No. 15-1138

IN THE

Supreme Court of the United States

BERNARDO EX REL. M&K ENGINEERING, INC.,
Petitioner,

v.

JEH C. JOHNSON, SECRETARY OF HOMELAND SECURITY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF VERSAME, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Considering the strong presumption of jurisdiction to review agency action in *Kucana v. Holder*, 558 U.S. 233, 251–52 (2010), whether a decision by the Secretary of Homeland Security that there is "good and sufficient cause" to revoke the approval of a visa petition may evade judicial review.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, VersaMe, Inc., is a promising start-up company focused on leveraging technology to impact childhood education during the most formative stages of development. VersaMe's ability to achieve their goal of enhancing early childhood education is largely dependent on employing highly skilled algorithm writers, software developers, and hardware engineers. The company's founders routinely find that talented non-U.S. citizens hold these specialized skill sets. VersaMe's ability to hire such individuals has the potential to be adversely impacted by the decision of the First Circuit below. *See* Pet. App. 1a–28a.

VersaMe's founders are not simply cognizant of the prospective issues associated with hiring immigrants seeking visas, one came to the United States on a visa herself; and the growing business faced disruptions as she navigated the immigration process. Nicola Boyd came to America after graduating from the University of Oxford and working as a successful private equity investor in the United Kingdom. She enrolled in a graduate business program at Stanford University for auspicious entrepreneurial professionals, along with fellow students from around the globe. At Stanford, she met Christian and Jonathan Boggiano, both West Point graduates and combat veterans, who recently sold their

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person other than amicus or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All parties consented to the filing of this brief; letters attesting to that consent are being filed along with this brief.

first successful business and were ready to embark on their next challenge. Ms. Boyd and the Boggiano brothers discovered their shared passion for improving early childhood education and the idea for VersaMe was born.[2]

Upon completion of their Stanford program, they incorporated VersaMe in Delaware and set up operations in California and North Carolina, placing the *amicus*'s business on either side of the circuit split presented by this petition, and began employing numerous highly skilled professionals. The company considers making the world a better place its mission, with a primary goal of "do[ing] good while building a great business" simultaneously.[3] VersaMe is the model of what start-up businesses should strive for in the new U.S. economy.

VersaMe's vanguard product is a children's wearable device, called the Starling. Research has shown that the number of words that a child is exposed to before the age of four can greatly impact brain development.[4] The Starling is designed to track and analyze the words babies and toddlers hear daily and provide parents and caretakers feedback on how to improve their verbal interactions.[5] To bring Starling to life, VersaMe, a company co-founded by a highly skilled immigrant, relied on a team of pro-

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[2] *See Our Story*, VERSAME, https://www.versame.com/our-story/ (last visited Apr. 4, 2016).

[3] *See We're on a Mission*, VERSAME, https://www.versame.com/team/ (last visited Apr. 4, 2016).

[4] *See Research*, VERSAME, https://www.versame.com/research/ (last visited Apr. 4, 2016).

[5] *See Starling*, VERSAME, https://www.versame.com/starling/ (last visited Apr. 4, 2016).

grammers, engineers, and childhood education specialists, many of whom are highly skilled immigrant employees in the U.S. on work-related visas. Resolving the inconsistencies arising from the decision below will provide VersaMe, and thousands upon thousands of similarly situated companies, greater stability in their ability to continue hiring highly qualified immigrant employees.

SUMMARY OF ARGUMENT

This petition presents the Court with an opportunity to resolve an entrenched circuit split that has significant economic ramifications.

