No. _____

IN THE
Supreme Court of the United States

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

v.

JEH JOHNSON, SECRETARY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al*.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has long recognized that Congress legislates with knowledge of "the strong presumption in favor of judicial review of administrative action." *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001); *see McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). That is why it "takes 'clear and convincing evidence' to dislodge the presumption." *Kucana* v. *Holder*, 558 U.S. 233, 252 (2010) (quoting *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993)).

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 strips the courts of jurisdiction to review certain decisions "specified" by statute "to be in the discretion of the Attorney General or Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii). The First Circuit, joining seven other courts of appeals, concluded over a dissent that this language bars review of a decision to revoke a visa petition. The Ninth Circuit has held that it does not. The question presented by this case is:

Whether a decision by the Secretary of Homeland Security that there is "good and sufficient cause" to revoke the approval of a visa petition is subject to judicial review.

PARTIES TO THE PROCEEDINGS

1. Henry Bernardo, Samuel Marinho Freitas, Ruth Lopes Freitas, Daniel Lopes Freitas, Graciane Lopes Freitas, and Graziela Lopes Freitas were plaintiffs-appellants below.

2. Jeh C. Johnson, Secretary, United States Department of Homeland Security; Loretta Lynch, Attorney General of the United States; Alejandro Mayorkas, Director, United States Citizenship and Immigration Service; Gregory A. Richardson, Director, Texas Service Center, United States Citizenship and Immigration Services; and Ron Rosenberg, Acting Chief, Administrative Appeals Office, United States Citizenship and Immigration Services, were defendants-appellees below.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Henry Bernardo brought this action on behalf of M&K Engineering, Inc. M&K does not have a parent corporation and no publicly held corporation owns ten percent or more of its stock.

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On behalf of M&K Engineering, Inc., Henry Bernardo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The First Circuit's opinion is not yet reported, but is available at 2016 WL 378918. The district court's decision is unreported, but available at 2014 WL 6905107.

JURISDICTION

The First Circuit entered judgment on January 29, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 8, section 1155 of the U.S. Code provides:

> The 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. Such revocation shall be effective as of the date of approval of any such petition.

Title 8, section 1252(a)(2)(B) provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and 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), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

INTRODUCTION

Filing a visa petition is a critical first step for the hundreds of thousands of foreign relatives of U.S. citizens and prospective employees of U.S. businesses who seek permanent legal residence in the United States each year. For more than a decade, the courts of appeals have split on the question whether a decision to revoke an approved petition is subject to judicial review. This case cleanly presents that split.

Since 2004, the Ninth Circuit—home to far more new legal permanent residents each year than any other circuit—has held that revocations are reviewable. It has repeatedly reaffirmed that decision even as seven other circuits, now joined by the First Circuit, have said that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) bars any review.

On one side of the split, the First, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have found that the authority of the Secretary of Homeland Security to revoke the approval of a visa petition is purely discretionary. *See* 8 U.S.C. § 1155. Accordingly, they have held that IIRIRA's bar on judicial review of discretionary decisions precludes court challenges to revocations. *See* 8 U.S.C. § 1252(a)(2)(B)(ii).

On the other side, the Ninth Circuit and the dissent below recognized that the statute's reference to "good and sufficient cause" provides an objective legal standard amenable to judicial review. That is how the agencies responsible for administering the revocation provision have consistently understood their authority. And that understanding was firmly

established when Congress twice reenacted § 1155 without disturbing the limiting language.

The decision below compounds the split by expressly rejecting the Ninth Circuit's reliance on agency precedent. The courts of appeals thus disagree both on the proper weight to be accorded to the different words in § 1155 and on the appropriate sources of meaning for those words.

Review is all the more important now that the split has persisted years after this Court's decision in *Kucana* v. *Holder*, 558 U.S. 233 (2010), made clear that IIRIRA's jurisdiction-stripping provision must be interpreted narrowly in light of its text, structure, and the "well-settled" "presumption favoring interpretations of statutes to allow judicial review of administrative action." *Id.* at 251-252 (alteration omitted) (quoting *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63-64 (1993)).

Without this Court's intervention, immigrants to the United States will continue to face a divided system, with a quarter of all new lawful permanent residents coming through a circuit that permits review, while another half come through circuits that do not, and the remaining quarter confront unsettled law. *See* Randall Monger & James Yankay, 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) ("*2013 Yearbook*").[1] That situa-

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

tion is untenable and contrary to the constitutional and statutory design, which is premised on nationwide uniformity. *See* U.S. Const. art. I, § 8, cl. 4 (vesting in Congress the "Power * * * To establish an uniform Rule of Naturalization"). This Court should grant the petition and reverse the decision below.

