No. 23-583

IN THE

Supreme Court of the United States

AMINA BOUARFA,

Petitioner,

v.

ALEJANDRO MAYORKAS,
SECRETARY OF HOMELAND SECURITY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR FORMER EXECUTIVE OFFICE FOR IMMIGRATION REVIEW JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are forty-three former immigration judges (IJs) and members of the Board of Immigration Appeals (BIA or Board). A complete list of signatories can be found in the Appendix of *Amici Curiae*.

Amici have dedicated their careers to the immigration court system and to upholding the immigration laws of the United States. Each is intimately familiar with the immigration court system and its procedures. Together they have a distinct interest in ensuring that claims duly asserted in immigration cases are afforded the level of Article III judicial review required by law.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress passed a number of provisions that were intended to "protect[] the Executive's discretion from the courts." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999). One such provision is 8 U.S.C. § 1252(a)(2)(B)(ii), which eliminates judicial review of "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." *Id.* Circuit courts around the country have, for many years, almost uniformly interpreted this provision to strip federal

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[1] *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of *amici*'s intent to file this brief.

courts of jurisdiction to review *discretionary* decisions—but not nondiscretionary, predicate determinations. In *amici*'s experience, this approach recognizes the decisions that Congress committed to executive discretion while preserving Article III review for nondiscretionary determinations in immigration or visa-related proceedings.

SUMMARY OF ARGUMENT

Congress drew clear boundaries in IIRIRA. The statute shields executive-branch discretionary decisions in immigration cases from judicial review while preserving Article III court review of nondiscretionary determinations that underlie discretionary decisions.

This case illustrates what happens when that Congressional plan is disregarded. Two years after approving Amina Bouarfa's application to have her husband classified as her immediate relative, the Secretary revoked that approval on the grounds that the Department of Homeland Security (DHS) lacked discretion to issue the visa in the first place. It is undisputed that a nondiscretionary denial of Ms. Bouarfa's application when she first filed it would have been judicially reviewable. However, because the Secretary's subsequent reassessment was procedurally classified as a revocation—albeit on the same substantive grounds—the Eleventh Circuit concluded that Ms. Bouarfa had lost her right to judicial review. *See Bouarfa v. Sec'y, Dep't of Homeland Sec.*, 75 F.4th 1157, 1164 (11th Cir. 2023). In doing so, the Eleventh Circuit deepened a circuit split, as the Sixth and Ninth Circuits would have allowed review of the revocation (just like an initial

denial) because of the nondiscretionary criteria underlying it.

The Eleventh Circuit's view yields the absurd result that the denial of an immigrant visa petition is subject to judicial review but revocation a day after approval is not—even where both decisions are based on the same substantive grounds. This incongruity makes an immigrant's fate dependent on chance factors—the judicial circuit where the petition is filed and whether the agency determines it made an error before or after issuing a visa.

Permitting judicial review of nondiscretionary determinations comports with the "well-settled" and "strong" presumption of judicial review that has "consistently" been applied to immigration legislation, "particularly to questions concerning the preservation of federal-court jurisdiction." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496, 498 (1991)); *Kucana v. Holder*, 558 U.S. 233, 251 (2010). And it avoids the "[s]eparation-of-powers concerns" created by further removing these cases from the judiciary's domain. *Kucana*, 558 U.S. at 237.

In *amici*'s experience, maintaining Article III review of predicate nondiscretionary determinations aids the proper functioning of the immigration adjudication system. Immigration adjudicators face heavy caseloads and are under significant pressure to complete cases rapidly, as *amici* have experienced firsthand. Indeed, U.S. Citizenship and Immigration Services (USCIS) officers face a backlog of nearly 9 million forms, immigration courts face a backlog of over 3 million cases, and the BIA ended the past fiscal

year with a record-high 113,511 pending appeals.[2] These severe and growing backlogs lead to errors and inconsistent results, as *amici* have also witnessed. In these circumstances, permitting Article III courts to correct agency mistakes and provide authoritative, consistent guidance on the application of nondiscretionary statutory criteria (as Congress intended) becomes all the more essential. Article III court review of objective, nondiscretionary determinations improves outcomes and builds confidence in the system. It is a checking function that Article III judges routinely undertake. Indeed, there are numerous examples of federal courts—including in cases involving erroneous determinations underlying denials of discretionary relief covered by § 1252(a)(2)(B)(ii)—correcting decisions of USCIS, IJs, and the BIA. Article III review promotes fair, reasoned, and legally sound immigration proceedings without interfering in decisions committed to executive discretion. When individuals like Ms. Bouarfa find their applications revoked based on a nondiscretionary determination, IIRIRA does not block Article III review.