I.A. The Illegal Immigration Reform and Immigrant Responsibility Act strips the federal courts of jurisdiction to review acts of the Secretary of Homeland Security made pursuant to statutorily given discretion. 8 U.S.C. § 1252(a)(2)(B)(ii) (2012). Under the Immigration and Nationality Act, the Secretary "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any [visa] petition approved by him under section 1154 of this title." 8 U.S.C. § 1155 (2012). Since 2004, the federal circuit courts have divided themselves on the question of jurisdiction to review I-140 form revocations. *See ANA Int'l, Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004) (finding jurisdiction to conduct judicial review). Since 2004, eight other circuits have concluded that jurisdiction does not lie in the I-140 form-revocation context. *See* Pet. App. 1a–28a (over vigorous dissent); *see also infra* note 7. Moreover, the Court's *Kucana v. Holder*, 558 U.S. 233 (2010), decision has not healed this division among the lower courts. Indeed, since 2010, the review-denying circuits have erroneously construed *Kucana* as a regu-

latory-only interpretation of § 1252(a)(2)(B)(ii)'s use of "specified."

I.B. In addition, this petition raises a matter of national importance worthy of this Court's attention regarding the United States' ability to compete for the world's best talent. Federal immigration law looks, *inter alia*, to "the promotion of entrepreneurial action as a motivating value." D. Gordon Smith & Darian M. Ibrahim, *Law and Entrepreneurial Opportunities*, 98 CORNELL L. REV. 1533, 1538 (2013). This is especially so with I-140 forms, the form at issue in this petition, because these visas apply only to aliens with specialized skills. 8 U.S.C. § 1153(b) (2012). By restricting access to the courts, the circuits that deny judicial review of I-140 revocations injure the American economy by creating barriers to the incorporation of these highly skilled individuals into the domestic workforce. *Cf.* Howard F. Chang, *Liberalized Immigration As Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1157–1221 (1997). Therefore, in addition to rectifying a deep circuit split, this Court should grant certiorari in this case so that the United States may better compete in the "global race for talent." *See* Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 151 (2008).

II. In light of *Kucana*, the Court should grant this petition because the majority opinion below, along with the other review-denying circuits, fundamentally errs in the construction of §§ 1155 and 1252(a)(2)(B)(ii). The court below, contrary to *Kucana*, fails to apply the strong presumption favoring judicial review of administrative decisions that this Court applied to § 1252(a)(2)(B)(ii). *See Kucana*, 558

U.S. at 251–52; *see also INS v. St. Cyr*, 533 U.S. 289, 298 (2001). Because the text of § 1155 is at a minimum "marginally ambiguous," this canon of construction favoring jurisdiction controls. *See Kucana*, 558 U.S. 243 n.10; *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). To avoid this canon presuming jurisdiction, the majority opinion below—disregarding the congressionally ratified meaning of § 1155's "good and sufficient cause" language—erroneously reads out the unavoidable ambiguity in the statute by focusing myopically on the words "may," "at any time," and "for what he deems to be."

ARGUMENT

I. RESOLVING THIS CIRCUIT SPLIT FURTHERS CONGRESS'S POLICY OF INCORPORATING HIGHLY SKILLED ALIENS INTO THE DOMESTIC ECONOMY.

A. The Post-*Kucana* Ruling at Issue in this Petition Demonstrates the Intractable Nature of this Circuit Split.

The Court should grant this petition for certiorari to resolve this twelve-year-old division among the circuit courts regarding federal court jurisdiction to review the Secretary's decisions to revoke I-140 forms. Under the Illegal Immigration Reform and Immigrant Responsibility Act, "no court shall have jurisdiction to review . . . . any other decision or action . . . . the authority for which is specified under this subchapter to be in the discretion of . . . the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii) (2012). Under the Immigration and Nationality Act, the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any [visa] pe-

tition approved by him under section 1154 of this title." 8 U.S.C. § 1155 (2012). The circuit-court split at issue here centers upon whether § 1155 vests the Secretary, in I-140 form-revocation decisions, with sufficient "specified" discretion to strip the federal courts of jurisdiction per § 1252(a)(2)(B)(ii).

