughter's college graduation, and her marriage to Arlo H. Smith Senior. On Wednesday, December 12, 2012 Arlo and Maria Elvia declared their love for each other and wed. We were so happy for the two and ecstatic they could start a new life together and at the same time I Lisbeth was joining to Maria next day of Arlo's death because she was really devastated.[38]

None of these five witnesses feature in the agency's decision, but a physician, Dr. Robert Taylor, MD, does. He stated that Arlo, Sr., labored under squamous cell carcinoma and had begun treatment on October 11, 2013.[39] Dr. Taylor added that Arlo, Sr. had

> frequent appointments in the office for his infusions. He also had two hospitalizations in October of 2013. During this time of treatments and hospitalizations, his wife, [Mrs. Smith], was his primary caregiver until his death in February 2014. She would care for him in the home and bring him to and from his appointments, as he was unable to care for himself during this time.[40]

A City of Burlington, Wisconsin, 911 call log for February 6, 2014, shows that Mrs. Smith, at 22:30, called from 500 Lewis Street, Burlington, Wisconsin, and told the 911 dispatcher that "her husband, Arlo Smith, was unresponsive."[41] Police went to the location and delivered CPR, and a paramedic unit went as well and transported Arlo, Sr., to the hospital.

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[38] 77a.
[39] 78a.
[40] *Id.*
[41] 62a.

Ms. Leopold's decision says that Arlo, Sr., filed a Form I-130 petition for Mrs. Smith on May 23, 2013.[42] She reports that he died on February 6, 2014, but adds that "when there is reason to doubt the validity of the marital relationship, the petitioner must present evidence to show that the marriage was not entered into for the purpose of evading immigration law."[43]

That decision states that on August 15, 2013, the two "appeared for an interview in connection with [ ] pending Forms I-130 and I-485." Further, writes Ms. Leopold, on August 19, 2015, USCIS issued a NOID to Mrs. Smith, listing evidence she and her late husband had submitted "as well as derogatory information gathered connected your [*sic*] immigration history."[44]

Ms. Leopold reiterates the NOID's content.[45] She states that Mrs. Smith first responded to the NOID on September 17, 2015, and requested additional time to respond as she had "filed a Freedom of Information/Privacy Act Request, Form G-639."[46] Further, wrote Ms. Leopold, Mrs. Smith filed a supplemental response to the NOID, which included notarized affidavits she swore and her ex-husband, Francisco Javier Hernandez-Rico, swore.[47]

Ms. Leopold describes the affidavits as denying that the two ever presented themselves as a married

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[42] 43a.
[43] 42a, *citing Matter of Phillis*, 15 I.&N. Dec. 385, 386 (BIA 1975).
[44] *Id.*
[45] 43a-46a.
[46] 46a.
[47] 46a-47a.

couple to immigration inspectors at Atlanta Airport in 2002.[48] But Ms. Leopold then adds,

> In contrast to these affidavits, immigration inspectors clearly indicated that you both presented yourselves as a married couple. In addition, [Mr. Hernandez-Rico] participated in a sworn statement taken during that time at the Atlanta airport with INS officers. In his statement he referred to you as his wife and stated his purpose for coming to the United States was [*sic*] for business and pleasure. He did not indicate that his purpose was to provide English interpretation for you.[49]

Among other things, Mrs. Smith swore in her affidavit that she traveled together with Mr. Hernandez-Rico to take advantage of his English skills, but that she "needed to go to the U.S. to finish some business. We both needed to go to the U.S. *for our own reasons, and we traveled together only because I needed Francisco's help with English*."[50]

In the end, Ms. Leopold wrote, "Based on the records of the former INS, you and [Mr. Hernandez-Rico] have now provided false and misleading information to USCIS in hopes of you obtaining an immigration benefit. Your notarized statement and [Mr. Hernandez-Rico's] notarized statement lack credibility."[51]

To get there, the agency delved into Mr. Hernandez-Ricos' own immigration and marital histories, saying that on May 12, 2005, Mr. Hernandez-Rico

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[48] 47a.
[49] *Id.*
[50] 63a (emphasis added).
[51] 47a.

married a U.S. citizen who filed an I-130 on his behalf, which USCIS denied.[52] Further, said the agency, that denial indicated that Mr. Hernandez-Rico had resided with Mrs. Smith at 528 N. 62nd Street, Wauwatosa, WI 53213-4170.

