No. 15-1138

IN THE
Supreme Court of the United States

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

v.

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

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

POLLY J. ESTES
Counsel of Record
ANNA-ROSE MATHIESON
CALIFORNIA APPELLATE LAW GROUP LLP
96 Jessie Street
San Francisco, CA 94105
(415) 649-6700 ext. 11
polly@calapplaw.com
Attorneys for Amici Curiae

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Brief of Law Professors as *Amici Curiae* in Support of Petitioner

The undersigned law professors respectfully submit this brief as *amici curiae* in support of petitioner.[1]

Interest of *Amici Curiae*

Amici curiae are law professors, listed below, who teach and write about constitutional law, statutory interpretation, and the relationship between the judicial and executive branches. *Amici* are neither related to nor employed by any of the parties, and have no personal stake in the outcome of this case. *Amici* are filing this brief because the decision below is inconsistent with the separation of powers, violates the canon of statutory construction that statutes should not be interpreted in a manner that leads to irrational results, and raises constitutional concerns under the Equal Protection Clause. *Amici* include:

Erwin Chemerinsky
University of California, Irvine School of Law

Katherine J. Florey
University of California, Davis, School of Law

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici* or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* provided notice to all parties of intent to file this brief more than ten days before the deadline pursuant to Supreme Court Rule 37.2(a). All parties consented to the filing of this brief; letters attesting to that consent are being filed along with this brief.

Caprice Roberts
Savannah Law School

Stephen I. Vladeck
American University Washington College of Law

For the reasons set forth in this brief, the petition for a writ of *certiorari*, the Ninth Circuit's opinion in *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 894 (9th. Cir. 2004), and the insightful dissent by Judge Lipez of the First Circuit, *amici* agree that "the Secretary's visa revocation decision is subject to judicial review because the text of the pertinent statutes, the nature of the visa revocation decisions, and the overall statutory scheme do not rebut the presumption of judicial review applicable to immigration statutes." *Bernardo v. Johnson*, 814 F.3d 481, 495 (1st Cir. 2016) (Lipez, J., dissenting). Accordingly, *amici* pray that the Court will grant the petition and reverse the decision below.

Introduction and Summary of Argument

The issue in this case is whether Congress provided clear and convincing evidence that it intended the limitation on judicial review found in 8 U.S.C. § 1252(a)(2)(B)(ii) to apply to decisions to revoke visa petitions under 8 U.S.C. § 1155.

Section 1252(a)(2)(B)(ii) removes judicial review for any decision "specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1155 provides in relevant part, "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title."

The circuits have long been split on the proper interpretation of these statutory provisions. The First Circuit in this case deepened the split by holding that § 1155 specifies that the decision to revoke a visa is in the discretion of the Secretary, and is thus encompassed by § 1252(a)(2)(B)(ii)'s foreclosure of jurisdiction to review discretionary decisions.

The First Circuit's interpretation is improper as a matter of statutory construction and raises serious constitutional concerns. As explained in this brief, that interpretation would undermine the Constitution's separation of powers and lead to irrational results that would violate basic canons of statutory construction and the Equal Protection Clause. It is a longstanding principle that statutes should, if possible, be construed to avoid finding them irrational or unconstitutional. The Court should grant review and hold that courts have jurisdiction to review the revocation of visa petitions.

Argument

"Certain other societies may respect the rule of force—we respect the rule of law." President John F. Kennedy, Remarks in Nashville at the 90th Anniversary Convocation of Vanderbilt Univ. (May 18, 1963). Judicial review is the only way to ensure this principle of our government is followed.

As this Court has previously held, when one construction of a statute would raise constitutional concerns, the courts should see whether an alternative interpretation is available that would ensure full compliance with the Constitution. "[I]t is a cardinal principle of statutory interpretation, however, that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quotation marks and citations omitted). This Court should grant review and apply the presumption in favor of judicial review to avoid these significant constitutional issues.

I. Congress did not unequivocally strip the federal courts of jurisdiction to review the Secretary's decision to revoke a visa petition.