In 2004, the Ninth Circuit held that the federal courts retain jurisdiction to review I-140 form revocations issued by the Secretary. *ANA Int'l, Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004). In *ANA International*, the Ninth Circuit reasoned that the jurisdiction-stripping language of § 1252(a)(2)(B)(ii) does not apply if the statutory provision granting the Secretary the "power to make a given decision also sets out specific standards governing that decision." *Id.* at 892. The Ninth Circuit went on to conclude that § 1155's phrase "good and sufficient cause" is a "meaningful standard that . . . [now the Secretary of Homeland Security] may 'deem' applicable or inapplicable in a particular case, but which he does not manufacture anew in every instance." *Id.* at 894. The Ninth Circuit, relying upon Board of Immigration Appeals (BIA) and circuit precedent, concluded that "'a visa is revoked for good and sufficient cause when the evidence of record at the time of issuance . . . would warrant a denial of the visa petition.'" *Id.* (quoting *Matter of Tawfik*, 20 I. & N. Dec. 166 (B.I.A. 1990)). As a result, the Ninth Circuit held that the federal courts retain jurisdiction to review I-140 form revocations. *Id.* Courts in the Ninth Circuit continue to adhere to this position.[6]

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[6] *See Herrera v. U.S. Citizenship & Immigration Servs.*, 571 F.3d 881, 885 (9th Cir. 2009); *Top Set Int'l, Inc. v. Neufeld*, 318 F. App'x 578, 580 (9th Cir. 2009) (unpublished); *Love Korean*

On the other side of this split, the decision below, *see* Pet. App. 1a–28a, delivered over a lengthy dissent, *see* Pet. App. 29a–65a, joined seven other circuits in adopting the view that § 1155 grants the Secretary full discretion and, as a result, strips the federal courts of jurisdiction under § 1252(a)(2)(B)(ii) to review the Secretary's visa-revocation decisions.[7] The Seventh Circuit leads this camp, reasoning that § 1155's language such as "may," "at any time," and "for what he deems to be" contains sufficient indicia of discretion to trigger the jurisdiction-stripping provisions of § 1252(a)(2)(B)(ii). *El–Khader v. Monica*, 366 F.3d 562, 567 (7th Cir. 2004). Importantly, the Seventh Circuit did not meaningfully consider the relevance of BIA precedent in its ruling. *Id*. at 568.

Six years after *El–Khader*, in *Kucana v. Holder*, 558 U.S. 233 (2010), this Court held that the jurisdiction-stripping provisions of § 1252(a)(2)(B)(ii), the very act at issue here, do not apply when regulatory, as opposed to statutory, rules deem an act of the Secretary to be discretionary. 558 U.S. at 237. In addition to the plain text of the statute, the Court

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Church v. Chertoff, 549 F.3d 749, 753 (9th Cir. 2008); *Liu v. Schiltgen*, 120 F. App'x 65, 67 n.3 (9th Cir. 2005) (unpublished); *V. Real Estate Grp., Inc. v. U.S. Citizenship & Immigration Servs.,* 85 F. Supp. 3d 1200 (D. Nev. 2015); *Carlsson v. U.S. Citizenship & Immigration Servs.,* 2015 WL 1467174 (C.D. Cal. Mar. 23, 2015).

[7] *See Mehanna v. U.S. Citizenship & Immigration Servs*., 677 F.3d 312, 313 (6th Cir. 2012); *Green v. Napolitano*, 627 F.3d 1341, 1343 (10th Cir. 2010); *Abdelwahab v. Frazier*, 578 F.3d 817, 821 (8th Cir. 2009); *Sands v. U.S. Dep't of Homeland Sec*., 308 F. App'x 418, 419–20 (11th Cir. 2009) (per curiam); *Ghanem v. Upchurch*, 481 F.3d 222, 223 (5th Cir. 2007); *Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196, 200–05 (3d Cir. 2006); *El–Khader v. Monica*, 366 F.3d 562, 567–68 (7th Cir. 2004).