In Mrs. Smith's affidavit,[53] and Mr. Hernandez-Rico's affidavit,[54] both declared that the property was in Mr. Hernandez-Rico's names because Mrs. Smith had no social security number. Further, according to Mr. Hernandez-Rico's affidavit, he, Mrs. Smith, and their son, "had separate bedrooms" in that home.[55] In fact, Mr. Hernandez-Rico swears that after marrying Eloisa Canales, a U.S. citizen, he

> …resided part of the week at 528 N. 62nd Street, Wauwatosa, and I stayed with Eloisa just a few nights a week…Eloisa never stayed overnight…because my son and my ex-wife [Mrs. Smith] were living there, and we considered it [Mrs. Smith's] house.[56]

Ms. Leopold wrote that on June 23, 2011, Mr. Hernandez-Rico sought a green card based on marriage to a U.S. citizen and submitted evidence, a Form G-325, which indicated that he lived at a residence at which Mrs. Smith lived from January 2006 through March 2011 at 2223 N. 115th Street, Wauwatosa, WI.[57] In contradiction, Mrs. Smith swore as follows:

> I understand that my G-325 has some mistakes. When my husband, Arlo H. Smith Sr. and I went to a company on May 20, 2013 to complete the

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[52] 44a.
[53] 64a-65a.
[54] 69a.
[55] *Id.*
[56] 70a.
[57] 45a.

> immigration forms, including the G-325, the company mistyped 2223 N 115th Street instead 528 N 62nd Street on which I was living from 2004 to 2009; for this reason I am attaching a copy of the installation of a new furnace in 528 N 62nd Street Wauwatosa.[58]

But USCIS saw other problems. Ms. Leopold wrote, for example,

> Your affidavits explain your history of residing together with your child in common in Wisconsin over the years after your divorce from each other and during periods of time during [Mr. Hernandez-Rico's] marriage to his petitioning United States citizen. You both stated you purchased home together and were in business together. You both indicated that you maintained a bank account together post-divorce.[59]

An immigration investigator went to 5101 N. Lovers Lane Road, Milwaukee, WI 53225, on June 6, 2014, and saw the names of Mrs. Smith, Mr. Hernandez-Rico, and their son on a mailbox for an apartment in that building.[60] Finding nobody at home, the investigator obtained a copy of the apartment's lease from the agent, which bore signatures of all three for a lease commencing on August 10, 2012.[61]

Mr. Hernandez-Rico swore that Mrs. Smith lived at that N. Lovers Lane address but only until October 6, 2012, when she moved to 500 Lewis Street, Burlington, WI "with her husband Arlo."[62]

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[58] 65a.
[59] 48a.
[60] 45a.
[61] 45a-46a.
[62] 71a.

That address, 500 Lewis Street, Burlington, WI, is where rescue response found Mrs. Smith with Arlo, Sr., dying in her arms.[63]

The agency, the district court, and the court below all do not ask what, if not in her marital relationship with her late husband, Mrs. Smith was doing at that address on a Saturday night at 10:30 pm.

D. The Procedure Below.

The Seventh Circuit decided that the district court properly dismissed Mrs. Smith's complaint, and rejected her claims premised in the APA and the Fifth Amendment. The court below endorsed USCIS's finding that Mrs. Smith's continued relationship with Mr. Hernandez-Rico undermined the validity of her marriage to Arlo, Sr.[64]

It rejected Mrs. Smith's claim that the agency ignored evidence supporting a finding of a *bona fide* marriage between the Smiths. But the court below did not show anywhere in the record where the agency mentioned, let alone evaluated, the four declarations offered to prove the *bona fides* of the Smith's marital relationship, and simply swept that problem aside in a *post hoc* rationalization that the agency gave the declarations "less weight."[65]

The court below rejected Mrs. Smith's procedural and substantive due process claims. There was no fundamental liberty interest for the agency to violate, said the court below, even though it was the

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[63] 61a.-62a.
[64] 14a, *Smith*, 103 F.4th at 1254.
[65] 13a, *Smith*, 103 F.4th at 1253.

process, not outcome, about which Mrs. Smith complained.[66]

This case began as Arlo, Sr.'s I-130 petition. When he died, it became Mrs. Smith's I-360 self-petition. Once the agency denied that petition, she appealed to the Board of Immigration Appeals.[67]

The BIA affirmed, Mrs. Smith sued in district court, and the district court dismissed her lawsuit because it found no claim on which it could grant her relief.[68] She appealed to the Seventh Circuit which affirmed the district court[69] and denied her timely petition for rehearing.