The presumption that the federal courts have jurisdiction to review cases arising under federal law is embodied in the Constitution, the federal question jurisdiction statute, 28 U.S.C. § 1331, and the Administrative Procedure Act, 5 U.S.C. § 702. "Separation-of-powers concerns, moreover, caution us against reading legislation, absent clear statement, to place in ex-

ecutive hands authority to remove cases from the Judiciary's domain." *Kucana v. Holder*, 558 U.S. 233, 237 (2010). Although *Kucana* dealt with a statute enabling the executive to promulgate regulations that would restrict judicial review, and this case deals with legislation that the First Circuit majority held restricts judicial review, the net effect is the same—the function of the judicial branch is given to the executive branch without a clear indication that Congress intended that result. "The ability of Congress to restrict federal court jurisdiction raises basic constitutional issues in terms of separation of powers" concerns. Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. MEM. L. REV. 295, 316 (1999).

A. The circuit split regarding how 8 U.S.C. § 1155 should be interpreted is clearly presented in this case, with each circuit relying on the plain text of the statute.

This case is a good vehicle for the Court to resolve the circuit split as to whether the federal courts have jurisdiction to review visa revocation decisions. This Court's guidance is needed because each circuit that has reviewed the issue has purported to rely on the plain text of the statute even while reaching disparate conclusions, and none have revisited their approach since this Court's opinion in *Kucana*.

The central disagreement in the courts below turns on whether the words "good and sufficient cause" in § 1155 have any meaning. The First Circuit focused on the words "may" and "for what he deems to be" in § 1155, holding that these words imply that the

decision to revoke a visa petition lies within the Secretary's discretion. *Bernardo*, 814 F.3d at 485-86. In so holding, the First Circuit also held that the phrase "good and sufficient cause" did not have an established meaning and did not limit the Secretary's discretion. *Id.* While the First Circuit's interpretation addresses some of the language in § 1155, it renders superfluous the language "good and sufficient cause." It thus contravenes the "cardinal principle of statutory construction" that courts must "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quotation marks and citations omitted).

The statute's reference to "good and sufficient cause" suggests a standard that does not vary from case to case. The phrase should be understood as the Ninth Circuit interpreted it: "'good and sufficient cause' refers to a meaningful standard that the Attorney General may 'deem' applicable or inapplicable in a particular case, but which he does not manufacture anew in every instance." *ANA*, 393 F.3d at 894 (citations omitted). Because "the statutory provision granting the Attorney General power to make a given decision [when revoking a visa] also sets out specific standards governing that decision, the decision is not 'in the discretion of the Attorney General.'" *Id*. at 892. This reasoning has been reaffirmed repeatedly by the Ninth Circuit in the last twelve years, and the court has declined to reconsider this interpretation en banc. *See, e.g.*, *Herrera v. U.S. Citizenship & Immigration Servs.*, 571 F.3d 881, 885 (9th Cir. 2009); *Love Korean Church v. Chertoff*, 549 F.3d 749, 753 (9th Cir. 2008).

The Ninth Circuit's interpretation of the phrase "good and sufficient cause" accords with the interpretation given to § 1155 by the agency itself. The Board of Immigration Appeals ("BIA") and the Administrative Appeals Office of the U.S. Citizenship and Immigration Services ("AAO") review the revocation of a visa petition under § 1155 to determine "whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Matter of Estime*, 19 I. & N. Dec. 450, 451 (BIA 1987); *In re [Identifying Info. Redacted by Agency]*, No. EAC0322452286, 2008 WL 4968848, at *1 (AAO July 18, 2008) (same).

Consistent with this standard, the immigration courts have held that "good and sufficient cause" to revoke a visa petition exists when there is reason to believe "that the petition was approved in error." *In re [Identifying Info. Redacted by Agency]*, 2008 WL 4968848, at *1; *Matter of Tawfik*, 20 I. & N. Dec. 166, 168-69 (BIA 1990); *Matter of Ho*, 19 I. & N. Dec. 582, 590 (BIA 1988). This standard of review focuses on the objective facts established in the record, rather than allowing the Secretary unfettered discretion to ignore such facts and revoke visa petitions based on a whim. The Ninth Circuit relied on agency precedent, *ANA*, 393 F.3d at 894; the First Circuit rejected any such reliance, *Bernardo*, 814 F.3d at 488-89.