concluded that § 1252(a)(2)(B)(ii) did not strip jurisdiction over administratively granted discretion for two reasons that are especially relevant here. First, this Court reaffirmed its longstanding jurisprudence "favoring interpretations of statutes to allow judicial review of administrative action," concluding that this canon fully applies to § 1252(a)(2)(B)(ii). *Id.* at 251–52. Second, the *Kucana* Court reasoned that § 1252(a)(2)(B)(ii)'s use of "specified" requires that the statutory provision granting discretion must do so with the utmost clarity. The Court quoted then-Judge Alito, noting "'that the use of marginally ambiguous statutory language, without more, is [not] adequate to specify that a particular action is within the . . . [Secretary's] discretion for purposes of § 1252(a)(2)(B)(ii).'" *Id.* at 243 n.10 (quoting *Soltane v. U.S. Dep't of Justice*, 381 F.3d 143, 147 (3d Cir. 2004) (Alito, J.)).

Despite its obvious applicability to the matter at issue in this petition, *Kucana* has not healed the division among the lower courts on this score. Post *Kucana*, four additional circuits rendered decisions favoring no judicial review of visa petition revocations. *See* Pet. App. 1a–28a; *Rajasekaran v. Hazuda*, — F.3d —, 2016 WL 362127 (8th Cir. Jan. 29, 2016); *Mehanna v. U.S. Citizenship & Immigration Servs.*, 677 F.3d 312 (6th Cir. 2012); *Green v. Napolitano*, 627 F.3d 1341 (10th Cir. 2010).

Dissenting below in this case, Judge Lipez rightly concludes that *Kucana* "changed the analytical landscape governing the application of the presumption of judicial review to the interplay between §§ 1155 and 1252(a)(2)(B)." Pet. App. 58a. Nevertheless, the judicial-review-denying circuits have misconstrued *Kucana* as a regulatory-only limitation of §

1252(a)(2)(B)(ii) jurisdiction stripping. The Court should grant this petition and heal this division among the circuits precisely because its *Kucana* ruling delivered a holding based upon first principles that is generally applicable to all matters of judicial review in the immigration setting, not merely the interplay of § 1252(a)(2)(B)(ii) and the particular administrative rules at play in that case.

B. Non-Uniform Immigration Regimes Deeply Inhibit the Nation's Ability to Compete Globally for Talent.

Just when the federal circuit courts started to entrench themselves into this § 1252(a)(2)(B)(ii) judicial-review split, the "global race for talent" began to heat up on the international stage. *See* Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 151 (2008). This international search for the best and brightest demonstrates that ensuring judicial review of visa revocations is a matter of national importance worthy of Supreme Court review.

The Court should hear this matter to ensure that the world's entrepreneurs, like *amicus* here, become a part of our domestic economy. While federal immigration law "has traditionally been motivated by concern for national security, labor supply, family reunification, [and] refugees," federal immigration law also now looks to "the promotion of entrepreneurial action as a motivating value." D. Gordon Smith & Darian M. Ibrahim, *Law and Entrepreneurial Opportunities*, 98 CORNELL L. REV. 1533, 1538 (2013). From the H-1B visa to discussions of the "'StartUp Visa Act' and the launch of 'Entrepreneur Pathways' in November 2012 by the U.S. Citizenship and Im-

migration Services," there can no longer be any doubt that "the promotion of entrepreneurial action is an important value" in federal immigration law. *Id.* at 1539. *Amicus's* founding and hiring experiences, recounted above, mirror this academic finding. Moreover, the importance of this issue—attracting the world's best and brightest into the domestic economy—has long been recognized. No less a luminary than Adam Smith pointed to the importance of welcoming foreign merchants into the domestic economy 240 years ago. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Bk. II, 385 (The Univ. of Chi. Press 1976). As such, national economic considerations, as well as the persistence of a deep circuit split, render this case ripe for Supreme Court review.

As background, for most aliens to enter the United States legally, the alien must first obtain a visa. RICHARD BOSWELL, ESSENTIALS OF IMMIGRATION 105 (3d ed. 2012). Visas are generally divided into two categories: permanent and temporary visas. *See id.* The visa application at issue in this case involves permanent visas. There are two categories of permanent visas: family-based and employment-based visas. *Id.* at 137.