Reasons for Granting the Writ

A. This Case Presents an Issue of National Importance; in that Close to a Million Family-Based Green Card Petitions are Filed Annually Including a Sizeable Number Based on Marriage, Potentially Raising Questions About the Agency's Reliance on Asserted Derogatory Information Warranting Denial of Petitions but Without the Agency Permitting Petitioners to Examine what it Asserts as Derogatory Information.

This case is a good vehicle for this court to establish safeguards against the danger that the agency will deny a green card petition in error citing

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[66] 17a-19a, *Smith*, 103 F.4th at 1255-56.
[67] 5a-8a, *Smith*, 103 F.4th at 1250-51.
[68] 8a-9a, *Smith*, 103 F.4th at 1251.
[69] 20a, *Smith*, 103 F.4th at 1256.

derogatory information which is not dispositive of whether a marriage on which a green card petition is based is *bona fide*. It is an issue of national importance, although the exact number of marriage-based petitions is difficult to ascertain, that the circuits maintain their position as arbiters of the meaning of legal terms and not defer to the agency without sound reason, especially not when the agency's administrative record is not in view, as here.

USCIS fielded close to a million I-130, family-based petitions, in 2023.[70] It is reasonable to assume that a good number of those I-130 family petitions were based on marital relationships.

Under the current interpretation of the agency's role in adjudicating the *bona fides* of such marital relationships, agency adjudicators have wide latitude to decide how much and in what form to reveal when the agency asserts that there is derogatory information warranting denial of a family-based petition. Mistakes happen and will happen with the potential that important rights will be denied.

The agency did not file its administrative record as Fed. R. App. Proc. 17(a)—(b)(1) requires. The parties never stipulated, under Fed. R. App. Proc. 17(b)(2), that filing the administrative record was unnecessary for judicial review.

In *Citizens to Preserve Overton Park v. Volpe*, this Court held that for judicial review, a reviewing court must examine the record on which the

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[70] U.S. Citizenship and Immigration Services, *Annual Statistical Report FY 2023*, (n.d.), https://www.uscis.gov/sites/default/files/document/reports/fy2023_annual_statistical_report.pdf.

administrative agency based its decision.[71] The administrative record, as the foundation of the agency's decision, ensures agency transparency and accountability to both the courts and the public.[72]

In this case, the missing agency administrative record prompted a member of the Seventh Circuit panel to ask at oral arguments whether it was going to become common for the court to have to review agency decisions without seeing the agency's administrative record.[73] The Attorney General's lawyer, Olga Y. Kuchins, answered that Mrs. Smith attached all necessary documents to her complaint.[74] Ms. Kuchins must have forgotten that she attached the NOID as Exhibit A to the Attorney General's brief in support of his motion to dismiss.[75]

The "whole record" rule required the agency's administrative record brought before the panel for judicial review.[76] This "whole record" rule is designed to prevent a reviewing court from weighing new evidence and "substitut[ing] its judgment for that of the agency."[77] The court below could not have assessed whether the agency's decision in Mrs. Smith's case ran "counter to the evidence before the agency," *Id.*, without having *all* the evidence the agency had before it

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[71] 401 U.S. 402, 419 (1971).
[72] *Dep't of Commerce v. New York*, 588 U.S. 752, 785 (2019).
[73] *Smith*, No. 23-2874, Oral Argument at 10:38 (7th Cir. Apr. 10, 2024).
[74] *Id.* at 10:49.
[75] *Smith*, 23-cv-0490-bhl, Brief in Support of Motion to Dismiss – Exhibit A (E.D. Wis. Jul. 11, 2023).
[76] 5 U.S.C. § 706(2).
[77] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

when it made the decision to deny her green card petition.