STATEMENT

Petitioner Henry Bernardo is the owner and president of Woburn, Massachusetts-based M&K Engineering, Inc. In October 2006, after obtaining the necessary approval from the Department of Labor, Bernardo filed a visa petition on behalf of Samuel Freitas, a Brazilian immigrant to the United States. Pet. App. 3a. M&K intended to hire Freitas as an assistant delivery supervisor. *Id*. The director of the United States Customs and Immigration Service (USCIS) Texas Service Center approved the petition five months later. *Id.*

In September 2010, however, the director issued a Notice of Intent To Revoke that approval, raising questions about whether M&K could pay the wage it planned to offer Freitas and whether Freitas met the minimum experience requirements at the time the company sought Department of Labor approval. *Id*. Although M&K was able to establish its ability to pay, the director concluded that Freitas had not met the experience requirements and revoked the approval of the visa petition. M&K appealed, but the USCIS Administrative Appeals Office (AAO) affirmed and dismissed the appeal. *Id*. at 3a-4a.

In July 2013, Bernardo filed a civil suit challenging the revocation on M&K's behalf in the U.S. District Court for the District of Massachusetts. *Id*. at 4a. After further proceedings in the AAO, the govern-

ment moved to dismiss M&K's lawsuit for lack of jurisdiction, arguing that the revocation was an unreviewable exercise of statutorily conferred discretion under § 1252(a)(2)(B)(ii). *Id.* The district court granted the motion, and a divided panel of the First Circuit affirmed.

IIRIRA strips the courts of jurisdiction to review "any * * * decision or action" that is "specified" by statute "to be in the discretion of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii). Under the Immigration and Nationality Act (INA), 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] petition approved by him under section 1154 of this title"—including petitions for immigrant worker visas like the one at issue here. *Id.* § 1155.

The panel majority concluded that the language of § 1155 "specified" that revocation is discretionary and thus shielded from review. Pet. App. 5a-6a. Although the majority briefly acknowledged the presumption favoring judicial review of administrative action, it found that "[a]t least three language choices in § 1155 dictate[d] this conclusion: 'may,' 'at any time,' and 'for what he deems to be good and sufficient cause.' " *Id.* at 8a. In the majority's view, "[t]ogether, these phrases * * * determine the question of discretion." *Id.* at 10a.

Most of the majority's opinion was devoted to responding to the points raised by Judge Lipez in dissent. Judge Lipez argued that the statute's reference to "good and sufficient cause" provided an "objective legal standard" that cabined the discretionary language relied on by the majority. *Id.* at

32a-36a. He pointed to almost thirty years of agency adjudications assessing "good and sufficient cause" by asking whether " 'the evidence of record at the time the decision is rendered * * * would warrant [a] denial' of the visa petition." *Id.* at 32a (quoting *In re Ho*, 19 I. & N. Dec. 582, 590 (B.I.A. 1988)). Judge Lipez suggested that this precedent had made "good and sufficient cause" a "term of art." *Id.* at 37a-38a. And he argued that Congress had ratified that interpretation by reenacting § 1155 without amendment in 1996 and 2004. *Id*. at 39a-44a.

The majority rejected the dissent's reliance on agency interpretation. Even if Congress had been aware of the Board of Immigration Appeals (BIA) decisions, the majority found that *judicial* interpretations of "good and sufficient cause" were mixed, so that "there was no 'broad and unquestioned' consensus as to the meaning of" that phrase. *Id.* at 16a (citation omitted). The majority faulted the dissent for focusing on "'good and sufficient cause' at the expense of the words 'for what he deems to be.'" *Id.* at 21a. Citing *Webster* v. *Doe*, 486 U.S. 592 (1988), the majority found that the Secretary's authority to "deem" a cause to be "good and sufficient" meant that he enjoyed complete discretion. Pet. App. 21a-23a.

Judge Lipez distinguished *Webster* by focusing on the objective criteria that govern visa petition approvals. Unlike the statute in *Webster*, which permitted the Director of Central Intelligence to fire any employee "in his discretion * * * whenever he shall deem such termination necessary or advisable in the interests of the United States," the grounds for denying a visa petition do not entail policy-driven judgment calls. *Webster*, 486 U.S. at 594; *see* Pet.

App. 46a-48a. A "good and sufficient cause" determination depends on objective criteria outlined by the INA.