The I-140 form, the one at issue here, does not apply to temporary workers, low-wage workers, or manual laborers. Rather, Congress directs that aliens with specialized skills be preferred in our immigration processes, which underlies the I-140 procedure. *See* U.S. Citizenship and Immigration Servs., *Immigrant Petition for Alien Worker* (hereinafter "I-

140 form").[8] There are seven primary types of visas that require the I-140 form: (1) alien with extraordinary ability; (2) outstanding professor or researcher; (3) a multinational executive or manager; (4) a member of the professions holding an advanced degree or an alien of exceptional ability; (5) a professional (a minimum of a bachelor's degree); (6) a skilled worker (requiring at least two years of specialized training or experience) and (7) any other worker (requiring less than two years training or experience). *See* 8 U.S.C. § 1153(b) (2012). Each of these categories aims to bring highly skilled individuals into the American economy.

The total number of employment-based visas, both those requiring I-140 forms and others, allowed each year is 140,000. 8 U.S.C. § 1151(d)(1)(A) (2012). In 2015, the Government approved 99,477 I-140 forms. *See* U.S. Citizenship and Immigration Servs., *Report: Service-Wide All Forms*.[9] Thus, approximately 71% of all employment visas granted last year required I-140 forms, which overwhelmingly includes highly skilled employment visas. As described above, these highly skilled visa applicants face non-uniform judicial protections as they engage with the immigration apparatus.

The applicants facing this non-uniform immigration process are our doctors, artists, professors, producers, and entrepreneurs in the new digital

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[8] Available at: https://www.uscis.gov/i-140 (last visited April 4, 2016).

[9] Available at: https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%2Data/All%20Form%20Types/all_forms_performancedata_Fy2015_qtr4.pdf (last visited April 4, 2016).

economy such as *amicus*. These are the individuals who create and innovate, thus generating new jobs and wealth within the United States economy. By way of illustration, "[b]etween 1901 and 1991 . . . the Nobel Prize, was awarded to one hundred researchers in the United States. Almost half of these Nobel Prize winners were foreign born researchers or first-generation immigrants." Shachar, 81 N.Y.U. L. REV. at 149.

The nation's employers recognize this value as well. The filing fee for each I-140 form paid by the domestic potential employer is $580. *See* I-140 Form. Meaning that in 2015, U.S. employers spent over $57 million in filing I-140 forms. This does not include the substantial amount of money spent on the other supporting materials that must be attached to each form. Thus it is clear that both Congress, in establishing the preferential I-140 process, and our nation's employers, in spending millions of dollars annually on this process, recognize that ensuring the immigration of these highly skilled I-140 applicants, within congressionally set limits, is a boon to the national economy.

By restricting access to the courts, the circuits that deny judicial review of I-140 form revocations injure the American economy. *Cf.* Howard F. Chang, *Liberalized Immigration As Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1157–1221 (1997) (discussing the positive effects of immigration for the national economy). Indeed, I-140 form applicants, who are primarily highly skilled experts, especially benefit the domestic economy. *See id.* at 1168–72 (discussing the unique economic benefits highly skilled immigrants bring to the national economy). Congress

clearly sought to enable the immigration of highly skilled aliens, not hinder it.

This circuit split has substantial logistical consequences as well. At present, nearly a quarter of all new lawful permanent residents may seek judicial review of I-140 form denials, namely those falling within the Ninth Circuit. Those in other parts of the country, however, either lack any circuit precedent on this judicial-review question at all or face appellate rulings denying such review altogether. *See* U.S. Dep't of Homeland Sec., *U.S. Lawful Permanent Residents: 2013,* at 4 tbl.4 (2014); U.S. Dep't of Homeland Sec., *2013 Yearbook of Immigration Statistics* 16 (2014).[10] *Amicus* is but one of a legion of foreign-talent-recruiting businesses, with offices on either side of this circuit divide, that must conform its internal employment practices in the face of non-uniform federal law.

