

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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AMINA BOUARFA,)
Petitioner,)
v.) No. 23-583
ALEJANDRO MAYORKAS, SECRETARY)
OF HOMELAND SECURITY, ET AL.,)
Respondents.)
- - - - -

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1 P R O C E E D I N G S

2 (11:16 a.m.)

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

6 Mr. Deger-Sen.

7 ORAL ARGUMENT OF SAMIR DEGER-SEN

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

1 same decision based on the same criteria. And
2 the government concedes that a person could
3 obtain review if they filed a new -- a new
4 petition and had it denied.

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

12 I welcome the Court's questions.

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

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

24 And if you look at the actual
25 decisions, the decisions all read like decisions

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

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

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

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

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

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

1 something like that, you know, we're going to
2 revoke their petition. We don't want them to
3 even apply for a green card.

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

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

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

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

1 discretion to not revoke it.

2 JUSTICE THOMAS: So what do you --

3 CHIEF JUSTICE ROBERTS: Well --

4 JUSTICE THOMAS: -- rely on for that?

5 MR. DEGER-SEN: And -- and we rely on

6 1154(c), and that language says no petition

7 shall be approved. And we think in context --

8 JUSTICE THOMAS: But that's approval.

9 I'm -- we're talking about revocation.

10 MR. DEGER-SEN: Right. I think that's

11 the question. You know, does -- does that

12 language -- does it end on the day of approval,

13 or does it create continuing obligations that

14 the petition can't maintain the status of being

15 approved after the first day?

16 And so -- and I think, in context, it

17 does mean the latter thing. And just to give

18 you an example that might help, we have a few

19 examples, but one example is no article shall be

20 approved for publication if there is evidence of

21 plagiarism. I think everyone would understand

22 that if you approve the article of publication

23 and then the next day you find out that there is

24 plagiarism, it would be very strange to say:

25 Well, the rule just says it shouldn't be

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

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

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

22 JUSTICE SOTOMAYOR: Counsel --

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

25 JUSTICE SOTOMAYOR: Sorry.

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

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

10 And -- and what -- what more can --
11 what more do you want?

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: And --

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

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

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

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Yeah.

24 MR. DEGER-SEN: Well, and that just
25 shows that why are they -- you know, there is --

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

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

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

23 I would think that the argument made
24 from people who are applying would be you have
25 discretion to -- to keep the approval in place.

1 You don't have to revoke it. You know, it was
2 your mistake. We've gotten past that stage, so
3 let me just keep going.

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

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

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

1 that's probably why --

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

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

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

1 JUSTICE JACKSON: Isn't that better
2 than arbitrarily going back and forth? I mean,
3 the -- the -- if -- if the government is
4 consistent in its practices with respect to how
5 it exercises its discretion, isn't that what one
6 would want in a rule of law kind of scenario?

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

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

18 JUSTICE JACKSON: Except for the --

19 JUSTICE BARRETT: Well, what if it
20 did? Oh, sorry.

21 JUSTICE JACKSON: Go ahead.

22 JUSTICE BARRETT: What if it did?
23 What if it started exercising discretion? Would
24 your case go away? Or what if it had been
25 conducting itself the way Justice Jackson is

1 positing, you know, sometimes revoking it,
2 sometimes not? Then do you have no case?

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

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

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

1 think that's what the government is suggesting
2 as the kind of discretion it has.

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

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

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

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

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

1 I think if, you know, if they
2 abolished all of their own procedures and BIA
3 review, I think we would still have an argument
4 that that was arbitrary and capricious.

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

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

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

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

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

25 JUSTICE SOTOMAYOR: So you're asking

1 us to say because of, as a matter of practice,
2 this is what they believe they must do. But I
3 don't even know if the agency has to bother,
4 meaning, if you posited that if they -- they
5 couldn't use the sham marriage later, but I
6 don't know why not. If the petition wasn't
7 revoked, they could just simply deny you a visa
8 or an adjustment of status because you're
9 under -- you're not admissible under
10 1182(a)(6)(C)(i) because of the fraud bar.

11 MR. DEGER-SEN: But the fraud bar is
12 waiveable. The -- that --

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

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

25 JUSTICE SOTOMAYOR: Alright. So what

1 do you do with 11 --

2 MR. DEGER-SEN: -- loses all
3 discretion.

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

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

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

19 JUSTICE SOTOMAYOR: And when the --
20 well, yeah.

21 MR. DEGER-SEN: Right. So, you know,
22 there's obviously 1256 and there's all kinds of
23 rescission provisions.

24 JUSTICE SOTOMAYOR: But go ahead to my
25 1182.

1 MR. DEGER-SEN: Right. I mean, the
2 lower courts have held -- I think it's been the
3 government consistent position that 1154(c) is
4 non-waiveable, as in it doesn't fall under that
5 provision. Now they can obviously deny on the
6 basis of fraud if they want, but they're not
7 obligated to.