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2 *See Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases*, Transactional Records Access Clearinghouse (Dec. 18, 2023), https://trac.syr.edu/reports/734; *All Appeals Filed, Completed, and Pending*, Dep't of Justice, Exec. Off. for Immigr. Rev. (Oct. 12, 2023), https://www.justice.gov/d9/pages/attachments/2020/02/12/38_all_appeals_filed_completed_pending.pdf; *Number of Service-wide Forms by Quarter, Form Status, and Processing Time April 1, 2023 – June 30, 2023*, U.S. Citizenship & Immigr. Servs. (last visited Dec. 28, 2023), https://www.uscis.gov/sites/default/files/document/data/quarterly_all_forms_fy2023_q3.pdf.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT CONCERNING ARTICLE III REVIEW UNDER IIRIRA § 1252(A)(2)(B)(II)

"Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *INS v. St. Cyr*, 533 U.S. 289, 307 (2001). As such, "[e]ligibility that was 'governed by specific statutory standards' provided 'a right to a ruling on an applicant's eligibility,' even though the actual granting of relief was 'not a matter of right under any circumstances, but rather is in all cases a matter of grace.'" *Id.* at 307–08 (quoting *Jay v. Boyd*, 351 U.S. 345, 353–54 (1956)).

The statutory provision at issue here reflects that distinction. In 1996, Congress amended the Immigration and Nationality Act by enacting the Illegal Immigration Reform and Immigrant Responsibility Act. Pub. L. No. 104–208, 110 Stat. 3009. The "theme" of IIRIRA was "protecting the Executive's *discretion* from the courts." *Reno*, 525 U.S. at 486 (emphasis added).

One provision that provides such protection is 8 U.S.C. § 1252(a)(2)(B). This subsection, titled "Denials of discretionary relief," contains two subclauses. The second, at issue here, provides that "no court shall have jurisdiction to review"

> 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.

Id. § 1252(a)(2)(B)(ii) (emphasis added).

The Sixth and Ninth Circuit Courts of Appeals agree that, although the plain language of this provision limits judicial review of the Secretary's discretionary decisions, it does not strip jurisdiction when the Secretary revokes approval of an immigrant visa petition on the basis of *non*discretionary criteria. *See Jomaa v. United States*, 940 F.3d 291, 294–96 (6th Cir. 2019); *ANA Int'l Inc. v. Way*, 393 F.3d 886, 894 (9th Cir. 2004). Rightfully so. There is no dispute that an *initial* denial of a § 1154(c) petition based on a nondiscretionary finding would be reviewable.[3] And as the government acknowledged in a different case,[4]

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[3] *See Bouarfa*, 75 F.4th at 1162 (noting the parties' agreement "that the denial of a petition based on section 1154(c) . . . is a non-discretionary decision that is subject to judicial review" and the court's previous review of the denial of an I-130 petition); *see also Soltane v. U.S. Dep't of Justice*, 381 F.3d 143, 147–48 (3d Cir. 2004) (holding that the denial of an employment-based visa petition is reviewable by a federal court despite § 1252(a)(2)(B)(ii) because the statute states that a visa "shall be made available" under certain conditions); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003) (same); *Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006) (presuming that denials of spousal visa petitions are reviewable under the Administrative Procedure Act); *Zemeka v. Holder*, 989 F. Supp. 2d 122, 127–32 (D.D.C. 2013) (reviewing the denial of a visa petition based on marriage fraud).

[4] *See* Br. for Resp't Supporting Pet'r 11, 23, 31, *Patel v. Garland*, 596 U.S. 328 (2022) (No. 20-979) (explaining that § 1252(a)(2)(B) "bars review of discretionary determinations, but not of underlying nondiscretionary determinations," and noting

§ 1252(a)(2)(B)(ii) does not bar review of "non-discretionary decisions that underlie determinations that are ultimately discretionary." *Hosseini v. Johnson*, 826 F.3d 354, 358 (6th Cir. 2016) (quoting *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 711 (6th Cir. 2004)); *see also Rajasekaran v. Hazuda*, 815 F.3d 1095, 1099 (8th Cir. 2016) ("[S]till reviewable is . . . 'a nondiscretionary determination underlying the denial of relief.'") (quoting *Abdelwahab v. Frazier*, 578 F.3d 817, 821 (8th Cir. 2009)). Logically, the agency's nondiscretionary determination concerning the same relief should not become unreviewable just because it is procedurally classified as a revocation rather than an initial denial.

