No. 24-

IN THE

Supreme Court of the United States

NEXT GENERATION TECHNOLOGY, INC.
AND PUSPITA DEO,

Petitioners,

v.

UR M. JADDOU, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can arguments in support of a court's subject-matter jurisdiction be waived?

2. The Federal Magistrates Act provides that a "judge of the [district] court shall make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1).

   Does § 636(b)(1) permit a district court to find that a party has waived *de novo* review of an objection to a magistrate judge's report and recommendations because the issue or argument was not first raised before the magistrate?

LIST OF PARTIES

Petitioners are Next Generation Technology, Inc. and Puspita Deo. Petitioners were plaintiffs in the district court and appellants before the Second Circuit.

Respondents are Ur M. Jaddou, Director, U.S. Citizenship and Immigration Services; Susan Dibbins, Chief, USCIS Office of Administrative Appeals; Alejandro N. Mayorkas, Secretary of Homeland Security; and Merrick Garland, Attorney General of the United States. Respondents were defendants in the district court and appellees before the Second Circuit. During proceedings before the district court, Respondents Jaddou, Mayorkas, and Garland were automatically substituted for original defendants Larry C. Denayer, Peter T. Gaynor, and Jeffrey Rosen under Federal Rule of Civil Procedure 25(d).

RULE 29.6 STATEMENT

Petitioner Next Generation Technology, Inc. has no parent corporation. No publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Next Generation Technology, Inc. v. Jaddou*, No. 23-495, U.S. Court of Appeals for the Second Circuit. Order granting motion to dismiss entered April 11, 2024.

- *Next Generation Technology, Inc. v. Jaddou*, No. 21-cv-1390, U.S. District Court for the Southern District of New York. Order granting motion to dismiss entered March 18, 2023.

The agency action at issue in this case was undertaken on remand from Petitioners' previous challenge to an earlier agency action in *Next Generation Technologies, Inc. v. Johnson*, No. 15-cv-5663, U.S. District Court for the Southern District of New York ("*Next Generation I*"). Order granting plaintiffs' motion for summary judgment in part and remanding the matter for further proceedings entered September 29, 2017.

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OPINIONS BELOW

The opinion of the court of appeals (P.App. 1a) is unreported. The opinion of the district court (P.App. 5a) is unreported and is available at 2023 WL 2570643. The report and recommendation of the magistrate judge (P.App. 30a) is available at 2022 WL 1548037. The opinion of the district court in *Next Generation I* is reported at 328 F. Supp. 3d 252.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2024. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the U.S. Constitution states in section 1 and section 2, clause 1:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under

> this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Federal Magistrates Act (28 U.S.C. §§ 631 *et seq.*) states in § 636(b)(1):

> Notwithstanding any provision of law to the contrary—
>
> (A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown

that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post[-]trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Federal Rule of Civil Procedure 72 states in section (b)(3):

> *Resolving Objections*. The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

INTRODUCTION

In the proceedings below, Petitioners Next Generation Technology, Inc. ("NGT") and Puspita Deo challenged the revocation by U.S. Customs and Immigration Services of NGT's H-1B petition on Deo's behalf. After years of litigation, the magistrate recommended that the case be dismissed for lack of subject-matter jurisdiction due to mootness because the court could no longer grant the relief that Petitioners sought.

Petitioners argued to the district court that, even if their claim for injunctive relief was moot, other bases for the court's exercise of subject-matter-jurisdiction existed. But the district court declined to consider Petitioners' contentions because they had not previously been raised in Petitioners' objections to the magistrate's report & recommendation.

This petition presents two questions. The first is whether arguments in support of a court's subject matter jurisdiction can be waived. That is, may a court disregard,

on waiver grounds, an asserted basis for its subject-matter jurisdiction, even if it leads the court to conclude incorrectly that it lacks subject-matter jurisdiction?

The second question is whether the Federal Magistrates Act, which requires a district court judge to make "a de novo determination" of any objected-to portions of a magistrate's report & recommendations, permits a district court to find that a party has waived *de novo* review because the issue or argument was not first raised before the magistrate?

As explained below, because courts are "independent[ly] obligat[ed] to determine whether subject-matter jurisdiction exists," *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999), and generally "lack the authority to abstain from the exercise of jurisdiction that has been conferred," *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358 (1989), arguments in support of a court's subject-matter jurisdiction should not be waivable.

Additionally, as explained in *United States v. George*, 971 F.2d 1113 (4th Cir. 1992), as well as below, because the text of 28 U.S.C. § 636(b)(1) makes a *de novo* determination mandatory when an objection is raised, and concluding otherwise would raise constitutional issues, failure to raise arguments or issues before the magistrate should not waive *de novo* review by the district judge.

Accordingly, the Court should grant this petition to consider both of these recurring issues of fundamental importance to the federal court system.

STATEMENT OF THE CASE

A. Legal and Factual Background

1. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. Cormack*, 395 U.S. 486, 496 (1969).

"Article III of the Constitution limits federal-court jurisdiction to 'cases' and 'controversies.'" *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016). The Court has "interpreted this requirement to demand that 'an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed.' 'If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* at 160-61 (citations omitted).

A moot case is "appropriately dismissed for lack of subject-matter jurisdiction." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 78-79 (2013). There are, however, a number of exceptions where a court does not lose jurisdiction over an otherwise factually moot case, including for the voluntary cessation of the challenged practice, *see, e.g.*, *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000), or for disputes that are "capable of repetition, yet evading review," *see, e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 17-18 (1998).

2. Waiver and forfeiture are related, albeit distinct, doctrines providing that if a party fails sufficiently to

raise an issue or argument at the required time, that issue or argument is deemed to have been abandoned and, therefore, will generally not be considered or addressed if raised subsequently. *See generally United States v. Olano*, 507 U.S. 725, 732-33 (1993).[1]

Waiver issues commonly arise when a party does not (i) raise an issue in a responsive pleading, *see Kontrick v. Ryan*, 540 U.S. 443, 460 (2004); (ii) raise an issue before the district court, *see, e.g.*, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); (iii) raise an issue before a magistrate judge, *see, e.g.*, *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990-91 (1st Cir. 1988); (iv) object to a finding of a magistrate judge, *see generally Thomas v. Arn*, 474 U.S. 140 (1985); or (v) sufficiently raise an issue in its opening appellate brief, *see Cone v. Bell*, 566 U.S. 449, 482 (2009).

3. In 28 U.S.C. § 636(b)(1)(A), Congress provided that a district court judge could designate a magistrate judge to 'hear and determine' any pretrial matter other than certain dispositive motions. The district judge may thereafter reconsider the magistrate's decision if it is "clearly erroneous or contrary to law."

Specified "dispositive" motions are addressed by § 636(b)(1)(B), under which a district judge may "designate a magistrate to conduct hearings, including evidentiary hearings, and to submit . . . proposed findings of fact and recommendations for the disposition" of the motion by the district judge.

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1. Because the differences between waiver and forfeiture are not relevant to the issues discussed herein, this petition uses the terms interchangeably.

Within 14 days of being served with the magistrate's proposed findings and recommendations, a party may file objections and the district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." The district judge "may accept, reject, or modify, in whole or in part, the [magistrate's] findings or recommendations" and "may also receive further evidence or recommit the matter to the magistrate judge with instructions." § 636(b)(1).

4. An H-1B visa is a nonimmigrant visa that allows U.S. employers to temporarily hire skilled foreign national beneficiaries to work in the United States in what are called "specialty occupations." P.App. 32a. The number of H-1B visas that may be issued for a given fiscal year is subject to a numerical cap set by Congress. P.App. 51a-52a.

As relevant here, the process for obtaining an H-1B visa begins with the U.S. employer filing a petition, Form I-129, with U.S. Citizenship and Immigration Services ("USCIS") on behalf on the foreign-national beneficiary. P.App. 33a. The petition must be accompanied by a Labor Condition Application for the requested visa validity period certified by the Department of Labor. P.App. 45a n.9. After a petition is approved, the beneficiary must take additional steps to obtain the H-1B visa itself and be admitted into the United States with H-1B status. P.App. 33a.

B. Procedural History

Petitioner Next Generation Technology, Inc. is a Schaumberg, Illinois-based information technology firm

that specializes in "providing IT services, [and] custom software solutions and development for its clients." P.App.. 33a. In April 2009, NGT filed an H-1B petition on behalf of Petitioner Deo, an Indian national with a Ph.D. in computer science from Dublin City University, to work as a computer programmer for fiscal years 2010 through 2012. *Id.* USCIS approved the petition in July 2009. P.App. 34a. Deo, however, did not finish the process to obtain the H-1B visa and instead entered the United States on a B-2 visitor visa. *Id*.

In June 2010, NGT filed an amended petition, seeking to obtain a valid H-1B visa for Deo and amend her immigration status to that of an H-1B worker. *Id.* On November 30, 2010, for reasons not relevant here, USCIS revoked NGT's approved petition, and, on December 14, 2010, denied the amended petition as the same or similar to the one that had been revoked. P.App. 35a. Two days later, NGT filed an appeal with the USCIS Administrative Appeals Office ("AAO"), which dismissed the appeal on November 3, 2012. NGT filed a motion to reconsider, which was finally denied on October 16, 2014. P.App. 35a-36a.

Following AAO's denial of their motion to reconsider, Petitioners brought an action in the U.S. District Court for the Southern District of New York, challenging the revocation and denial of NGT's petitions under the Administrative Procedure Act ("APA"). *Id*. On September 19, 2017, the magistrate judge sided with Petitioners and remanded the proceedings to USCIS with instructions to reconsider its decision. P.App. 36a. USCIS, however, went beyond the scope of the remand and instead raised new, not previously identified reasons to revoke or reject NGT's petitions, which it did on July 31, 2019. *See* P.App. 37a-38a.

Petitioners thereafter again brought an action under the APA in the Southern District on February 17, 2021, seeking the reinstatement of Deo's H-1B status, an award of attorney's fees and costs, and other equitable relief. P.App. 31a. This time Respondents (defendants at the district court) moved to dismiss the action under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction due to mootness, which was referred to a magistrate judge. P.App. 38a.

Respondents argued that the court could not grant Petitioners meaningful relief because (i) the validity period for the petitions at issue had expired in 2012 and (ii) that no H-1B visa numbers remained available under the cap for the relevant years. P.App. 44a. The magistrate judge agreed with Respondents' arguments, and, finding that the "capable of repetition, yet evading review" exception to mootness did not apply, recommended dismissal for lack of subject-matter jurisdiction. P.App. 45a-60a.

Before the district judge, Petitioners raised several objections to the magistrate's report and recommendation: (i) that the court could order USCIS to approve a new validity period, contingent on Petitioners obtaining a new certified Labor Condition Application; (ii) that Respondents had unilaterally caused the mootness and should not thereby be permitted to evade judicial review; (iii) that the court had the power to reinstate the approval *nunc pro tunc*; (iv) that claims for costs and attorney's fees or nominal damages defeated a finding of mootness, regardless, and (v) that the dispute fell within the "capable of repetition, yet evading review" exception. P.App. 16a-17a, 26a-27a.

Addressing the first ground for mootness (the expiration of the validity period), the district court rejected Petitioners' objections concerning a new validity period and *nunc pro tunc* relief because they were the same as arguments previously made to the magistrate judge. P.App. 17a-18a. The district court then declined to consider Petitioners' arguments about unilateral mootness,[2] costs and fees, and nominal damages because they had *not* been made to the magistrate judge. P.App. 18a. Addressing the second ground (the lack of available visa numbers), notwithstanding that Petitioners' objections were directed at both mootness grounds, the district court found that "Plaintiffs do not object to this recommendation." P.App. 22a.

Thus, after rejecting the "capable of repetition, yet evading review" objection, P.App. 28a, the district court overruled Petitioners' objections and adopted the magistrate's recommendation to dismiss the case for lack of subject-matter jurisdiction due to mootness. P.App. 28a-29a.

Petitioners appealed to the U.S. Court of Appeals for the Second Circuit, which had jurisdiction under 28 U.S.C. § 1291. Before the Second Circuit, Respondents moved to dismiss the appeal on the grounds that Petitioners "did not object to a dispositive ground for dismissal identified in the magistrate judge's report and recommendation—namely, the lack of available H-1B visa numbers for the time period in question" and, thereby, waived appellate review of a dispositive issue. P.App. 84a. In response, Petitioners argued that they had raised valid objections,

2. This is described in the court's opinion as an objection "regarding the core values of the Constitution."

that courts should consider even belated objections, and that the case was not, in fact, moot. *See generally* P.App. 63a-82a.

The Second Circuit, however, found that Petitioners "have waived the dispositive issue identified by [Respondents]," and granted Respondents' motion to dismiss. P.App. 2a

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari to Consider Whether Arguments in Support of a Court's Subject-Matter Jurisdiction May Be Waived

A. This question raises a recurring issue of fundamental importance to the federal court system

The first question in this case is whether a federal court is permitted to rely on doctrines of waiver or forfeiture to deny the existence of subject-matter jurisdiction. That is, may a federal court decline to consider an argument in favor of its subject-matter jurisdiction because it was waived or forfeited, and thereby conclude that it lacks subject-matter jurisdiction, regardless of whether that conclusion is substantively correct?

This question goes to the heart of the most fundamental issue for a federal court: the power and duty to hear the cases presented to it.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution

and statute . . . ." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of [the appellate] court, and then of the court from which the record comes." *Mansfield, C. & LMR Co. v. Swan*, 111 U.S. 379, 382 (1884).

The existence of subject-matter jurisdiction is a precondition not only to the exercise of a court's power over the parties appearing before it, but to a litigant's ability to invoke that power in support of everything from the defense of individual rights to the prevention of arbitrary regulatory actions. In other words, a court's determination of whether it has subject-matter jurisdiction matters greatly. A finding that subject-matter jurisdiction is absent automatically closes the courthouse doors. Because this implicates the "fundamental right of access to the courts," *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004), it is all the more important that a court reach the correct conclusion.

This case presents an ideal vehicle for the Court to address this issue. At both the district court and circuit court levels, Petitioner's case was dismissed because each court found that a dispositive issue of mootness had been waived.

To be sure, these decisions did not break any new legal ground. Rather, they involved the regular application of standard principles of waiver (albeit on an issue which, Petitioners contend, is not an appropriate subject for waiver). But because there is nothing unusual, idiosyncratic, or messy about the decisions below, this case

is an effective stand-in for the many similar situations that arise in federal litigation.

This case also presents the issue in one of the most likely contexts for it to arise, mootness, because (i) mootness can arise at any point in the proceedings, unlike other reasons why subject-matter jurisdiction could be missing—for example, absence of a federal question or lack of complete diversity and amount in controversy—that are decided only at the outset; and (ii) whether a case is moot, or if an exception applies, are more likely to involve colorable arguments on both sides.

Petitioners raised the issue of the district's court refusal to consider their arguments against mootness before the Second Circuit. Petitioners have what they believe to be viable arguments that the case is not moot and seek only the opportunity to have then fully considered on the merits.

B. The decision below conflicts with the logic of this Court's precedents

Arguments that a court lacks subject-matter jurisdiction may be raised at any point, and objections to the lack of subject-matter jurisdiction cannot be waived or forfeited. This case presents the parallel question of whether arguments *for the existence* of subject-matter jurisdiction may be waived or forfeited.

As explained below, a court is independently responsible for assuring itself of its subject-matter jurisdiction. Moreover, with few exceptions, a court may not decline to exercise the jurisdiction that it possesses.

It follows that a court is obligated to consider every argument concerning its jurisdiction—supporting or opposing—without regard to whether they have been waived or forfeited by the parties. Otherwise, by failing to consider potentially viable arguments that subject-matter jurisdiction exists, a court may, in effect, be electing not to exercise its jurisdiction, thereby wrongfully depriving litigants of their day in court.

1. Courts are responsible for their own subject-matter jurisdiction

Federal courts are "empowered to hear only those cases that (1) are within the judicial power of the United States, as defined in the Constitution, and (2) that have been entrusted to them by a jurisdictional grant by Congress." 13 Charles Alan Wright, Arthur Miller et al., *Federal Practice and Procedure* § 3522 (3d ed.).

In particular, "Article III, § 2, of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' which restricts the authority of federal courts to resolving 'the legal rights of litigants in actual controversies[.]'" *Genesis Healthcare*, 569 U.S. at 71 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982)). "Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement[.]" *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

Among the jurisdictional limitations inherent in the Article III "case-or-controversy" requirement, is mootness. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam). As this Court has explained:

> Mootness is a jurisdictional question because the Court "is not empowered to decide moot questions or abstract propositions," *United States v. Alaska S. S. Co.*, 253 U.S. 113, 116 (1920), quoting *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308, 314 (1893); our impotence "to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3 (1964).

North Carolina v. Rice, 404 U.S. 244, 246 (1971).

"Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system. Under that system, courts are generally limited to addressing the claims and arguments advanced by the parties [and] do not usually raise claims or arguments on their own." *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) (citation omitted). But federal courts have an "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citing *Ruhrgas*, 526 U.S. at 583).

"When a requirement goes to subject-matter jurisdiction," a court must "consider *sua sponte* issues that the parties have disclaimed or have not presented." *Gonzalez v. Thaler*, 565 U.S. 134, 648 (2012). "The objection that a federal court lacks subject-matter jurisdiction may be raised," therefore, "by a court on its own initiative, at any stage in the litigation, even after trial and the

entry of judgment." *Arbaugh*, 546 U.S. at 506 (citations omitted). Likewise, "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)).

For this reason, the Court has repeatedly explained that "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez*, 565 U.S. at 648; *accord, e.g.*, *United States v. Cotton*, 535 U.S. 625, 630 (2002); *Ahrens v. Clark*, 335 U.S. 188, 193 (1948); *United States v. Griffin*, 303 U.S. 226, 229 (1938); *Powers v. Chesapeake & Ohio R. Co.*, 169 U.S. 92, 98 (1898).

2. Courts may not decline to exercise the jurisdiction they possess

As this Court has recognized, its decisions "have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Public Service*, 491 U.S. at 358.

Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Marshall, J.). They have, rather, what this Court has described as "a strict duty to exercise the jurisdiction that is conferred upon them," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), and a "virtually unflagging

obligation . . . to exercise the jurisdiction given them," *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 821 (1976).