This is especially important because Mrs. Smith challenged the very existence of such derogatory information; she averred in her complaint that she had tried to obtain a copy of the alleged immigration inspectors' report the agency said was created at Atlanta on May 13, 2002, through a Freedom of Information/Privacy Act request but had received no such report.[78]

In Mrs. Smith's case, § 103.2(b)(16)(i) created the potential for violation of her procedural due process rights. In *Greene v. McElroy*,[79] this Court held that not only had it emphasized the accused's right to confront witnesses in the criminal context, it had also done so in the administrative context.[80]

A petitioner aware of the identity of her accuser cannot complain that the agency used the accuser's testimony wrongly, if she failed to depose the accuser, for example.[81] It is impossible to depose a subject whose identity you do not know. The agency gave Mrs. Smith a summary of its asserted derogatory information in two parts – one in the NOID and the other in the agency's final decision, and neither identified the alleged maker(s) of the report(s) the agency cited

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[78] *Smith v. Garland*, Complaint ¶ 49, No. 23-2874, (E.D. Wis. Apr. 14, 2023).

[79] 360 U.S. 474, 496–97 (1959).

[80] *Id.* at 497, *citing Southern R. Co. v. Virginia*, 290 U.S. 190 (1933); *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937); *Morgan v. United States*, 304 U.S. 1, 19 (1938); *Carter v. Kubler*, 320 U.S. 243 (1943); *Reilly v. Pinkus*, 338 U.S. 269 (1949)

[81] *Richardson v. Perales*, 402 U.S. 389, 402-06 (1971).

as containing the derogatory information. *Greene* is instructive – for it holds:

> [U]nder the present clearance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally.[82]

The agency's asserted derogatory information relating to "Atlanta 2002" would have happened in what most travelers present at the time would recall as a frenzied scene at our airports in the aftermath of the terror attacks on September 11, 2001. The agency's decision states that Mrs. Smith and Mr. Hernandez-Rico were detained at Atlanta and found to be inadmissible but were allowed to withdraw their applications for admission.[83]

Her right to prosecute her late husband's green card petition for her was an important benefit the agency was duty-bound to consider carefully. In a case involving a party threatened with deprivation of disability benefits, this Court held:

> A [] safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency. In addition, prior to the cutoff of

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[82] *Green*, 360 U.S. at 497-99.
[83] 44a.

> benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, *enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions*. These procedures, again as contrasted with those before the Court in *Goldberg*, enable the recipient to 'mold' his argument to respond to the precise issues which the decisionmaker regards as crucial.[84]

The panel held that the NOID afforded Mrs. Smith a fair opportunity to rebut the agency's asserted derogatory information. Said the court below, referring to *Ghaly*, "…the submission of rebuttal evidence in response to the agency's intent to revoke its approval of the petition was evidence that the summary was sufficient."[85]

That contention manages the difficult trick of a *post hoc ergo propter hoc*, "it follows this, therefore, this caused it," fallacy, and ignoring that *ex nihilo nihil fit*, "from nothing comes nothing."

Speculation though it is, the agency, to infuse "Mexico City 2004" into Mrs. Smith's record when she was nowhere near that embassy on July 6, 2004, means that the agency, at a minimum, made a mistake and, at worst, may have fabricated that event.

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[84] *Mathews v. Eldridge*, 424 U.S. 319, 345-46 (1976) (emphasis added).

[85] 16a, *Smith*, 103 F.4th at 1255.

The district court chastised Mrs. Smith for suggesting that because the agency planted that untruth in the NOID, it was not credible, saying:

> Invoking the common law maxim "*falsus in uno falsus in omnibus*," she contends that USCIS is not trustworthy because it "admits that it made a factual claim in the NOID that turned out to be a total fabrication…But the entire purpose of the NOID is to give the petitioner a chance to rebut an agency's initial conclusion. A successful rebuttal of a part of the NOID does not render the entire NOID discreditable. If anything, accepting at least some of the petitioner's argument on rebuttal suggests the kind of *thoughtful, self-critical review necessary for the immigration system to properly function.*"

24a-25a.[86]

Federal agencies deserve at least some presumption that their functions are regular. After all, the common law pedigree of the presumption of regularity is well-worn.[87]

But "presumption of regularity" is a deference doctrine,[88] not unlike that this Court enunciated in *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*,[89] whose outer contours this Court redrew earlier this year in *Loper Bright Enterprises v. Raimondo*.[90]