Despite the Sixth and Ninth Circuits' well-reasoned rulings, the Eleventh Circuit precluded judicial review and deepened the circuit split. *Bouarfa*, 75 F.4th at 1162–64. Following the Second, Third, and Seventh Circuits, the Eleventh Circuit concluded that courts lack subject-matter jurisdiction to review revocations of visa petitions based on nondiscretionary criteria, ignoring the fact that the sham-marriage bar underlying the revocation of Ms. Bouarfa's petition is a nondiscretionary statutory factor. *Nouritajer v. Jaddou*, 18 F.4th 85, 89–90 (2d Cir. 2021); *Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196, 203–05 (3d Cir. 2006); *El-Khader v. Monica*, 366 F.3d 562, 568 (7th Cir. 2004). Put differently, although all Courts of Appeals agree that § 1252(a)(2)(B)(ii) does not strip jurisdiction over

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that "nearly all court of appeals" to address this issue has agreed).

nondiscretionary determinations,[5] there is a circuit split over whether a citizen can obtain judicial review

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[5] *See Cho v. Gonzales*, 404 F.3d 96, 99–102 (1st Cir. 2005) (finding that § 1252(a)(2)(B)(ii) did not bar review of the relevant decision because it was non-discretionary); *Sharkey v. Quarantillo*, 541 F.3d 75, 86 (2d Cir. 2008) (finding that "the jurisdictional bar in 8 U.S.C. § 1252(a)(2)(B)(ii) does not apply" because the alleged rescission was not "in the discretion of the Attorney General"); *Pinho v. Gonzales*, 432 F.3d 193, 204 (3d Cir. 2005) ("Non-discretionary actions . . . remain subject to judicial review."); *Moore v. Frazier*, 941 F.3d 717, 725 (4th Cir. 2019) (finding that "the district court erred in dismissing the complaint for lack of jurisdiction" because the relevant decision was non-discretionary); *Flores v. Garland*, 72 F.4th 85, 92 (5th Cir. 2023) ("[A] court may have jurisdiction to review the agency's non-discretionary decision . . . ."); *Hussam F. v. Sessions*, 897 F.3d 707, 723 (6th Cir. 2018) ("The jurisdiction-stripping provision in 8 U.S.C. § 1252(a)(2)(B)(ii) does not extend to non-discretionary decisions upon which the discretionary decision is predicated.") (internal quotation marks omitted); *Cuellar Lopez v. Gonzales*, 427 F.3d 492, 493 (7th Cir. 2005) ("[A] non-discretionary question of statutory interpretation . . . falls outside § 1252(a)(2)(B)'s jurisdiction stripping rule."); *Rajasekaran*, 815 F.3d at 1099 ("[S]till reviewable is . . . a nondiscretionary determination underlying the denial of relief.") (internal quotation marks omitted); *Poursina v. USCIS*, 936 F.3d 868, 875 (9th Cir. 2019) ("§ 1252(a)(2)(B)(ii) allows us to review certain legal conclusions made on nondiscretionary grounds . . . .") (internal quotation marks omitted); *Estrada-Ortega v. Barr*, 824 F. App'x 559, 563 (10th Cir. 2020) ("[W]e have jurisdiction to hear appeals from nondiscretionary BIA decisions."); *Mejia Rodriguez v. U.S. Dep't of Homeland Sec.*, 562 F.3d 1137, 1144–45 (11th Cir. 2009) ("§ 1252(a)(2)(B)(ii) does not preclude . . . review[] . . . because . . . *non-discretionary* . . . decisions made by USCIS fall outside the limitations on judicial review in the INA.") (emphasis in original); *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1138–39 (D.C. Cir. 2014) (finding that § 1252(a)(2)(B)(ii) did not bar review of the relevant decision because it was non-discretionary).

of DHS's subsequent revocation of an approved visa petition on the basis of a nondiscretionary requirement.