Judge Lipez also argued that his interpretation was bolstered by the structure of § 1252(a)(2)(B). Section 1252(a)(2)(B)(i) bars review of several specific categories of "substantive decisions * * * made by the Executive * * * as a matter of grace," while § 1252(a)(2)(B)(ii) is a catch-all provision. Pet. App. 53a (quoting *Kucana*, 558 U.S. at 247). In *Kucana*, this Court explained that the language and juxtaposition of § 1252(a)(2)(B)(i) and (ii) "suggests that Congress had in mind decisions of the same genre." 558 U.S. at 246-247. Judge Lipez argued that a "decision to revoke the approval of a visa petition is not 'of a like kind.'" Pet. App. 53a (quoting *Kucana*, 558 U.S. at 248).

REASONS FOR GRANTING THE PETITION

I. THIS CASE IS THE IDEAL VEHICLE FOR RESOLVING AN ENTRENCHED CIRCUIT SPLIT.

A. The Decision Below Deepens A Longstanding Split Over The Reviewability Of Visa Petition Revocations.

The First Circuit held that the authority to revoke a visa petition is "specified" by statute "to be in the discretion of * * * the Secretary of Homeland Security." Pet. App. 6a (quoting 8 U.S.C. § 1252(a)(2)(B)(ii)). In doing so, the court of appeals joined seven other circuits and compounded their decade-long split with the Ninth Circuit by specifically rejecting any reliance on agency precedent to

interpret the revocation provision. Because the Ninth Circuit has repeatedly reaffirmed its longstanding position allowing judicial review, only this Court's intervention can resolve the conflict.

1. The Ninth Circuit has clearly held that IIRIRA does not bar judicial review of visa petition revocations. *See ANA Int'l Inc.* v. *Way*, 393 F.3d 886, 893-894 (9th Cir. 2004).

The Ninth Circuit's analysis began with the jurisdiction-stripping language in § 1252(a)(2)(B)(ii). It concluded that "if the statutory provision granting the Attorney General power to make a given decision also sets out specific standards governing that decision, the decision is not 'in the discretion of the Attorney General.'" *ANA Int'l*, 393 F.3d at 892 (citing *Spencer Enters., Inc.* v. *United States*, 345 F.3d 683, 691 (9th Cir. 2003)).

The Ninth Circuit relied on prior circuit and BIA decisions to hold that § 1155's text did not preclude judicial review. It found that "'good and sufficient cause' refers to a meaningful standard that the Attorney General [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." *ANA Int'l*, 393 F.3d at 894 (citing *Tongatapu Woodcraft Haw., Ltd.* v. *Feldman*, 736 F.2d 1305 (9th Cir. 1984); *In re Tawfik*, 20 I. & N. Dec. 166 (B.I.A. 1990)). "Given the construction of § 1155 by which we are bound," the Ninth Circuit concluded that "the right or power to act is *not entirely* within the Attorney General's judgment or conscience." *Id.* IIRIRA therefore did not preclude review.

By contrast, the Seventh Circuit thought that "good and sufficient cause" was "highly subjective" and that "there exist no strict standards for making this determination." *El-Khader* v. *Monica*, 366 F.3d 562, 567 (7th Cir. 2004). In the court's view, "the discretionary nature of the decision is apparent from the plain language of the statute"—especially "the permissive 'may' and a temporal reference to 'at any time.'" *Id.* Although the appellant in *El-Khader* had pointed to BIA precedent, the Seventh Circuit brushed that argument aside, addressing only the related argument that the Secretary's authority to revoke was constrained by the conditions on his power to grant or deny petitions in the first place. *Id.* at 568. The court found those regulations irrelevant and observed that "we know of no factual predicates for finding 'good and sufficient cause' in the context of decisions made under § 1155." *Id.*

Those two perspectives have defined the split ever since. The Seventh Circuit held that the permissive language of § 1155, coupled with what it saw as the "highly subjective" nature of "good and sufficient cause," was ample indication of discretionary authority. *Id.* at 567. The Ninth Circuit criticized the Seventh for "seem[ing] to begin and end" with the discretion-granting language while "ignor[ing] the 'good and sufficient cause' portion of the same phrase." *ANA Int'l*, 393 F.3d at 893. After all, "Congress did not have to put those words there, and in many other instances it did not." *Id.* at 893-894.

2. Every other circuit to consider the question has confronted those competing readings. The rest have favored the Seventh Circuit's interpretation over the Ninth's.

The Third Circuit found § 1155 "devoid of any legal requirements." *Jilin Pharm. USA, Inc.* v. *Chertoff*, 447 F.3d 196, 202 (3d Cir. 2006). "The operative fact required to exercise discretion under § 1155 is not merely the presence of cause for the revocation, but the Secretary's *judgment* that such cause exists." *Id.* at 204.