8 And our understanding or our argument
9 is that 1154(c) --

10 JUSTICE SOTOMAYOR: So, if they're not
11 obligated to, they can't waive either? Well,
12 your --

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

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

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

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

24 JUSTICE SOTOMAYOR: No, that's because
25 the law requires them not to give it.

1 MR. DEGER-SEN: Exactly. And so
2 then --

3 JUSTICE SOTOMAYOR: But that says
4 nothing about what happens later.

5 MR. DEGER-SEN: And -- and that -- but
6 I think that's the nub of the dispute. I mean,
7 I think there's a lot of common ground here.
8 And, really, the nub of the dispute is, does
9 1154(c) apply just on the day of approval, or
10 does it extend to the day after?

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

16 JUSTICE SOTOMAYOR: Alright, counsel.

17 MR. DEGER SEN: -- to apply to the
18 next day.

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

25 So why does practice matter?

1 MR. DEGER-SEN: Oh, I think practice
2 only matters in that it informs what the statute
3 requires. And we think that 1154(c) makes this
4 non-discretionary in this situation, i.e.,
5 because the agency has to revoke when it has
6 found a sham marriage. It's non-discretionary
7 and falls outside of the relief bar.

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

14 MR. DEGER-SEN: With 1155? Well, no,
15 I --

16 JUSTICE ALITO: 1155, yes.

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

1 course, if you have -- you know, X statute says
2 you have discretion to do all of these things,
3 and then another statute says but you don't have
4 discretion to do this, then, clearly, that
5 second statute means you don't have discretion
6 to do that second thing.

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

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

25 MR. DEGER-SEN: Well, it -- it allows

1 the -- the agency to come up with lots of
2 additional reasons. It's -- it's a way of
3 saying the agency, even in situations where the
4 eligibility criteria have been satisfied, we can
5 come up with additional reasons. We can stop
6 visa petitions coming through.

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

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

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

25 JUSTICE ALITO: But it doesn't say --

1 you changed it. You said where the babysitter
2 says for good and sufficient cause, not what the
3 babysitter deems to be for good and sufficient
4 cause.

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

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

22 JUSTICE ALITO: Thank you. Thank you.

23 MR. DEGER-SEN: I'm sorry.

24 JUSTICE KAGAN: If -- if I understand
25 the argument, it's that we're supposed to ignore

1 the very discretionary language of 1255 because
2 of the very non-discretionary language of
3 1154(c). But the non-discretionary language of
4 1154(c) does not pertain to revocations. It
5 applies -- it pertains instead to the initial
6 approval or denial of a petition.

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

17 The -- the decision to revoke is just
18 different from the decision to approve or deny
19 in the first instance. So this language about
20 approving or denying in the first instance
21 doesn't really speak to the decision to revoke,
22 which is instead governed by 1255.

23 MR. DEGER-SEN: I think all of that
24 might be true in a situation where what's being
25 given is -- is something other than just that

1 piece of paper. But the government has been
2 very clear. Its longstanding position is
3 there's no reliance interest in this piece of
4 paper because it's just -- it confers no
5 substantive benefits. All it is is something
6 that says you met those criteria. It's all --
7 that's literally the entire value of the paper.
8 And you take it to the next -- and you take it
9 to the agency the next day and it says, I met
10 the criteria.

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

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

24 MR. DEGER-SEN: But the only benefit
25 you're entitled to is the fact that you have

1 that piece of paper that allows you to go apply
2 for the green card. That -- that's literally
3 what that approved petition means.

4 And if the government has said you're
5 in a sham marriage and we don't actually think
6 that you are able to apply for -- you know,
7 apply for the green card, we're going to deny
8 the green card probably, we have to deny the
9 green card. I think that's what they think,
10 that they have to deny the green card. Then the
11 discretion we're talking about in this case --

12 JUSTICE KAGAN: Well, they have to
13 deny the green card if they've revoked the
14 petition, but they don't have to deny the green
15 card if the person has an approved petition and
16 nothing's happened to it.

17 MR. DEGER-SEN: Well, that's an
18 interesting question. I think that -- that's a
19 question, I think, for the government. The
20 government's longstanding position has been
21 the -- the -- the 1154(c) sham-marriage bar.
22 Congress enacted it. It's one of very few
23 restrictions like this that is non-waiveable.
24 It was such a fundamental thing that they said
25 your petition shouldn't even get off the ground.

1 Your application should -- and it's -- and it's,
2 you know, described as one of the most serious
3 and disabling judge -- judgments you can have
4 against you. You can -- it's perpetual. It's
5 non-waiveable. You can never become -- you can
6 never get U.S. status. So that's why it's so
7 fundamental. And the government's position, I
8 think, is that, yeah, we are not able to give
9 you the ultimate immigration benefit.