"Abdication of the obligation to decide cases can be justified . . . only in the exceptional circumstances," *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959), "where denying a federal forum would clearly serve an important countervailing interest, for example, where abstention is warranted by considerations of 'proper constitutional adjudication,' 'regard for federal-state relations, or 'wise judicial administration,'" *Quackenbush*, 517 U.S. at 716 (quoting *Colorado River*, 424 U.S. at 813, 817) (citation omitted).

3. Failure to raise an asserted basis for a court's subject-matter jurisdiction should not waive the issue

The logic of both lines of cases described above points in the same direction: arguments that a court possesses subject-matter jurisdiction should be no more waivable than arguments that a court lacks jurisdiction.

Jurisdictional questions are not subject to the normal adversarial paradigm of party presentation because ultimate responsibility for ensuring that a court possesses the authority to decide a case lies with the court, not the litigants. This is only possible if the court is obligated to consider its own jurisdiction *sua sponte*, even if not raised by the parties. Yet there is a clear tension between the court's ultimate responsibility and the possibility that a viable jurisdictional basis may be forfeited or waived.

It would hardly be sufficient if a court's assessment of its own jurisdiction took into consideration only some of the possible objections and only some of the possible responses. But limiting the reasons in support of jurisdiction that a court may consider is exactly what the application of waiver doctrines does.

Take, for example, the facts from *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), in which an advocacy group filed a lawsuit claiming that the Bipartisan Campaign Reform Act of 2002 unconstitutionally prohibited it from running certain political advertisements during a 30-day "blackout period" prior to the Wisconsin primary election. The conclusion of the blackout period, however, would appear to moot the case, as the advocacy group could no longer receive the relief of being permitted to run its ads during that period. At that point, the district court would have been obligated to consider *sua sponte* whether the case had become moot.

In considering that issue, the court would be expected to take into account both the reasons that can render a case moot, such as the plaintiff no longer having a concrete interest in the outcome of the litigation, *and* reasons that it might not be moot, such as whether the case fell into the exception for disputes "capable of repetition, yet evading review."[3] To consider only one side of the question would make a mockery of the court's responsibility and would, presumably, be quickly corrected on appeal.

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3. As this Court eventually concluded, the case "fit comfortably" within that exception. *Wisc. Right to Life*, 551 U.S. at 462.

Now, take again the same facts, except, this time, assume that the defendant moves to dismiss the case for lack of subject-matter jurisdiction on the grounds of mootness immediately following the blackout period. If the plaintiff neglects to raise the "capable of repetition, yet evading review" exception in response, the court would have to deem it waived, conclude that it lacked subject-matter jurisdiction, and dismiss the case. And neither that erroneous conclusion, nor the resulting dismissal, could be corrected on appeal, as the plaintiff would have waived appellate review by failing to raise the issue before the district court.

There is no principled reason why the manner in which a jurisdictional question is raised—by a party or on the court's own motion—should be outcome determinative. Yet that is precisely the situation when viable arguments in support of a court's jurisdiction are subject to waiver or forfeiture.

Waiver doctrines are, by and large, indifferent to merit. The failure to raise an issue or argument at the proper time prevents consideration, even of what would otherwise have been a successful argument.[4] That is, waiver leads to incorrect outcomes as illustrated by the *Wisconsin Right to Life* example. But, when it comes to a court's jurisdiction, incorrect outcomes matter.

4. While courts do have some discretion to address issues that were otherwise abandoned, *see Singleton v. Wulff*, 428 U.S. 106, 121 (1976), that discretion is not so broad, either in theory or in practice, to ensure that every viable waived argument receives the consideration it deserves.

As described above, federal courts have a "strict duty" and "virtually unflagging obligation . . . to exercise the jurisdiction given them," absent, at minimum, "an important countervailing interest." Permitting arguments in support of a court's subject-matter jurisdiction to be waived or forfeited means that courts end up dismissing cases for lack of subject-matter jurisdiction when such jurisdiction is not, in fact, lacking and, consequently, "abstain[ing]," impermissibly, "from the exercise of jurisdiction that has been conferred."

II. The Court Should Grant Certiorari to Consider Whether the Federal Magistrates Act Permits the Waiver of *De Novo* Review

A. There is a well-established and entrenched circuit split over this recurring issue of fundamental importance to the federal courts

The Federal Magistrates Act provides that a district court judge "shall make a de novo determination of those portions of [a magistrate judge's] report or specified proposed findings or recommendations to which objection is made." The judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge," amd "may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1).

Federal Rule of Civil Procedure 72(b)(3) similarly provides that a "district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive

further evidence; or return the matter to the magistrate judge with instructions."

There exists an entrenched 7-2-1 circuit split over whether a litigant waives the right to *de novo* review from the district court judge by failing to raise the argument before the magistrate judge, with only the Fourth Circuit remaining faithful to textual requirement that a judge "shall" make a *de novo* determination.

Whether subsection (b)(1) permits a district court judge to refuse consideration of an argument not presented to the magistrate was first addressed in *Borden v. Sec'y of Health and Human Servs.*, where the First Circuit held that the appellant "was not entitled to a de novo review of an argument never raised." 836 F.2d 4, 6 (1st Cir. 1987). It reasoned that the purpose of the Federal Magistrates Act "is to relieve courts of unnecessary work" and that "[i]t would defeat this purpose if the district court was required to hear matters anew on issues never presented to the magistrate." *Id.*; *see also Paterson-Leitch Co.*, 840 F.2d at 990-91.

Approximately five years later, the Fourth Circuit addressed the same issue in *United States v. George*, holding that "as part of its obligation to determine de novo any issue to which proper objection is made, a district court is required to consider all arguments directed to that issue, regardless of whether they were raised before the magistrate." 971 F.2d at 1118. Judge Luttig, writing for the court, explained that:

> By definition, de novo review entails consideration of an issue as if it had not been decided previously. It follows, therefore, that the party entitled to de novo review must be permitted to raise before the court any argument as to that issue that it could have raised before the magistrate. The district court cannot artificially limit the scope of its review by resort to ordinary prudential rules, such as waiver, provided that proper objection to the magistrate's proposed finding or conclusion has been made and the appellant's right to de novo review by the district court thereby established.

Id.

Furthermore, the Fourth Circuit warned that "any other conclusion would render the district court's ultimate decision at least vulnerable to constitutional challenge." *Id.* (citing *United States v. Raddatz*, 447 U.S. 667, 683 (1980) for the proposition that "delegation" to a magistrate "does not violate Art. III so long as the ultimate decision is made by the district court").

Despite the Fourth Circuit's warning, over the next few years the Fifth and Tenth Circuits both adopted the First Circuit's view. *See Cupit v. Whitley*, 28 F.3d 532, 535 n.5 (5th Cir. 1994) (citing *Paterson-Leitch Co.*, 840 F.2d at 990-91); *Marshall v. Chater*, 75 F.3d 1421, 1426-27 (10th Cir. 1996) (same). In 2000, they were joined by the Sixth, Seventh, and Eighth Circuits. *See Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000) (citing *Marshall*, 75 F.3d at 1426-27; *Cupit*, 28 F.3d at 535; *Paterson-Leitch*

Co., 840 F.2d at 990-91);[5] *United States v. Melgar*, 227 F.3d 1038, 1040 (7th Cir. 2000) (explaining that "[f]ailure to raise arguments will often mean that facts relevant to their resolution will not have been developed" and that "one of the parties may be prejudiced by the untimely introduction of an argument"); *Roberts v. Apfel*, 222 F.3d 466, 470 (8th Cir. 2000) (explaining that the purpose of referring cases to a magistrate "would be contravened if parties were allowed to present only selected issues to the magistrate, reserving their full panoply of contentions for the trial court," and that, otherwise, "a claimant [could] raise new claims to the district court and thus effectively have two opportunities for judicial review"). And, more recently, the Third Circuit also concluded that "[a]rguments not presented to a magistrate judge and raised for the first time in objections to the magistrate's recommendations are deemed waived." *In re Nat'l Collegiate Student Loan Trusts 2003-1, 2004-1, 2004-2, 2005-1, 2005-2, 2005-3*, 971 F.3d 433, 444 (3d Cir. 2020) (citing *Marshall*, 75 F.3d at 1426).[6]

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5. *But see Glidden Co. v. Kinsella*, 386 F. App'x 535, 544 n.2 (6th Cir. 2010) ("This Court has not squarely addressed whether a party may raise new arguments before a district judge that were not presented to the magistrate judge. In *Murr v. United States*, however, the Court indicated that a party's failure to raise an argument before the magistrate judge constitutes a waiver.").

6. The D.C. Circuit also appears to have adopted this position although it is not entirely clear, as the court cited to both the district's court's local rules and the Tenth Circuit's decision in *Marshall*. *See Klayman v. Judicial Watch, Inc.*, 6 F.4th 1301, 1312 (D.C. Cir. 2021). In the subsequent three years, neither the court of appeals nor the district court has cited *Klayman* for this position. Previously, in *Baylor v. Mitchell Rubenstein & Assocs., P.C.*, an unpublished decision, *see* D.C. Cir. R. 36(e)(2), the

The Ninth and Eleventh Circuits, however, adopted the position that consideration of arguments not first presented to the magistrate is up to the discretion of the district court judge. The Ninth Circuit, treated the question as if it had been resolved by an earlier decision in which it held that "a district court has discretion, but is not required, to consider *evidence* presented for the first time in a party's objection to a magistrate judge's recommendation." *Brown v. Roe*, 279 F.3d 742, 744-45 (9th Cir. 2002) (emphasis added) (quoting *United States v. Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000); *but cf.* § 636(b)(1) ("The judge *may* also receive further evidence or recommit the matter to the magistrate with instructions") (emphasis added). And, although *Howell* purported to agree with the First Circuit's decision in *Paterson-Leitch*, *see Howell*, 231 F.3d at 621, the Ninth Circuit made clear in *Brown*, as well as in subsequent cases, that it would closely police the requirement that "the district court must actually exercise its discretion." *See Brown*, 279 F.3d at 744, 745; *see also, e.g.*, *Jones v. Blanas*, 393 F.3d 918, 935 (9th Cir. 2004) (finding that the district court did not "actually exercise its discretion"). The Eleventh Circuit, in turn, aligned itself with the Ninth Circuit's decision in *Howell*. *See Williams v. McNeil*, 557 F.3d 1287, 1290-92 (11th Cir. 2009) (quoting *Raddatz*, 447 U.S. at 675-76, for the proposition that "the purpose of the [Federal Magistrates] Act's language 'was to vest ultimate adjudicatory power over dispositive motions in

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D.C. Circuit had cited to both the Tenth and Eleventh Circuits' positions in explaining that "[a]lthough the District Court may deem forfeited an objection not raised before the magistrate judge, nothing prohibits the court from reviewing a new objection." 735 F. App'x 733, 735 (D.C. Cir. 2018) (per curiam) (citation omitted) (citing *Marshall*, 75 F.3d at 1426-27; *Williams*, 557 F.3d at 1291).

the district court while granting the widest discretion on how to treat the recommendations of the magistrate.").[7]

The longstanding nature of this conflict indicates that it is unlikely to resolve on its own. Decisions of the Fifth, Sixth, Seventh, Ninth and Eleventh Circuits have all recognized their disagreement with the Fourth Circuit. *See Freeman v. County of Bexar*, 142 F.3d 848, 852 (5th Cir. 1988); *Glidden*, 386 F. App'x at 544 n.2; *USA Gymnastics v. Liberty Ins. Underwriters, Inc.*, 27 F.4th 499, 515 (7th Cir. 2022); *Brown*, 279 F.3d at 745-46; *Williams*, 557 F.3d at 1291. And, as recently as 2017, the Fourth Circuit candidly acknowledged that its view of this question "is distinct from that of other circuits," *Samples v. Ballard*, 860 F.3d 266, 273 n.7 (4th Cir. 2017), stating:

> Our approach in *George* is a minority position, and one that has been criticized and rejected by our sister circuits. The other circuits generally believe that our requirement that "de novo" must include every single argument goes too far, and that a district judge may consider new arguments, but by no means is required to do so in order for the review to count as de novo.

Id. (citations omitted).

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7. The Second Circuit has not decided the issue, *see Ryu v. Hope Bancorp, Inc.*, 786 F. App'x 271, 272 n.2 (2d Cir. 2019) (summary order), and district courts have taken a different approach. *Compare, e.g.*, *Ortiz v. Barkley*, 558 F. Supp. 2d 444, 451 (S.D.N.Y. 2008) (following the First Circuit), *with Wells Fargo Bank N.A. v. Sinnot*, No. 2:07–CV–169, 2010 WL 297830, at *2-4 (D. Vt. Jan. 19, 2010) (following the Eleventh Circuit).

After 30-some years, there is little reason to think that further percolation among the lower courts would assist this Court's consideration.

And the Court's consideration is certainly warranted on such a recurring issue of fundamental importance to the federal courts. According to statistics from the Administrative Office of the U.S. Courts, in Fiscal Year 2023, magistrate judges issued 15,760 reports & recommendations on dispositive motions under § 636(b) in civil pretrial matters, and 2,296 in criminal pretrial matters.[8] If issues about the scope of *de novo* review arise in even a small percentage of these cases, this question still implicates hundreds of cases a year. And, as discussed further in the following section, because the majority of circuits have adopted a rule that takes the judicial power out of the hands of Article III judges, it raises fundamental constitutional questions about decision making in federal district courts.

8. *See* Administrative Office of the U.S. Courts, Table M-4, U.S. District Courts—Criminal Pretrial Matters Handled by U.S. Magistrate Judges Under 28 U.S.C. § 636(b) During the 12-Month Period Ending September 30, 2023, https://www.uscourts.gov/sites/default/files/data_tables/jb_m4_0930.2023.pdf (Oct. 17, 2023); Administrative Office of the U.S. Courts, Table M-4A, U.S. District Courts—Civil Pretrial Matters Handled by U.S. Magistrate Judges Under 28 U.S.C. § 636(b) During the 12-Month Period Ending September 30, 2023, https://www.uscourts.gov/sites/default/files/data_tables/jb_m4a_0930.2023.pdf (Oct. 17, 2023).

B. The decision below conflicts with the text of 28 U.S.C. § 636(b)(1) and this Court's decisions in *Thomas v. Arn* and *United States v. Raddatz*

In the proceedings below, the district court took the view that "courts do not consider 'new arguments raised in objections to a magistrate judge's report and recommendation that could have been raised before the magistrate but were not.'" P.App. 12a (quoting *United States v. Gladden*, 394 F. Supp. 3d 465, 480 (S.D.N.Y. 2019). Because Petitioners had not raised various arguments as to why their case was not moot or subject to the "capable of repletion, yet evading review" exception to mootness before the magistrate, the district judge declined to determine issues raised in their objections *de novo* and adopted the magistrate's recommendation to dismiss the case as moot. P.App. 18a, 28a. The Second Circuit subsequently dismissed Petitioners' appeal because they had waived a "dispositive issue." P.App. 2a.

For the reasons explained in *United States v. George* and below, the failure to make a "de novo determination" of an objected-to portion of the magistrate judge's report & recommendation conflict with the express terms of the statute and this Court's decisions in *Thomas v. Arn* and *United States v. Raddatz.*

1. Section 636(b)(1) requires "de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made"

"To decide" between differing interpretations, "we start with the text of the statute." *Babb v. Wilkie*, 140

S. Ct. 1168, 1172 (2020). "A statute's plain meaning must be enforced," *U.S. Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 454 (1993), "since that approach respects the words of Congress," *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004).

In this case, "[t]he statutory command in § [636] is unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993). The concluding provision of subsection (b)(1) states without qualification that a "judge of the [district] court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."

As the Court has explained, "[t]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." *Ross v. Blake*, 578 U.S. 632, 639 (2016) (quoting *Miller v. French*, 530 U.S. 327, 337 (2000)). "Congress sets the rules — and courts have a role in creating exceptions only if Congress wants them to." *Id.*

Moreover, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The same concluding provision stating that a district judge "shall make a de novo determination" additionally states that the "judge *may* also receive further evidence . . . ." § 636(b)(1) (emphasis added). This use of "shall" in one sentence and "may" in the other, demonstrates that the use of "shall" was an intentional choice on the part of the Congressional drafters.

The legislative history provides further evidence that Congress' choice of terms was intentional. As originally introduced, the bill enacting § 636(b) "provided that upon request by a party to a proceeding before a magistrate, the district 'court shall hear de novo those portions of the report or specific proposed findings of fact or conclusions of law to which objection is made.'" *Raddatz*, 447 U.S. at 674 n.2 (quoting S. 1283, 94th Cong., 1st Sess. (1975)). This language was deleted by the Senate Judiciary Committee, which reported out a bill "includ[ing] only the language permitting the district court to 'accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.'" *Id.* at 675. The House Judiciary Committee, however, reinserted language requiring *de novo* review by a district judge, explaining that its amendment meant that the district judge "would have to give fresh consideration to those issues to which specific objection has been made by a party." *Id.* (quoting H. R. Rep. No. 94-1609, at 3 (1976)).

By failing to treat "shall make a de novo determination" as mandatory, the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits' interpretations fail to give effect to Congress' choice of words. *Cf. Lopez v. Davis*, 531 U.S. 230, 240 (2001) ("If § 3621(e)(2)(B) functions not as a grant of discretion . . . , but both as an authorization and a command . . . , then Congress' use of the word 'may,' rather than 'shall,' has no significance.").

In deciding that *de novo* determination of a magistrate's objected-to findings was not required, these circuits relied primarily on arguments about the purpose of § 636(b). *See, e.g.*, *Borden*, 836 F.2d at 6; *Roberts*, 222 F.3d at 470; *Williams*, 557 F.3d at 1291. And although *Raddatz*

may have referred to "the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts" in support of finding that § 636(b)(1) did not require district judges to hold new evidentiary hearings, that consideration was subsidiary to, and pointed in the same direction as, the statutory text and legislative intent. *See Raddatz*, 447 U.S. at 474-76 & n.3. On the question here, in contrast, the text and evidence of legislative intent point in one direction, and broad purposive considerations point in the other. But "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cnty, Ga.*, 140 S. Ct. 1731, 1737 (2020); *see also United States v. Gonzales*, 520 U.S. 1, 6 ("Given the straightforward statutory command, there is no reason to resort to legislative history.") (citing *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)).