In this case, M&K Engineering was applying for a "skilled worker" visa petition for Samuel Freitas. In deciding whether to approve or deny this type of petition, the immigration courts review evidence of the alien's education, training, employment, and experi-

ence, such as "letters from trainers or employers giving . . . a description of the training received or the experience of the alien." 8 C.F.R. § 204.5(*l*)(3)(ii)(A); *In re [Identifying Info. Redacted by Agency]*, 2014 WL 3951145, at *4-6 (AAO Jan. 3, 2014); U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR PETITION FOR ALIEN WORKER (2015), *available at* http://tinyurl.com/hj5mh76; *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 5-6 (1st Cir. 1981) (holding that, where applicable, the terms of the labor certification are binding on the agency in terms of which qualifications need to be shown).

Applying its objective interpretation of "good and sufficient cause," the AAO has reversed many decisions by the Secretary to revoke visa petitions because those decisions would not have supported a denial of the visa petition. *See*, *e.g.*, *In re [Identifying Info. Redacted by Agency]*, 2013 WL 5296475, at *1-2 (AAO Jan. 2, 2013) (finding the record as a whole shows petitioner met eligibility requirements); *Tawfik*, 20 I. & N. Dec. at 169 (finding the revocation was "unsupported by documentary evidence"); *Matter of Arias*, 19 I. & N. Dec. 568, 571 (BIA 1988) (finding the revocation lacked "[s]pecific, concrete facts [that] are meaningful, not unsupported speculation and conjecture").

This decades-long interpretation by the agency charged with enforcing the immigration statutes is certainly a "reasonable" one. This Court should adopt the reading advanced by the Ninth Circuit, the BIA, and the AAO and hold that the words "good and sufficient cause" *do* limit the Secretary's discretion. Under this interpretation, revocation of a visa petition should be affirmed if the reason for the revocation would support a denial of the visa petition at that

time, and the courts retain jurisdiction to review such decisions. When a statute is "reasonably susceptible to divergent interpretation," the presumption that "executive determinations generally are subject to judicial review" controls. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995).

B. The discretionary decisions specifically listed in § 1252(a)(2)(B)(i) are of a different genre than § 1155.

In *Kucana*, one of the tools of statutory construction this Court employed was to compare different subsections of 8 U.S.C. § 1252(a)(2)(B) with one another. The first part of § 1252(a)(2)(B) lists five specific statutes under which the courts may not review decisions. The second part, the part at issue here, is a catch-all provision depriving courts of jurisdiction to review decisions that are "specified" by statute to be discretionary. The language of section 1252(a)(2)(B) states:

> **Denials of discretionary relief**
>
> Notwithstanding any other provision of law (statutory or nonstatutory), . . . except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h) [waiver of inadmissibility based on certain criminal offenses], 1182(i) [waivers of inadmissibility based on fraud], 1229b [cancellation of removal], 1229c

> [granting permission for voluntary departure], or 1255 [adjustment of status] of this title, or
>
> (ii) any other decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . . , other than the granting of relief under section 1158(a) [asylum] of this title.

This Court compared parts (i) and (ii) above to determine the type of decision Congress must have meant for § 1252(a)(2)(B)(ii) to include. *Kucana*, 558 U.S. at 246-47. This Court concluded that when adding § 1252(a)(2)(B)(ii)'s catch-all provision "Congress had in mind decisions of the same genre" as those set forth immediately above in §1252(a)(2)(B)(i). *Id.* The First Circuit's decision ignores this analysis.