The Fifth Circuit agreed. In *Ghanem* v. *Upchurch*, 481 F.3d 222 (5th Cir. 2007), the court "interpret[ed] the phrase 'for what he deems' as vesting complete discretion in the Secretary to determine what constitutes good and sufficient cause." *Id.* at 225. And the Sixth Circuit faulted the Ninth Circuit for "focusing on the 'good and sufficient cause' language to the exclusion of the word 'deems.'" *Mehanna* v. *U.S. Citizenship & Immigration Servs.*, 677 F.3d 312, 315 (6th Cir. 2012).

The Eighth, Tenth, and Eleventh Circuits came to the same conclusion—albeit with only cursory analysis of the statute. *See Abdelwahab* v. *Frazier*, 578 F.3d 817, 821 (8th Cir. 2009) (one paragraph); *Hamilton* v. *Gonzales*, 485 F.3d 564, 567 n.6 (10th Cir. 2007) (a footnote); *Karpeeva* v. *U.S. Dep't of Homeland Sec. Citizenship & Immigration Servs. ex rel. DHS Sec'y*, 432 F. App'x 919, 925 (11th Cir. 2011) (per curiam) (unpublished); *Sands* v. *U.S. Dep't of Homeland Sec.*, 308 F. App'x 418 (11th Cir. 2009) (per curiam) (unpublished) (affirming dismissal on jurisdictional grounds without analysis); *see also Mantena* v. *Johnson*, 809 F.3d 721, 728 (2d Cir. 2015) (noting the court's prior statement, made only "in dicta" (citing *Firstland Int'l, Inc.* v. *INS*, 377 F.3d 127, 131 (2d Cir. 2004))).

Ordinarily, such a clear, uneven split might be counted on to resolve itself. Not here. In the years since it concluded that petition revocations are reviewable, the Ninth Circuit has repeatedly reaffirmed and relied on that holding without dissent, even as its sister circuits have come to the opposite conclusion. *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 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). The most recent of those cases was decided after the Third, Fifth, Tenth, and Eleventh Circuits had expressly or impliedly rejected the reasoning of *ANA International* to side with the Seventh Circuit. Meanwhile, district courts across the Ninth Circuit continue to entertain challenges to revocation orders. *See, e.g.*, *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.*, No. 2:12-CV-07893-CAS(AGRx), 2015 WL 1467174 (C.D. Cal. Mar. 23, 2015). With no indication that the Ninth Circuit will revisit its precedent, this Court's review is the only path to a uniform, nationwide rule.

3. The First Circuit's decision compounds the split. Like the other courts that have rejected the Ninth Circuit's view, the panel majority focused on the statute's use of the words "may," "at any time," and "deems." Pet. App. 7a-9a. Between the majority and the dissent, the decision contains a deep and thorough analysis of the dueling perspectives. And, unlike most of the circuits on its side of the split, the

First Circuit also addressed the role of agency interpretations in interpreting the statutory language.[2]

The First Circuit concluded that the agency decisions could not give objective legal content to "good and sufficient cause" without affirmative evidence that Congress intended to ratify their understanding of the statute. The majority found "no evidence that Congress was even aware of the purported administrative interpretation, let alone intended to adopt it" when it reenacted § 1155 in 1996 and 2004 without changing the language at issue here. Pet. App. 17a. And even if Congress had known of that interpretation, the majority concluded that "it was undoubtedly aware of the judiciary's interpretations thereof as well." *Id*. *El-Khader* was decided eight months before the 2004 reenactment, and several prior decisions similarly suggested that there were no objective criteria for "good and sufficient cause." *Id.* at 12a-13a & n.8.

Those conclusions cannot be reconciled with the reasoning in *ANA International*. Although the Ninth Circuit did not specifically discuss the canon of legislative ratification, it did find that "Congress was on notice of the BIA construction of ['good and sufficient cause'] when drafting IIRIRA." *ANA Int'l*, 393 F.3d at 894. And it held that it was "bound to the narrower interpretation" of "good and sufficient cause" provided by both the BIA and prior circuit precedent. *Id.* Subsequent decisions of the Ninth

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[2] Outside the Ninth Circuit, only the Third Circuit has (briefly) addressed the BIA's settled interpretation of what constitutes "good and sufficient cause." *Jilin Pharm.*, 447 F.3d at 201 & n.7.

Circuit reviewing visa revocations have continued to embrace the BIA's precedent as a reasonable interpretation of the statute. *See Herrera*, 571 F.3d at 886; *Love Korean Church*, 549 F.3d at 754 n.3.