In *Thomas v. Arn*, this Court upheld the Sixth Circuit's decision to impose a "rule that the failure to file objections to the magistrate's report waives the right to appeal the district court's judgment." 474 U.S. at 142. As *Thomas* acknowledged, "the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation," including the power "to mandate 'procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute . . . .'" *Id.* at 146-47 (*quoting Cupp v. Naughten*, 414 U.S. 141, 146 (1973)).

"[Not] commanded by statute," however, is not the same as contrary to statutory command, and *Thomas* explained that "[e]ven a sensible and efficient use of the

supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions," *id.* at 148. To permit otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *Id.* (quoting *United States v. Payner*, 447 U.S. 727, 737 (1980)); *see also Chambers v. Nasco, Inc.*, 501 U.S. 32, 47 (1991) ("the exercise of the inherent power of lower federal courts can be limited by statute and rule").

2. A rule that prevents a party from obtaining a *de novo* determination from an Article III judge raises constitutional issues

"Article III vests the judicial power of the United States in judges who have life tenure and protection from decreases in salary." *Id.* at 153. In holding that Article III permitted waiver of appellate review of those portions of a magistrate's report to which no objections were filed, the Court pointed to the fact that the "waiver of appellate review does not implicate Article III, because it is the district court, not the court of appeals, that must exercise supervision over the magistrate." *Id.* at 153-54. *Thomas* further explained that "[a]ny party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard." *Id.* at 154.

Delegating to a magistrate judge the power to made proposed findings of fact and recommendations "does not violate Art. III so long as the ultimate decision is made by the district court." *Raddatz*, 447 U.S. at 683. Under the interpretation adopted by the First, Third, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits, however, a party no longer has the right to obtain "plenary consideration by the Article III judge of any issue" decided by the magistrate. Where a party neglects to first present an argument to the magistrate, the magistrate's findings become conclusive and it cannot be said that "the ultimate decision is made by the district court." Under such circumstances, "the essential attributes of the judicial power," *id.* (quoting *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 77 (1982) (plurality opinion)), no longer belong to the Article III judge, but to the magistrate.

While the Fourth Circuit's decision in *United States v. George* is an outlier among the approaches adopted by the other circuits, it is, for the reasons just given, the correct approach. The Court should therefore grant *certiorari* on this question to resolve the circuit split in favor of the Fourth Circuit.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED APRIL 11, 2024

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

23-495

NEXT GENERATION TECHNOLOGY, INC., PUSPITA DEO,

Plaintiffs-Appellants,

v.

UR M. JADDOU, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,

Defendants-Appellees.

Present: John M. Walker, Jr., Steven J. Menashi, *Circuit Judges*, Orelia E. Merchant, *District Judge.*[*]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of April, two thousand twenty-four.

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[*] Judge Orelia E. Merchant, of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix A

Appellees move to dismiss this appeal based on Appellants' waiver of a dispositive issue. Appellants move for leave to file a sur-reply and Appellees move for leave to file a response to that sur-reply. Upon due consideration, it is hereby ORDERED that the motions for leave to file the sur-reply and the response to the sur-reply are GRANTED, and Appellees' motion to dismiss the appeal is GRANTED. Appellants have waived the dispositive issue identified by Appellees and it would not be in the interests of justice to excuse those waivers because the relevant issue lacks merit. *Smith v. Campbell*, 782 F.3d 93, 102 (2d Cir. 2015) ("Where parties receive clear notice of the consequences, failure to timely object to a magistrate's report and recommendation operates as a waiver of further judicial review of the magistrate's decision."); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal.").

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 20, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 CIVIL 1390 (PGG) (RWL)

NEXT GENERATION TECHNOLOGY, INC., AND PUSPITA DEO,

Plaintiffs,

-against-

UR M. JADDOU, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,

Defendants.

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated March 18, 2023, Plaintiffs' objections to the R&R are overruled, and Judge Lehrburger's recommendation that the Complaint be dismissed for lack of subject matter jurisdiction is adopted; accordingly, the case is closed.

Appendix B

Dated: New York, New York
March 20, 2023

RUBY J. KRAJICK

Clerk of Court

BY: /s/ [Illegible]
Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 18, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 21 Civ. 1390 (PGG) (RWL)

NEXT GENERATION TECHNOLOGY, INC., AND PUSPITA DEO,

Plaintiffs,

- against -

UR M. JADDOU, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,[1]

Defendants.

Filed March 18, 2023

ORDER

PAUL G. GARDEPHE, U.S.D.J.:

Plaintiffs Next Generation Technology, Inc. and its employee, Puspita Deo, challenge a decision by the U.S.

1. Ur M. Jaddou, Alejandro Mayorkas, and Merrick Garland are automatically substituted for original Defendants Larry C. Denayer, Peter T. Gaynor, and Jeffrey Rosen. *See* Fed. R. Civ. P. 25(d).

Citizenship and Immigration Services ("USCIS") to revoke its approval of H-1B status for Deo. Deo is a citizen of India and is the beneficiary of a petition submitted by Next Generation for H-1B non-immigrant status for specialty occupation employment. USCIS approved the petition in 2009 but later revoked its approval. (Cmplt. (Dkt. No. 1) ¶¶ 19, 28) In the Complaint, Plaintiffs seek a declaration that the revocation was unlawful and an order "reinstat[ing] DEO in H-1B status immediately." (*Id.* ¶¶ 218-20)

The Complaint was filed on February 17, 2021. (Cmplt. (Dkt. No. 1)) On August 17, 2021, Defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (Dkt. No. 26) This Court referred Defendants' motion to Magistrate Judge Robert W. Lehrburger for a Report and Recommendation ("R&R"). (Dkt. No. 30) On May 12, 2022, Judge Lehrburger issued a 27-page R&R recommending that the Defendants' motion to dismiss be granted for lack of subject matter jurisdiction. (R&R (Dkt. No. 31)) Plaintiffs submitted objections to the R&R. (Pltf. Objs. (Dkt. No. 37))

For the reasons stated below, Plaintiff's objections will be overruled, and Judge Lehrburger's recommendation that the Complaint be dismissed for lack of subject matter jurisdiction will be adopted.

Appendix C

BACKGROUND

I. FACTS[2]

Next Generation is a computer software consulting company. The Company employs Deo and is the sponsor of a 2009 H-1B petition, filed via Form I-129, to employ Deo as a computer programmer for three years. (Cmplt. (Dkt. No. 1) ¶¶ 7, 16)

On July 27, 2009, USCIS approved Next Generation's petition, thus authorizing Deo to apply for an H-1B visa at a U.S. consulate. (Cmplt. (Dkt. No. 1) ¶ 19) Deo did not apply for an H-1B visa through a U.S. consulate, however. She instead entered the United States on November 22, 2009, as a "Nonimmigrant Visitor," which corresponds to a status of B-2. (*Id.*)

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2. Because the parties have not objected to the R&R's factual statement, this Court adopts it in full. (R&R (Dkt. No. 31) ¶¶ 2-7) *See Syville v. City of New York*, No. 20-CV-4633 (PGG)(JLC), 2022 WL 16541162, at *1 (S.D.N.Y. Oct. 28, 2022) ("Because the parties have not objected to Judge Cott's factual statement, this Court adopts it in full."); *See Silverman v. 3D Total Solutions, Inc.*, No. 18-CV-10231 (AT), 2020 WL 1285049, at *1 n.1 (S.D.N.Y. Mar. 18, 2020) ("Because the parties have not objected to the R&R's characterization of the background facts . . . , the Court adopts the R&R's 'Background' section and takes the facts characterized therein as true."); *See Hafford v. Aetna Life Ins. Co.*, No. 16-CV-4425 (VEC)(SN), 2017 WL 4083580, at *1 (S.D.N.Y. Sept. 13, 2017) ("The parties do not object to the Magistrate Judge's excellent recitation of the facts of this case, and the Court adopts them in full.").

Appendix C

On March 1, 2010, Next Generation filed an amended H-1B petition with USCIS to amend Deo's status from B-2 to H-1B specialty worker. (*Id.* ¶ 20) USCIS denied the amended petition for failure to submit the $1,500 filing fee, prompting Next Generation to file a second amended petition with the required fee. (*Id.* ¶¶ 21, 22) On August 2, 2010, USCIS issued a request for evidence regarding the second amended petition. Next Generation filed a response on September 10, 2010. (*Id.* ¶¶ 23, 24) USCIS then determined that Next Generation had provided false information in its second amended petition and issued a Notice of Intent to Revoke the approval of the initial H-1B petition. (*Id.* ¶ 25)

On October 18, 2010, Next Generation provided additional information and evidence to USCIS in response to the Notice of Intent to Revoke. (*Id.* ¶ 26) However, on November 30, 2010, USCIS revoked approval of the initial H-1B petition, and on December 14, 2010, USCIS denied Next Generation's second amended petition as being "the same or similar" to the initial petition for which approval had been revoked. (*Id.* ¶¶ 28-31)

On December 16, 2010, Next Generation filed an appeal with the Administrative Appeals Office challenging USCIS's revocation of the approval for the initial H-1B petition. (*Id.* ¶ 32) On November 3, 2012, the Administrative Appeals Office dismissed the appeal, finding that Next Generation had not demonstrated that (1) Deo's position qualified as a "specialty occupation"; or (2) a "credible offer of H-1B caliber employment existed at the time of the filing and for the duration of the beneficiary's stay." (*Id.* ¶ 32; Certified Admin. Record (Dkt. No. 23-2) at 25)

Appendix C

On July 20, 2015, Next Generation brought an action in this District alleging that USCIS had acted arbitrarily and capriciously in revoking its approval of the original H-1B petition and in denying the second amended petition. (Cmplt. (Dkt. No. 1) ¶ 46) In a September 29, 2017 decision, Magistrate Judge Freeman remanded the case to USCIS for additional administrative proceedings. (*Id.* ¶ 48) *See Next Generation Tech., Inc. v. Johnson ("Next Generation I")*, 328 F. Supp. 3d 252 (2017).

On February 23, 2018—after remand—USCIS issued a notice of "intent to dismiss and request for evidence" to Next Generation. Next Generation submitted a response to the agency's inquiries, but claimed that the notice of intent was beyond the scope of this Court's remand. (Cmplt. (Dkt. No. 1) ¶¶ 61-64) On July 31, 2019, the Administrative Appeals Office issued a final decision upholding the USCIS's notice of intent to dismiss and concluding that USCIS had properly revoked its approval of Next Generation's initial H-1B petition and properly denied Next Generation's second amended petition. (*Id.* ¶¶ 65-75)

II. PROCEDURAL HISTORY

The Complaint was filed on February 17, 2021, and alleges that USCIS and the Administrative Appeals Office violated Judge Freeman's remand order by ignoring the scope of the remand and raising new grounds for revocation of the initial approval and denial of the second amended petition. (Cmplt. (Dkt. No. 1) ¶¶ 83-85)

Appendix C

On August 17, 2021, Defendants moved to dismiss, pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. (Def. Mot. (Dkt. No. 26)) Plaintiffs filed their opposition on October 1, 2021, and Defendants filed a reply on November 12, 2021. (Pltf. Opp. (Dkt. No. 29); Def. Reply Br. (Dkt. No. 28))

On December 29, 2021, this Court referred Defendants' motion to Judge Lehrburger for an R&R. (Dkt. No. 30) Judge Lehrburger issued an R&R on May 12, 2022, recommending that the Complaint be dismissed for lack of subject matter jurisdiction. (R&R (Dkt. No. 31)) Plaintiffs filed objections to the R&R on July 29, 2022. (Pltf. Objs. (Dkt. No. 37)) On August 12, 2022, Defendants filed a response to Plaintiffs' objections. (Def. Resp. (Dkt. No. 38))

DISCUSSION

I. LEGAL STANDARDS

A. Review of a Magistrate Judge's Report and Recommendation

A district court reviewing a magistrate judge's report and recommendation "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). "'The district judge evaluating a magistrate judge's recommendation may adopt those portions of the recommendation, without further review, where no

specific objection is made, as long as they are not clearly erroneous.'" *Gilmore v. Comm'r of Soc. Sec.*, No. 09-CV-6241 (RMB)(FM), 2011 WL 611826, at *1 (S.D.N.Y. Feb. 18, 2011) (quoting *Chimarev v. TD Waterhouse Investor Servs., Inc.*, 280 F. Supp. 2d 208, 212 (S.D.N.Y. 2003)). A decision is "clearly erroneous" when, "upon review of the entire record, [the court is] left with the definite and firm conviction that a mistake has been committed." *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006) (quotation marks and citation omitted).

Where a timely objection has been made to a magistrate judge's recommendation, the district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). However, "[o]bjections that are 'merely perfunctory responses argued in an attempt to engage the district court in a rehashing of the same arguments set forth in the original [papers] will not suffice to invoke de novo review.'" *Phillips v. Reed Grp., Ltd.*, 955 F. Supp. 2d 201, 211 (S.D.N.Y. 2013) (second alteration in original) (quoting *Vega v. Artuz*, No. 97-CV-3775 (LTS)(JCF), 2002 WL 31174466, at *1 (S.D.N.Y. Sept. 30, 2002)). "To the extent . . . that the party . . . simply reiterates the original arguments, [courts] will review the Report strictly for clear error." *IndyMac Bank, F.S.B. v. Nat'l Settlement Agency, Inc.*, No. 07-CV-6865 (LTS)(GWG), 2008 WL 4810043, at *1 (S.D.N.Y. Nov. 3, 2008) (citations omitted); *see also Ortiz v. Barkley*, 558 F. Supp. 2d 444, 451 (S.D.N.Y. 2008) ("Reviewing courts should review a report and recommendation for clear error where objections are merely perfunctory responses, . . .

rehashing . . . the same arguments set forth in the original petition." (quotation marks and citations omitted)).

"Courts generally do not consider new evidence raised in objections to a magistrate judge's report and recommendation." *Tavares v. City of New York*, No. 08-CV-3782 (PAE), 2011 WL 5877548, at *2 (S.D.N.Y. Nov. 23, 2011) (citation omitted). "The submission of new evidence following [a magistrate judge's R&R] is merited only in rare cases, where the party objecting . . . has offered a most compelling reason for the late production of such evidence, or a compelling justification for [the] failure to present such evidence to the magistrate judge." *Fischer v. Forrest*, 286 F. Supp. 3d 590, 603 (S.D.N.Y. 2018), *aff'd*, 968 F.3d 216 (2d Cir. 2020) (quotation marks and citations omitted). Similarly, courts do not consider "'new arguments raised in objections to a magistrate judge's report and recommendation that could have been raised before the magistrate but were not.'" *United States v. Gladden*, 394 F. Supp. 3d 465, 480 (S.D.N.Y. 2019) (quoting *Hubbard v. Kelley*, 752 F. Supp. 2d 311, 313 (W.D.N.Y. 2009)).

B. Rule 12(b)(1) Motion to Dismiss

"[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit ([i.e.,] subject-matter jurisdiction). . . ." *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district

court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). Where subject matter jurisdiction is challenged, a plaintiff "bear[s] the burden of 'showing by a preponderance of the evidence that subject matter jurisdiction exists.'" *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (quoting *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003)). "In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may consider evidence outside the pleadings." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (citing *Makarova*, 201 F.3d at 113), *aff'd*, 561 U.S. 247 (2010).

In ruling on a Rule 12(b)(1) motion, a court "must accept as true all material factual allegations in the complaint, but [is] not to draw inferences from the complaint favorable to plaintiffs." *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004). The court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but . . . may not rely on conclusory or hearsay statements contained in the affidavits." *Id.* A court may also "consider 'matters of which judicial notice may be taken.'" *Greenblatt v. Gluck*, No. 03-CV-597 (RWS), 2003 WL 1344953, at *1 n.1 (S.D.N.Y. Mar. 19, 2003) (quoting *Hertz Corp. v. City of New York*, 1 F.3d 121, 125 (2d Cir. 1993)).

"Where, as here, the defendant moves for dismissal under Rule 12(b)(1) . . . as well as on other grounds, the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter

jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990) (quotation omitted).

1. Mootness

Mootness "is a condition that deprives the court of subject matter jurisdiction." *Fox v. Board of Trustees of the State University of New York*, 42 F.3d 135, 140 (2d Cir. 1994). "The mootness doctrine, which is mandated by the 'case or controversy' requirement in Article III of the United States Constitution, requires that federal courts may not adjudicate matters that no longer present an actual dispute between parties." *Catanzano v. Wing*, 277 F.3d 99, 107 (2d Cir. 2001). "Thus, when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome, . . . a case is moot, and the federal court is divested of jurisdiction over it." *Id.* (internal quotation marks and citations omitted).

II. ANALYSIS

Judge Lehrburger recommends that this Court grant Defendants' motion to dismiss on the basis that Plaintiffs' claims are moot. (R&R (Dkt. No. 31) at 26)[3] Judge Lehrburger finds that this Court lacks subject matter jurisdiction over Plaintiffs' claim for H-1B visa

3. The page numbers of documents referenced in this Order correspond to the page numbers designated by this District's Electronic Case Files ("ECF") system.

status because "[t]he validity period for Deo's unawarded H-1B visa expired over ten years ago, and there no longer are any visa numbers that can be granted for the relevant [time] period." (*Id.* at 13) He rejects Plaintiffs' assertion that Defendants' mootness argument is barred by Judge Freeman's 2017 decision (*id.* at 9), and he finds that the exception for cases that are "capable of repetition, yet evading review" is not available here. (*Id.* at 23-25)

A. Finding that Plaintiffs' Claims Are Moot Because the Validity Period for Deo's H-1B Petition Has Expired

Defendants argue that "[P]laintiffs' claims are moot because there are no validity dates that can be approved for the Forms I-129." (Def. Br. (Dkt. No. 27) at 21) They note that Plaintiffs' Labor Condition Application ("LCA") requested a validity period of October 1, 2009 to September 28, 2012, and that "[a] Form I-129 cannot be approved for a period that 'exceed[s] the validity period of the labor condition application.'" (*Id.* at 12, 22 (quoting 8 C.F.R. § 214.2(h)(9)(iii)(A)(1)) (second set of brackets in Defendant's brief)) Defendants also assert that "a start date cannot be backdated." (*Id.* at 22) Given that "there is no live case or controversy as to whether USCIS properly denied [Next Generation]'s petitions seeking to employ Deo for [the October 1, 2009 to September 28, 2012] period, . . . the relief sought (i.e., H-1B status with a validity period through September 2012) is no longer available and cannot be awarded." (*Id.* at 23)

Judge Lehrburger accepts Defendants' argument, finding that the dispute between the parties is moot because the validity period for Plaintiffs' petition has long since expired. (R&R (Dkt. No. 31) at 13-14, 18)

1. Plaintiffs' Objections

Plaintiffs object to Judge Lehrburger's recommendation that their claims be dismissed on mootness grounds.

