No. 15-1138

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The Solicitor General does not dispute that this case presents the Court with the opportunity to resolve a longstanding split among the circuits. That split has created a divided system in which, by dint of geography alone, hundreds of thousands of applicants for permanent residence are subject to unreviewable revocations of their visa petitions, while hundreds of thousands of others may seek review in federal court for revocations lacking "good and sufficient cause." *See* Pet. 3. The conflict undermines the constitutional imperative of uniformity in immigration and contravenes the statutory scheme. This

Court should grant review and reverse the First Circuit's decision. *See* Amicus Br. Versame, Inc. 5-9.

The government asks this Court to wait and see whether the problem might resolve itself in light of *Kucana* v. *Holder*, 558 U.S. 233 (2010). But the Ninth Circuit's reasoning is consistent with *Kucana*, and five of the eight circuits on the other side of the divide have reaffirmed their prior views since *Kucana* was decided. There is no reason to expect the split to heal itself.

The government next contends this Court should wait until the government itself petitions for review. But the government's attempt to find a vehicle problem here goes nowhere. This case cleanly presents the question that divides the circuits. And downplaying the importance of the split elides the fact that it leaves hundreds of thousands of visa applicants without recourse to the courts.

Finally, the government leans on the same fractured reading of the statute relied on by the panel majority below. That reading disregards basic principles of statutory interpretation, including the strong presumption that Congress intends to subject executive action to judicial review. Read as a whole, the provision authorizing the Secretary to revoke visa petitions does not "specify" that act to be in his discretion. This Court should therefore grant review and reverse, resolving the split once and for all. *See* Amicus Br. Law Professors 3-12.

ARGUMENT

I. THE DECISION BELOW SQUARELY PRESENTS AN INTRACTABLE CIRCUIT SPLIT ON AN ISSUE OF EXCEPTIONAL IMPORTANCE.

A. The Split Will Not Resolve Itself.

The government concedes (at 16) that this case cleanly presents the opportunity to resolve a circuit split that has persisted since the Ninth Circuit issued its decision in *ANA International Inc.* v. *Way*, 393 F.3d 886 (9th Cir. 2004). Yet it asserts the split may dissipate because "the Ninth Circuit has not addressed *ANA*'s continuing validity in light of *Kucana*." U.S. Br. 16. That argument is flatly wrong. The split is here to stay and this Court's review is needed to resolve it.

The government contends that *Kucana* "calls * * * into question" *ANA*'s reference to agency interpretations of § 1155's "good and sufficient cause" standard "by establishing that the availability of judicial review under section 1252(a)(2)(B) depends on statutory language set forth in discretionary terms, not how the agency has chosen to apply statutorily-conferred discretionary authority." U.S. Br. 16. But the Ninth Circuit knew all of that long before *Kucana*. *ANA* itself recognized that the Ninth Circuit had earlier held that "the scope of the § 1252 inquiry * * * is limited to the statute; standards gleaned from agency practice cannot provide a basis for review." *ANA Int'l*, 393 F.3d at 893 (citing *Spencer Enters., Inc.* v. *United States*, 345 F.3d 683, 691 (9th Cir. 2003)). And the *ANA* court was careful to observe that rule, using agency interpretations "to help us decide what the statute means"—not "as an

independent source of law." *Id.* *Kucana* added nothing on that score.

In any event, *Kucana* deals with what it means for an action to be "specified * * * to be in the discretion" of the agency; it says nothing about what evidence a court may use after concluding that a statute does *not* specify an action to be in the agency's discretion on its face. To the contrary, *Kucana* observed that "marginally ambiguous statutory language" cannot bring an action within the statute's jurisdiction-stripping scope. 558 U.S. at 243 n.10 (quoting *Soltane* v. *U.S. Dep't of Justice,* 381 F.3d 143, 147 (3d. Cir. 2004) (Alito, J.)). So there is nothing in *Kucana* that would bar a court from looking to "the statute in search of a legal standard and *upon finding one*, turn[ing] to relevant case-law, which may include [agency] cases and, of course [the court's] own decisions construing § 1155, in order to understand what that standard means." *ANA Int'l*, 393 F.3d at 893 (emphasis added).