As *amicus's* own story demonstrates, this petition presents the Court with more than its "standard" opportunity to unify disparately interpreted federal law. In addition to rectifying a deep circuit split, this Court should grant certiorari in this case so that the United States may better compete in the "global race for talent." Shachar, 81 N.Y.U. L. REV. at 151 (describing the global race for talent and the fast-track admission processes for highly skilled professionals around the globe).

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[10] Available at: https://www.dhs.gov/sites/default/files/ publications/ois_lpr_fr_2013.pdf (last visited April 4, 2016), and https://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf (last visited April 4, 2016).

II. THE LOWER COURT IGNORES THE STRONG PRESUMPTION OF JURISDICTION TO REVIEW AGENCY ACTION AND § 1155'S "GOOD AND SUFFICIENT CAUSE" STANDARD.

In light of *Kucana*, the Court should grant this petition because the First Circuit majority, along with the other review-denying circuits, fundamentally errs in the construction of §§ 1155 and 1252(a)(2)(B)(ii). The majority opinion below, contrary to *Kucana*, failed to apply the canon presuming jurisdiction to review administrative decisions. In a related move to avoid this canon presuming jurisdiction, the majority—disregarding the congressionally ratified meaning of § 1155's "good and sufficient cause" language—blots out the unavoidable ambiguity in the statute by focusing myopically on the words "may," "at any time," and "for what he deems to be."

The First Circuit majority, like the other review-denying circuits, did not correctly apply the most salient of interpretive canons when deciding whether § 1155 triggers § 1252(a)(2)(B)(ii) jurisdiction stripping: the presumption in favor of federal court jurisdiction to review administrative agency decisions. But six years ago the Court held, in a § 1252(a)(2)(B)(ii) jurisdiction-stripping case, that "[w]hen a statute is reasonably susceptible to divergent interpretation, this Court adopts the reading that executive determinations generally are subject to judicial review." *Kucana*, 558 U.S. at 235 (internal quotations and citations omitted). While the majority opinion below referenced *Kucana*'s application of this presumption, it found that the presumption can

be "overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." Pet. App. 8a. The lower court majority held that this presumption was overcome here because in its view the language in § 1155 clearly grants the Secretary discretionary authority to revoke visa approvals. *Id.*

The lower court majority's reasoning is seriously flawed, however, because the standard it used for what constitutes a clear statement overcoming the strong presumption of jurisdiction is fatally low. The *Kucana* Court set a very high bar, in line with this Court's long-lived jurisprudence, protecting jurisdiction to review agency action. *See Kucana*, 558 U.S. at 251; *see also INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (invoking "the strong presumption in favor of judicial review of administrative action"); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670–73 (1986). Moreover, the Court will not deem this "strong presumption" in favor of jurisdiction overcome unless it finds "an intent to preclude such review . . . with 'clear and convincing evidence.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (quoting *Rusk v. Cort*, 369 U.S. 367, 379–80 (1962)); *see also Catholic Soc. Servs.*, 509 U.S. at 63. Further still, the Court has applied *Abbott Laboratories*' clear-and-convincing-evidence test to § 1252(a)(2)(B)(ii)'s use of "specified." *Kucana*, 558 U.S. at 243 n.10. Quoting then-Judge Alito, the Court reasoned that even "'marginally ambiguous statutory language'" would be enough to derail the jurisdiction-stripping provisions of § 1252(a)(2)(B)(ii). *Id.* (quot-

ing *Soltane v. U.S. Dep't of Justice*, 381 F.3d 143, 147 (3d Cir. 2004) (Alito, J.)).