Plaintiffs contend that they "are always free to file a new [LCA] reflecting a change in the years," and they state that they "intend to file such application . . . within the next two [] weeks." (Pltf. Objs. (Dkt. No. 37) at 2-3) According to Plaintiffs, this Court can "reinstate [Deo's H-1B] status and order Defendants to approve a new employment starting period for the beneficiary Deo, made contingent on Plaintiffs obtaining a new [LCA] from the U.S. Department of Labor." (*Id.* at 3)

Plaintiffs also argue that "the expiration of the initial employment period without an approved H-1B was caused by Defendants. . . . [and] Defendants should not be allowed to have caused the so-called 'mootness,' and then use the Defendants-created mootness to claim this Court's lack of subject-matter jurisdiction and thus defeat the redressability by this Court of Defendants' wrongs. This would go against the core of what the United States Constitution stands for." (*Id.* at 4)

Plaintiffs further contend that—even if the Court cannot reinstate Defendants' petition because of the

expired validity period—there is still a live case or controversy because the Complaint seeks an award of costs and attorneys' fees, as well as "'any and all other relief . . . that may be available that this Court deems just and proper,'" which could include nominal damages. (*Id.* at 5-6 (quoting Cmplt. (Dkt. No. 1) at 94))

Finally, Plaintiffs argue that their claims are not moot because this Court has the "power to reinstate the petition approval nunc pro tunc to allow Deo a fresh validity period." (*Id.* at 7-8 (citing *Edwards v. INS*, 393 F.3d 299 (2d Cir. 2004)))

2. Standard of Review

Plaintiffs' argument that they can file a new LCA merely rehashes an argument they made in their opposition papers, and that Judge Lehrburger rejects. (Pltf. Opp. (Dkt. No. 29) at 29-31; R&R (Dkt. No. 31) at 14-15 ("There is no LCA supporting a 'fresh' validity period more than ten years later. Of course, as Plaintiffs recognize, they are free to file a new labor condition application reflecting a change in the years for which the visa is now requested. . . . But that is not the issue before the Court."))

Similarly, Plaintiffs' argument about nunc pro tunc relief echoes the argument they made in their opposition, and cites the same case: *Edwards v. I.N.S.* (Pltf. Opp. (Dkt. No. 29) at 23-24, 30-31 (citing *Edwards*, 393 F.3d at 308-10)) Judge Lehrburger distinguishes Edwards and rejects Plaintiffs' arguments about nunc pro tunc relief,

which they repeat in their objections. (R&R (Dkt. No. 31) at 14-18 (distinguishing Edwards as involving denial of an alien's right to habeas relief, and stating that "Plaintiffs . . . do not provide any examples of courts granting nunc pro tunc relief in the context of an H-1B petition or for any other visa with an expired validity period"))

Plaintiffs' objections regarding the core values of the Constitution and their request for an award of attorneys' fees and costs and/or nominal damages are improperly raised for the first time in response to the R&R. *See Gladden*, 394 F. Supp. 3d at 480 ("[A] district judge will not consider new arguments raised in objections to a magistrate judge's report and recommendation that could have been raised before the magistrate but were not.") (quotation omitted).

Given these circumstances, this Court reviews the R&R's recommendation regarding the expiration of the validity period for clear error only. *See Phillips*, 955 F. Supp. 2d at 211; IndyMac Bank, 2008 WL 4810043, at *1; *Tavares*, 2011 WL 5977548, at *2; *Gladden*, 394 F. Supp. 3d at 480.

* * * *

In deciding that the expiration of the validity period renders this case moot, Judge Lehrburger cites statutes and regulations providing that an LCA is a "necessary component of an [H-1B] visa petition." (R&R (Dkt. No. 31) at 13 n.9 (citing 8 C.F.R. § 214.2(h)(4)(i)(B)(1) ("Before filing a petition for H-1B classification in a specialty

occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.") and 8 U.S.C. § 1182(n) ("No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating [relevant details of the proposed employment]."))) Judge Lehrburger also notes that "[H-1B] visas are approved for a specific period of time not to exceed three years—the validity period [of the LCA]." (*Id.* at 13 (citing 8 C.F.R. § 214.2(h)(9)(iii)(A)(1) and *Dandamudi v. Tisch*, 686 F.3d 66, 70 (2d Cir. 2012)))

Because the validity period of Next Generation's petition—under the applicable LCA—"was from October 1, 2009 to September 28, 2012," and because this "period expired almost a decade [before the R&R]," Judge Lehrburger correctly concludes that—even if "the Court were to reinstate the approval of the Initial Petition"—"Deo would have an approved Form I-129 with a valid employment through 2012," which would not be "an effectual remedy." (*Id.* at 13-14) The R&R cites case law holding that where the deadline for a petitioner's adjustment of immigration status has passed, the petitioner's request for a court to order a change to his or her immigration status is moot. (*Id.* at 14 (citing *Zapata v. I.N.S.*, 93 F. Supp. 2d 355, 358 (S.D.N.Y. 2000) ("Because [the relevant deadline] has passed, the INS cannot now be required to rule by that date on [petitioners'] application for adjustment of status. Accordingly, [petitioners'] . . . request for injunctive relief is plainly moot. . . .") and

Sadowski v. U.S. I.N.S., 107 F. Supp. 2d 451, 454 (S.D.N.Y. 2000) ("When a relevant deadline for adjustment of status has passed, a request for relief is deemed plainly moot, depriving courts of subject matter jurisdiction.")); *see also id.* at 16-17 (noting that in the diversity visa context, the Second, Fifth, and Eleventh Circuits "have found that challenges to the denial of a . . . status adjustment application become[] moot after the relevant . . . period has expired because the district court can no longer provide meaningful relief") (citing *Mohamed v. Gonzales*, 436 F.3d 79, 81 (2d Cir. 2006); *Ermuraki v. Renaud*, 987 F.3d 384, 386 (5th Cir. 2021); and *Nyaga v. Ashcroft*, 323 F.3d 906, 916 (11th Cir. 2003)))

Judge Lehrburger also correctly concludes that nunc pro tunc relief is not available, finding that "[this] remedy does not . . . have . . . a history as applied to the scenario presented here." The case law in this Circuit indicates only "the potential, but not guaranteed, availability of nunc pro tunc relief in inapt and exceptional circumstances." (R&R (Dkt. No. 31) at 15 (citing *Edwards*, 393 F.3d at 308; and *Iavorski v. U.S.I.N.S.*, 232 F.3d 124, 130 n. 4 (2d Cir. 2000)))

This Court finds no error in Judge Lehrburger's determination that the expiration of the validity period renders the instant dispute moot, and his recommendation on this point will be adopted by this Court.[4]

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4. As to Plaintiffs' argument that their request for an award of attorneys' fees, costs, and nominal damages presents a live "case or controversy," an "interest in [attorneys'] fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Cont'l Bank Corp.,* 494

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B. Finding that Plaintiffs' Claims Are Moot Because There Are No Available H-1B Visa Numbers for the 2009 to 2012 Time Period

Defendants argue that "[P]laintiffs do not have a redressable injury because[, pursuant to the cap on H-1B visas that Congress set,] there are no longer H-1B visa numbers available for the relevant years." (Def. Br. (Dkt. No. 27) at 23) Accordingly, "[e]ven if [Plaintiffs'] April 2009 Form I-129 were re-opened, the relief sought is no longer available due to . . . the lack of available visa numbers. If the Court were to provide declaratory relief despite . . . the fact that the agency cannot grant the requested relief, it would be issuing an advisory opinion." (*Id.* at 26)

U.S. 472, 480 (1990). Likewise, the possibility of nominal damages is an insufficient basis for federal jurisdiction where "there is . . . no specific mention in the Complaint of nominal damages," and "a request for such damages [cannot] be inferred from the language of the Complaint." *Fox,* 42 F.3d at 141 (quotation omitted). Here, the Complaint does not mention nominal damages, and this Court rejects Plaintiffs' argument that the Complaint's boilerplate request for "any and all other relief " (Cmplt. (Dkt. No. 1) at 94) implies such a request.

Plaintiffs' argument concerning fairness and the core values of the Constitution is vague and conclusory, and they cite no case suggesting that application of the mootness doctrine here violates the Constitution.

For these reasons, even if this Court were to consider Plaintiffs' arguments regarding attorneys' fees and costs, nominal damages, and the core values of the Constitution—arguments that are improperly raised for the first time in Plaintiffs' objections to the R&R—they would not be persuasive.

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Judge Lehrburger recommends that this Court hold that the lack of available H-1B visa numbers renders the parties' dispute moot:

> It is undisputed that the H-1B numerical cap for Deo's requested validity period had been reached by December 2009. Deo did not receive any of those numbers. That is because, although her Initial Petition had been approved, Deo failed to take the necessary steps—attending an interview and providing required documentation at a consulate abroad—to obtain H-1B status in the fall of 2009 or at any time thereafter. . . . In seeking reinstatement of approval of Deo's H-1B status, Plaintiffs essentially ask this Court to ignore the Congressionally-set limits for H-1B visas. . . . [Because] the cap for the relevant years was exhausted long ago, [t]here is no relief the Court can order to "recapture" even one of those for Plaintiffs. . . . In sum, Plaintiffs' claim is moot not only due to expiration of the validity period, but also because the numerical cap for the relevant period was met.

(R&R (Dkt. No. 31) at 19-23 (citations omitted))

Because Plaintiffs do not object to this recommendation, it will be reviewed solely for clear error. *See Gilmore*, 2011 WL 611826, at *1.

In concluding that the lack of "cap visa numbers available for the relevant years of Deo's petition [renders

the parties' dispute moot]," the R&R cites statutes providing that, from 2009 to 2012—the relevant time period—the number of H-1B visas was "strictly limit[ed] . . . to no more than 85,000 in each fiscal year." (R&R (Dkt. No. 31) at 18-19 (citing 8 U.S.C. §§ 1184(g)(1)(A)(vii) and (5)(C)) The R&R correctly notes that it is undisputed that there are no longer any visa numbers available for the 2009 to 2012 time period, because the caps were reached long ago. (*Id.* at 19; *see* Def. Br. (Dkt. No. 27) at 23 ("[T]here are no longer H-1B cap visa numbers available for the relevant years."); Pltf. Opp. (Dkt. No. 29) at 12 (referring to "the H-1B cap . . . having been reached long ago")) Judge Lehrburger goes on to cite case law holding that in such circumstances a visa applicant does not have a redressable injury. (*Id.* at 20-21 (citing *Nat'l Basketball Retired Players Ass'n v. U.S.C.I.S.*, No. 16 CV 09454, 2017 WL 2653081, at *4 (N.D. Ill. June 20, 2017) ("This Court cannot raise the numerical caps that Congress has set by statute. To the extent that the petition was for [a] fiscal year [for which the cap has been reached], . . . the plaintiffs lack standing[,] because they have failed to establish that a favorable ruling by this Court is likely to redress their alleged injury."); and *Alpha K9 Pet Servs. v. Johnson*, 171 F. Supp. 3d 568, 580-81 (S.D. Tex. 2016) (holding that plaintiffs seeking H-2B visas for the 2015 fiscal year "lack[ed] redressability" because "USCIS ha[d] already reached its statutory H-2B visa cap for the 2015 fiscal year"))

Judge Lehrburger also correctly distinguishes *Espindola v. United States Dep't of Homeland Sec.*, No. 120CV1596MADDJS, 2021 WL 3569840 (N.D.N.Y. Aug.

12, 2021))—cited by Plaintiffs—where the Court rejected a mootness argument, finding that the Government had "'merely received sufficient H-1B petitions to issue the maximum number of visas'" but—unlike here—"had not actually issued the maximum number." (*Id.* at 22 (quoting Espindola, 2021 WL 3569840, at *3); *see* Pltf. Opp. (Dkt. No. 29) at 27 (discussing Espindola))

This Court agrees with Judge Lehrburger that because the visa cap number for the relevant time period was reached long ago, Plaintiffs have no redressable injury. Accordingly, Judge Lehrburger's recommendation concerning this point will be adopted.

C. Finding that Defendants' Mootness Argument Is Not Precluded

Plaintiffs contend that Defendants are precluded from arguing mootness because (1) they did not argue mootness before Judge Freeman; and (2) Judge Freeman "already determined that there is subject matter jurisdiction and standing under Article III as a matter of fact and law." (Pltf. Opp. (Dkt. No. 29) at 12)

Judge Lehrburger concludes that the litigation before Judge Freeman presents no bar to Defendants' mootness argument. In so finding, Judge Lehrburger notes that in Next Generation I, "Judge Freeman did not . . . decide the [mootness] issue raised here," but rather "held that [Next Generation] had standing to challenge USCIS' decision." (R&R (Dkt. No. 31) at 10 (citing *Next Generation I*, 328 F. Supp. 3d at 264-65)) Therefore, "[t]he doctrine of collateral estoppel—or issue preclusion—[] does not

apply." (*Id.*) As for Plaintiffs' argument that Defendants waived their mootness argument by not raising it before Judge Freeman, Judge Lehrburger concludes that "Defendants are [not] precluded from asserting the mootness argument merely because they did not do so before Judge Freeman. Under well-established law, federal subject matter jurisdiction can never be waived or forfeited; a party therefore may raise the issue at any point in a case." (*Id.* at 11)

Plaintiffs object to this finding, asserting that "the Southern District Court has already determined that there is subject matter jurisdiction and standing under Article III as a matter of fact and law," and that "[t]he arguments presented now could have been presented when jurisdiction and standing were at issue in prior proceedings and were readily available when the matter was first before the Court." (Pltf. Objs. (Dkt. No. 37) at 9) This objection merely rehashes the arguments Plaintiffs made before Judge Lehrburger. Accordingly, as to this portion of the R&R, this Court conducts only clear error review. *See Ortiz*, 558 F. Supp. 2d at 451.

This Court finds no error in Judge Lehrburger's analysis. Mootness goes to subject matter jurisdiction, and an issue of subject matter jurisdiction can never be waived. *See Fox*, 42 F.3d at 140 ("When a case becomes moot, the federal courts lack subject matter jurisdiction over the action. Defects in subject matter jurisdiction cannot be waived and may be raised at any time during the proceedings.") (quotation omitted); *United States v. Bond*, 762 F.3d 255, 263 (2d Cir. 2014) ("'The absence of subject matter jurisdiction is non-waivable.'") (quoting *Consol.*

Edison Co. of N.Y. v. UGI Utils., 423 F.3d 90, 103 (2d Cir. 2005)). Similarly, Plaintiffs' arguments regarding the alleged preclusive effect of Judge Freeman's decision in Next Generation I are not persuasive, because "principles of estoppel do not apply to subject matter jurisdiction determinations." *L.A. v. New York City Dep't of Educ.*, No. 1:20-CV-05616-PAC, 2021 WL 1254342, at *4 (S.D.N.Y. Apr. 5, 2021) (citing *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). For these reasons, this Court will adopt Judge Lehrburger's finding that Defendants' mootness argument is not precluded.

D. Finding that the "Capable of Repetition, Yet Evading Review" Exception to Mootness Does Not Apply

Plaintiffs argue that they "continue to have standing despite the expiration of the period in which Deo initially sought the [H-1B] visa based on the 'exception to mootness for cases capable of repetition, yet evading review,' which 'applies when (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.'" (Pltf. Opp. (Dkt. No. 29) at 32 (quoting *In re Zarnel*, 619 F.3d 156, 162 (2d Cir. 2010)) (further quotation omitted; brackets in Zarnel)) According to Plaintiffs, "[t]he first element is clearly fulfilled since the initial[] validity period has expired, proving far too short to pursue the matter to its conclusion in litigation," and "[t]he second element is also satisfied given the agency's record of ill-treatment of the Plaintiffs' petition from the time it was revoked to the most recent decision on remand from the

District Court." Plaintiffs contend that this background supports an inference that "the agency will persist in striking petitions filed by [Next Generation] in the future in a similar manner." (*Id.* at 32-33, 36 (quotations and brackets omitted))

In his R&R, Judge Lehrburger finds that Next Generation's claim that it will suffer future harm in connection with sponsor petitions it submits on behalf of other individuals is "far too speculative," and that "Plaintiffs do not set forth any factual basis for the claim that they will be victimized again." (R&R (Dkt. No. 31) at 23-24) He therefore concludes that Plaintiffs have not made a "sufficient showing" as to "the reasonable expectation element" and cannot "invoke the exception," even if the first element of the exception—duration—is satisfied. (*Id.* at 23-25)

Plaintiffs object to this determination, arguing that

> [i]f this Court refuses to grant Deo any relief, [she will] start accruing an unlawful presence in the United States, and [USCIS will] undoubtedly initiate removal proceedings against [her] in the Immigration Court. Because the U.S. Department of Justice . . . which has already taken a harsh position toward Plaintiffs, particularly Deo, exerts much influence on the immigration courts and the Board of Immigration Appeals, it is highly likely that Deo will be denied any relief from removal. In turn, Deo's removal will certainly end up again here before this Court or the

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> Second Circuit Court of Appeals, [with the Court asked] to re-examine [the potential] forms [of] relief [from] removal for which [Deo] is eligible, including a new petition for an [H-1B] visa.

