Ruling Shows High Court Willing To Limit Immigration Review

By **Mark Fleming** (January 22, 2025)

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In the last five years, the U.S. Supreme Court has decided several cases involving the limits on federal appellate review of immigration agency decisions, turning out an average of a decision per year.

The most recent of these, Bouarfa v. Mayorkas, was published Dec. 10 and shows the Supreme Court's continued willingness to limit judicial review of agency decisions in the immigration space.[1] The court's engagement with this issue is likely to continue, and presents a notable counterpoint to the court's recent expansion of judicial review of agency decisions in other areas.

Bouarfa arose in the context of family-based immigration, specifically the provisions governing a U.S. citizen's ability to pursue lawful permanent residence, commonly known as a green card, for a noncitizen spouse.

The process begins when the U.S. citizen files a petition with U.S. Citizenship and Immigration Services. If USCIS determines that the facts stated in the petition are true and that the noncitizen spouse is eligible for a family-based immigration benefit, the law provides that USCIS shall approve the petition.[2]

On the other hand, USCIS must deny the petition if the noncitizen spouse has previously received or sought an immigration benefit through a marriage found to be fraudulent.[3] The parties agreed, and the Supreme Court did not deny, that if a petition is denied based on this so-called sham-marriage bar, the U.S. citizen spouse may seek judicial review of the denial by filing an Administrative Procedure Act challenge in federal court.[4]

However, USCIS may resolve a petition unfavorably to the U.S. citizen through another route. After a petition is approved, the agency may revoke its approval, "at any time, for what [the agency] deems to be good and sufficient cause."[5]

The question in Bouarfa was whether federal courts have jurisdiction to review the agency's revocation of approval on a ground that would have been reviewable had the petition originally been denied on that basis.

Specifically, U.S. citizen Amina Bouarfa petitioned for a green card for her husband, Ala'a Hamayel, a Palestinian national. USCIS initially approved the petition.

Hamayel had been married previously. Two years after approving Bouarfa's petition, the agency revoked the approval because Hamayel's ex-wife had stated during an interrogation that this first marriage was fraudulent. Bouarfa argued that the ex-wife's statement was recanted as having been made under duress.[6]

The agency stuck to its revocation, and Bouarfa filed an APA challenge, arguing that the determination was arbitrary and capricious, and unsupported by sufficient evidence.

Both the U.S. District Court for the Middle District of Florida and the U.S. Court of Appeals for the Eleventh Circuit dismissed the case without addressing the merits, ruling that Congress had stripped jurisdiction to review revocation decisions — though not initial

denials — by enacting Title 8 of the U.S. Code, Section 1252(a)(2)(B)(ii).

That provision removes jurisdiction to review decisions that are "specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security."

The Supreme Court unanimously agreed with the lower courts. Justice Ketanji Brown Jackson's opinion explained that initial denials of approval were based on mandatory factors that did not implicate agency discretion, and thus remained reviewable in court. But because the law states that the agency "may" — but is not required to — revoke approval of a previously-approved petition under the sham-marriage bar, the court concluded that a revocation decision was discretionary, and thus fell within the jurisdiction-stripping provision.

The court acknowledged that it did not appear that the agency ever declines to revoke approval of a petition once it makes a sham-marriage determination — government counsel could not identify a single instance at oral argument.[7]

Nor did the court deny that its holding made it possible for the agency to foreclose judicial review at will, by approving a petition and then revoking approval, instead of initially denying it. In a footnote, the court noted that Bouarfa "points to no evidence suggesting that the agency has done so in this case or any other."[8]

The court also noted that a U.S. citizen petitioner like Bouarfa was free to file a second petition and, if USCIS denied it outright, challenge that denial in court.[9]

The Bouarfa decision is the latest example of a deep engagement by the court in resolving circuit disagreements regarding jurisdiction to review agency decisions in the immigration space. Between 2020 and 2024, the court has averaged one such decision a year. And Bouarfa is a rare display of unanimity in this area. Most of these decisions have been divided, often sharply.