10 If the government says, yes, we can
11 exercise discretion to just let you through the
12 system and get a green card, I think their
13 argument looks different. I don't think they've
14 said that anywhere in their briefs. And that
15 would be contradictory to their longstanding
16 position.

17 And that's all consistent with, in
18 fact, what happens in the real world, which is
19 that in over 50 -- you know, 50 years or maybe
20 even 70 years, there has just never been an
21 instance where this purported discretion has
22 ever been exercised.

23 So where this all cashes out is this
24 means nothing other than taking away judicial
25 review from people who, you know, have this --

1 this very disabling judgment made against them.
2 And, in some instances, that means getting
3 kicked back in line and having to wait 10 more
4 years.

5 And the government cannot come up with
6 a single reason why that makes any sense. It
7 agrees that can be reviewed yesterday. It can
8 be reviewed tomorrow. It's the kind of decision
9 that's generally reviewed. Why does it not
10 allow review in this situation?

11 CHIEF JUSTICE ROBERTS: Thank --

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 Justice Alito, anything? No?

18 Justice Barrett?

19 JUSTICE JACKSON: Can I just --

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: Yes. Can I just
23 quickly ask about -- your client is not in
24 removal, right?

25 MR. DEGER-SEN: No.

1 JUSTICE JACKSON: And we've never held
2 that 1252 applies in the non-removal context.
3 So isn't there at least a threshold issue
4 that -- I mean, the Northwest Immigrants' Rights
5 Project amicus raises that, so I didn't know if
6 you wanted to speak to that or --

7 MR. DEGER-SEN: No, absolutely. I
8 mean, that was the question this Court reserved
9 in Patel. It's a threshold issue that wasn't
10 raised in our case, so -- but I think it's
11 absolutely something that this Court can and
12 should reserve. It -- it has enormous
13 ramifications.

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

1 JUSTICE JACKSON: So you're say -- so
2 it wasn't -- it wasn't briefed, though, in this
3 case?

4 MR. DEGER-SEN: It wasn't briefed in
5 this case, so I -- I -- I -- I --

6 JUSTICE JACKSON: So any holding
7 against you would have to make clear that we're
8 reserving that issue?

9 MR. DEGER-SEN: Reserving that issue.
10 The same issue that was reserved in Patel.
11 Absolutely.

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Ms. Sinzduk.

16 ORAL ARGUMENT OF COLLEEN R. SINZDAK

17 ON BEHALF OF THE RESPONDENTS

18 MS. SINZDAK: Mr. Chief Justice, and
19 may it please the Court:

20 There were more than 900,000 I-130
21 visa petitions filed last year, and USCIS
22 granted, denied, or revoked more than 800,000
23 such petitions. Given this volume, Congress had
24 every reason to streamline judicial review by
25 prohibiting litigation at the revocation stage.

1 And, to be clear, the government
2 believes that Congress did prohibit litigation
3 by making revocations discretionary, including
4 in the face of a sham-marriage determination.
5 The government does not view a revocation as
6 mandatory in that stage, and I am not aware of a
7 longstanding position of the kind that counsel
8 suggests.

9 The text is very clear on this.
10 Section 1252 bars review of actions, the
11 authority for which is specified to be in the
12 discretion of the Secretary of Homeland
13 Security. And Section 1155 specifies that the
14 Secretary's authority to revoke visa petitions
15 is discretionary at least three times over, as
16 Justice Alito was noting.

17 It uses the term "may," which connotes
18 discretion. It uses the term "deems," which
19 fairly exudes discretion. And it uses the
20 capacious term "good and sufficient cause,"
21 which calls for a discretionary judgment.

22 Now I -- I don't hear Petitioner today
23 to be advancing the secondary argument that I
24 think we saw in his briefing with respect to the
25 idea that a sham -- at least an underlying

1 sham-marriage determination might be reviewable
2 even if the revocation decision itself is not
3 because the revocation decision is clearly
4 discretionary under Section 1155, and I think
5 that's for good reason.

6 I don't think that this Court has ever
7 suggested that someone can evade a judicial
8 review bar on review of a decision by breaking
9 that decision into its constituent parts.

10 And, here, the text of Section
11 1252(a)(2)(B)(ii) is very clear because it says
12 that you -- it puts the focus on the nature of
13 the agency's authority. So it says: A
14 decision, the authority for which is specified
15 to be in the Secretary's discretion.

16 And any decision that the Secretary is
17 making using his discretionary revocation
18 authority is therefore covered.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: But don't you think
21 it's a bit odd that the underlying determination
22 initially was not discretionary and now it is
23 being disposed of after the fact in a
24 discretionary way?