The decision below thus highlights the gulf between the rule in the Ninth Circuit and its sister circuits. The courts of appeals disagree both on how much weight should be accorded to the different words in § 1155, and on whether those words should be interpreted in light of agency practice. The split is clear. Without this Court's intervention, it will remain intractable.

B. The Persistence Of The Split After *Kucana* v. *Holder* Underscores The Need For Review.

The split presented here is all the more untenable in light of this Court's recent examination of IIRIRA in *Kucana*, 558 U.S. 233. As the dissent below observed, *Kucana* "inescapably 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. In the six years since *Kucana*, just three of the eight circuits implicated in the split have addressed its impact, including the decision below. Unless this Court intervenes, those circuits will continue to apply a reading of IIRIRA's jurisdictional bar that clashes with this Court's considered views.

The question in *Kucana* was whether § 1252(a)(2)(B)(ii)—the same provision at issue in this case—barred review of decisions "specified" to be discretionary by *regulation*, rather than by statute. The Court held that it did not, for three reasons that bear directly on the split presented here.

First, the Court held that any doubt about the scope of the jurisdiction-stripping language must be resolved in favor of review. "When 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 (quoting *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 434 (1995)). The Court noted that it has "consistently applied th[is] interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Id.* And because "the Court assumes that Congress legislates with knowledge of' the presumption," it "takes 'clear and convincing evidence' to dislodge the presumption." *Id.* at 252 (citations omitted).

Second, the Court emphasized that § 1252(a)(2)(B)(ii) "speaks of authority 'specified'—not merely assumed or contemplated—to be in the Attorney General's discretion. 'Specified' is not synonymous with 'implied' or 'anticipated.'" *Kucana*, 558 U.S. at 243 n.10 (citing *Webster's New Collegiate Dictionary* 1116 (1974), which states that "specify" means "to name or state explicitly or in detail"). In other words, the clear statement rule of the presumption in favor of judicial review is reinforced by a *statutory* clear statement rule built into the jurisdictional bar itself.

The government agreed.[3] In opposing certiorari in *Kucana*, the government conceded that IIRIRA did not bar review of decisions on motions to reopen because the statute "does not 'specif[y]' that motions to reopen may be granted 'in the discretion of the Attorney General'"—even though the decision was in fact discretionary. U.S. Br. in Opp. at 12, *Kucana*, *supra* (No. 08-911).

Finally, the Court observed that § 1252(a)(2)(B)(ii) was linked to the enumerated decisions insulated from review by § 1252(a)(2)(B)(i). It found "significant" that the decisions Congress enumerated in clause (i) are "substantive decisions made by the Executive in the immigration context as a matter of grace, things that involve whether aliens can stay in the country or not." *Kucana*, 558 U.S. at 247 (citation and alteration omitted). That juxtaposition suggested that the catch-all jurisdictional bar of clause (ii) did not include the kinds of "adjunct rulings" or "procedural device[s]" that, if reversed, would not require a reviewing court to "direct the Executive to afford the alien substantive relief." *Id.* at 248.

Those three interpretive principles raise serious questions about the *El-Khader* line of cases. Yet the split has persisted. In the years since *Kucana*, the First, Sixth, Eighth, Tenth, and Eleventh Circuits have considered the reviewability of petition revocations. *See Mehana*, 677 F.3d 312 (6th Cir.); *Raja-*

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[3] The government confessed error in *Kucana* and filed a brief supporting the petitioner after the Court granted certiorari. U.S. Br., *Kucana*, 558 U.S. 233 (No. 08-911).

sekaran v. *Hazuda*, No. 14-3623, 2016 WL 362127 (8th Cir. Jan. 29, 2016); *Green* v. *Napolitano*, 627 F.3d 1341 (10th Cir. 2010); *Karpeeva*, 432 F. App'x 919 (11th Cir.). But only the Sixth and Tenth Circuits have engaged with *Kucana*.

The Sixth Circuit brushed off *Kucana*'s admonition that discretion cannot be implied or assumed. *Mehana*, 677 F.3d at 316. And it found that visa petition revocations "fit[] squarely within the class of 'substantive decisions' described in *Kucana* as warranting insulation from judicial review," even though agency precedent demonstrates that revocations are based on record-bound assessments of evidentiary sufficiency—not "grace." *Id.* at 317. The Tenth Circuit's analysis was even more limited, concluding simply that § 1155 was unambiguous. *Green*, 627 F.3d at 1346.