That "Mexico City 2004" is in the NOID at all, causes the mind to wonder what else the agency got

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[86] *Smith*, No. 23-cv-0490-bhl, 23 WL 6048830, at *3 n. 2.
[87] *Chicago, B. & Q. Ry. v. Babcock*, 204 U.S. 585, 593 (1907).
[88] *Cf.* Adrian Vermeule, *Law's Abnegation* 120–21 (2016).
[89] 467 U.S. 837 (1984).
[90] 144 S.Ct. 2244, 2265 (2024).

wrong. Yes, the agency withdrew it, but not anything else, and that was key to the agency's beginning assault on Mrs. Smith's credibility.

The court below responded to Mrs. Smith's challenge to how the agency deployed § 103.2(b)(16)(i) against her, saying

> This section does not command the production of the actual 'record of proceeding'; it directs the agency to disclose only the 'information' that is 'contained in the record of proceeding.' 8 C.F.R. § 103.2(b)(16)(ii). USCIS complies with this regulatory requirement when it provides visa petitioners with a summary of a sworn statement against them.

15a-16a.[91]

Neither the district court nor the panel below put the agency to its strictest proof on its asserted derogatory information when it is clear that the agency's adjudicators, being human, are not beyond making mistakes that can injure an individual like Mrs. Smith seriously.[92]

The panel relied on intra circuit opinions for legal authority to interpret § 103.2(b)(16)(i) and held that it had to uphold the agency's action if "a reasonable mind would find adequate support for the decision."[93]

This Court has held that agencies' interpretations of their own regulations are subject to judicial deference.[94] But the Court has limited that rule to

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[91] *Smith*, 103 F.4th at 1254-55, *citing Ghaly*, 48 F.3d at 1434-35.
[92] *See Greene*, 360 U.S. at 496; *see also Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).
[93] 14a, *Smith*, 103 F.4th at 1254, *citing Ghaly*, 48 F.3d at 1431; *Ogbolumani*, 557 F.3d at 733.
[94] *See Auer v. Robbins*, 519 U.S. 452 (1997).

agency interpretations which pass muster under the multifactor test in *Kisor v. Wilkie*.[95]

One of the leading reasons why courts tend to defer to the agency's use of summaries rather than opening the record to inspection is the belief that derogatory information risks exposing those furnishing it confidentially.[96] As seen here, that can be a red herring – nothing the agency asserted as derogatory information involved confidential informants in Mrs. Smith's case.

The passage of time – "Atlanta 2002" was more than a decade when the Smiths married – makes it less plausible that the agency was protecting sources. But the agency's failure to reconsider its approach deserves remark. When caught asserting "Mexico City 2004" which never happened, the agency doubled down on "Atlanta 2002," coming back with a little more in its final decision than it had let on in the NOID: It revealed to Mrs. Smith that Mr. Hernandez-Rico participated in a sworn statement in which he referred to Mrs. Smith as his wife and made other statements contrary to facts she submitted in her rebuttal to the NOID.[97]

B. The Court Should Remand this Case Because the Panel Below Erred in its Factual Rendition by Retaining a Withdrawn Fact, and Erred as a Matter of Procedure Because it did not Require Filing of the Missing Administrative Record that was Critical to Deciding the Truth of the Agency's

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[95] 139 S.Ct. 2400 (2019).
[96] *Mestanek*, 93 F.4th at 174.
[97] 47a.

Assertions, the Existence of Which Mrs. Smith Challenged.

The district court held that the agency, after Mrs. Smith's rebuttal to the NOID, withdrew its assertion that she and Mr. Hernandez-Rico appeared together at the American Consulate in Mexico City on July 6, 2004. Wrote the district court,

> …USCIS withdrew its preliminary conclusion that Mrs. Smith and Hernandez-Rico applied together for visas at the American Consulate in Mexico City in 2004…the entire purpose of the NOID is to give the petitioner a chance to rebut an agency's initial conclusion…accepting at least some of a petitioner's argument on rebuttal suggests the kind of thoughtful, self-critical review necessary for the immigration system to properly function.[98]

The opinion of the court below retains the "Mexico City 2004" event as if fact.[99] That finding, as fact, is clearly erroneous.[100]

So, too, did the court below err when it proceeded to the merits without the agency having filed its administrative record. Fed. R. App. Proc. 17(a)

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[98] 24a-25a, *Smith*, 23-cv-0490, 23 WL 6048830, at *3 n. 2.