This Court should grant a writ of certiorari to resolve the open conflict. *See* Supreme Court Rule 10 (noting that conflict among the circuits is a basis for certiorari). As a consequence of the circuit split, DHS's denial of an immigrant visa petition is subject to judicial review but a DHS revocation of the same approved petition performed just a day after DHS approval is not—even where both decisions concern the same relief and are based on the same substantive grounds. *Cf. Kucana*, 558 U.S. at 252 ("If the Seventh Circuit's construction of § 1252(a)(2)(B)(ii) were to prevail, the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'"). And that incongruity leads to the absurd result that a petitioner's fate depends on which circuit's rule covers the location where a visa petition is filed and adjudicated. *See* 8 U.S.C. § 1252(b)(2) ("The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."); *see also Fang Lin Ai v. United States*, 809 F.3d 503, 507 (9th Cir. 2015) (explaining that "a circuit split would create two mutually exclusive rules . . . leading to uncertainty and obvious forum shopping opportunities"). That more circuits have adopted the government's view does not weigh against granting review or suggest that this view has merit. *See, e.g.*, *Nasrallah v. Barr*, 140 S. Ct. 1683, 1689 (2020) ("Most Courts of Appeals have sided with the Government[.]").

II. The Eleventh Circuit's Rule Upsets The Balance That IIRIRA Strikes Between Executive Discretion And Article III Review

The Eleventh Circuit's arbitrary rule conflicts with IIRIRA's mandate and this Court's rulings on the strong presumption in favor of judicial review, warranting a grant of certiorari. *See Kucana*, 558 U.S. at 251–52. "From the beginning," the Court has established that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986) (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140 (1967)).

As a result, there is a "well-settled" and "strong" presumption favoring judicial review of administrative action. *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quoting *McNary*, 498 U.S. at 496, 498). The Court has "consistently" applied this presumption to "legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana*, 558 U.S. at 251; *see also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."). To that end, the Court "assumes that 'Congress legislates with knowledge of' the presumption," and thus requires "'clear and convincing evidence' to dislodge" it. *Kucana*, 558 U.S. at 252 (quoting *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993)).

Relatedly, "[s]eparation-of-powers concerns" also militate "against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Id.* at 237. "Article III is an inseparable element of the constitutional system of checks and balances" and "preserve[s] the integrity of judicial decisionmaking." *Stern v. Marshall*, 564 U.S. 462, 482, 484 (2011) (internal quotation marks omitted). Consequently, this Court has found that Article III "bar[s] congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (alteration in original) (internal quotation marks omitted). Accordingly, in the bankruptcy context, for instance, this Court has held that "Article I adjudicators" may decide claims without "offend[ing] the separation of powers" only "so long as Article III courts retain supervisory authority over the process." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 678 (2015). To allow otherwise risks upsetting the Framers' "solution to governmental power and its perils . . . : divid[ing] it." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020).

Against this backdrop, "it is most unlikely that Congress intended to foreclose *all* forms of meaningful judicial review" in § 1252(a)(2)(B)(ii). *McNary*, 498 U.S. at 496 (emphasis added). Doing so would leave an individual aggrieved by an incorrect nondiscretionary determination with "no remedy, no appeal to the laws of his country." *United States v.*

Nourse, 34 U.S. 8, 9 (1835) (Marshall, C.J.). At the same time, it would deny Article III courts "supervisory authority" to check that nondiscretionary determinations are correct, and to provide administrative adjudicators consistent guidance on such determinations going forward. *Wellness Int'l*, 575 U.S. at 678. And it would do so in a particularly arbitrary manner, allowing judicial review of visa petitions denied outright on predicate nondiscretionary grounds like the sham-marriage bar but not visa decisions later revisited and revoked on the very same basis.

This case illustrates why § 1252(a)(2)(B)(ii) should not be read to foreclose Article III review of agency determinations that in any way touch upon the forms of relief specified therein. Ms. Bouarfa's application to have her husband, Ala'a Hamayel, classified as her immediate relative was approved. But two years later, the Secretary revisited that decision and revoked the approval on the ground that DHS *should have* denied her application in the first place under 8 U.S.C. § 1154(c)'s "sham-marriage bar." There is no dispute that an initial decision to deny the petition based on § 1154(c) would have been reviewable in *every* circuit. But under the Eleventh Circuit's ruling, that the Secretary (by his own belated estimation) later found error in that initial decision means that Ms. Bouarfa lost her access to judicial review of the very same statutory factor.