As explained in more detail in Part III, *infra*, *Kucana* counsels strongly in favor of the reading advocated by the dissent, which is consistent with the Ninth Circuit's rule. Under *Kucana*, the balance between the discretion-granting and discretion-limiting language in § 1155 must tip in favor of review, especially in the absence of an express statement to the contrary. And the nonsubstantive nature of petition revocations makes the application of the bar all the more doubtful.

II. REVIEW IS NECESSARY TO ESTABLISH A UNIFORM, NATIONWIDE RULE ON A MATTER OF CENTRAL IMPORTANCE TO IMMIGRATION AND THE NATIONAL ECONOMY.

Visa petitions are the critical first step in the process of obtaining lawful permanent residence in the

United States for more than one million immigrants each year—including hundreds of thousands of family members of U.S. citizens and tens of thousands of skilled workers and professionals employed by U.S. companies of all sizes. *See 2013 Yearbook*, *supra*, at 5, 16, 18-19. The statute at issue here thus performs an important gatekeeping function, for which the availability of judicial review under a single, national standard is vital.

As members of this Court have recognized, matters touching on the review of immigration decisions are "of particular importance in those Circuits with States on our international borders," especially the Ninth Circuit, which "considers over half of all immigration petitions filed nationwide, and [where] immigration cases compose nearly half of the * * * docket." *Nken* v. *Holder*, 556 U.S. 418, 437 (2009) (Kennedy, J., concurring, joined by Scalia, J.).

Indeed, more than twenty-six percent of the national total of immigrants granted permanent residence (in each of the five most recent years for which statistics are available) resided in states under the Ninth Circuit's jurisdiction. Just over fifty percent resided in states on the other side of the split. *See 2013 Yearbook*, *supra*, at 16. The controversy thus affects the vast majority of the nation's flow of new lawful permanent residents.

The current circuit split has effectively created two systems for immigrants seeking lawful permanent residence. Almost exactly half of the Nation's new permanent residents each year go through a system that allows judicial review of revocation decisions (in the Ninth Circuit and the circuits that have not explicitly barred review). The other half are pro-

cessed in a system that forecloses judicial review (in the circuits on the other side of the split that have precluded review).

The number of individuals and businesses affected annually by the processing of these petitions makes the continuing split intolerable. Only this Court can mend the rift between these disparate systems.

III. THE DECISION BELOW IMPROPERLY DEPRIVES THE COURTS OF JURISDICTION OVER AN OBJECTIVE, RECORD-BASED AGENCY DETERMINATION.

In choosing the wrong side of the split, the First Circuit flatly misconstrued the statutes at issue here. Notwithstanding this Court's admonition in *Kucana*, the panel majority disregarded the clear indications from the statutory text, structure, and policy considerations, all of which militate in favor of preserving judicial review. IIRIRA bars review of decisions expressly "specified" by statute—"not merely assumed or contemplated"—to be within the Secretary's discretion. *Kucana*, 558 U.S. at 243 n.10. Read against the "strong presumption in favor of judicial review," that directive requires exceptionally clear evidence that Congress meant to insulate a particular decision from review. *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001); *see Kucana*, 558 U.S. at 251-252. The decision to revoke a visa petition fails to clear that high bar. On the contrary, it hinges on a legal standard, "good and sufficient cause," that is tailor-made for judicial review.

1. This Court has "consistently applied" the " 'well-settled' " presumption in favor of judicial review "to legislation regarding immigration, and particularly

to questions concerning the preservation of federal-court jurisdiction." *Kucana*, 558 U.S. at 251-252 (quoting *Catholic Soc. Servs.*, 509 U.S. at 63-64); *see St. Cyr*, 533 U.S. at 298; *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). This presumption is rooted in more than two centuries of judicial precedent and congressional practice. *See Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 670-672 (1986).

Because "'Congress legislates with knowledge of' the presumption," only "clear and convincing evidence" will suffice to overcome it. *Kucana*, 558 U.S. at 252 (quoting *McNary*, 498 U.S. at 496; *Catholic Soc. Servs.*, 509 U.S. at 64); *see also Bowen*, 476 U.S. at 672 (noting "the heavy burden of overcoming the strong presumption" (citation omitted)). Ambiguity or even "substantial doubt" about congressional intent is not enough to rebut the presumption that judicial review survives. *Block* v. *Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984). "When a statute is 'reasonably susceptible to divergent interpretation," this Court "adopt[s] 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 (quoting *Lamagno*, 515 U.S. at 434).

That "interpretive guide" forms an essential backdrop to a case like this one centering on review of immigration decisions. *Id.* Yet the majority below brushed it aside.

2. The majority purported to rely on "three language choices in § 1155," Pet. App. 8a—"may," "at any time," and "for what he deems to be good and sufficient cause." But its selective analysis read

"good and sufficient cause" out of the statute, ignoring the objective legal standard Congress meant to govern petition revocations.