25 MS. SINZDAK: I -- I do think that

1 you've put your finger on perhaps the oddity of
2 this statute, which is that approval is banned,
3 and that's a mandatory decision, but revocation
4 is discretionary.

5 I think that, as Justice Jackson was
6 suggesting, that is to the benefit for the most
7 part of non-citizens because it allows some
8 discretion on the part of the agency to decide
9 not to revoke when it notices that it has made a
10 mistake in the past.

11 So I -- I agree that's a little bit
12 odd. It is the plain text of the statute. And
13 I think that in -- in the mine-run of
14 situations, it's going to be helpful to
15 non-citizens.

16 JUSTICE GORSUCH: Ms. Sinzdak, your
17 friend on the other side suggested that the
18 government has never exercised its discretion to
19 overlook a sham marriage. Is that correct?

20 MS. SINZDAK: We do not have a record
21 of the government overlooking a sham marriage.
22 We do not keep records with respect to times
23 that the government --

24 JUSTICE GORSUCH: Are you aware of any
25 case?

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

2 JUSTICE GORSUCH: Okay. The other
3 question I had is your friend on the other side
4 also suggests that this obligation of approval
5 is ongoing because you cannot grant a green card
6 either or any kind of visa relief in the end if
7 there is a sham marriage. Is that right?

8 MS. SINZDAK: No. So there is a --
9 the -- the -- the government has the discretion
10 whether or not to revoke. Then, at the green --
11 green card stage, I believe Justice Sotomayor
12 was alluding to another statute, which is 80 --
13 1182(a)(6).

14 JUSTICE GORSUCH: Six.

15 MS. SINZDAK: That says that if the
16 non -- the non-citizen has made a
17 misrepresentation in order to get immigration
18 benefits of any kind, then he has no
19 eligibility. But that, as Justice Sotomayor
20 pointed out, is waiveable. There can be a
21 waiver. So I think that's the way that the --
22 the statutes interact.

23 JUSTICE GORSUCH: Can you explain that
24 to me a little bit more?

25 MS. SINZDAK: Sure. So 1182 -- again,

1 1182(a) --

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

4 MS. SINZDAK: It -- it is -- it -- it
5 says that the -- the non-citizen is
6 inadmissible. But the way in which it becomes,
7 I -- I suppose you could say, discretionary, in
8 that there is a discretionary waiver under
9 1182(i), which says that in an instance where
10 there has been extreme hardship, where -- on --
11 to -- where there would be extreme hardship to a
12 U.S. citizen --

13 JUSTICE GORSUCH: U.S.

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

17 JUSTICE GORSUCH: But, other than that
18 carveout for an effect on a U.S. citizen, the
19 bar is mandatory?

20 MS. SINZDAK: That's correct.

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

25 MS. SINZDAK: And that's simply

1 incorrect.

2 JUSTICE GORSUCH: And -- and you --
3 and you put that together with the fact the
4 government's unable to point to a single
5 circumstance in which it's ever waived the
6 sham-marriage requirement, and it -- it's
7 starting to look pretty non-discretionary.

8 I think that's the nature of the
9 argument.

10 MS. SINZDAK: The question under
11 (b)(2) is whether Congress has specified that a
12 decision is in the discretionary authority of
13 the Secretary.

14 JUSTICE GORSUCH: Right. But
15 that's -- that's the question.

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

17 JUSTICE GORSUCH: I mean, you're
18 stating the question rather than giving the
19 answer. So help me with the answer.

20 MS. SINZDAK: Sure. The answer is
21 that Section 1155 makes the decision whether to
22 revoke discretionary.

23 JUSTICE GORSUCH: Mm-hmm.

24 MS. SINZDAK: So, because the statute
25 makes it discretionary, the fact that the agency

1 has always exercised it in one particular
2 direction doesn't have anything to do with the
3 applicability of the review bar.

4 JUSTICE GORSUCH: Got it. Next --

5 JUSTICE SOTOMAYOR: Can you imagine --
6 I'm sorry.

7 JUSTICE GORSUCH: I'm -- I'm sorry.
8 I'll finish it real quick.

9 JUSTICE SOTOMAYOR: Go ahead.

10 JUSTICE GORSUCH: The -- the case --
11 cases below which you cite and rely on have this
12 broad reading of -- of the bar. But many of
13 them, including the Eleventh Circuit, also
14 permit review on an allegation of procedural
15 error, including, it seems, procedural error of
16 regulations that the -- the agency's adopted
17 itself.

18 Where do you stand on whether those
19 decisions are reviewable?

20 MS. SINZDAK: That's right. There is
21 something of a circuit dispute. It's not
22 implicated here. I -- I -- I think that we
23 think that procedural errors are similarly
24 foreclosed by the discretionary relief bar.