Section 1155 is not of the same genre as the five statutes listed in § 1252(a)(2)(B)(i). All five statutes corroborate § 1252(a)(2)(B)(i)'s statement that these decisions lie within the sole discretion of the Attorney General or the Secretary and courts do not have jurisdiction to review these decisions. They do this by either using the very word "discretion" or through an explicit statement reinforcing that the courts do not have jurisdiction to review the Secretary's decision. Three of them include both forms of corroboration:

- 8 U.S.C. § 1182(h): "The Attorney General may, in his discretion, waive the application of [inadmissibility based on certain criminal offenses] . . . . No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.";

- 8 U.S.C. § 1182(i): "(1) The Attorney General may, in the discretion of the Attorney General, waive the application of [inadmissibility based on fraud] . . . . (2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).";

- 8 U.S.C. § 1229b: "In acting on applications under this paragraph [for cancellation of removal], the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.";

- 8 U.S.C. § 1229c: In the case of voluntary departure, "[t]he Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens. No court may review any regulation issued under this subsection. . . . No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b) of this section, nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure."; and

- 8 U.S.C. § 1255: "The status of an alien . . . may be adjusted by the Attorney General, in his discretion and under such regulations as

> he may prescribe, to that of an alien lawfully admitted for permanent residence . . ." and providing under one subsection that, "[i]n accordance with regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence."

By contrast, § 1155 is not of the same genre as these statutes. Section § 1155 contains no explicit statement that the Secretary's decision under that section is within his sole discretion, nor any mention of "discretion" at all. It also does not contain any statment that Congress intended to preclude judicial review of decisions made under that section.

Moreover, all of the statutes specified in § 1252(a)(2)(B)(i) deal with decisions by the government to deny discretionary relief. The heading of the statute, while not determinative, confirms this understanding since § 1252(a)(2)(B) is titled "Denials of discretionary relief." The decision to revoke a visa petition is not of the same type. The statute governing the initial grant of a visa petition, 8 U.S.C. § 1154, is not a "discretionary" decision (*see* Section II.A, *infra*), so it would make little sense to call the revocation of that same visa petition under § 1155 a revocation of "discretionary relief."

In sum, the First Circuit's decision is inconsistent with this Court's analysis in *Kucana* that Congress meant for the catch-all provision in § 1252(a)(2)(B)(ii) to include only those statutes that are of the same genre as those in § 1252(a)(2)(B)(i).

C. The presumption in favor of judicial review resolves the conflict in this case.

This Court's jurisprudence mandates that, where a statute is capable of two divergent constructions—one that finds the right to judicial review has been taken away and one that finds the right to judicial review remains—the right to judicial review prevails.

Section 1155 does not provide "clear and convincing evidence" that Congress intended decisions made under that statute to be exempt from judicial review. Congress could have simply stated, "the decision to grant, deny, or revoke a visa petition under sections 1154 and 1155 is within the sole discretion of the Attorney General or the Secretary of the Department of Homeland Security, and is unreviewable by the courts." Congress certainly knew how to draft that sort of language and used words explicitly granting the Secretary complete discretion in several other nearby statutory sections. *See* Section I.B, *supra*. But it did not use any such clear terms here. "Because the presumption favoring interpretations of statutes to allow judicial review of administrative action is well-settled, the Court assumes that Congress legislates with knowledge of the presumption. It therefore takes clear and convincing evidence to dislodge the presumption." *Kucana*, 558 U.S. at 251-52 (quotation marks, citations, and brackets omitted).

In a case similar to this one, this Court reviewed whether a statute barring judicial review for "a determination respecting an application" did in fact bar all judicial review of such decisions. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991) (emphasis omitted). This Court held that because Congress knows of the presumption in favor of judicial review,

"it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review." *Id.* at 496.

Because § 1155 is susceptible to two different interpretations, the default presumption that Congress intends to preserve judicial review must prevail. As this Court has explained, "[w]hen a statute is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Kucana*, 558 U.S. at 251 (quotation marks and citations omitted); *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001), *superseded on other grounds by statute*, 8 U.S.C. § 1252(a)(5); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (holding that even a court's "substantial doubt" about whether Congress intended to revoke judicial review is not enough to overcome the presumption that judicial review exists in all federal question cases).

This Court is "most reluctant to adopt [an interpretation precluding review] without a showing of clear and convincing evidence to overcome the strong presumption that Congress did not mean to prohibit all judicial review of executive action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) (quotation marks and citations omitted). Thus, "[a]ny lingering doubt about the proper interpretation of 8 U.S.C. § 1252(a)(2)(B)(ii) would be dispelled by a familiar principle of statutory construction: the presumption favoring judicial review of administrative action." *Kucana*, 558 U.S. at 251.