It is a "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) (citations omitted); *see King* v. *Burwell*, 135 S. Ct. 2480, 2498 (2015). However permissive the words "may," "at any time," and "deems" may seem in isolation, they cannot overcome the strong presumption favoring review. The Secretary "may" decide to revoke the approval of a visa petition based on "what he deems to be good and sufficient cause"—but his determination is still subject to review in court, to ascertain whether there was indeed "good and sufficient cause" for the revocation. And the fact that he can issue that decision "at any time" says nothing about the substance of his decision.

As the government explained in *Kucana*, "Congress required more than that the Attorney General's discretionary authority for making the decision at issue ultimately derives from a provision in the relevant statutory subchapter. Congress provided instead that the discretionary authority must be 'specified under this subchapter.'" U.S. Br. at 25, *Kucana*, *supra* (No. 08-911).

In its effort to read such a specification into § 1155, the panel majority reached for this Court's decision in *Webster*, 486 U.S. 592, to conclude that the Secretary's authority to "deem" deprived "good and sufficient cause" of any objective legal significance. Pet. App. 21a-23a. But *Webster* does not stretch so far. The *Webster* Court considered a provision in the

National Security Act of 1947 providing that "the Director of Central Intelligence may, *in his discretion*, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable *in the interests of the United States*." 486 U.S. at 594 (emphases added). As a preliminary matter, the *Webster* provision expressly invoked the Director's "discretion." As the government told this Court in *Kucana*, "[t]here are over thirty provisions in the relevant subchapter of the INA that explicitly grant the Attorney General or the Secretary 'discretion' to make a certain decision." U.S. Br. at 19-20 & n.11, *Kucana*, *supra* (No. 08-911). Section 1155 is not one of them.

An even more fundamental difference lies in the kind of determination involved. The Director's decision was statutorily premised on a multifaceted policy assessment of U.S. interests and national security. *See Webster*, 486 U.S. at 600-601 (concluding that there would be "*no basis*" for judicial review "[s]hort of permitting cross-examination of the Director concerning his views of the Nation's security," and emphasizing "the Act's extraordinary deference to the Director in his decision to terminate individual employees" (emphasis added)). In other words, the *Webster* provision offered "no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 600 (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)). Section 1155 does.

Indeed, as Judge Lipez's perceptive dissent recognized, for almost three decades the agencies charged with implementing the immigration laws have interpreted "good and sufficient cause" to cabin the Secretary's discretion. Thus, the BIA and AAO have

reviewed petition revocations by "ask[ing] 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." *In re Estime*, 19 I. & N. Dec. 450, 451 (B.I.A. 1987); *see In re [Identifying Info. Redacted by Agency]*, 2008 WL 4968848, at *1 (A.A.O. July 18, 2008) (using the same interpretation). Put another way, they have found that "good and sufficient cause" exists when there is reason to believe "that the petition was approved in error." *In re [Identifying Info. Redacted by Agency]*, File No. EAC 03 224 52286, 2013 WL 5296475, at *2 (A.A.O. Jan. 2, 2013); *see Ho*, 19 I. & N. Dec. at 590.

The "good and sufficient cause" test calls for an objective assessment of the evidentiary record—not a freewheeling policy determination. It is no different from the kind of inquiry the federal courts engage in every day. Take the "skilled worker" visa petition M&K filed on Freitas's behalf: in deciding whether to approve such a petition, the agency reviews documentation of the petitioning immigrant's education, training, employment, and experience. *See* 8 C.F.R. § 204.5. Relevant evidence might include "letters from trainers or employers giving * * * a description of the training received or the experience of the alien." *Id.* § 204.5(*l*)(3)(ii)(A); *see, e.g.*, *In re [Identifying Info. Redacted by Agency]*, 2014 WL 3951145, at *4-6 (A.A.O. Jan. 3, 2014) (weighing the petitioner's qualifying experience and education).

And the agencies reverse revocation decisions on grounds that would be familiar to any appellate court. *See, e.g.*, *In re [Identifying Info. Redacted by Agency]*, 2013 WL 5296475, at *1-2 (record as a

whole shows petitioner met eligibility requirements); *Tawfik*, 20 I. & N. Dec. at 169 (revocation "unsupported by documentary evidence"); *In re Arias*, 19 I. & N. Dec. 568, 571 (B.I.A. 1988) (revocation lacked basis in "[s]pecific, concrete facts [that] are meaningful, not unsupported speculation and conjecture"). The "good and sufficient cause" standard thus provides a test well suited to judicial review.