The government's wait-and-see approach ignores the real significance of *Kucana*. If anything, the persistence of the split after *Kucana* makes review more urgent. As explained in the petition, *Kucana* undermines the reasoning on the other side of the divide. *See* Pet. 14-17. Yet none of the five circuits to address reviewability of petition revocations since *Kucana* has reconsidered its position. *Id.* at 17. And the Ninth Circuit has consistently adhered to *ANA*. *See id.* at 12 (citing published and unpublished Ninth Circuit decisions reiterating the rule in *ANA* without dissent). Without this Court's review the circuits will remain divided.

B. The Issue Is Important.

The government does not dispute that the split affects three-quarters of all new lawful permanent residents in the United States. *See* Pet. 4. Yet it claims (at 16-17) that the issue is not important because petition revocations are infrequently appealed in the Ninth Circuit. That gets it backwards. The question is not how many people seek review in the Ninth Circuit; the question is how many people are denied the opportunity to exercise that vitally important right in other circuits. And, of course, the impact on skilled immigrants, particularly under the divided system produced by the circuit split, is immense. *See* Amicus Br. Versame, Inc. 5-13.

The right to judicial review of executive action has deep roots in this Court's jurisprudence. *See Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670-673 (1986) (surveying the history of judicial review). That right has both individual and structural significance. Not only does "[t]he very essence of civil liberty * * * consist[] in the right of every individual to claim the protection of the laws," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); our system of divided powers demands that the Executive's exercise of statutorily conferred authority is "open to judicial review" when it exceeds the scope of that authority. *INS* v. *Chadha*, 462 U.S. 919, 954 n.16 (1983). That is why this Court's cases have consistently applied a strong presumption favoring review of agency action in the immigration context. *See, e.g.*, *Kucana*, 558 U.S. at 252; *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001); *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993); *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991).

If revocations are, in fact, reviewable, then the persistence of the split means that hundreds of thousands of individuals are denied the opportunity to exercise a crucial right each year and the public at large is deprived of an essential check on executive power. That is untenable. This Court should grant review.

C. This Case Is An Appropriate Vehicle To Consider The Question.

The government closes (at 18-19) with a half-hearted argument that this Court should hold out for a case from the Ninth Circuit in which a visa applicant prevails on the underlying merits of the revocation. That case will never come. The petitioner in such a case would necessarily be the government, and the government is unlikely to imperil the unfettered discretion it now enjoys in eight other circuits by petitioning for this Court's review. In any event, it would make little sense for this Court to await a case from the Ninth Circuit to decide whether immigrants in eight *other* circuits have improperly been barred from seeking judicial review.

Nor is there any merit to the government's suggestion that petitioner would not "actually prevail on the merits if he had sued in the Ninth Circuit." Br. Opp. 19. The government obtained dismissal of petitioner's complaint for lack of subject-matter jurisdiction. Pet. App. 65a. That argument would not have been available to the government in the Ninth Circuit, and that is the only issue litigated by the parties in this case. The merits of the Secretary's revocation decision have no bearing on the jurisdiction of the federal courts to hear appeals from revocations, which is presumably why the government

never raised the point below. The First Circuit's decision cleanly presents the jurisdictional question and offers an appropriate vehicle to resolve the split.

II. THE COURT OF APPEALS' DECISION WAS INCORRECT.

The government's merits argument (at 9-15) doubles down on the errors of the panel majority below: it disregards the strong presumption favoring review of agency action, advances a fractured textual analysis, and misunderstands the structure of the statute. This Court has repeatedly admonished that it "takes 'clear and convincing evidence' to dislodge the presumption" in favor of judicial review. *Kucana*, 558 U.S. at 252 (citation omitted). That evidence is lacking here. Reading § 1155 as a whole in light of the presumption, the provision does not "specify" that petition revocations are in the Secretary's discretion. Revocations are therefore reviewable, and the decision below should be reversed.