The critical importance of judicial review has been recognized for well over two centuries. As Chief Justice John Marshall explained, the constitution expressly extends the judicial power "to all cases arising under the laws of the United States." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-74, 176-77 (1803); *see also* Stephen I. Vladeck, Boumediene's *Quiet Theory: Access to Courts and the Separation of Powers,* 84 NOTRE DAME L. REV. 2107, 2128 (2009) (the presumption of judicial review was developed due to "the possibility that the burgeoning administrative state would frustrate the courts' power to have the final say" (emphasis omitted)).

When laws are construed to remove this check on executive power, they raise serious separation of powers concerns because they allow the executive branch to encroach upon the functions of the judicial branch. The judicial branch is the only branch of the government "whose independence and authority ensures that individuals exposed to the government's coercive force will be treated fairly and in accordance with the rule of law." M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525, 1525 (1997).

This principle is especially important in the immigration arena because of the peculiar vulnerability of immigrants, who often lack both a voice in the political process and knowledge of how to navigate the workings of government. Hence, it is no coincidence that many of the cases in which this Court has reiterated the presumption in favor of judicial review, such as *Kucana*, *St. Cyr*, *McNary*, and others, have arisen

in the immigration context. And this issue is important not only to the millions of immigrants who have been granted visa petitions over the years and who have now built a life here, but also to the businesses who employ them and the family members who rely upon them.

This Court should grant review to resolve the longstanding circuit split over the scope of judicial review of visa revocations, and to give effect to the words of Chief Justice Marshall from long ago: "[t]he distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed . . . . It is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 176-77.

II. Precluding judicial review would lead to irrational results.

As explained above, the Secretary's denial of a visa petition is reviewable and subject to non-discretionary standards. As a matter of law and logic, the Secretary should not be able to revoke that same visa on a discretionary and non-reviewable basis. Courts construe legislation so that the overall legislative scheme is rational, because "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

A. Longstanding canons of statutory construction counsel against adopting an interpretation that leads to irrational results.

Every court to have considered the issue has held that the initial decision whether to grant or deny a visa petition under § 1154 is reviewable.[2] Further, § 1154 is not discretionary. A skilled worker visa petition should be granted where the petitioner produces evidence he has the qualifications necessary for approval. *See* 8 U.S.C. § 1154(b) (the Attorney General "shall" approve a visa petition when he determines the facts stated in the petition are true and the alien has met the criteria); *id*. § 1153(b)(3)(A) (visas "shall be made available" for "skilled workers" upon satisfaction of the criteria); 8 C.F.R. § 204.5 (specifying the required qualifications for skilled worker visa petitions).

The First Circuit's holding that an alien whose visa petition is revoked has no right to judicial review leads to absurd results. Although an alien whose visa petition is denied has a right to judicial review, if courts held that a particular reason is not a valid ground for denying a petition, the Secretary could simply grant the petition and then immediately revoke it for the very reason the court had just held invalid.

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[2] *See, e.g., Bangura v. Hansen,* 434 F.3d 487, 498 (6th Cir. 2006); *Soltane v. U.S. Dep't of Justice,* 381 F.3d 143, 147-48 (3d Cir. 2004); *Spencer Enters., Inc. v. United States,* 345 F.3d 683, 689 (9th Cir. 2003); *Zemeka v. Holder,* 989 F. Supp. 2d 122, 128-30 (D.D.C. 2013); *Z-Noorani, Inc. v. Richardson,* 950 F. Supp. 2d 1330, 1337-43 (N.D. Ga. 2013).

For instance, suppose that the executive branch decided to bar a particular group of immigrants from obtaining visas on the sole ground that their experience did not count if the company where they gained their experience was located within Mexico. Under the First Circuit's interpretation, the Secretary could avoid any court challenge to this policy by simply granting all such visa petitions, and then immediately revoking them. Not only is this result irrational, but it would render the right to judicial review under § 1154 meaningless.