25 JUSTICE GORSUCH: So, even if the

1 government completely abandons its existing
2 procedures, ignores them willy-nilly, that's not
3 reviewable in the government's view?

4 MS. SINZDAK: If we're talking about a
5 procedural error. And --

6 JUSTICE GORSUCH: Yes.

7 MS. SINZDAK: -- here, I'm setting
8 aside constitutional claims --

9 JUSTICE GORSUCH: Yes.

10 MS. SINZDAK: -- which I think go in
11 at least into a different basket, then --

12 JUSTICE GORSUCH: I'm talking about
13 procedural errors.

14 MS. SINZDAK: -- yes. I think a
15 judicial review bar, the way that it works is to
16 bar claims that the government has made a
17 mistake, including in that way.

18 JUSTICE GORSUCH: So, if the
19 government makes a mistake by throwing all the
20 papers up in the air and say, we're going to --
21 we're -- we're going to revoke the pile that
22 lands over there, despite all of our fine-tuned
23 regulations --

24 MS. SINZDAK: I --

25 JUSTICE GORSUCH: -- that the bar on

1 judicial review applies?

2 MS. SINZDAK: I think that when
3 Congress enacts judicial review bars, it assumes
4 that the agency is not going to behave like a
5 monster or --

6 JUSTICE GORSUCH: I would have
7 thought. But you're -- you're telling me that
8 they can.

9 MS. SINZDAK: I -- I'm telling you
10 that Congress has made the decision that it does
11 not think that kind of behavior is going to
12 happen, or at least that it's going to be such a
13 fringe case that the benefits of barring
14 judicial review are going to be worth it.

15 JUSTICE GORSUCH: Got it. Thank you.
16 I'm sorry.

17 JUSTICE KAGAN: You said that you
18 didn't know of a case in which revocation wasn't
19 the decision, but do -- but you also said you
20 didn't know of a policy that made revocation
21 automatic. Is that what you said?

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

24 First of all, USCIS does not keep
25 records of times that it decided not to revoke.

1 So I'm not sure that I would be aware if there
2 were these non-revocations --

3 JUSTICE KAGAN: Okay. I was really
4 asking about the second half of that. You said
5 you were not aware of any policy that revocation
6 was automatic.

7 MS. SINZDAK: That's right. It is
8 not --

9 JUSTICE KAGAN: So, in all your
10 conversations, which I imagine you -- you had,
11 with the people who are implementing this law,
12 they said, we -- we don't have a policy that
13 revocation is automatic. We think that we have
14 discretion.

15 MS. SINZDAK: I want to be clear.
16 They believe that they have statutory
17 discretion. Sham-marriage -- the sham-marriage
18 bar is not one of the reasons for automatic
19 revocation. Those reasons are set out --

20 JUSTICE KAGAN: I -- I understand.
21 We're talking about, in practice, do they think
22 of themselves as having a policy of yes, of
23 course, we would always revoke? Or do they
24 think of themselves as having something like:
25 Well, of course, we would usually revoke, but we

1 retain the right to not revoke in certain
2 circumstances?

3 MS. SINZDAK: I think that it's
4 exactly what we said in our brief, which is that
5 they do strive to revoke when they determine
6 that there has been a sham-marriage
7 determination.

8 They're not required to do so by
9 statute. And that's dispositive with respect to
10 the application of the judicial review bar. But
11 I do think that they are -- where they find
12 sufficient evidence, they are revoking.

13 JUSTICE KAGAN: So what you're saying
14 is that there really are no set of circumstances
15 in which they would say, in this case, because
16 of the peculiarities of this case, we're not
17 going to revoke?

18 MS. SINZDAK: I -- I can't say that
19 there would never be that circumstance. They
20 have not -- they -- they -- when I have spoken
21 to them, what they have said is that, in
22 general, if they do find sufficient evidence,
23 they will revoke.

24 But let me just, again --

25 JUSTICE KAGAN: Well, I guess, I --

1 I -- I -- you know, the "in general" in that
2 sentence, is it in general, or is it always?

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

5 MS. SINZDAK: Well, I think, quite
6 honestly, the problem is that this is being done
7 by individual adjudicators who have been given
8 discretion under the statute. And so what they
9 are telling -- telling me is that, to their
10 knowledge, where there are -- the evidentiary
11 burden is satisfied, the agency generally is
12 going to revoke if it determines that there has
13 been a sham marriage but not that the statute
14 requires it. And that's the key -- that's the
15 key question.

16 And I just want to make clear, because
17 I think it's getting a little fuzzy, we're
18 looking at discretionary authority, and -- and
19 so if I can just give kind of my own child
20 hypothetical. If I tell my daughter that she
21 may have dessert after dinner every night, she
22 has discretionary authority to decide whether to
23 have dinner -- whether to have dessert.