(Pltf. Objs. (Dkt. No. 37) at 8)

This argument was not made before Judge Lehrburger, and in any event is speculative. The prospect that USCIS might initiate removal proceedings against Deo in the future, and that an appeal of the outcome of those proceedings might require an Article III court to consider Deo's eligibility for an H-1B visa, requires multiple assumptions and logical leaps. And even assuming arguendo that these future proceedings will take place, a removal proceeding is not the "same action" as a dispute over an H-1B visa petition. Accordingly, Plaintiffs have not "demonstrate[d] that there is a reasonable expectation that [they] will be subjected to the same actions again." (R&R (Dkt. No. 31) at 23)

For these reasons, this Court finds no error in Judge Lehrburger's determination that the "capable of repetition, yet evading review" exception to the mootness doctrine does not apply here.

CONCLUSION

For the reasons states above. Plaintiffs' objections to the R&R are overruled, and Judge Lehrburger's recommendation that the Complaint be dismissed for lack

of subject matter jurisdiction is adopted.[5] The Clerk of Court is directed to terminate the motion (Dkt. No. 26), to enter judgment, and to close this case.

SO ORDERED.

/s/ Paul G. Gardephe
Paul G. Gardephe
United States District Judge

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5. The R&R recommends that dismissal be without prejudice. (R&R (Dkt. No. 31) at 26) Because Plaintiffs' claims are moot, however, they are not subject to cure. Accordingly, the Complaint is dismissed with prejudice. *See Pierce v. Fordham Univ., Inc.*, No. 15-CV-4589 (JMF), 2016 WL 3093994, at *7 (S.D.N.Y. June 1, 2016)(denying leave to amend because "'better pleading will not cure' the mootness of Plaintiff 's claims against the Government Defendants")(quoting *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000)), *aff 'd*, 692 F. App'x 644 (2d Cir. 2017); *Rodriquez v. Touchette,* No. 5:19-CV-143-GWC-JMC, 2020 WL 2322615, at *7 (D. Vt. May 11, 2020)("Because [Plaintiff 's] action is barred for mootness, failure to exhaust administrative remedies, and the doctrine of sovereign immunity, the defects in his Complaint cannot be cured by amendments."), report and recommendation adopted, No. 5:19-CV-143, 2020 WL 3896848 (D. Vt. July 9, 2020). The preclusive effect of this ruling is, of course, limited to the facts and analysis underlying the mootness determination. *See Hell's Kitchen Neighborhood Ass'n v. Bloomberg*, No. 05 CIV. 4806 (SHS), 2007 WL 3254393, at *6 (S.D.N.Y. Now. 1, 2007) (contruing prior discontinuance "with prejudice" on mootness grounds as limited to "the question decided therein, i.e., the mootness of the claims")(quotation omitted); *Bank v. Spark Energy Holdings, LLC*, No. 13-CV-6130 ARR LB, 2014 WL 2805114, at *4-5 (E.D.N.Y. June 20, 2014)(same).

APPENDIX D — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MAY 12, 2022

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

21-CV-1390 (PGG) (RWL)

NEXT GENERATION TECHNOLOGY, INC. AND PUSPITA DEO,

Plaintiffs,

- against –

UR. M. JADDOU, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,[1]

Defendants.

May 12, 2022, Decided
May 12, 2022, Filed

REPORT AND RECOMMENDATION TO HON. PAUL G. GARDEPHE: MOTION TO DISMISS

ROBERT W. LEHRBURGER, United States Magistrate Judge.

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1. Ur M. Jaddou, Alejandro Mayorkas, and Merrick Garland are automatically substituted for Larry C. Denayer, Peter T. Gaynor, and Jeffrey Rosen. *See* Fed. R. Civ. P. 25(d).

Appendix D

The United States Citizenship and Immigration Services ("USCIS") approved and then revoked its approval of H1-B visa status for Puspita Deo ("Deo"), a designated employee of the visa applicant Next Generation Technology, Inc. ("NGT"). NGT and Deo (collectively "Plaintiffs") filed an action challenging that decision, and the Court remanded the matter to USCIS for further consideration. On remand, USCIS reached the same conclusion.

Plaintiffs now bring this action for declaratory relief pursuant to the Administrative Procedures Act ("APA"), claiming that USCIS arbitrarily and capriciously acted beyond the scope of remand and improperly raised grounds for its decision not previously addressed in any of the agency's prior notices or decisions. Plaintiffs request the Court to order Defendants to reinstate Deo's H-1B status, award attorney's fees and costs, and grant any equitable relief that may be available.

Defendants move to dismiss the complaint pursuant to Federal Rules Of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim. Defendants assert that Plaintiffs' claims for relief are moot because the Court cannot provide any effectual relief, and thus the Court lacks subject matter jurisdiction. The Court agrees and recommends that the motion be GRANTED.

Appendix D

BACKGROUND

The factual history of this case is extensive. The case spans over a decade, and the administrative record consists of more than 1,200 pages. To streamline matters, the Court incorporates by reference the factual background penned by Magistrate Judge Debra Freeman in her decision to remand, *Next Generation Technology, Inc. v. Johnson*, 328 F. Supp. 3d 252 (S.D.N.Y. 2017) ("*Next Generation I*"). Below is a summary of the factual and procedural background relevant to the instant motion. As required on a motion to dismiss, the Court accepts as true all well-pled allegations of the Complaint and draws all reasonable inferences in favor of Plaintiffs, the non-moving parties.

A. The H-1B Nonimmigrant Visa Program

The H-1B visa program enables U.S. employers to temporarily employ foreign nationals to work in "specialty" occupations that require both "theoretical and practical application of a body of specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." *Next Generation I*, 328 F. Supp. 3d at 257 (quoting 8 U.S.C. § 1184(h)(3)). The regulations identify the standards and criteria a position must meet to be considered a specialty occupation, as well as the qualifications beneficiaries must possess to be awarded the visa. See 8 C.F.R. § 214.2(h)(4)(iii)(A); § 214.2(h)(4)(iii)(C)(1)-(4).

To begin the process of acquiring an H-1B visa, an employer must file a petition, the Form I-129, with USCIS on behalf of the alien beneficiary. 8 U.S.C. § 1184(c)(1); 8 C.F.R. § 214.2(h)(4)(i)(B)(1). If the Form I-129 is approved, the beneficiary must take additional steps, such as interviewing and providing requested documentation to a consulate abroad, before obtaining a visa. 8 U.S.C. § 1184(c)(1); 8 C.F.R. § 214.1(a)(3). The dispute in this case arises from an application filed by NGT seeking to obtain an H1-B visa for Deo.

B. NGT's Application To Obtain An HB-1 Visa For Deo

NGT is "an information technology firm specialized in providing IT services, custom software solutions and development." (R. 256.[2]) As of the filing of this action on February 17, 2021, NGT had 45 employees and a gross annual income of approximately $6.5 million. (Compl. ¶ 14.) Deo is a native and citizen of India and has a Ph.D. in Computer Science from Dublin City University in Ireland. (Compl. ¶¶ 13, 16.)

On April 1, 2009, NGT filed an H-1B Petition for Nonimmigrant Worker with USCIS to employ Deo in the specialty position of computer programmer for three years (the "Initial Petition"). (Compl. ¶ 16.) The period of employment was to be from October 9, 2009 to September 30, 2012. (Compl. ¶ 16.) On June 9, 2009, USCIS issued a Request for Evidence ("RFE") seeking additional

2. "R." refers to the certified administrative record (Dkt. 23).

information to clarify, among other matters, NGT's "employer-employee relationship with the beneficiary;" NGT provided the requested information on July 18, 2009. (Compl. ¶¶ 17, 18.)

On July 27, 2009, USCIS approved NGT's Initial Petition, placing Deo in valid status as a specialty worker for NGT from July 28, 2009 until September 28, 2012. (Compl. ¶ 19.) Instead of taking the next step to apply for her H-1B visa at the U.S. consulate in Amsterdam, however, Deo left for the U.S. and re-entered on November 22, 2009 as a B-2 Nonimmigrant Visitor for a period not to exceed May 23, 2010.[3] (Compl. ¶ 20; R. 66, 126.) Still in need of a visa for the full employment period, NGT filed an amended H-1B Petition with USCIS on March 1, 2010 (the "Amended Petition") to amend DEO's status to that of an H-1B specialty worker. (Compl. ¶ 20.) On May 26, 2010, USCIS issued a decision construing the petition as a request for "change of status" from B-2 to H-1B and denying it for failure to submit the required $1,500 filing fee for initial H-1B petitions. (Compl. ¶ 21.) On June 9, 2010, NGT filed a second amended H-1B petition ("Second Amended Petition") with the proper $1,500, but USCIS returned the $1,500 as not required on the basis that Deo was already in valid H-1B status. (Compl. ¶ 22.) On August 2, 2010, USCIS issued another RFE on the Second

3. A B-2 non-immigrant visitor visa enables non-U.S. citizens to legally enter the United States temporarily for pleasure, tourism, amusement, visits with friends or relatives, and medical treatment. *See* 22 C.F.R. § 41.31(b)(2)(i). While on a B-2 visa, individuals are not eligible for employment in the United States. 8 C.F.R. § 214.1(e).

Amended Petition, and NGT responded addressing each request and providing evidence. (Compl. ¶¶ 23, 24.)

Determining that the Amended Petition contained false information, on September 26, 2010, USCIS issued a Notice of Intent to Revoke ("NOIR") the approval of the Initial Petition that had been granted in July 2009. (Compl. ¶ 25.) In response, on October 18, 2010, NGT responded to the NOIR and provided additional information and evidence of its business and employment relationship with Deo. (Compl. ¶¶ 26, 27.) Still, USCIS revoked approval of the Initial Petition on November 30, 2010, and denied the Amended Petition on December 14, 2010 as being the "same or similar to the previously approved petition" that had been revoked. (Compl. ¶¶ 26-31.) On December 16, 2010, NGT filed an appeal to the Administrative Appeals Office ("AAO") challenging revocation of the Initial Petition. (Compl. ¶¶ 32-36.) Almost two years later, on November 3, 2012, the AAO dismissed the appeal, finding the following: NGT had failed to establish that a "credible offer of H-1B caliber employment existed at the time of filing and for the duration of the beneficiary's requested stay" (R. 144); the "petitioner's lack of contracts, statements of work, or other such documentation precluded a finding that the beneficiary would be employed in a specialty occupation" (R. 144); NGT had failed to establish that the "petition was filed for non-speculative work for the beneficiary, for the entire period requested, that existed as of the time of the petition's filing" (R. 147); and that "the content of the NOIR comported with the regulatory notice requirements." (Compl. ¶¶ 37,38; R. 143.) NGT filed a motion to reconsider, but, after passage of almost

another two years, the AAO issued a final denial of the motion on October 16, 2014. (Compl. ¶¶ 40-45.)

C. *Next Generation I*

On July 20, 2015, Plaintiffs brought an action in this District challenging under the Administrative Procedure Act the final decision of USCIS revoking its approval of an H-1B visa petition and denial of its subsequently amended petition. (Compl. ¶ 46.) Plaintiffs moved for summary judgment claiming that the USCIS decisions were arbitrary and capricious; Defendants cross-moved for summary judgment arguing that the administrative decisions were proper and entitled to deference. (Compl. ¶ 47.)

On September 29, 2017, Judge Freeman issued her decision in *Next Generation I*, remanding administrative proceedings for reconsideration on the grounds that the agency "either disregarded evidence or failed to explain its reasons for rejecting evidence in the record that could have met the statutory requirements for an H-1B visa." *Next Generation I*, 328 F. Supp.3d at 265. The Court directed USCIS on remand "to reconsider its decisions regarding the H-1B visa petitions at issue here, in light of the evidence of Record favorable to Plaintiffs ... and, if USCIS decides upon reconsideration to discount that evidence, it is directed to articulate its reasons for doing so." *Id.* at 272-73.

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D. The Agency's Actions On Remand

Following remand on February 23, 2018, USCIS issued to NGT a notice of "intent to dismiss and request for evidence." (Compl ¶¶ 61-62.) The notice indicated the following reasons for the agency›s intent to dismiss: (1) the Initial Petition was automatically revoked by filing of the Amended Petition, which effectively withdrew the first (and unused) H-1B petition; (2) NGT had misrepresented the facts on its initial application, in particular, failing to indicate that it was H-1B dependent;[4] (3) specialty work was unavailable because the Initial Petition misrepresented a project completion date; and (4) the Amended Petition reflected a change in the projected assignments to the beneficiary. The notice of intent also posed a series of inquiries into Deo's employment, salary, and family relationship to NGT personnel. (Compl. ¶ 62.) Plaintiffs submitted a response claiming the notice of intent was beyond the scope of the District Court remand but responding to each of the agency's inquires. (Compl. ¶ 63.)

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4. A company is H1-B dependent if it meets one of the three standards: "(i) (A) The employer has 25 or fewer full-time equivalent employees who are employed in the U.S.; and (B) Employs more than seven H-1B nonimmigrants; (ii) (A) The employer has at least 26 but not more than 50 full-time equivalent employees who are employed in the U.S.; and (B) Employs more than 12 H-1B nonimmigrant[s]; or (iii) (A) The employer has at least 51 full-time equivalent employees who are employed in the U.S.; and (B) Employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees." 20 C.F.R. § 655.736(a). NGT qualified as an H-1B employer under 20 C.F.R. § 655.736(a)(ii).

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On July 31, 2019, the AAO issued a final decision concluding that the Director of USCIS properly revoked approval of the Initial Petition, affirming the Director's denial of the Second Amended Petition, and finding that the Director acted consistently with the District Court's remand order. (Compl. ¶ 65; *see* R. 812-30.) The AAO concluded that "[o]nce the Initial Petition was revoked, the Second Amended Petition was no longer eligible for a numerical exemption from the H-1B cap and became subject to the usual H-1B cap-subject filing requirements." (R. 828.)

E. The Instant Action

Plaintiffs commenced this action on February 17, 2021, alleging that USCIS did not reconsider its decision as instructed by Judge Freeman but instead addressed issues that were not before the District Court and announced new grounds for revocation and denial that had not been included in any of the agency's prior notices or decisions. (Compl. ¶ 61.) Defendants filed the instant motion to dismiss on August 17, 2021, and briefing was completed on November 17, 2021. Judge Gardephe referred the motion to me for a Report and Recommendation. (Dkt. 30.)

LEGAL STANDARDS

Defendants move to dismiss based on Federal Rule Of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction due to mootness, and Rule 12(b)(6) for failure to state a claim.

Appendix D

A. Rule 12(b)(1) Motion To Dismiss For Lack Of Subject Matter Jurisdiction

Under Rule 12(b)(1), a pleading may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A court must dismiss a claim if it "lacks the statutory or constitutional power to adjudicate it." *Morrison v. National Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (internal quotation marks omitted), *aff'd*, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transportation System, Inc.*, 426 F.3d 635, 638 (2d Cir. 2005). In deciding a Rule 12(b)(1) motion to dismiss, the Court "'must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff.'" *Morrison*, 547 F.3d at 170 (quoting *Natural Resources Defense Council v. Johnson*, 461 F.3d 164, 171 (2d Cir. 2006) (internal quotation omitted)). Additionally, the Court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue ...." *J.S. ex rel. N.S. v. Attica Central Schools*, 386 F.3d 107, 110 (2d Cir. 2004); *see also Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) ("In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court ... may refer to evidence outside the pleadings").

B. Rule 12(b)(6) Motion To Dismiss For Failure To State A Claim

Under Rule 12(b)(6), a pleading may be dismissed for "failure to state a claim upon which relief can be granted."

Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). A claim is facially plausible when the factual content pleaded allows a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

"Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1966). In considering a motion to dismiss, a district court must "accept[ ] all factual claims in the complaint as true, and draw[ ] all reasonable inferences in the [non-moving party's] favor." *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 403 (2d Cir. 2014) (internal quotation marks omitted). However, this tenet is "inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949-50. "[R]ather, the complaint's [f]actual allegations must be enough to raise a right to relief above the speculative level, ... *i.e.*, enough to make the claim plausible." *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (internal quotation marks omitted). A complaint is properly dismissed where, as a matter of law, "the allegations in [the] complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558, 127 S. Ct. at 1966.

Appendix D

DISCUSSION

I. USCIS Is Not Precluded From Raising Mootness

Before addressing the merits of Plaintiffs' mootness argument, the Court first looks at the threshold issue of whether Defendants are precluded from making the argument. As Plaintiffs would have it, Defendants' mootness and subject matter jurisdiction arguments are barred by issue and claim preclusion by Judge Freeman's previous decision in *New Generation I*. More particularly, Plaintiffs argue that Judge Freeman previously determined that Plaintiffs had standing to challenge the merits of the agency's decision under the APA and that the Court had subject matter jurisdiction to consider the challenge. (Pl. Mem. at 4.[5]) Plaintiffs further contend that the issues raised by Defendants could have been presented in the case before Judge Freeman and now are precluded because they were not. (Pl. Mem. at 10.) Those arguments are unavailing.

First, Judge Freeman did not previously decide the issue raised here. In *Next Generation I*, Judge Freeman held that NGT had standing to challenge USCIS' decision because "courts in this district have permitted employer-petitioners of visa applications, made on behalf of alien employee beneficiaries, to challenge final determinations of USCIS." 328 F. Supp. 2d. 264-65. Judge Freeman declined to rule on whether Plaintiff Deo had standing but

5. "Pl. Mem." refers to Memorandum Of Law In Opposition To The Defendants' Motion To Dismiss The Complaint (Dkt. 29.).

did find that some of the agency's decisions were arbitrary and capricious and directed USCIS to reconsider the evidence in the record. *Id.* at 264, 272.

The standing issue resolved by Judge Freeman is entirely different than the issue raised by the instant motion, which is whether the claim asserted by Plaintiffs has been rendered moot.[6] The doctrine of collateral estoppel - or issue preclusion - thus does not apply.[7]*See, e.g., Bader v. Goldman Sachs Group, Inc.*, 455 F. App'x 8, 9 (2d Cir. 2011) ("If the issues are not identical, there is no collateral estoppel") (internal citation omitted); *Burgos v. Hopkins*, 14 F.3d 787, 792 (2d Cir. 1994) (in order for issue preclusion to apply "[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action," and "there

6. As a secondary argument, Defendants do argue that Plaintiffs lack standing to proceed and advance the same reasons that render the instant dispute moot:. namely, that Plaintiffs' alleged injury cannot be redressed by a favorable decision of the Court due to passage of the relevant visa period and a cap on the number of visas that can be issued. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (to establish Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision"). Again, Judge Freeman did not address those issues.