The different procedural posture of an alien applying for a visa petition and an alien whose visa petition is being revoked is simply a matter of timing. This is not a case where the procedural posture would mean that a different evaluation applies, such as the difference between assessing whether the allegations in a complaint state plausible grounds for relief versus assessing whether there is a genuine dispute as to any material fact. *Compare* Fed. R. Civ. P. 12(b)(6) *with* 56. Of course, in some cases new facts will have come to light and the Secretary will be entitled to consider these new facts in deciding whether to revoke the visa petition. But the query remains the same: Does the evidence (still) prove that the alien meets the criteria for a visa petition? There is no rational reason why the query should change.

Here, the visa petition simply establishes whether the alien has met the statutory and regulatory requirements to be eligible for a visa. *See* 8 U.S.C. § 1154; 8 C.F.R. § 204.5. This decision does not concern the ultimate question of whether the alien can remain in the country or not.

Courts have gone to much greater lengths to avoid a statutory interpretation that would lead to irrational results. In an analogous situation, a previous statute provided that aliens who had committed crimes "involving moral turpitude" could be excluded. 1917 Immigration Act, Pub. L. No. 301, § 3, 39 Stat. 874, 875 (1917). The statute contained an exception, however, stating that aliens returning to the U.S. after a temporary absence could be admitted in the discretion of the Secretary. *Id.* at 878. This exception applied only to exclusion proceedings, not deportation proceedings. Nevertheless, the same exception was read in to the statute governing deportation because, to do otherwise, would be "capricious and whimsical." *Matter of L,* 1 I. & N. Dec. 1, 5 (BIA 1940) (op. of the Attorney General) (quoted in *St. Cyr*, 533 U.S. at 294 n.3); *see also Matter of Silva,* 16 I. & N. Dec. 26, 30 (BIA 1976). Both groups of aliens were seeking the same form of relief—lawful admission to the country through suspension of deportation.

Here, both an alien whose visa petition has been denied and an alien whose visa petition has been revoked are also seeking the same form of relief; they are simply trying to establish their legal eligibility for a visa. The results of both a denial and revocation are the same. Further, the two provisions come in consecutively-numbered sections of the same subchapter of the immigration statutes. Because the decision to deny a visa petition is subject to judicial review, the decision to revoke one should be as well, absent the clearest indication that Congress specifically intended such a disjointed result. To resolve ambiguities in these sections in a way that subjects the Secre-

tary's decision to judicial review if he denies a visa petition, but not if he grants and then immediately revokes that same petition, would be an irrational result that contravenes established rules of statutory interpretation. *See Griffin*, 458 U.S. at 575.

B. The right to equal protection includes a guarantee against irrational legislation.

Not only do the canons of statutory construction counsel against adopting an interpretation that would lead to irrational results, but so does the Equal Protection Clause. This Court has held that equal protection includes a guarantee against irrational or arbitrary legislation. *Plyler v. Doe*, 457 U.S. 202, 224 n.21 (1982).[3]

A construction of § 1155 that permits judicial review has the further advantage of avoiding constitutional problems that might otherwise arise given the irrational results the First Circuit's interpretation could produce. It is, of course, another long-standing principle that statutes should, if possible, be construed to avoid finding them unconstitutional. *Bowen*, 476 U.S. at 681 n.12.

As this Court has long recognized, equality under the law is one of the most fundamental principles of our country:

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[3] An alien whose visa petition has been previously granted will necessarily have substantial and voluntary connections to the United States. Such aliens are entitled to equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution. *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *see also Plyler*, 457 U.S. at 212-14.

> Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which Legislatures, executives and courts are expected to make, execute and apply laws.

Truax v. Corrigan, 257 U.S. 312, 332 (1921). The Constitution guarantees equal protection through judicial review.

The First Circuit's holding that what constitutes "good and sufficient cause" can change from case to case at the Secretary's whim is also irrational. The Constitution gives Congress the power to establish a "*uniform* Rule of Naturalization," U.S. CONST. art. I, § 8, cl. 4 (emphasis added), not one that changes with every case at the whim of the Secretary.