24 As a practical matter, she is going to
25 eat dessert every single night.

1 (Laughter.)

2 MS. SINZDAK: I can assure you of
3 that. But I have given her discretionary
4 authority. And so, if there was a judicial
5 review bar, it would cover.

6 JUSTICE KAGAN: But -- but your
7 daughter would be able to tell you: I have a
8 policy of giving -- of having dessert every
9 night.

10 (Laughter.)

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

13 MS. SINZDAK: I -- I think what you
14 have seen is there is -- it's not an automatic
15 grounds for revocation. I -- I have not --
16 the -- the agency could not point me to a case
17 where they have decided not to revoke.

18 I -- I -- what I'm concerned about,
19 and I don't want to misrepresent to you, is
20 whether there's some sort of unwritten policy.
21 I don't know whether the adjudicators all sort
22 of sit around and say, of course, because
23 1154(c) seemed to have been really, really
24 important to Congress, we really do --

25 JUSTICE KAVANAUGH: How --

1 MS. SINZDAK: -- always revoke. I
2 just don't know.

3 JUSTICE KAVANAUGH: How many decision
4 makers are there?

5 MS. SINZDAK: There are many. I do
6 not know the exact number.

7 JUSTICE JACKSON: Do you agree that
8 Bouarfa could obtain judicial review by refileing
9 a petition in this case? The government's not
10 going to pop up and say if he tries to do that,
11 no?

12 MS. SINZDAK: That's correct. He
13 might not need to if he does -- sorry, it's a --
14 Bouarfa is a she.

15 JUSTICE JACKSON: She. Excuse me.

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

17 JUSTICE JACKSON: Sorry.

18 MS. SINZDAK: She -- if she refiles
19 and the -- and the agency tooks a -- takes a
20 fresh -- since she has refiled, if the agency
21 takes a fresh look at the facts or if she were
22 to submit additional evidence, the agency could,
23 of course, change its mind. But, if it did not,
24 then, yes, judicial review would be available.

25 JUSTICE JACKSON: Then she could get

1 review judicial review at that point? All
2 right.

3 The applicability of the judicial
4 review bar in 1252 it seems to me is a threshold
5 determination that hasn't been briefed here.
6 So, if we agree with you that the discretionary
7 nature -- about the discretionary nature of the
8 revocation provision, would you have any problem
9 with a line that expressly preserves that
10 threshold question?

11 MS. SINZDAK: I don't think that it's
12 a threshold question because I think Congress
13 was quite clear here in terms of the language of
14 (b), which says that it applies regardless of
15 whether the judgment, decision, or action is
16 made in removal proceedings. I haven't been
17 able to think of another way to read that line.
18 I --

19 JUSTICE JACKSON: No, I mean, you --
20 you -- you -- you think the issue comes out in
21 the government's favor, but, clearly, it's a
22 threshold question. I mean, we have -- we --
23 we -- we would have to decide whether 1252
24 applies.

25 And my concern is that by just jumping

1 to your conclusion -- let's say I, for the
2 purpose of this, agree with you that this is a
3 discretionary decision under 1154 or what --
4 1155. We only get to precluding judicial review
5 through 1252, correct?

6 MS. SINZDAK: Yes.

7 JUSTICE JACKSON: In other words,
8 the -- the -- the judicial stripping -- the --
9 the jurisdiction stripping comes from 1252?

10 MS. SINZDAK: That's correct. Now I
11 don't want to hide the ball because there is
12 jurisdiction stripping in the APA context
13 because the APA bars review of decisions that --

14 JUSTICE JACKSON: Yes. Setting that
15 aside, the parties here have been assuming that
16 the jurisdiction stripping is coming from 1252?

17 MS. SINZDAK: Correct.

18 JUSTICE JACKSON: And 1252 says you
19 don't have jurisdiction of discretionary
20 decisions. And so the argument here has been
21 about whether or not this is a discretionary
22 decision. But there's a threshold issue because
23 it seems to me -- at least I haven't found a
24 case in which we have applied 1252 jurisdiction
25 stripping in the non-removal context. So, if we

1 were to suddenly say in agreement with you this
2 is discretionary and, therefore, there's
3 jurisdiction stripping under 1252, we would be
4 assuming that 1252 applies in this context.

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

11 Is the government on board with at
12 least that little -- even though I know you
13 think you win.

14 MS. SINZDAK: Okay.

15 JUSTICE JACKSON: Okay.

16 MS. SINZDAK: I will happily take the
17 win in this case --

18 JUSTICE JACKSON: Yes.

19 MS. SINZDAK: -- with the knowledge
20 that in the future, I will win on this other
21 question.

22 (Laughter.)