7. If any party is barred by preclusion, it would be Plaintiffs. In *Next Generation I*, Judge Freeman held that the Court could not "reinstate" Deo's H-1B status because Deo was never an H-1B visa holder. 328 F. Supp. 2d. at 263. Yet Plaintiffs again ask the Court to do just that. (See Compl. ¶ 103.)

must have been a full and fair opportunity to contest the decision now said to be controlling") (internal quotation marks omitted).

Nor are Defendants precluded from asserting the mootness argument merely because they did not do so before Judge Freeman. Under well-established law, federal subject matter jurisdiction can never be waived or forfeited; a party therefore may raise the issue at any point in a case. *Alliance of American Insurers v. Cuomo*, 854 F.2d 591, 605 (2d Cir. 1988) ("The fact that neither party contested the District Court's authority to hear this aspect of the case does not act to confer jurisdiction on the Court since a challenge to subject matter jurisdiction cannot be waived and may be raised *sua sponte* by the district court"); *United States v. Bond*, 762 F.3d 255, 263 (2d Cir. 2014) ("The absence of subject matter jurisdiction is non-waivable"); *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 915, 157 L. Ed. 2d 867 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance"). Plaintiffs thus gain no ground by arguing that Defendants did not argue before Judge Freeman that the Court lacked subject matter jurisdiction due to mootness.

II. The Court Cannot Provide Relief Because Plaintiffs' Claims Are Moot

"The mootness doctrine is derived from Article III of the Constitution, which provides that federal courts may decide only live cases or controversies." *Van Wie v.*

Pataki, 267 F.3d 109, 113 (2d Cir. 2001). "A case becomes moot when interim relief or events have eradicated the effects of the defendant's act or omission, and there is no reasonable expectation that the alleged violation will recur." *Irish Lesbian & Gay Organization v. Giuliani*, 143 F.3d 638, 647 (2d Cir. 1998). "When a case becomes moot, the federal courts lack subject matter jurisdiction over the action." *Hassoun v. Searls*, 976 F.3d 121, 127 (2d Cir. 2020) (alteration and citation omitted); *Fox v. Board of Trustees of State University of New York*, 42 F.3d 135, 140 (2d Cir. 1994) (same); *see also Russman v. Board of Education of Enlarged City School District of City of Watervliet*, 260 F.3d 114, 118-19 (2d Cir. 2001) ("Whenever mootness occurs, the court - whether trial, appellate, or Supreme - loses jurisdiction over the suit, which therefore must be dismissed"); *Alston v. Coughlin*, 109 F.R.D. 609, 612 (S.D.N.Y. 1986) ("The mootness doctrine is an elemental limitation on federal judicial power, and its effect may not be waived by a party").

Defendants assert that Plaintiffs' claims are moot, and the Court thus lacks subject matter jurisdiction, because the Court cannot provide any effectual relief. They advance two independent arguments for why the claims are moot. First, there are no "validity dates" that can be approved for Plaintiff's applications; and second, there no longer are H-1B cap visa numbers available for the relevant years.[8] USCIS thus cannot grant, and the Court cannot award, H1-B visa status. In response,

8. "The period of validity of a nonimmigrant visa is the period during which the alien may use it in making application for admission." 22 C.F.R. § 41.112(a).

Plaintiffs assert that Defendants' failure to raise this jurisdictional argument at any previous stage in the litigation precludes them from raising it now. The Court agrees with Defendants. The validity period for Deo's unawarded H-1B visa expired over ten years ago, and there no longer are any visa numbers that can be granted for the relevant period. Accordingly, Plaintiffs' claim for H1-B visa status is moot. There is no equitable relief for the Court to grant, and so, the Court lacks subject matter jurisdiction. The argument is properly raised now because lack of federal subject matter jurisdiction cannot be waived.

A. The Validity Period For Plaintiffs' H-1B Petition Is Expired

H1-B visas are approved for a specific period of time not to exceed three years - the validity period. *See* 8 C.F.R. § 214.2(h)(9)(iii)(A)(1) ("An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application");[9]*Dandamudi v. Tisch*,

9. The labor condition application - "LCA" - is a necessary component of an H1-B visa petition. Prior to filing a Form I-129, "a petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed." 8 C.F.R. § 214.2(h)(4)(i)(B)(1); *see also* 8 U.S.C. § 1182(n) ("No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application" disclosing a range of details

686 F.3d 66, 70 (2d Cir. 2012) ("For purposes of ... the H1-B ... visa[ ], the initial period during which the visa-holder can legally remain and work in the United States is three-years") (citing 8 C.F.R. § 214.2(h)(9)(iii)(A)(1)). The validity period for NGT's H1-B application was from October 1, 2009 to September 28, 2012. (R. 103-107 (Filed Labor Condition Application for Nonimmigrant Workers stating "end date of period of intended employment" as September 28, 2012); R. 607-616 (Form I-129, Petition for a Nonimmigrant Worker stating "validity dates" as October 1, 2009 to September 28, 2012).) That period expired almost a decade ago. The time period for which Plaintiffs sought a visa no longer exists. If, as Plaintiffs seek, the Court were to reinstate the approval of the Initial Petition, Deo would have an approved Form I-129 with a valid employment period through 2012. That is not an effectual remedy. *See Zapata v. I.N.S.*, 93 F. Supp. 2d 355, 358 (S.D.N.Y. 2000) (court declined to grant Plaintiffs' request for an injunction because the date INS was required to rule by had passed and therefore the request was moot); *Sadowski v. U.S. I.N.S.*, 107 F. Supp. 2d 451, 454 (S.D.N.Y. 2000) ("When a relevant deadline ... has passed, a request for relief is deemed plainly moot"). Despite the long-ago expiration of the validity period, Plaintiffs argue that the Court has the "power to reinstate the petition approval *nunc pro tunc* to allow Deo a fresh validity period." (Pl. Mem. at 15.) The regulations do enable a petitioner to file an amended or new petition to reflect any material changes in the terms and conditions of employment or training. In

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pertaining to the specialty position and the relationship between the employer and beneficiary).

such instance, however, the "petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application." 8 C.F.R. § 214.2(h)(2)(i)(E).

The LCA included with Plaintiffs' Initial and Amended Petitions was based on information provided by NGT in 2009. (R. 103-107 (LCA).) That LCA comported with the statutory requirement that the employer provide attestations as to the labor market at the time of the filing. *See* 8 U.S.C. § 1182(n)(1). There is no LCA supporting a "fresh" validity period more than ten years later.[10] Of course, as Plaintiffs recognize, they are free to file a new labor condition application reflecting a change in the years for which the visa is now requested pursuant to 8 C.F.R. 214.2(h)(2)(i)(E). (Pl. Mem. at 21.) But that is not the issue before the Court.

"The equitable remedy of *nunc pro tunc* (literally 'now for then') relief has a long and distinguished history in the field of immigration law ... in mitigating potentially harsh

10. To be sure, NGT did file an amended Form I-129 on March 1, 2010. (Compl. ¶ 20.) The amendment, however, was to Deo's application status as an H-1B specialty worker following her re-entry into the country on a B-2 Nonimmigrant visitor visa; it did not contain any additional or new information. (Compl. ¶ 21.) On June 9, 2010, NGT filed a second amended H-1B petition solely for the purpose of including the required filing fee. (Compl. ¶¶ 21-22.) Thus, the original LCA and petitions in the record were never amended to include information beyond what was filed in the initial LCA and Form I-129.

results of the immigration laws." *Edwards v. I.N.S.*, 393 F.3d 299, 308 (2d Cir. 2004). The remedy does not, however, have such a history as applied to the scenario presented here. Plaintiffs thus do not provide any examples of courts granting *nunc pro tunc* relief in the context of an H-1B petition or for any other visa with an expired validity period. Instead, Plaintiffs cite to cases articulating the potential, but not guaranteed, availability of *nunc pro tunc* relief in inapt and exceptional circumstances. *See Edwards*, 393 F. 3d at 308 (explaining an award of *nunc pro tunc* relief may ordinarily be available where agency error resulted in an "alien being deprived of the opportunity to seek a particular form of deportation relief" pursuant to a habeas petition); *Iavorski v. U.S. I.N.S.*, 232 F.3d 124, 130 n. 4 (2d Cir. 2000) (stating that the "equitable remedy of granting relief *nunc pro tunc*" may be available "in certain exceptional cases").

To the contrary, courts have rejected visa application claims as moot where the requested validity period has expired. In *International Internship Programs v. Napolitano*, the plaintiff brought an action alleging defendants (including the Secretary of the Department of Homeland Security and the Director of USCIS) violated the APA by denying its petitions for potential Q-1 cultural exchange visa recipients. 853 F. Supp. 2d 86 (D.D.C. 2012), *aff'd sub nom.*, 718 F.3d 986, 405 U.S. App. D.C. 336 (D.C. Cir. 2013). The defendants moved to dismiss the APA claims on the grounds that the claims were moot because the validity period of the visas were valid through January 24, 2012, and the Court was addressing the motion in March 2012. *Id.* at 95. In words that apply

with similar force here, the Court held "[o]n the face of its complaint, plaintiffs APA claims are indisputably moot. Plaintiff sought injunctive and declaratory relief for Q-1 visas valid through January 24, 2012. As this date has long since passed, the Court is unable to grant any effectual relief."[11] *Id.* (internal citation omitted).

Courts have held similarly with respect to other types of visas. In particular, the Second Circuit, as well as other circuit courts of appeals, have found that challenges to the denial of a diversity visa status adjustment application becomes moot after the relevant fiscal-year period has expired because the district court can no longer provide meaningful relief. *See Mohamed v. Gonzales*, 436 F.3d 79, 81 (2d Cir. 2006) (collecting cases and acknowledging the harsh consequences of the statutes and regulations imposing a "strict one-year time limit on the granting of diversity visas" but finding "federal courts do not have the authority to hear these claims because ... they are now moot"); *Ermuraki v. Renaud*, 987 F.3d 384, 386

11. Like the H-1B visa, the Q-1 visa is an employment-oriented visa that allows one to come to the United States "temporarily to participate in an international cultural exchange program that provides practical training and employment." *Q Visa, Cultural Exchange*, U.S. Citizenship and Immigration Services (April 28, 2022), https://www.uscis.gov/forms/explore-my-options/q-visa-cultural-exchange. The process for acquiring one and its general structure parallels that of the H-1B visa. To obtain a Q-1 visa, a U.S. employer must simultaneously petition USCIS for Q-1 status by filing a Form 1-129, the cultural exchange program must meet requirements similar to those of the specialty requirements of an H-1B, and there is an explicit validity period for the visa of 15 months. 8 C.F.R. § 214.2(q)(3)(i)-(iii).

(5th Cir. 2021) (holding plaintiffs' case was moot prior to entry of the district court's final judgment because the complaint was filed after the relevant fiscal year ended and stating, "This court has not yet addressed whether a claim challenging the denial of a diversity visa status adjustment application becomes moot after the relevant fiscal year expires. Our sister circuits, however, have overwhelmingly concluded that such a circumstance does moot the claim"); *Nyaga v. Ashcroft*, 323 F.3d 906, 916 (11th Cir. 2003) ("Because we conclude that Nyaga is no longer eligible to receive a visa, the district court could not provide meaningful relief to the Plaintiffs and the court was compelled to dismiss this case as moot.").

Plaintiffs contend that, unlike the statutes on diversity visas, the H-1B statutory provisions do not contain the same type of strict limitations on eligibility and do not preclude *nunc pro tunc* relief. (Pl. Mem. at 16, 18.) To support this position, Plaintiffs compare 8 U.S.C. § 1184(g), which contains the numerical caps for H-1B visas to be issued in a fiscal year, with 8 U.S.C. § 1154(a)(1)(I)(ii)(II), which states that "[a]liens who qualify, through random selection, for a visa ... shall remain eligible to receive such visa only through the end of the specific fiscal year for which they were selected."[12] The Court is not persuaded. If anything, the comparison reinforces the

12. Plaintiffs incorrectly cite to 8 U.S.C. § 1154(a)(1)(G) for the provision "expressly preclud[ing] the issuance of a diversity visa after the expiration of fiscal year the alien is selected in lottery." (Pl. Mem. at 16.) The correct provision is 8 U.S.C. § 1154(a)(1)(I)(ii)(II); § 1154(a)(1)(G) pertains to alien classification and not the issuance of a diversity visa after the expiration of the fiscal year.

notion that the H-1B statutes and regulations, like those governing diversity visas, place clear limits on when and how many individuals can be awarded an H-1B visa. *See, e.g.*, 8 C.F.R. § 214.2(h)(9)(ii)(B) ("If a new H petition is approved after the date the petitioner indicates that the services or training will begin, the approved petition and approval notice shall show a validity period commencing with the date of approval and ending with the date requested by the petitioner, as long as that date does not exceed either the limits specified by paragraph (h)(9)(iii) of this section"); § 214.2(h)(9)(iii)(A)(1) ("An approved [H-1B] petition for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application").

Plaintiffs have not presented the Court with any sound basis to distinguish H1-B visas from cultural exchange visas or diversity visa status adjustments with respect to mootness after the relevant validity period expires. Accordingly, expiration of the October 2009 - September 2012 validity period for Plaintiffs' H1-B visa approval renders the instant case moot.

B. There Are No Available H-1B Visa Numbers For The Validity Period

The Court is additionally incapable of granting Deo's requested relief because there no longer are H-1B cap visa numbers available for the relevant years of Deo's petition.

"To fairly allocate" the limited number of H-1B visas, "the Department of Homeland Security has set

up a strict regulatory framework." *Espindola v. United States Department of Homeland Security*, No. 20-CV-1596, 2021 U.S. Dist. LEXIS 151656, 2021 WL 3569840, at *1 (N.D.N.Y. Aug. 12, 2021). 8 U.S.C. § 1184(g) strictly limits the "total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year" to no more than 85,000 in each fiscal year following 2003.[13] 8 U.S.C. §§ 1184(g)(1)(A)(vii); 1184(g)(5)(C). "[B]efore a petitioner can file an H-1B cap-subject petition for a beneficiary who may be counted [toward the cap], the petitioner must register to file a petition on behalf of an alien beneficiary electronically through the USCIS website." 8 C.F.R. § 214.2(h)(8)(iii)(A)(1). If USCIS receives more registrations than the 85,000-cap permits, the agency closes the registration period and selects recipients through a lottery. 8 C.F.R. § 214.2(h)(8)(iii)(A)(5)(i)-(ii). If a registration is selected, the petitioner is notified that it is eligible to file an H-1B cap-subject petition which "must be properly filed within the filing period indicated on the relevant section notice." 8 C.F.R. § 214.2(h)(8)(iii)(D)(1)-(2). An alien is counted "for purposes of any applicable numerical limit" only when they are issued a visa or granted non-immigrant status. *See* 8 C.F.R. 214.2(h)(8)(ii)(A).

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13. 8 U.S.C. § 1184(g)(1) sets the cap of aliens who may be issued visas at 65,000 but (g)(5)(C) states the "numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status ... who has earned a master's or higher degree from a United States institution of higher education ... until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000." The additional 20,000 is known as the "master's cap."

It is undisputed that the H-1B numerical cap for Deo's requested validity period had been reached by December 2009.[14] (Pl. Mem. at 4; Def. Mem. at 15.[15]) Deo did not receive any of those numbers. That is because, although her Initial Petition had been approved, Deo failed to take the necessary steps - attending an interview and providing required documentation at a consulate abroad - to obtain H-1B status in the fall of 2009 or at any time thereafter. And, as Deo was never issued a visa or provided non-immigrant status, she was not counted for the purposes of the numerical limit.

In seeking reinstatement of approval of Deo's H-1B status, Plaintiffs essentially ask this Court to ignore the Congressionally-set limits for H-1B visas. Courts have declined to do exactly that. For example, in *National Basketball Retired Players Association v. United States Citizenship & Immigration Service*, the plaintiff ("NBRPA") challenged USCIS's rejection of their April 6, 2016 Form I-129 filed on behalf of individual plaintiff Kurdadze to secure her H-1B status. No. 16-CV-09454, 2017 U.S. Dist. LEXIS 94948, 2017 WL 2653081, at *2 (N.D. Ill. June 20, 2017). The Form I-129 listed Kurdadze's dates of intended employment as running from "10/1/2016" to "06/01/2019," but the LCA listed her period of intended employment as beginning "06/01/2016"

14. *USCIS Announced FY 2010 H1B Cap Reached*, AILA (April 19, 2022), https://www.aila.org/infonet/uscis-fy10-h1b-cap-reached-updated-12-22-09.

15. "Def. Mem." refers to Memorandum of Law in Support of the Defendants' Motion to Dismiss the Complaint (Dkt. 27).

and ending "06/01/2019." *Id.* USCIS rejected the Form I-129 on the basis that there was a discrepancy between the employment start dates listed on the Form I-129 and the LCA and that employers may not file the I-129 petition more than six months before the requested employment start date. *Id.; see* 8 C.F.R. § 214.2(h)(9)(i)(B). Following the rejection, NBRPA filed another petition and included documentation, stating that the agency's rejection was improper because the April 6, 2016 Form I-129 clearly listed October 1, 2016 as Kurdadze's employment start date, less than six months after the date of application. USCIS nonetheless rejected Plaintiff's Form I-129 because the employment start date on the LCA was earlier than the approved October 1, 2016 date, and because "the H-1B cap for FY17 closed on April 7, 2016." *Id.*

Plaintiff then sued, claiming that rejection of the April 6, 2016 petition was unlawful because USCIS did not act in accordance with its own regulations. *Id.* at *3. USCIS moved to dismiss, arguing that the Court lacked subject matter jurisdiction because Plaintiffs' alleged injury was not redressable by the Court. 2017 U.S. Dist. LEXIS 94948, [WL] at *4. The Court granted Defendant's motion stating that "fiscal year 2016 ended on September 30, 2016, several days before plaintiffs even lodged the current suit. As a result, even if this Court were to order the USCIS to consider the April 2016 petition, that agency has no ability to issue H-1B visas or otherwise provide H-1B status for fiscal year 2016 presently (and, indeed, had no such ability when this case was filed)." *Id.* The Court admonished: "This Court cannot raise the numerical caps that Congress has set by statute." *Id.; see also Alpha*

K9 Pet Services v. Johnson, 171 F. Supp. 3d 568, 580-81 (S.D. Tex. 2016) (finding plaintiffs lacked standing on redressability grounds, as "USCIS ha[d] already reached its statutory H-2B visa cap for the 2015 fiscal year" and the petitions at issue were filed for that fiscal year).