Applying this standard here, because § 1155 is at a minimum "marginally ambiguous," the jurisdiction-stripping provisions of § 1252(a)(2)(B)(ii) cannot overcome the strong presumption of jurisdiction. The very fact of a circuit split, especially when coupled with the dissenting opinions, in relation to § 1155 shows on its face that the statute is reasonably susceptible to multiple interpretations. On the one hand, the Ninth Circuit and Judge Lipez's dissent in the present case read § 1155's "good and sufficient cause" language as the embodiment of a standard in light of BIA and AAO practice. *See ANA Int'l,* 393 F.2d at 894; Pet. App. 32a. On the other hand, following *El-Khader*, the majority below and the other review-denying circuits find that § 1155's language such as "may," "at any time," and "for what he deems to be" contains indicia of discretion. *See El–Khader*, 366 F.3d at 567. Yet this blending together of a long-established agency standard with competing discretionary language creates, in the words of the *Kucana* Court, a statute that is at least "marginally ambiguous." It is precisely when faced with statutory ambiguity, like that found in § 1155, that the strong presumption of jurisdiction to review agency action controls. *See Kucana*, 558 U.S. 243 n.10; *Abbott Labs.*, 387 U.S. at 141.

Indeed, the conclusion that § 1155 is at a minimum marginally ambiguous follows so plainly that it is only by reading "good and sufficient cause," and its concomitant agency history, out of the statutory text that the First Circuit majority can avoid the strong presumption in favor of jurisdiction. In fact, the lower court majority turns a blind eye to the

meaning of the phrase "good and sufficient cause," and in particular the long-standing agency practice with the phrase. *See* Pet. App. 14a–21a; *see also El–Khader*, 366 F.3d at 568 (refusing to address BIA practice directly despite the matter being briefed). When this unsustainably strained reading of § 1155 is set aside, however, the majority's position fails.

To avoid this failure, the lower court majority baldly asserts that its refusal to apply the doctrine of congressional ratification to BIA and AAO interpretations of § 1155—despite the fact that Congress reenacted the provision in 1996 and 2004—renders § 1155 unambiguously clear. *See* Pet. App. 15a; *but see Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."). Yet as the dissent below details, the BIA and AAO have an over 30-year practice of embodying "good and sufficient cause" with a clear legal standard that pre-dates both congressional reenactments of § 1155. *See* Pet. App. 32a; see also *Matter of Tawfik*, 20 I. & N. Dec. 166 (B.I.A. 1990) (concluding that a visa is revoked "for 'good and sufficient cause' when the evidence of record at the time of issuance ... would warrant a denial of the visa petition ..."); *In re Estime*, 19 I. & N. Dec. 450, 451 (B.I.A. 1987). In light of this history, the First Circuit majority's position is so extreme, to restate it is to disprove it: The majority opinion below avoids the plain conclusion that § 1155—with its mixing of standard-creating and discretion-granting language—is at least "marginally ambiguous" such that the strong presumption of jurisdiction would control only by overtly refusing to consider decades of BIA and AAO precedent hand-

ed down prior to both congressional reenactments of § 1155.

This Court's precedent precludes such an extreme view. The Court has repeatedly held that congressional reenactment of a statute that has been interpreted by an agency can provide "persuasive evidence that the [agency's] interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *Nat'l Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). The idea that Congress did not have imputed knowledge of the BIA and AAO's long-running precedent with the phrase "good and sufficient cause" is little more than a red herring here. *See* Pet. App. 17a–19a (advancing this position as a reason to deny jurisdiction to review revocation decisions).

Importantly, in this case, the question of congressional ratification rests against the backdrop of the application of the strong presumption of jurisdiction to review agency action. The court below hangs its hat on the truism that in many circumstances congressional "silence is [not] tantamount to acquiescence." Pet. App. 18a (citing *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969)). The lower court majority's inapt citation to *Zuber* does not control here, however, because the ultimate issue is one of a strong presumption in favor of jurisdiction to review agency action. The entire point of a presumption in favor of jurisdiction is that in the face of congressional silence or ambiguity the courts retain jurisdiction—only clear and convincing evidence showing an intent to strip jurisdiction can overcome this presumption. *See Kucana*, 558 U.S. 243 n.10; *Abbott Labs.*, 387 U.S. at 141.