3. The panel majority ignored the compelling evidence of agency practice on the ground that there was no indication that "Congress was even aware of the purported administrative interpretation" when it twice reenacted § 1155—in 1996 and 2004. Pet. App. 17a. But as this Court has explained, "Congress is *presumed* to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-240 (2009) (emphasis added) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)).

In the case of § 1155, there is more than just an interpretive presumption of legislative ratification. Congress undertook "a comprehensive reexamination and significant amendment," but "left intact" the legal standard that enables judicial review of revocation decisions. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381 (1982). In 1996, when Congress enacted § 1252(a)(2)(B), the judicial-review provision under IIRIRA, it also reenacted § 1155. *See* IIRIRA, Pub. L. No. 104-208, div. C, §§ 306(a), 308(g)(3)(A), 110 Stat. 3009-546, 3009-607, 3009-622 (1996). In 2004, Congress substantively amended § 1155, deleting two sentences requiring prior notice. Intelligence Reform and Terror-

ism Prevention Act of 2004, Pub. L. No. 108-458, § 5304(c), 118 Stat. 3638, 3736 (2004). Yet Congress, across all those changes, left the "good and sufficient cause" standard undisturbed. That fact "is itself evidence that Congress affirmatively intended to preserve" the prospect of review. *Curran*, 456 U.S. at 381-382.

At each step, Congress could have altered the provision to "specify" that revocation decisions were discretionary. It could have listed § 1155 among the enumerated actions insulated from judicial review. *See* 8 U.S.C. § 1252(a)(2)(B)(i). Or it could have amended § 1155 to provide that the kind of explicit language *Kucana* suggested is required in light of § 1252(a)(2)(B)(ii)'s reference to "authority 'specified'—not merely assumed or contemplated—to be in the Attorney General's discretion." 558 U.S. at 243 n.10. But Congress did no such thing.

By focusing on a handful of discretion-granting words, the panel majority failed to give due weight to IIRIRA's own clear-statement rule, the significance of "good and sufficient cause," or Congress' express decision to retain that crucial limitation. Even a "substantial doubt about the congressional intent" cannot trump the presumption favoring review. *Block*, 467 U.S. at 351. The First Circuit failed to give effect to that presumption here.

4. Finally, the panel majority failed to account for the structure of IIRIRA's jurisdictional bar. As this Court explained in *Kucana*, the scope of § 1252(a)(2)(B)(ii), a catch-all provision, is informed by the decisions specifically enumerated in § 1252(a)(2)(B)(i). *See* 558 U.S. at 247.

None of the provisions cited in that paragraph connect the Secretary's exercise of discretion to "cause"—let alone "good and sufficient cause." *See* 8 U.S.C. §§ 1182(h), 1182(i), 1229b, 1229c, 1255. As the government itself told the Court in *Kucana*, the enumerated determinations are all "substantive decisions made by the Executive in the immigration context as a matter of grace, things that involve whether aliens can stay in the country or not." *Kucana*, 558 U.S. at 247 (alteration omitted). The "other decision[s]" "shielded from court oversight by § 1252(a)(2)(B)(ii)" must be "of a like kind." *Id.* at 248.

The Secretary's decision to revoke the approval of a visa petition is manifestly different. A visa petition differs from the application for admission itself. The original approval of the visa petition is only a "preliminary step" in the process of applying for admission as a permanent resident. *Ho*, 19 I. & N. Dec. at 589. To apply for admission, the immigrant must have a visa petition approved that was filed on his or her behalf by either a family member or a potential employer. The issue at this stage of the process is the immigrant's eligibility to apply for admission, not any ultimate entitlement to permanent residency.

Unlike decisions "that involve whether aliens can stay in the country or not," revocations do not call for policy-driven judgments. *Cf., e.g.*, *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1692 (2013) (Attorney General may deny relief from removal "if he concludes the negative equities outweigh the positive equities of the noncitizen's case"); *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012) (explaining that "[d]iscretion in the enforcement of immigration law

embraces immediate human concerns" and that "[t]he equities of an individual case may turn on many factors"). *See generally In re C-V-T-*, 22 I. & N. Dec. 7, 10 (B.I.A. 1998) (mandating a balancing of the equities, both positive and negative factors, to decide whether an immigrant is worthy of permanent residency); *In re Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978) (same). Instead, a revocation is little more than a "procedural device" for disposing of approved petitions unsupported by sufficient record evidence. *Kucana*, 558 U.S. at 248. A revocation determination depends on objective criteria—"grace" plays no part in the decision. It is simply not the kind of decision that Congress sought to insulate from judicial review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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