Plaintiffs argue, once again, that by relying on diversity visa cases, Defendants are attempting to apply wholly distinct statutory requirements to H-1B visas. (Pl. Mem. at 18-19.) But that argument ignores cases such as *NBRPA* where H-1B visas were directly at issue. And, as explained above in the context of expired validity periods, the principles stated in the cases addressing diversity visas are similarly applicable here. As the Ninth Circuit has explained in the context of Employment-Based Third Preference Category visas ("EB-3"):[16]

> [t]here is no statute or regulation authorizing [the Department of State] to take a visa number from one year and allocate it to another year. Just as in the diversity visa lottery program, the employment-based visa numbers available in a particular fiscal year expire at the end of the year, rendering moot any claim for a visa number from a prior year. It does not matter whether administrative delays and errors are to blame for an alien not receiving a visa number on time. Once a visa number is gone, it cannot be recaptured absent an act of Congress.

16. EB-3 visas are employment-based immigrant visas allocated to 'skilled workers,' 'professionals' or 'other workers' and are subject to an annual cap. *See* 8 U.S.C. § 1153(b)(3)(A)(ii); 8 U.S.C. § 1151(d).

Zixiang Li v. Kerry, 710 F.3d 995, 1002 (9th Cir. 2013). So too here; the cap for the relevant years was exhausted long ago. There is no relief the Court can order to "recapture" even one of those for Plaintiffs.

Plaintiffs rely on a recently decided case, *Espindola v. United States Department of Homeland Security*, to support the contention that the cases Defendants cite are irrelevant. 2021 U.S. Dist. LEXIS 151656, 2021 WL 3569840 at *1. In *Espindola*, the employer plaintiff, Order Up Analytics, received notice that its registration on behalf of beneficiary Plaintiff was selected in the H-1B lottery process. 2021 U.S. Dist. LEXIS 151656, [WL] at *2. USCIS rejected the petition, however, because it was missing a required signature page for Form I-129. *Id.* Plaintiffs resubmitted the H-1B petition five times following the initial rejection, and all five were rejected as untimely because they were received after the registration deadline. *Id.*

Defendants asserted that the case was moot, arguing that the relief sought could not be granted because USCIS had already completed the lottery and received petitions necessary to reach the 85,000 cap. The Court distinguished the diversity visa cases, where caps had been reached, on the basis that the H-1B cap had not been reached for fiscal year 2021. As the Court explained, Defendants "merely received sufficient H-1B petitions to issue the maximum number of visas" but had not actually issued the maximum number. Defendants therefore "still retain[ed] the power to issue H-1B visas in this fiscal year" and thus did not "lack the statutory authority to grant the relief sought." 2021 U.S. Dist. LEXIS 151656, [WL] at *3. As is evident,

Espindola is materially distinguishable from the case at hand where there is no dispute that the maximum number of visas allocated were awarded.

In sum, Plaintiffs' claim is moot not only due to expiration of the validity period, but also because the numerical cap for the relevant period was met.

C. The "Capable Of Repetition" Exception To Mootness Does Not Apply

Plaintiffs contend that this case falls within the exception to "for cases capable of repetition, yet evading review." (Pl. Mem. At 24.) The "capable-of-repetition doctrine applies only in exceptional situations." *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S. Ct. 978, 988, 140 L. Ed. 2d 43 (1998) (internal citation and quotation marks omitted). As the party asserting the exception, Plaintiffs must demonstrate both that "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *United States v. Juvenile Male*, 564 U.S. 932, 938, 131 S. Ct. 2860, 2865, 180 L. Ed. 2d 811 (2011) (brackets omitted); *Doe v. Decker*, No. 18-CV-3573, 2019 U.S. Dist. LEXIS 101793, 2019 WL 2513838, at *3 (S.D.N.Y. June 18, 2019). Plaintiffs cannot do so, having failed to satisfy the "reasonable expectation" element.

Plaintiffs argue that the second element is satisfied because of the agency's "pattern of unscrupulous conduct" as well as its disregard for both the law and the

District Court's order on remand. (Pl. Mem. at 25.) That argument is far too speculative. Simply alleging that the agency has acted in ways unfavorable to Plaintiffs does not demonstrate that there is a reasonable expectation that the Plaintiffs will be subjected to the same actions again. *See Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 94 F.3d 96, 101 (2d Cir. 1996) ("mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a 'reasonable expectation' or 'demonstrated probability' of recurrence") (internal quotation marks omitted).

Plaintiffs essentially allege that the agency has an ongoing conspiracy against them and that it is evident "how future petitions filed by the Plaintiff/Petitioner would be treated by the agency." (Pl. Mem. at 28.) Besides recounting the prolonged factual history of the case, however, Plaintiffs do not set forth any factual basis for the claim that they will be victimized again. That is not a sufficient showing to invoke the exception. *See, e.g., Ramos v. New York City Department of Education*, 447 F. Supp.3d 153, 158-59 (S.D.N.Y. 2020) (exception did not apply where parent failed to show there was a reasonable likelihood that Department of Education would fail to provide for pendency payment in the future merely because it had failed to do so for the prior year); *Smith v. New Haven Superior Court*, No. 3:20-CV-00744, 2020 U.S. Dist. LEXIS 132358, 2020 WL 4284565, at *4 (D. Conn. July 27, 2020) (exception did not apply absent any indication of a reasonable expectation that the petitioner would again be subjected to overcrowding and exposure to COVID-19 positive prisoners even though authorities

had the ability to freely transfer the petitioner between facilities prior to the full litigation of his claims); *Pierre-Paul v. Sessions*, 293 F. Supp. 3d 489, 492 (S.D.N.Y. 2018) (exception did not apply where petitioner could not point to any facts indicating that ICE would detain her again despite having been detained and released by ICE on three previous occasions).

For the duration element, Plaintiffs state "[it is] clearly fulfilled since the initial[ ] validity period has expired, proving far too short to pursue the matter to its conclusion in litigation." (Pl. Mem. at 24-25) (citing *In re Zarnel*, 619 F. 3d 156, 164 (2d Cir. 2010) (cleaned up).) Indeed, Plaintiffs have been, in one way or another, litigating this case for over ten years. The case was appealed and remanded within the Agency several times, and this is the second time the case is before the District Court. Given that timeline coupled with the strictly limited three-year validity period, the facts of this case suggest satisfaction of the duration element. However, the exception does not apply unless Plaintiffs can satisfy both prongs, which, as explained above, they cannot do. *See New Jersey Carpenters Health Fund v. Novastar Mortgage Inc.*, 753 F. App'x 16, 20 (2d Cir. 2018) (providing no analysis of duration prong because plaintiffs did not meet second element of the exception and thus case was moot); *Video Tutorial Services, Inc. v. MCI Telecommunications Corp.*, 79 F.3d 3, 6 (2d Cir. 1996) (exception did not apply where plaintiffs satisfied first element due to quick expiration of temporary stay of arbitration but did not satisfy the second element); *F.O. v. New York City Department of Education*, 899 F. Supp. 2d

251, 255 (S.D.N.Y. 2012) ("Even assuming that Plaintiffs have shown that this issue would evade review due to its short duration, there is no reasonable expectation that Plaintiffs here would be subject to the same action again") (internal quotation marks omitted).

Accordingly, the capable of repetition exception does not apply, and Plaintiffs' claims are moot.

III. Dismissal For Failure To State A Claim

In addition to arguing lack of subject matter jurisdiction, Defendants contend that Plaintiffs' claims should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim for relief. They advance three arguments in support: (1) the government cannot violate the limit on the number of H-1B visas that may be issued; (2) the Court cannot order Defendants to reinstate Deo to H-1B status; and (3) Deo cannot receive H-1B status immediately. (Def. Mem. at 21-23.)

Having determined it does not have subject matter jurisdiction, however, the Court does not separately address whether dismissal is appropriate under Rule 12(b)(6). *See Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 430-31, 127 S. Ct. 1184, 1191, 167 L. Ed. 2d 15 (2007) ("a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)"); *Solis v. 666 Fifth Associates LLC*, No. 20-CV-5105, 2021 U.S. Dist. LEXIS

242532, 2021 WL 5998416, at *2-3 (S.D.N.Y. Dec. 20, 2021) (dismissing complaint as moot under 12(b)(1) and therefore not addressing 12(b)(6) arguments); *Juca v. Carranza*, No. 19-CV-9427, 2020 U.S. Dist. LEXIS 199251, 2020 WL 6291477, at *3 n.1 (S.D.N.Y. Oct. 26, 2020) ("Because the Court concludes that Plaintiffs' claim must be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction [due to mootness], the Court does not evaluate whether Plaintiffs failed to state a claim pursuant to Rule 12(b)(6)").[17]

17. Defendants additionally argue that the Court should dismiss Plaintiffs' due process challenge. The Complaint alleges that Defendants have violated their rights to notice and opportunity to respond, i.e. their due process rights, because Defendants "continue to raise new issues to which Plaintiffs had previously respond[ed] and were unaware were under scrutiny." (Compl. ¶¶ 213-15.) Defendants separately address the point apart from mootness, and Plaintiffs do not contest the point in opposition. As a result, Plaintiffs have waived any opposition to the point. *See BYD Company Ltd. v. VICE Media LLC*, 531 F. Supp.3d 810, 821 (S.D.N.Y. 2021), *aff'd*, No. 21-1097, 2022 U.S. App. LEXIS 5351, 2022 WL 598973 (2d Cir. Mar. 1, 2022) ("Plaintiffs' failure to oppose Defendants' specific argument in a motion to dismiss is deemed waiver of that issue") (quoting *Kao v. British Airways, PLC*, No. 17-CV-0232, 2018 U.S. Dist. LEXIS 8969, 2018 WL 501609, at *5 (S.D.N.Y. Jan. 19, 2018); *Arista Records, LLC v. Tkach*, 122 F. Supp.3d 32, 38-39 (S.D.N.Y. 2015) (same). As discussed above, however, the Court has found subject matter jurisdiction to be absent and therefore does not separately address the merits of Plaintiffs' due process challenge.

Appendix D

CONCLUSION

For the foregoing reasons, I recommend Defendants' motion be GRANTED for lack of subject matter jurisdiction and the case dismissed without prejudice.

Procedures For Filing Objections And Preserving Appeal

Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of Court, with extra copies delivered to the Chambers of the Honorable Paul G. Gardephe, U.S.D.J., United States Courthouse, 40 Foley Square, New York, NY 10007, and to the Chambers of the undersigned, United States Courthouse, 500 Pearl Street, New York, NY 10007. **Failure to file timely objections will result in a waiver of objections and will preclude appellate review**.

Respectfully submitted,

/s/ Robert W. Lehrburger
ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

Dated: May 12, 2022

APPENDIX E — PLAINTIFF-APPELLANTS' SUR-REPLY IN OPPOSITION TO DEFENDANT-APPELLEES' MOTION TO DISMISS THE APPEAL OR FOR SUMMARY AFFIRMANCE OF THE JUDGMENT, FILED JANUARY 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-495

NEXT GENERATION TECHNOLOGY, INC., *et al.*,

Plaintiff-Appellants,

v.

UR M. JADDOU, *et al.*,

Defendant-Appellees.

On Appeal from an Order Granting Dismissal
Pursuant to Federal Rule of Civil Procedure 12(b)(1)
in the United States District Court for the
Southern District of New York

PLAINTIFF-APPELLANTS' SUR-REPLY IN OPPOSITION TO DEFENDANT-APPELLEES' MOTION TO DISMISS THE APPEAL OR FOR SUMMARY AFFIRMANCE OF THE JUDGMENT

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Appendix E

Dated: January 15, 2024

[TABLES INTENTIONALLY OMITTED]

PRELIMINARY STATEMENT

The government's motion seeks to dismiss Plaintiffs Next Generation Technologies, Inc. and Puspita Deo's appeal on the grounds that (1) Plaintiffs failed to object to the magistrate's finding of mootness in his Report & Recommendations to the district court, and (2) the Court should not exercise its discretion to hear Plaintiffs' objections on appeal because the district court was correct to conclude that the lack of available H-1B visa numbers for the relevant time period rendered the dispute moot.

The government, however, appears to have misunderstood Plaintiff 's mootness arguments on appeal. Plaintiffs do not challenge the district court's finding about the unavailability of H-1B visa numbers for the initial eligibility period, nor are they required to do so. Instead, Plaintiffs raise other arguments which, if accepted, would defeat a finding a mootness. Therefore, whether any visa numbers remain from the initial eligibility period is not a dispositive issue and Plaintiffs' alleged waiver of this issue is not grounds to dismiss their appeal.

Accordingly, Plaintiffs submit this sur-reply to clarify their position and explain why they should be entitled to appellate review of the mootness issue and why the dispute is not moot.

Appendix E

ARGUMENT

I. Defendants Misconstrue Plaintiffs' Appeal to Create A Waiver Issue Where None Exists.

A. Plaintiffs are not seeking to raise objections on appeal that they failed to raise below.

In the proceedings below, Defendants moved to dismiss Plaintiffs' claims for lack of subject-matter jurisdiction on the ground that that the court's inability to provide the relief sought by Plaintiffs rendered their claims moot. Defendants offered "two independent arguments" for mootness: "First, there are no 'validity dates' that can be approved for Plaintiff 's applications; and second, there no longer are H-1B cap visa numbers available for the relevant years." R&R [ECF 31] at 12. The Magistrate Judge agreed with both of Defendants' arguments and recommended dismissing the case for mootness because "[t]he validity period for Deo's unawarded H-1B visa expired over ten years ago, and there no longer are any visa numbers that can be granted for the relevant [time] period." Order [ECF 42] at 8 (quoting R&R at 26).

As the district court recognized, "Plaintiffs object[ed] to [Magistrate] Judge Lehrburger's recommendation that their claims be dismissed on mootness grounds." *Id.* at 9. These objections included (1) that Plaintiffs could approve a new employment period for Deo's H-1B if Plaintiffs obtained a new LCA from the Department of Labor; (2) that any mootness was the result of Defendants' actions and they should not be allowed to benefit therefrom, (3)

that costs, fees, and nominal damages still provided a basis for finding the existence of a live case or controversy; and (4) that the court had the power to reinstate the H-1B petition *nunc pro tunc*. *See id.* at 9-10.

Plaintiffs' objections were thus either applicable to a finding of mootness on either basis advocated by Defendants or contemplated the possibility of relief via a new validity period. Had the district court agreed, these arguments would have defeated any finding of mootness based on unavailable visa numbers from the original validity period. That Plaintiffs did not directly object to the conclusion that there were no available visa numbers for the original validity period is of no import when their objections on the issue of mootness generally, if accepted, would have made that conclusion legally irrelevant.

Defendants contend that Plaintiffs' alleged failure to object to the second of the two arguments underlying the Magistrate Judge's recommendation that the case be dismissed for mootness requires dismissal of Plaintiffs' appeal because the unavailability of H-1B visa numbers for the relevant period is allegedly dispositive on the issue of mootness and Plaintiffs have waived their right to object to this finding. *See* Defs' MTD at 12, 14.

Defendants, however, are incorrect. Waiver is not an issue here because Plaintiffs do not seek to raise arguments on appeal that they failed to raise below. They do not challenge the unavailability of visa numbers directly, nor are they required to do so in order to avoid

a finding of mootness. This is because, as just noted, Plaintiffs' arguments on mootness generally would make the district court's visa-number finding irrelevant.[1]

Defendants' waiver arguments are all premised on a misunderstanding or mischaracterization of Plaintiffs' appeal. Plaintiffs do not seek to raise objections that they failed to make in the district court. That is, they do not argue on appeal that valid visa numbers remain from the original eligibility period. Rather, they argue that the "law of the case" establishes the existence of subject-matter jurisdiction and that the district court's authority to craft other relief for Plaintiffs means that a live case or controversy remains. *See* Appellants' Br. at 35-38. Indeed, Plaintiffs explicitly concede that the district court "clearly could not" "award an H-1B visa for 2010." *Id.* at 38.

In other words, Plaintiffs are not directly challenging the district court's finding as to the unavailability of visa numbers on appeal; they have chosen to sidestep it instead. Under such circumstances, attempting to determine whether Plaintiffs have waived an argument which they are not making on appeal makes no sense. Simply put, waiver is not the issue here.

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1. Even if Plaintiffs had failed to object to a dispositive aspect of the magistrate's recommendation, this Court still has the discretion to consider their arguments against mootness on appeal. *See* Section II, *infra*.

B. Plaintiffs' arguments against mootness do not require them to challenge the court's visa-number finding, which is not dispositive of the case.

The arguments that Plaintiffs do make with respect to mootness generally also mean that, contrary to Defendants, the district court's conclusion that no visa numbers remained available from the original validity period is *not* dispositive of the case.

If Plaintiffs succeed in arguing that there are other reasons to find that a live case or controversy exists, whether or not visa numbers remain available from the original validity period becomes irrelevant to the Court's subject-matter jurisdiction. And Defendants do not claim, nor could they, that Plaintiffs have waived these *separate arguments* that the district court erred in finding that it could not fashion an effective remedy for Plaintiffs.

Because the visa-number issue is not dispositive, any alleged waiver of this issue (or the failure to raise it on appeal) does not provide a proper basis for dismissing this appeal or summarily affirming the district court. To dismiss this appeal (or grant summary affirmance) at this stage would deprive Plaintiffs of the right to be heard on arguments that would negate the basis of Defendants' motion.

II. Plaintiffs Have Not Waived Their Arguments on Mootness and the Court Has Discretion to Hear Plaintiffs' Appeal, Regardless

Plaintiffs' objections to the magistrate's conclusion on mootness are sufficient to preserve the issue, and they are not thereafter limited in the legal arguments they can make in support of their position, just as the Court is not limited in the grounds it could rely upon for affirmance or reversal. And, even Plaintiffs objections were insufficient, the Court would still have the discretion to consider Plaintiffs' arguments on this issue.