23 JUSTICE JACKSON: Fine. Okay. Thank
24 you.

25 JUSTICE KAVANAUGH: But you don't

1 think we should reserve it, right?

2 MS. SINZDAK: I -- I -- I don't think
3 there's any --

4 JUSTICE KAVANAUGH: Because there's
5 no -- yeah.

6 MS. SINZDAK: -- ambiguity in the
7 text.

8 JUSTICE KAVANAUGH: I don't --

9 JUSTICE SOTOMAYOR: Counsel --

10 JUSTICE JACKSON: But we have to
11 decide it. I mean, I'm just saying I don't want
12 the answer to this question to necessarily
13 decide -- and there's a -- there's a cert
14 petition, I understand, that's coming up that's
15 asking just this question. Amicus here says
16 this is a separate question. We don't have
17 to -- you all haven't briefed the answer to this
18 question, correct?

19 MS. SINZDAK: That's correct.

20 JUSTICE JACKSON: Okay.

21 JUSTICE SOTOMAYOR: Justice Gorsuch's
22 hypothetical would give rise to a constitutional
23 challenge, wouldn't it?

24 MS. SINZDAK: I --

25 JUSTICE SOTOMAYOR: That if -- if the

1 INS just decided to throw the pile of
2 applications on the floor?

3 MS. SINZDAK: I -- I suspect that the
4 non-citizen would raise a due process
5 contention. I think they would then have to
6 deal with Munoz. And I also want to be clear
7 here there is division in the circuits regarding
8 whether constitutional claims are reviewable in
9 the revocation context because there is judicial
10 review available after the denial of a visa
11 petition, so this isn't a situation --

12 JUSTICE GORSUCH: What's your view on
13 that?

14 MS. SINZDAK: The government has not
15 taken a position.

16 JUSTICE GORSUCH: The government has
17 no position on whether an individual can raise a
18 constitutional claim about a -- a -- a -- a
19 violation in -- in revocation?

20 MS. SINZDAK: A non-citizen certainly
21 can raise a constitutional claim after the
22 denial of a -- visa petitions.

23 JUSTICE GORSUCH: After the denial of
24 the visa at the end of this process, which, as
25 your friend points out, is a continuing process,

1 but not after the revocation decision itself?

2 That's the government's view?

3 MS. SINZDAK: It -- it -- I -- no.

4 The government has not taken --

5 JUSTICE GORSUCH: Not taken a view.

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

7 JUSTICE GORSUCH: You're not going

8 to -- we don't know?

9 MS. SINZDAK: I'm not going to take a

10 position on that. I --

11 JUSTICE GORSUCH: Wait for coming

12 attractions?

13 MS. SINZDAK: -- I -- I would note,

14 Justice --

15 JUSTICE GORSUCH: Don't you think

16 that's an important thing for us to know in --

17 in terms of interpreting the scope of this, to

18 say, if we're going to insulate substantive and

19 procedural determination -- questions,

20 arbitrary-and-capricious-type decisions, the

21 throwing the papers up in the air, and perhaps

22 that's what happened here, we don't know for all

23 we know, don't you think it's important for us

24 to understand that whether you'd really even bar

25 constitutional questions?

1 MS. SINZDAK: Justice Gorsuch, the
2 Eleventh Circuit itself has treated these as
3 separate issues because it has actually held
4 that constitutional claims are reviewable. But,
5 of course, we're up on a -- defending a decision
6 in which it said that these claims are not
7 reviewable.

8 JUSTICE GORSUCH: If you agree that
9 it's reviewable at the end of the process, the
10 visa process, why wouldn't the same be true
11 here? This question of the sham-marriage
12 determination, would be -- would it be
13 reviewable at the end of -- at the end of the
14 process?

15 MS. SINZDAK: If the agency does
16 not --

17 JUSTICE GORSUCH: Mm-hmm.

18 MS. SINZDAK: -- reach a different
19 outcome, yes.

20 JUSTICE GORSUCH: Mm-hmm. Okay. So
21 it's reviewable at the beginning. It's
22 reviewable at the end. You're just saying this
23 one's not reviewable in the middle?

24 MS. SINZDAK: That's correct.

25 JUSTICE GORSUCH: And on

1 constitutional claims, we don't know? Wait?

2 MS. SINZDAK: That's correct.

3 JUSTICE GORSUCH: Okay. Got it.

4 CHIEF JUSTICE ROBERTS: Thank you,

5 counsel.