1. Like the panel majority below, the government relies on a dissection of § 1155. The government focuses (at 9-10) on the statute's use of the words "may," "at any time," and "deems." But "[s]tatutory language has meaning only in context." *Graham Cty. Soil & Water Conservation Dist.* v. *U.S. ex rel. Wilson*, 545 U.S. 409, 415 (2005). A court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Dada* v. *Mukasey*, 554 U.S. 1, 16 (2008) (quoting *United States* v. *Heirs of Boisdoré*, 49 U.S. 113, 122 (1850)). Section 1155 cannot be reduced to "three language choices" and their dictionary definitions alone. Br. Opp. 9.

The full text of § 1155 makes clear that the Secretary's discretion is cabined by an objective and reviewable legal standard. To be sure, nothing in the statute obligates the Secretary to revoke a petition ("may"), sets a timeframe for his decision ("at any time"), or requires him to find specific facts ("deems"). But Congress nevertheless directed that the Secretary's decision to revoke be based on "good and sufficient cause." As the agency's own established practice confirms, that standard places an objective check on agency discretion. *See* Pet. 21-24.[1]

Thanks to the presumption favoring review, the "good and sufficient cause" standard would require review of revocations even if it did no more than render § 1155 "marginally ambiguous." *Kucana*, 558 U.S. at 243 n.10 (citation omitted); *see id.* at 251 ("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.' " (quoting *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 434 (1995))). The government fails to adduce the "clear and convincing evidence" necessary to displace the presumption in this case.

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[1] As explained above, there is no merit to the government's suggestion (at 14) that *Kucana* bars such reference to agency practice. That argument is even less persuasive since Congress is presumed to have adopted the agency interpretation when it twice reenacted the provision without change. *See* Pet. 24 (citing *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-240 (2009)).

2. Neither the statute at issue in *Webster* v. *Doe*, 486 U.S. 592 (1988), nor the Secretary's discretionary authority to grant asylum, 8 U.S.C. § 1158(b)(1)(A), supports the government's reading of the statute because neither subjects agency discretion to an objective legal standard. Once again, the government's argument depends on reading words in isolation.

The government suggests (at 11) that the decisive feature of the *Webster* statute was the fact that it authorized the Director of Central Intelligence to "deem" an employee's termination necessary. *See* 486 U.S. at 594 (quoting 50 U.S.C. § 403(c)) (now codified at 50 U.S.C. § 3036(e) (Supp. I 2013)). Far more important to this Court's analysis was the fact that the Director had to "deem" that termination was "*necessary or advisable in the interests of the United States*." *Id.* at 594 (emphasis added). That statutory language provided "*no basis* on which a reviewing court could properly assess an Agency termination decision"—and thus "strongly suggest[ed]" the decision was "committed to agency discretion by law." *Id.* at 600 (emphasis added).

The government again relies (at 12) on language shorn of any context in discussing the asylum provision. The statute says the Secretary "may grant asylum" if he determines that the applicant is a refugee. 8 U.S.C. § 1158(b)(1)(A). Because grants of asylum are discretionary, the government argues, it must be that using the word "may" confers unreviewable discretion. Not at all. Like the *Webster* statute, the asylum provision is not amenable to review because it offers courts no basis for assessing the agency's determination.

3. The government's structural argument is no more persuasive. As this Court explained in *Kucana*, § 1252(a)(2)(B)(ii)'s jurisdictional bar does not reach non-substantive "adjunct rulings" or "procedural device[s]." *Kucana*, 558 U.S. at 248. The government claims (at 15) that visa revocations are "substantive" because an immigrant whose petition has been revoked loses the ability to obtain a visa. That argument misunderstands *Kucana*'s reasoning. The question under *Kucana* is whether "a court decision *reversing*" the challenged action "direct[s] the Executive to afford the alien substantive relief." 558 U.S. at 248 (emphasis added). Thus, a decision to deny asylum is substantive because reversal would entail granting the appellant legal status to remain in the United States. By contrast, a petition revocation is non-substantive because reversal by a court would merely reinstate the applicant's *eligibility* to receive a visa; it would not entitle him to substantive relief.

At best, the government's argument shows that this Court's intervention is required to settle the debate and restore uniformity to the immigration system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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