If one alien is allowed to have a visa on a particular set of facts, while another has his revoked on virtually identical facts, it would be a denial of equal protection of the law unless there was, at the very least, some rational basis for treating the aliens differently.[4] While rational basis review is more forgiving than other standards of review, it too requires that the classification is not arbitrary or irrational. *Tuan*

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[4] This brief does not address the situation where a visa is revoked for national security reasons. That raises entirely different considerations, (and far stronger justifications for the relevant government conduct), and thus the First Circuit's reliance on *Webster v. Doe*, 486 U.S. 592, 594 (1988) was misplaced.

Anh Nguyen v. I.N.S., 533 U.S. 53, 76 (2001), (O'Connor, J., dissenting).

Additionally, the First Circuit's holding that what constitutes "good and sufficient cause" can change from case to case at the Secretary's whim is also irrational. Here again, the only way to ensure the uniform application of the immigration laws is judicial review.

Uniform application of the laws is required where there is no rational basis for dissimilar treatment. For instance, in the case of *Village of Willowbrook v. Olech*, a landowner requested that her home be connected to the municipal water service. 528 U.S. 562 (2000) (per curiam). The city initially required a thirty-three-foot easement on her land where it usually required only a fifteen-foot easement. The landowner sued, alleging this requirement had no rational basis, but was instead retaliation for a previous lawsuit she had won against the city. *Id.* at 563. This Court held that the landowner had alleged a valid equal protection claim for a "class of one" where the complaint stated that the thirty-three-foot easement was motivated by animus rather than due to a rational basis. *Id.* at 564-65. "[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Id.* at 564 (quotation marks and citations omitted).

Similarly, if the Immigration Service typically finds that a particular set of facts do not constitute a

valid reason to deny a visa petition, it would be difficult to find a rational basis for why virtually identical facts would constitute good and sufficient cause to revoke a visa petition.

The provision in 8 U.S.C. § 1252(a)(2)(D) allowing an alien to raise "constitutional claims or questions of law" does not solve this equal protection problem because the right to equal protection is not limited to pure questions of law or constitutional interpretation. The right to equal protection goes further: It includes the right of people who are similarly situated factually to be treated the same. This principle goes back more than a century. The Equal Protection Clause requires that all persons "shall be treated alike, under like circumstances and conditions, both in privileges conferred and in the liabilities imposed." *Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887). "Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so." *Truax*, 257 U.S. at 333.

The First Circuit's interpretation eliminates the set standard of "good and sufficient cause" from the statute; it allows the Secretary unfettered discretion, and thus opens the door to potentially irrational results. By contrast, the Ninth Circuit, the BIA and the AAO have held that "good and sufficient cause" is an objective standard that can be measured against the case law and regulations to determine whether the evidence in any case establishes that the alien has met the statutory and regulatory requirements for eligibility—a standard that necessarily presupposes a rational basis for the government's revocation decision.

Without this standard, the First Circuit's interpretation may raise serious equal protection concerns.

Whenever possible, the courts will construe legislation so that the overall legislative scheme is rational. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin*, 458 U.S. at 575. Accordingly, this Court should grant review and hold that the interpretation given to the phrase "good and sufficient cause" in § 1155 by the Ninth Circuit, the BIA and the AAO is the correct one. The First Circuit's interpretation not only contravenes settled principles of statutory interpretation, but raises both separation of powers and equal protection concerns. These problems "surely cast[] sufficient doubt on the constitutionality" of applying § 1252(a)(2)(B)(ii) to § 1155 to support the alternative interpretation advanced by the Ninth Circuit, the BIA and the AAO. *Bowen*, 476 U.S. at 681 n.12.

Conclusion

For the reasons stated herein and those stated in the petition for a writ of *certiorari*, this Court should grant *certiorari* and hold that the federal appellate courts have jurisdiction to review the Secretary's decision to revoke a visa petition.

Respectfully submitted,

POLLY J. ESTES
Counsel of Record
ANNA-ROSE MATHIESON
CALIFORNIA APPELLATE LAW GROUP LLP
96 Jessie Street
San Francisco, CA 94105
(415) 649-6700 EXT. 11
polly@calapplaw.com
Attorneys for Amici Curiae

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