The nondiscretionary determination embedded within the agency's ultimate conclusion—whether Mr. Hamayel entered into a previous "sham marriage"—is the type of nondiscretionary determination that Article III courts are well equipped to review. *Cf.*

Nasrallah, 140 S. Ct. at 1694 (holding that 8 U.S.C. § 1252(a)(2)(C)–(D) does not preclude judicial review of facts underlying Convention Against Torture orders). Section 1252(a)(2)(B) reflects "Congress' choice to provide reduced procedural protection for *discretionary* relief" only, *Patel v. Garland*, 596 U.S. 328, 345 (2022) (emphasis added), *not* nondiscretionary decisions like the application of the sham-marriage bar.

This case provides the Court with an opportunity to elucidate, consistent with *Patel*, the types of nondiscretionary decisions that are judicially reviewable. *Patel* held that § 1252(a)(2)(B)(i)'s text, which is directed to "*any* judgment regarding" actions taken by the Secretary, precluded judicial review of underlying nondiscretionary determinations. *Patel*, 596 U.S. at 338 (emphasis in original). In contrast, the text of the subsection at issue here references only decisions or actions "in the *discretion* of" the Secretary. 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added); *see also Mia v. Renaud*, No. 22-cv-2098, 2023 WL 7091915, at *5 (E.D.N.Y. Oct. 26, 2023) (explaining that "the provision at issue in *Patel*, § 1252(a)(2)(B)(i), materially differs from § 1252(a)(2)(B)(ii)"). Thus, subsection (ii) explicitly addresses only judicial review of discretionary decisions, and does not speak to judicial review of *nondiscretionary* decisions, such as whether Mr. Hamayel engaged in a prior "sham marriage," regardless of whether the Secretary was "required" to revoke the petition approval as a result. *Patel* did not directly address subsection (ii), and the Court should therefore resolve the circuit conflict over whether Congress intended to leave open Article III judicial

review under that provision. *See Alzaben v. Garland*, 66 F.4th 1, 6 (1st Cir. 2023) (noting that *Patel* "does not directly address the scope" of § 1252(a)(2)(B)(ii)).

"Congress has to structure and allocate the resources of our immigration system," such that "judicial review may be thought to be warranted in some, but not all, situations." *Bernardo ex rel. M & K Eng'g, Inc. v. Johnson*, 814 F.3d 481, 494 (1st Cir. 2016). In § 1252(a)(2)(B)(ii) of IIRIRA, Congress defined a protected territory for certain agency decisions by removing judicial review over "subjective question[s] that depend[] on the value judgment of the person or entity examining the issue," *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003) (internal quotation marks omitted), while retaining judicial review over underlying nondiscretionary determinations.

This division prevents Article III courts from second-guessing subjective determinations—such as whether discretionary relief is appropriate in any particular case—while preserving the courts' ability to correct agency errors involving statutory factors or objective factual determinations that are antecedent to those discretionary determinations. *See Patel*, 596 U.S. at 353, 358 (Gorsuch, J., dissenting) (explaining that by labelling this subsection, "Denials of discretionary relief," "Congress left little doubt that subparagraph (B) and its accompanying clauses (i) and (ii) are designed to bar review of only those decisions invested to the Attorney General's discretion, not antecedent statutory eligibility determinations").

For these reasons, the decision below conflicts

with this Court's rulings, and cannot be squared with text, precedent, or common sense.

III. Article III Review Of Nondiscretionary Determinations Is Critical To Correct Unavoidable Errors That Overburdened Immigration Adjudicators Will Make

The Eleventh Circuit's decision to foreclose all forms of meaningful review in § 1252(a)(2)(B)(ii) has far-reaching consequences. Every year, USCIS, the immigration courts, and the BIA adjudicate literally hundreds of thousands of proceedings that involve ultimate exercises of discretion under § 1252(a)(2)(B)(ii). For example, in FY 2022, USCIS issued:

> 76,200 revocations of employment-based nonimmigrant visas;
>
> 528,548 advance parole decisions;
>
> 109,925 decisions on petitions to remove conditions on residence;
>
> 70,821 decisions on applications to adjust asylees' and refugees' status;
>
> 9,492 denials of petitions for fiancée visas; and
>
> 6,064 decisions on applications for provisional unlawful presence waivers.[6]

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[6] *Annual Statistical Report FY 2022*, at 10, U.S. Citizenship & Immigr. Servs. (2022), https://www.uscis.gov/sites/default/files/document/reports/FY2022_Annual_Statistical_Report.pdf; *Number of Service-wide Forms By Quarter, Form Status, and Processing Time July 1, 2022 – September 30, 2022*, U.S. Citizenship & Immigr. Servs. (Dec. 16, 2022),