In Guerrero-Lasprilla v. Barr, in 2020, a 7-2 majority ruled that — even though Congress generally prohibited noncitizens convicted of certain crimes from seeking review of removal orders — an exception for review of "questions of law" preserved their ability to seek review of questions of application of law to undisputed or established facts.[10]

That same year, in Nasrallah v. Barr, the same 7-2 majority ruled that noncitizens with such criminal convictions could also challenge factual findings to an order denying relief from removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[11]

In 2022, in Patel v. Garland, a 5-4 majority held that federal courts lack jurisdiction to review challenges by noncitizens without any criminal history to factual errors made in denying a request for a discretionary immigration benefit, even if the factual finding concerned a nondiscretionary eligibility factor.

Notably, both the first Trump administration and the Biden administration had agreed with the petitioners that the courts did have jurisdiction.[12]

In 2024, a five-justice majority ruled in Wilkinson v. Garland that federal courts could review an agency determination that undisputed facts did not show that a noncitizen's removal would cause an "exceptional and extremely unusual hardship" to a U.S. citizen or

lawful permanent resident family member — an eligibility requirement for the discretionary remedy of cancelation of removal — and that that finding was not itself a discretionary determination.[13]

Justice Jackson concurred only in the judgment, stating that the majority's decision was compelled by Guerrero-Lasprilla and stare decisis, but pointing out that she "had not yet joined the Court when it decided Guerrero-Lasprilla" and questioned its correctness.[14]

This recent history, culminating in Bouarfa, makes it difficult to predict how the Supreme Court will approach future jurisdictional disputes involving the review of immigration agency decisions. At the very least, these cases provide a counterpoint to observations that the court will consistently expand judicial review of agency decisions — a trend that does not apply, at least uniformly, with respect to immigration.

Justice Neil Gorsuch evoked this concern in his dissent in Patel, decrying a holding under which, in his view, "a federal bureaucracy can make an obvious factual error, one that will result in an individual's removal from this country, and nothing can be done about it."[15]

The court's engagement with these issues is unlikely to end anytime soon. Later this term, in Riley v. Garland, the court will decide whether the 30-day deadline to petition for review of an order of removal is jurisdictional, or alternatively is satisfied by filing a petition within 30 days of an order denying withholding of removal or protection under the Convention Against Torture, even if the removal order was issued earlier.

Riley is another case in which the U.S. and petitioners agree that jurisdiction exists.[16]

And just weeks ago, in Magana-Magana v. Garland, the U.S. Court of Appeals for the Ninth Circuit, acknowledging a circuit split, ruled that it had jurisdiction to review — and ultimately affirm — an agency decision that a noncitizen did not demonstrate "extraordinary circumstances or extreme hardship to [the noncitizen's] child," as required to waive the time limit for filing a motion to reopen removal proceedings under the Violence Against Women Act.[17]

The scope of federal jurisdiction to review immigration agency decisions is thus likely to be a component of the Supreme Court's docket for some time to come.

Mark C. Fleming is a partner and co-chair of the appellate and Supreme Court litigation practice group at WilmerHale.

Disclosure: The author represented the petitioners in Patel v. Garland.

[1] No. 23-583, 604 U.S. ___ (Dec. 10, 2024).

[2] 8 U.S.C. § 1154(b).

[3] 8 U.S.C. § 1154(c).

[4] Bouarfa, slip op. 2.

[5] 8 U.S.C. § 1155.

[6] Bouarfa, slip op. 4.

[7] Bouarfa, slip op. 9-10.

[8] Bouarfa, slip op. n.5.

[9] Bouarfa, slip op. 8. Bouarfa had done exactly that.

[10] Guerrero-Lasprilla v. Barr, 589 U.S. 221 (2020).

[11] Nasrallah v. Barr, 590 U.S. 573 (2020).

[12] Patel v. Garland, 596 U.S. 328 (2022).

[13] Wilkinson v. Garland, 601 U.S. 209 (2024).

[14] Wilkinson, 601 U.S. at 226-277 (Jackson, J., concurring in the judgment). In a brief dissent, Chief Justice John Roberts stated that he believed that Guerrero-Lasprilla was correctly decided but did not compel the result in Wilkinson. Justice Samuel Alito dissented separately in an opinion joined by Justice Roberts and Justice Clarence Thomas.

[15] Patel, 596 U.S. at 347-348 (Gorsuch, J., dissenting).

[16] Riley v. Garland, No. 23-1270 (U.S.).

[17] Magana-Magana v. Garland, No. 23-1887, __ F.4th __ (9th Cir. Dec. 26, 2024).