6 Justice Thomas?

7 Justice Alito, anything further? No?

8 Justice Jackson -- oh, Justice

9 Barrett?

10 Thank you, counsel.

11 MS. SINZDAK: Thank you.

12 CHIEF JUSTICE ROBERTS: Rebuttal,

13 Mr. Deger-Sen?

14 REBUTTAL ARGUMENT OF SAMIR DEGER-SEN

15 ON BEHALF OF THE PETITIONER

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

17 Four quick points. So I think the key

18 thing that we heard again was that they strive

19 to revoke. And what "strive to revoke" I

20 understand means is we try to find everyone, and

21 when we find someone, we revoke. In the real

22 world, they are interpreting and administering

23 the statute in exactly the way we're describing.

24 So why -- and, again, that's not going

25 to be enough, but I think it's good evidence

1 that, in fact, this is the right way to read the
2 statute. And the right way to read the statute
3 is the way we've been describing, which is
4 1154(c) doesn't just apply on the first day; it
5 applies the day after.

6 And ordinary English often connotes
7 that. So, as I gave the example, no article
8 should be approved for publication if there's
9 evidence of plagiarism. I can give you a few
10 more examples. No person shall be approved for
11 TSA pre-check if they lied on the application.
12 No ballot proposition shall be listed if there
13 are less than a hundred signatories. No lawyer
14 shall be licensed if they've committed a felony.

15 In all of these situations, no one
16 seriously thinks that the obligation is on the
17 first day and no -- and -- and no further, that
18 if they find out you lied on your TSA
19 application, that they don't have to revoke
20 approval. You can still go on and be approved,
21 or that a lawyer can just continue to be
22 licensed, or that the ballot proposition has to
23 go ahead and, you know, be voted on in the
24 future even though, in fact, there were not
25 enough signatories.

1 Routine error correction that happens
2 the next day is subsumed within the idea that
3 something can't initially be approved. And
4 ordinary English reflects that. And, as this
5 Court said in Campos-Chaves, there's no -- you
6 know, there's no canon of construction against
7 reading, you know, and using common sense and
8 construing laws what -- saying what they
9 obviously mean.

10 That's what this obviously connotes.
11 That's why the government administers it this
12 way. The government believes that Congress
13 enacted a sham-marriage bar that was this
14 fundamental restriction that was so important it
15 couldn't even -- an application couldn't even
16 get off the ground. The idea that then the very
17 next day, Congress would have thought, actually,
18 it's optional, the agency has discretion, it can
19 get to do whatever it wants, and the thing which
20 triggers the agency's discretion is the agency
21 made a mistake. Because the agency made a
22 mistake, suddenly, it's important for the agency
23 to get discretion.

24 And if you think that reliance
25 interests are at stake, the government has

1 always said there are no reliance interests in
2 this document. And if you care about reliance
3 interests, then you want our results because, if
4 people have been in the system for a while, the
5 result here of -- of accepting the government's
6 view is that those are the people that are going
7 to have their revocations not judicially
8 reviewed and get kicked back to the beginning of
9 the process.

10 And I do think the question about the
11 fraud bar is important. The government is
12 basically saying, well, we can, we have
13 discretion to administer this at the back end,
14 but Congress never told us we have to. Congress
15 never said the sham marriage is -- is mandatory.

16 But its longstanding position has been
17 that the sham-marriage bar is mandatory, not for
18 revocations, they get to revoke, but we can't
19 give you benefits. In the real world, we can
20 never give you benefits because that's obviously
21 what Congress meant.

22 Congress thought this is the threshold
23 requirement. Of course, Congress would have
24 thought it would carry over to the day after
25 approval and would carry over further into the

1 process.

2 On the constitutional question issue,
3 there is -- the logic of the government's
4 position, because there is no preservation for
5 constitutional or legal claims, we're not in a
6 removal proceeding. So subparagraph (D) doesn't
7 apply.

8 So as -- as I understand the logic of
9 the government's position is that it is allowed
10 to violate the Constitution with impunity in the
11 context of revocation and that it's fine because
12 you can go ahead and refile later and that --
13 this is my final point -- refiling later is not
14 an adequate substitute. It is -- I -- I've
15 never known a situation where years of delay is
16 considered to just be equivalent, especially
17 when you're living under uncertainty of whether
18 you're family's going to be unified.

19 And for lots of people, that can be,
20 as this Court said in Tesoro, a decade, a decade
21 and a half, two decades of just not -- of --
22 of -- of, you know, being waiting in line,
23 suddenly having your -- your petition revoked,
24 going back to the beginning and starting again.
25 That is a life-altering, life-destroying result.

1 So there are real stakes in this case, but there
2 are no stakes on the government's side. There's
3 no streamlining.

4 If, you know, the government -- the --
5 the -- the streamlining is a product of the
6 government's own view in this case. If there
7 was judicial review straight out, we never would
8 have had to file in the first place. So there
9 is literally no reason to support the
10 government's -- no logical reason to support the
11 government's view in this case.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 12:06 p.m., the case
15 was submitted.)

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