The interpretation of § 1252(a)(2)(B)(ii)'s scope determines whether and to what extent these types of frequently recurring decisions are subject to judicial review.[7] When such decisions turn on nondiscretionary determinations, those nondiscretionary determinations ought to be subject to Article III review. Article III review of nondiscretionary determinations—including those that underlie the agency's ultimate exercise of discretion—can provide critical guidance to agency decisionmakers so that "minimum standards of legal justice" are met in this flood of adjudications. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

In cases like this one, an erroneous agency determination could require families to make the impossible choice of either living in different countries or leaving the United States altogether. Because "[d]eportation is always 'a particularly severe penalty'" for individuals and their families, *Lee v.*

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https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2022_Q4.pdf.

[7] *See Hosseini*, 826 F.3d at 358 (finding decision on adjustment of asylee's status to permanent resident falls under § 1252(a)(2)(B)(ii), but reviewing predicate nondiscretionary determination); *Jilin Pharm.*, 447 F.3d at 205 (finding revocation of an employment-based nonimmigrant visa falls under § 1252(a)(2)(B)(ii)); *Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 156 (3d Cir. 2004) (decisions on petition to remove conditions on residence); *Samirah v. O'Connell*, 335 F.3d 545, 547 (7th Cir. 2003) (decisions on advance parole); *Dehrizi v. Johnson*, No. 15-cv-8, 2016 WL 270212, at *1 (D. Ariz. Jan. 21, 2016) (adjustment of asylee's status to permanent resident); *Beeman v. Napolitano*, No. 10-cv-803, 2011 WL 1897931, at *2 (D. Or. May 17, 2011) (denial of petition for fiancée visa).

United States, 582 U.S. 357, 370 (2017) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010)), review of predicate nondiscretionary determinations is essential to preventing adjudicators from categorically barring discretionary relief or making a discretionary decision—with severe consequences—based on an objectively incorrect finding. And, where courts do find and correct errors in the application of nondiscretionary statutory factors, agencies can look to those decisions for clear guidance going forward.

Reading § 1252(a)(2)(B)(ii) in the manner advocated by Petitioner, and followed by the Sixth and Ninth Circuits, would allow Article III judges to perform a review function with which they are completely familiar. Indeed, federal courts have stepped in to address significant nondiscretionary errors underlying visa revocations and to offer clear directives for avoiding future errors of that nature. *See, e.g.*, *Ved v. U.S. Citizenship & Immigr. Servs.*, No. 22-cv-88, 2023 WL 2372360, at *6, *9 (D. Alaska Mar. 6, 2023) (finding USCIS's revocation of an employment-based visa after ten-plus years, based on the agency's finding that visa's issuance was mistaken, was "not adequately explained or supported" and relied on "an inaccurate representation of the record"); *Doe I v. U.S. Dep't of Homeland Sec.*, No. 20-cv-7517, 2022 WL 1212013, at *7 (N.D. Cal. Apr. 25, 2022) (reversing revocation of an employment visa where USCIS failed to follow notice requirements); *Coniglio v. Garland*, 556 F. Supp. 3d 187, 204, 207 (E.D.N.Y. 2021) (cautioning that "agencies [must] adhere to circuit precedent," reviewing nondiscretionary legal decisions underlying visa revocation, and finding that USCIS erroneously

"separate[d] a family to satisfy a rule of bureaucratic convenience").

Practically speaking, Article III judicial review would provide the relevant administrative actors—USCIS officers, IJs, and the BIA—with the guidance needed to manage their burgeoning dockets.

First, USCIS officers face a backlog of nearly 9 million forms, including 1.9 million I-130 petitions to classify a non-citizen as a relative of a U.S. citizen.[8] In 2022, USCIS received more I-130 visa petitions than it had in the previous five years, but adjudicated fewer.[9] Compounding the risk of error and inconsistency, only a fraction of USCIS decisions are published.[10]

Immigration courts likewise face a growing national backlog of over 3 million cases.[11] That calculates to an average backlog of nearly 4,500 cases for each of the approximately 682 IJs.[12] One judge

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8 *Number of Service-wide Forms by Quarter, supra* note 2; *see also Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year*, U.S. Citizenship & Immigr. Servs., https://egov.uscis.gov/processing-times/historic-pt (last updated Oct. 31, 2023) (showing increase in I-130 processing times over past five years, albeit with a slight dip in the first month of FY 2024).