The lower court opinion stands this presumption on its head. Here the lower court, in direct contradiction of the presumption in favor of jurisdiction, demands that "Congress [must have] affirmatively sought to" ratify agency practice and in turn to retain federal court jurisdiction to review actions of the Secretary affirmatively. Pet. App. 18a. This up-is-down, black-is-white application of the interpretive canons at issue in this case is the exact inverse of how the presumption to preserve jurisdiction to review agency action works. *See Kucana*, 558 U.S. at 251. It is precisely in cases, like this one, where congressional intent may not be crystal clear—which is what the majority below posits, *see* Pet. 17a–19a—that the strong presumption favoring jurisdiction applies with full force. *Kucana*, 558 U.S. at 251–52. Thus, even if the majority below is correct that congressional intent to ratify 30 years of BIA and AAO precedent in constructing § 1155's "good and sufficient cause" language is lacking, a dubious proposition at best, then a proper application of the canon presuming federal court jurisdiction to review agency action applies with full force. *See Kucana*, 558 U.S. at 251–52 (applying this canon to § 1252(a)(2)(B)(ii) jurisdiction stripping).

Moreover, the "strong presumption in favor of judicial review of administrative action," *St. Cyr*, 533 U.S. at 298, because it embodies fundamental rule-of-law norms, is not one to be lightly brushed aside. *Cf. Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The Government of the United States has been emphatically termed a government of laws, and not of men."). "The underlying constitutional conception is that wielders of governmental power must be subject to the limits of law, and that the applicable limits

should be determined, not by those institutions whose authority is in question, but by an impartial judiciary." Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 938 (1988). Put differently, the proposition that foxes should not guard henhouses is as applicable to administrative agencies as it is to Congress or the executive. Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 467 (1987). This is not to say that the Constitution demands judicial review of all agency action, but that these rule-of-law commitments deeply cement the notion that the presumption in favor of jurisdiction to review agency actions is not to be displaced absent clear and convincing evidence of congressional intent. This bedrock rule-of-law commitment runs contrary to the position forwarded by the majority below. *Compare Kucana*, 558 U.S. 243 n.10 and *Abbott Labs.*, 387 U.S. at 141 *with* Pet. App. 18a.

Finally, even if this Court accepted the lower court majority's specious position, as Judge Lipez points out in his dissent, reading § 1155 as leading to unbounded discretion produces absurd results. Pet. App. 55a–57a. Under 8 U.S.C. § 1154(b) (2012), the Secretary is required to grant or deny I-140 form petitions based on enumerated criteria. *Id.* at 55a (citing *Soltane v. U.S. Dept. of Justice*, 381 F.3d 143, 147–48 (3d Cir. 2004) (Alito, J.)). These determinations are mandatory and are thus not within the Secretary's unbounded discretion. Pet. App. 56a. This means that mandatory grants or denials of these petitions are subject to judicial review. *Id.* Section 1155 revocations, on the other hand, are essentially subsequent denials of the original visa petition and should be treated as such. *Id.* The same underlying facts

are used in denying and revoking, so the two should be treated similarly. If the review-denying circuits' contortion of the statutory text prevails, the Secretary will essentially be allowed to circumvent all visa granting and denying requirements laid out in § 1154(b), which by its very nature would be an absurd result.

In the end, it is only by wishing away § 1155's "good and sufficient cause" language that the review-denying circuits can avoid the strong presumption favoring jurisdiction to review agency actions. But such a perverse reading of the statute leads to its own set of absurdities. As such, the Court should grant this petition to reverse the erroneous course set by the review-denying circuits.

CONCLUSION

The Court should grant the petition for certiorari so as to create a uniform rule, ensuring judicial review of the denial of I-140 form applications, that comports with the nation's economic interests and long-standing rule-of-law norms.

Respectfully submitted,

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