[99] 5a, *Smith*, 103 F.4th at 1249-50 ("Two years later, [Mrs.] Smith and [Mr. Hernandez-]Rico applied for nonimmigrant visas at the United States consulate in Mexico City, again presenting themselves as a married couple. Officials issued the visas, and both traveled to the United States.").

[100] *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

requires filing of the administrative record within 40 days of service of the appeal.

As held by *Citizens to Preserve Overton Park*, an administrative record is a prerequisite for APA review.[101] The importance of the administrative record cannot be overstated in this case because the agency relied on asserted derogatory information whose form only it knew.

Besides the difficulty of ascertaining from a summary what the entire exchange between Mrs. Smith, Mr. Hernandez-Rico, and immigration inspectors was – Mrs. Smith, in her affidavit, swears that the encounter at Atlanta in 2002 lasted two hours[102] – there is a valid question why, if both Mr. Hernandez-Rico and Mrs. Smith were detained at Atlanta, the agency only refers to a sworn statement by Mr. Hernandez-Rico.

When immigration officials conduct airport interviews and decide that a subject applying for admission must be returned to his or her origin, they

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[101] *Citizens to Preserve Overton Park*, 401 U.S. at 419-20 ("The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely *'post hoc'* rationalizations…which have traditionally been found to be an inadequate basis for review. And they clearly do not constitute the 'whole record' compiled by the agency: the basis for review required by § 706 of the Administrative Procedure Act. Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision.") (internal citations omitted).

[102] 63a ("After around two hours in the room at Atlanta Airport, the officer said to Francisco and me…").

complete Form I-867A and/or I-867B.[103] It does not seem likely that immigration inspectors took a sworn statement from Mr. Hernandez-Rico but did not take one from Mrs. Smith, if the two were traveling together and, as the agency asserts, claimed to be a married couple found to be inadmissible and allowed to withdraw their admission applications.

The importance of this question is, of course, that what the agency claims Mr. Hernandez-Rico said may be contrary to what Mrs. Smith said. Naturally, if his statement is to be used against her, as happened here, her statement, if it exists, should be in view to decide whether his statement stands as derogatory information against her. The only way to know whether there is a sworn statement by Mrs. Smith is to examine the administrative record.

There are other reasons to want to examine the administrative record. For example, Mr. Hernandez-Rico's immigration history as it relates to his marriages to U.S. citizens seems to have captured the imagination of the agency's adjudicating officer. It is no accident that Mr. Hernandez-Rico's immigration and marital histories feature prominently against Mrs. Smith when the two are not related, other than as exspouses, a relationship that would not warrant merging their immigration records.

The agency's adjudications officer must have decided in the course of adjudicating Mrs. Smith's petition that Mr. Hernandez-Rico's immigration and marital histories were relevant to Mrs. Smith. That

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[103] Under current practice under 8 C.F.R. § 235(b)(1), when inspectors decide to remove an arriving non-citizen, the process begins with an I-867A and continues on an I-831 continuation page as opposed to Schedule I-867B under prior practice.

decision, potentially documented in the record, would lend insight to how the agency decided what it would do as its investigation of the *bona fides* of the Smiths' marital relationship.

In short, the chasm where the administrative record should be yawns. Deliberative process privilege can shield agency adjudicator notes and other things.[104] But the agency must assert it before a court can presume that it applies. Here, the court below seems to just have proceeded and was satisfied that the agency withheld what it withheld because it was empowered to do so. Again, Judge Hamilton, on the panel at oral arguments, asked about the missing administrative record and got no satisfactory answer.[105]

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[104] *See*, *e.g.*, *Department of Interior v. Klamath Water Users Prot. A.*, 532 U.S. 1, 6 (2001) ("These privileges are said to be incorporated in FOIA Exemption 5, which exempts from disclosure 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.'").

[105] *Supra* n. 71.

Conclusion

For the foregoing reasons, we respectfully urge the Court to grant this petition.

Respectfully,

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