9 *Annual Statistical Report FY 2022*, *supra* note 6.

10 8 C.F.R. § 103.3(c) (providing for publication only of precedential decisions selected by higher-level officials).

11 *Immigration Court Backlog Tops 3 Million, supra* note 2.

12 *Id.* An estimated 1,349 IJs would be needed to clear the backlog by 2032. Holly Straut-Eppsteiner, Cong. Rsch. Serv., R47637, Immigration Judge Hiring and Projected Impact on the

described her experience as "nightmarish," explaining that to tackle her "pending caseload [of] about 4,000 cases"—a staggering number, yet one that falls below the current average—she had only "about half a judicial law clerk and less than one full-time legal assistant to help [her]."[13] While IJs are not involved in decisions to revoke visas issued under Form I-130 like Ms. Bouarfa's—USCIS makes those decisions, and the BIA handles appeals from them, *see* 8 U.S.C. § 1155; 8 C.F.R. § 1003.1(b)(5)—IJs do adjudicate other applications and proceedings that courts have held fall under § 1252(a)(2)(B)(ii).[14]

The BIA—capped at 23 members, plus four temporary members—is swamped.[15] At the end of fiscal year 2023, it had 113,511 pending appeals, up 14 percent from the prior year and 151 percent from

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Immigration Courts Backlog 10 (2023), https://crsreports.congress.gov/product/pdf/R/R47637.

[13] *Amid "Nightmarish" Case Backlog, Experts Call for Independent Immigration Courts*, A.B.A. News (Aug. 9, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/amid-_nightmarish-case-backlog--experts-call-for-independent-imm.

[14] *See, e.g.*, *Alzaben*, 66 F.4th at 6–8 (analyzing hardship waiver under 8 U.S.C. § 1186a(c)(4)); *Malik v. Att'y Gen.*, No. 21-2177, 2022 WL 1024623, at *3 n.4 (3d Cir. Apr. 6, 2022) (noting the denial of a hardship waiver under 8 U.S.C. § 1186a(c)(4)).

[15] *See* 8 C.F.R. § 1003.1(a)(1); *Board of Immigration Appeals*, Exec. Off. for Immigr. Rev (last visited Dec. 26, 2023), https://www.justice.gov/eoir/board-of-immigration-appeals#board. The number of temporary members can vary.

2017.[16] As a result, each BIA member spends just one hour adjudicating each appeal.[17]

In *amici*'s respectful view, these docket pressures further heighten the risk that USCIS, IJ, and BIA errors will go unseen and uncorrected, and that they will repeat themselves across future cases. For all of these agency adjudicators, "[c]onsistency and accuracy across this staggering number of decisions may be impossible to achieve."[18] Congress recognized as much in IIRIRA, cutting off judicial review in some circumstances (discretionary decisions) but preserving Article III courts' ability to provide authoritative oversight and guidance over nondiscretionary decisions. Although agency adjudicators may have a better sense of the "overall . . . landscape" than federal judges, "the time and resource shortfalls that afflict agency decision-making may make its adjudicators more error-prone, while federal judges' comparative surfeit of both improves their relative capacity to decide cases accurately."[19] Indeed, social science research confirms that "[t]he accuracy of human judgments decreases under time

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16 *All Appeals Filed, Completed, and Pending*, *supra* note 2 (tallying "[a]ppeals from completed removal, deportation, exclusion, asylum-only, and withholding-only proceedings").

17 Faiza W. Sayed, *The Immigration Shadow Docket*, 117 NW. U.L. REV. 893, 945 (2023).

18 *Id.* at 964.

19 Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1111 (2018).

pressure."[20] The pressures on the immigration adjudication system have already produced significant factual errors and oversights, which Article III courts have corrected and set guardrails for avoiding in future cases.[21] And, the federal reporters are replete with decisions of Article III courts concluding that agency adjudicators followed deficient legal reasoning, and outlining the correct standards to apply going forward.[22] The BIA publishes only

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[20] Anne Edland & Ola Svenson, *Judgment and Decision Making Under Time Pressure Studies and Findings*, in TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING 29, 35–36 (Ola Svenson & A. John Maule eds., 1993); *see also* Eberhard Feess & Roee Sarel, *Judicial Effort and the Appeals System: Theory and Experiment*, 47 J. LEGAL STUD. 269, 270–71 (2018) (concluding from a laboratory experiment that penalizing reversals prompts greater trial-level effort compared with systems with no appeals and systems where reversals are not penalized).

[21] *See, e.g.*, *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 248 (4th Cir. 2017) ("[T]he IJ and BIA failed to appreciate, or even address, critical evidence in the record."); *Makwana v. Att'y Gen.*, 611 F. App'x 58, 61 (3d Cir. 2015) (remanding case because of a factual error by the BIA regarding the date that the visa was revoked); *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (BIA was "not aware of the most basic facts of [the petitioner's] case" and ruling lacked "a rational basis"); *Niam v. Ashcroft*, 354 F.3d 652, 656 (7th Cir. 2004) (IJ's opinion "is riven with [factual] errors" that "were not noticed by the [B]oard"); *Berishaj v. Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004) (BIA's summary affirmance "shirk[ed] its role and duty of ensuring that the final agency determination in an immigration case is reasonably sound and reasonably current"), *abrogated on other grounds by Nbaye v. Att'y Gen.*, 665 F.3d 57 (3d Cir. 2011).

[22] *See, e.g.*, *Arita-Deras v. Wilkinson*, 990 F.3d 350, 359 (4th Cir. 2021) (criticizing numerous IJ and BIA decisions in the case as "err[oneous] as a matter of law," "flawed," with "no plausible

0.0001% of its decisions each year, leaving thousands of unpublished, nonprecedential decisions where errors and inconsistencies lurk unseen.[23]

To be sure, as *amici* are familiar, "the large number of cases" on their dockets "imposes practical limitations on the length" of written opinions. *Voci v. Gonzales*, 409 F.3d 607, 613 n.3 (3d Cir. 2005). IJs and BIA members may have spent more time evaluating a case than the length of an opinion alone would suggest. At the same time, "every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020). In that context, Article III courts play a crucial role in ensuring that executive-branch productivity mandates do not override the obligation to give due attention to a case; and that "crowded dockets or a backlog of cases" do not "allow an IJ or the BIA to dispense with an adequate explanation . . . merely to

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basis . . . in violation of the Board's precedent"); *Quinteros v. U.S. Att'y Gen*, 945 F.3d 772, 791 (3d Cir. 2019) (McKee, J., concurring) ("There are numerous examples of [the BIA's] failure to apply the binding precedent of this Circuit," including "in the two years since we explicitly emphasized its importance"); *Lockhart v. Napolitano*, 573 F.3d 251, 260 (6th Cir. 2009) (finding USCIS's interpretation of the statue "creates an arbitrary, irrational and inequitable outcome") (quoting *Robinson v. Napolitano,* 554 F.3d 358, 371 (3d Cir. 2009) (Nygarrd, J., dissenting)); *Freeman v. Gonzales*, 444 F.3d 1031, 1041 (9th Cir. 2006) (remanding because USCIS followed an "untenable interpretation" of the statute).

[23] Sayed, *supra* note 17, at 926. Around 13 percent of federal circuit court decisions are published, and those unpublished decisions are far more easily accessible and citable by parties. *Id.* at 900.

facilitate or accommodate administrative expediency." *Valarezo-Tirado v. U.S. Att'y Gen.*, 6 F.4th 542, 549 (3d Cir. 2021). Moreover, judicial review is vital not just to correct error in individual cases, but also to ensure that agency adjudicators apply consistent, correct legal standards in future cases as they wade through their backlogs.[24] This judicial review (and the attendant checks it provides) should be available to petitioners nationwide, instead of only to those living in a jurisdiction that, under the current circuit split, permits Article III review.

The Court should read § 1252(a)(2)(B)(ii) to permit Article III courts to continue to correct the objective underlying determinations that can be critical in requests for ultimate discretionary relief like Ms. Bouarfa's.

CONCLUSION

For the reasons stated above and in Petitioner's brief, the Court should grant the petition for certiorari and reverse the Eleventh Circuit's judgment.

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[24] *See* Sayed, *supra* note 17, at 921, 925 (noting "the well-documented inconsistencies in the application of immigration law" by agency adjudicators and finding that "precedent is crucial for creating uniformity in immigration law"); *see also id.* at 947 (observing that "restrictions on judicial review" make it "likely that BIA errors will go unchecked," with "profound consequences on the lives of noncitizens and their families").

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January 2, 2024