It is issues, not arguments, that must be preserved for appeal. This is because "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991). It would be incongruous if the Court could decide this appeal based on an argument or theory not advanced below, but Plaintiffs were prohibited from advocating that argument or theory.

Additionally, even if the Court considers that waiver operates as the level of a specific argument and that Plaintiffs waived any argument concerning the availability of visa numbers, it should still deny Defendants' motion to dismiss because the Court should exercise its discretion to consider such an argument.

Appendix E

Defendants concede that the rule waiving appellate review when a party fails to object to an issue in a magistrate's report "is nonjurisdictional and can be excused in the interest of justice." Defs' MTD at 14; *accord, e.g.*, *Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003); *United States v Male Juvenile*, 121 F.3d 34, 38-39 (2d Cir. 1997).

As the Supreme Court has held, whether to resolve an issue not previously raised below "is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *see also Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000) (quoting *Lo Duca v. United States*, 93 F.3d 1100, 1104 (2d Cir. 1996) ("We retain broad discretion to consider issues not raised initially in the District Court.")). On the facts here, the Court would have multiple reasons to address the visa-number issue. *First*, the issue was 'pressed or passed upon below.'" *United States v. Harrell*, 268 F.3d 141, 146 (2d Cir. 2001) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). "A claim is 'pressed or passed upon' when it fairly appears in the record as having been raised *or decided*." *Harrell*, 268 F.3d at 146 (emphasis added). Here, because the district court actually considered and decided the issue, it is appropriate for appellate review. *See Mario v. P&C Food Markets, Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) (citing *Male Juvenile*, 121 F.3d at 39) (when a district court reviews an issue in a magistrate's report that was not subject to an objection, "this [C]ourt may disregard the waiver and reach the merits"); *see also Thomas v. Arn*, 474 U.S. 140, 158 (1985) (Stevens, J. dissenting) ("our precedents often recognize an exception to waiver rules—namely, when a

reviewing court decides the merits of an issue even though a procedural default relieved it of the duty to do so").

Second, "the issue is purely legal and there is no need for additional fact- finding." *Baker*, 239 F.3d at 420 (quoting *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 302 (2d Cir. 1996)). Here, all the relevant facts have already been found by the district court. *See* Order at 13-15. What would remain is a purely legal question of statutory interpretation which would be subject to *de novo* review anyway.

And, *third*, "consideration of the issue [would be] necessary to avoid manifest injustice." *Baker*, 239 F.3d at 420 (quoting *Readco*, 81 F.3d at 302). If, for some reason, the Court considers that Plaintiffs' choice to challenge the district court's mootness finding without directly attacking the visa-number finding would be grounds to dismiss the appeal (or summarily affirm the district court), it would be manifestly unjust to punish Plaintiffs for not anticipating such a departure from standard practice.[2]

III. Plaintiffs' Case is Not Moot Because Defendants Could Adjust the H-1B Visa Allocation in Response to Any Judicial Decision.

In their opposition to Defendants' motion to dismiss, Plaintiffs point to the recent publication by USCIS of

2. It would also be unjust to prevent Plaintiffs from raising arguments based on actions taken by Defendants' agency after this appeal was filed, as described below.

a notice of proposed rulemaking. *See* Opp. At 8 (citing U.S. Citizenship & Immigration Services, Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, 88 Fed. Reg. 72870 (proposed Oct. 23, 2023) [hereinafter, "*Modernizing H-1B Requirements*"]).

In this notice, "DHS proposes to allow H–1B petitions to be approved or have their requested validity period dates extended if USCIS adjudicates and deems the petition approvable after the initially requested validity period end-date, or the period for which eligibility has been established, has passed." *Modernizing H-1B Requirements*, 88 Fed. Reg. at 72882. One of the benefits of this rule would be to avoid "the H–1B beneficiary losing their cap number," which USCIS acknowledges to be an unequitable result for a petition that was otherwise approvable. *See id.* at 72883.

This notice, even if the proposed rule has yet to enter into force, demonstrates that contrary to the district court's reasoning and Defendants' assertions, *see* Order at 12-13; Defs' MTD at 15, there is no statutory bar to USCIS approving Plaintiffs' petition for a new validity period for which visa numbers remain available. Because USCIS has the power to approve Plaintiffs' petition for a new eligibility period, the district court was wrong to find that it could not grant Plaintiffs effective relief after the expiry of the original validity period.

Appendix E

CONCLUSION

For all of the foregoing reasons, the Court should deny Defendants' motion to dismiss Plaintiffs' appeal or summarily affirm the district court's opinion.

Respectfully submitted,

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Dated: New York, NY
January 15, 2024

APPENDIX F — REPLY BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS, FILED JANUARY 2, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-495

NEXT GENERATION TECHNOLOGY, INC.,
PUSPITA DEO,

Plaintiffs-Appellants,

v.

UR M. JADDOU, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, SUSAN DIBBINS, CHIEF OF THE ADMINISTRATIVE APPEALS OFFICE, ALEJANDRO MAYORKAS, SECRETARY, DEPARTMENT OF HOMELAND SECURITY, MERRICK GARLAND, THE ATTORNEY GENERAL OF THE UNITED STATES,

Defendants-Appellees.

On Appeal From An Order Granting Dismissal
Pursuant to Federal Rules of Civil Procedure 12(b)(1)
In The United States District Court for the
Southern District of New York.

Appendix F

REPLY BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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Dated: January 2, 2024

[TABLES INTENTIONALLY OMITTED]

PRELIMINARY STATEMENT

The questions presented in this appeal lie at the intersection of procedural prudence and the equitable dispensation of justice. Appellees NGT challenge the U.S. District Court for the Southern District of New York's refusal to consider their belated objections to the magistrate judge's Report and Recommendation (R&R), contending that such dismissal was an abuse of discretion that ignored the persuasive precedence allowing such deference, as well as impending concerns of fairness and due process.

Additionally, the Appellees contest the mootness of their case based on the government's assertion of the unavailability of H-1B visa numbers. This claim was predicated on what is now an outdated understanding of visa allocation, made evident by emergent policy developments and systemic updates by the U.S. Citizen

and Immigration Services (USCIS) that suggest a responsive and flexible visa allocation system.

Appellees NGT and Deo's delayed objections to the magistrate judge's R&R are grounded in well-established legal principles and case law from various jurisdictions. The precedents from the Eleventh Circuit, supported by concordant Ninth Circuit holdings, underscore the district court's discretionary capacity to consider novel legal arguments.

As illustrated in the Eleventh Circuit's determination that a district court retains "ultimate adjudicatory power over dispositive motions," this understanding supports the Appellees' arguments that their objections merit consideration.

There is a six-part test for the exercise of discretion that the District Court should have followed; this test was overlooked in the preliminary dismissal of the Appellees' argument by the District Court. As the Article III judge is to keep "final decision-making authority," failing to consider the objections based solely on their delayed nature neglects the judicial commitment to fairness and justice as highlighted by *Raddatz and Thomas v. Arn*, 474 U.S. 140, 153.

Additionally, Second Circuit precedent, as well as 28 U.S.C. § 636(b)(1)(C) and the Federal Rule of Civil Procedure 72(b), support the district court's authority to consider evidence not initially presented to the magistrate judge. The equitable discretion to mitigate the miscarriage

of justice, as persuaded by *Singleton v. Wulff*, intimates that the District Court's refusal to acknowledge Appellees' objections was not only premature but also potentially injurious to the precepts of justice. 428 U.S. 106, 121.

The premise of the mootness argument, based on an alleged insufficiency of H-1B visa numbers, crucially misreads both the factual and legal landscape surrounding visa allocation.

With contemporary changes and updated guidance from USCIS, it becomes clear that the system is not static but subject to adjustments and reallocations. Significantly, the Federal Register's proposed rule as of December 22, 2023, for "Modernizing H-1B Requirements and Program Improvements Affecting Other Nonimmigrant Workers," manifests a legal framework within which visa availability is an evolving metric, and thus the factual basis of the government's mootness claim is flawed. 88 FR 72870.

ARGUMENT

I. APPELLEES' POSTPONED OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ARE JUSTIFIED AND VALID

Whether a party objecting to a magistrate judge's Report and Recommendation (hereinafter, "R&R") may raise before the district court an argument that was not raised before the magistrate judge, even though it could have been, should be a matter of district court discretion.

This discretion is well-established by both statutory and case law, as explicitly affirmed by the Eleventh Circuit in a precedent case that emphasizes a district court's broad discretion in considering new legal arguments. *Stephens v. Tolbert*, 471 F.3d 1173, 1174, 1177 (11th Cir. 2006) (district court did not abuse its discretion by considering an argument that was not presented to the magistrate judge) (emphasis added).

The Eleventh Circuit's holding that the district court preserves "ultimate adjudicatory power over dispositive motions" is legally persuasive before the Second Circuit. ***Id.*** at 1173, 1176. Under the Second Circuit Court of Appeals, this Honorable Court has yet to issue a direct holding regarding the issue of whether a party objecting to a magistrate judge's Report and Recommendation (hereinafter, "R&R") may raise before the district court an argument that was not raised before the magistrate judge (471 F.3d 1173, 1176).

The Eleventh Circuit provides additional persuasive authority in *Williams v. McNeil*, where it rejected the idea of mandating the district court to only consider arguments that were presented before the magistrate judge. 557 F.3d 1287, 1291 (11th Cir. 2009). The Ninth Circuit has also held that "a failure to object to a legal conclusion "is a factor to be weighed in considering the propriety of finding a waiver of an issue on appeal."

It is vital to recognize that, while the U.S. District Court for the Southern District of New York does have expansive discretion in reviewing a magistrate

judge's R&R, this discretion is ***not*** without bounds or consideration for justice and procedural efficiency. Guided by the precedent set in *Wells Fargo Bank, N.A. v. Sinnott*, where the court adopted a six-part test to exercise this discretion. 2010 WL 297830, r *2-5 (D. Vt. Jan. 19, 2010) (Reis, J.).

In *Wells Fargo*, the Appellees submit that the District Court prematurely disregarded such factors. *Id.* This six-part test is crucial, especially when considering the well-established legal principle that 'the Article III judge must retain final decision-making authority. *See Raddatz and Thomas v. Arn*, 474 U.S. 140, 153 (U.S. 1980) ("the district judge in marking the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objections has been made by a party).

If a district court were to reject arguments solely on their novelty *without considering the merits or the potential impact on justice*, it would constrict its jurisdiction and undermine the balance of fairness and judicial efficiency meant to be protected.

Furthermore, ***in the Second Circuit, the district court is duly authorized to receive evidence not presented to the magistrate judge***. *See* 28 U.S.C. § 636(b)(1)(C); *see* Federal Rule of Civil Procedure 72(b) (procedural mechanisms exist specifically to prevent the miscarriage of justice due to a ***rigid adherence to sequential procedural technicalities***) (emphasis added). This policy is supported

by the notion that appellate courts retain discretion to hear arguments not raised at the district court level to prevent injustice, pursuant to guidance by the Supreme Court in *Singleton v. Wulff*, 428 U.S. 106, 121 (U.S. 1976); *see also Magi XXI, Inc. v. Stato Della Cita Del Vaticano*, 714 F.3d 714, 724 (2d Cir. 2013) ("'[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.' However, this rule is 'prudential, not jurisdictional,' and [the Second Circuit] has exercised our discretion to hear otherwise waived arguments, 'where necessary to avoid manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding.'").

In the instant case, the refusal of the U.S. District Court for the Southern District of New York to even consider the delayed objections by the Appellees NGT and Deo suggests a dereliction of this discretionary principle. It creates a precedent that could unduly penalize parties for procedural lapses, ignoring the potential substance of their claims that may indeed warrant further review for the sake of justice, and possibly setting a dangerous precedent that overlooks the equitable foundations of our legal system. Therefore, it was an abuse of discretion for the said District Court not to consider these delayed objections, especially without a fulsome application of the *Wells Fargo Bank* six-factor test. Such consideration is not only warranted but paramount to ensure that procedural oversight does not trump substantive justice.

Appendix F

III. THE NUMBERS OF AVAILABLE H-1B VISAS WAS MISSTATED AND DID NOT RENDER THE APPELLEE'S CASE OR CONTROVERSY MOOT

In the present case, Appellees were justified in their delay of objection towards the government's argument that their action to reinstate Ms. Deo's H-1B visa was moot because of a "lack of visa numbers remaining for the relevant time period." *See* SPA 80. The presumed inaccessibility of visa numbers no longer aligns with the reality, given the jurisdictional implications of recent visa allocation developments.

Recent policy guidance from USCIS suggests a visa allocation system that is responsive to judicial findings. *See* Federal Register, Proposed Rule "Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, 88 FR 72870 (Comments closed on December 22, 2023).

Appendix F

CONCLUSION

Therefore, based on the foregoing reasons, NGT and Ms. Deo have a case or controversy that is ripe for review. Accordingly, Appellant's Motion to Dismiss should be denied by this Honorable Court.

Respectfully submitted,

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January 2, 2024

APPENDIX G — DEFENDANTS-APPELLEES' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE APPEAL OR FOR SUMMARY AFFIRMANCE OF THE JUDGMENT, FILED DECEMBER 22, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-495

NEXT GENERATION TECHNOLOGY, INC., PUSPITA DEO,

Plaintiffs-Appellants,

- against -

UR M. JADDOU, SUSAN DIBBINS, ALEJANDRO N. MAYORKAS, MERRICK B. GARLAND,

Defendants-Appellees.

DEFENDANTS-APPELLEES' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE APPEAL OR FOR SUMMARY AFFIRMANCE OF THE JUDGMENT

[TABLES INTENTIONALLY OMITTED]

PRELIMINARY STATEMENT

Defendants-appellees Ur M. Jaddou, Susan Dibbins, Alejandro N. Mayorkas, and Merrick B. Garland (collectively, the "government") respectfully submit this memorandum of law in support of their motion to dismiss

this appeal. Because plaintiffs-appellants Next Generation Technology, Inc. ("NGT") and Puspita Deo did not object to a dispositive ground for dismissal identified in the magistrate judge's report and recommendation—namely, the lack of available H-1B visa numbers for the time period in question—they have waived appellate review of that issue, which requires dismissal for lack of subject matter jurisdiction. This Court should therefore dismiss the appeal, or, alternatively, the district court's judgment should be summarily affirmed.

BACKGROUND

A. The H-1B Program

The Immigration and Nationality Act ("INA"), as amended, provides for the classification of qualified temporary foreign workers who are coming to the United States to perform services in a "specialty occupation" based "upon petition of the importing employer." 8 U.S.C. §§ 1101(a)(15)(H)(i)(b); 1184(c)(1) (the "H-1B program"). In creating this program, Congress specified that a "specialty occupation" is an occupation that requires both:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 U.S.C. § 1184(i)(1)(A)-(B). Since 2003, Congress has also implemented an annual cap of 65,000 (with certain exceptions) on the number of foreign nationals[1] who may be issued an initial H-1B visa or otherwise provided initial H-1B status, with an additional 20,000 for individuals who have earned a master's or higher degree from a United States institution of higher learning. 8 U.S.C. § 1184(g).

For purposes of the H-1B visa, Congress further required that any employer seeking to employ a foreign national as a temporary H-1B nonimmigrant worker must file a petition (*i.e.*, Form I-129) with United States Citizenship and Immigration Services ("USCIS"), which must "consult[]" with other appropriate agencies of the federal government such as the Department of Labor ("DOL"). 8 U.S.C. § 1184(c)(1); 8 C.F.R. § 214.2(h)(4)(i)(B)(1) (requirement that petitioner for H-1B "specialty occupation" classification obtain a DOL certification that it has filed a Labor Condition Application ("LCA") pursuant to 8 U.S.C. § 1182(n)); *see also* 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. Part 655, subparts H and I. An I-129 petition cannot be approved for a period that "exceed[s] the validity period of the labor condition application." 8 C.F.R. § 214.2(h)(9)(iii)(A)(1). Further, the start date for the beneficiary's employment cannot be backdated. *Id.* § 214.2(h)(9)(ii)(B).

The demand for initial H-1B status typically exceeds the congressionally imposed numerical allocations,

1. This memorandum uses the term "foreign national" to have the same meaning as the statutory term "alien" in the INA.

and accordingly DHS regulations provide rules for the administration of an H-1B selection process, commonly referred to as a "lottery." *See* 8 C.F.R. § 214.2(h)(8)(iii). "[T]he agency projects how many petitions it must process to issue a full complement of visas, taking into account historical rates of denials, withdrawals, and revocations." *Rubman v. USCIS*, 800 F.3d 381, 384 (7th Cir. 2015). "If the agency receives more petitions than it projects it will need, a lottery is conducted; selected petitions are issued a receipt number while the others are rejected and returned, along with their filing fees." *Id.*

USCIS uses projections to administer the cap, but a person is not actually counted toward the numerical limitation until the person is issued a visa or otherwise provided H-1B status. 8 C.F.R. § 214.2(h)(8)(ii)(A) ("Each alien issued a visa or otherwise provided nonimmigrant status under section[] 101(a)(15)(H)(i)(b) . . . of the Act shall be counted for purposes of any applicable numerical limit.").

After an I-129 petition is approved for an individual who is outside the United States, she must take additional steps before she can obtain a visa. *See* 8 U.S.C. § 1184(c)(1); 22 C.F.R. § 41.53(b) ("The approval of a petition . . . does not establish that the alien is eligible to receive a nonimmigrant visa."). Specifically, the individual must actually apply for the issuance of an H-1B visa from the Department of State, and then use that visa to enter the United States. 8 C.F.R. § 214.1(a)(3) ("Upon application for admission, the alien must present a valid passport and valid visa."). But "when an approved petition is not used

because the beneficiary(ies) does not apply for admission to the United States, . . . [t]he petition shall be revoked pursuant to paragraph (h)(11)(ii) of this section and USCIS will take into account the unused number during the appropriate fiscal year." 8 C.F.R. § 214.2(h)(8)(ii)(C); *see id.* § 214.2(h)(11)(ii) (providing for "immediate and automatic revocation").

B. Factual and Procedural History

In 2009, NGT filed an I-129 petition with USCIS to employ Deo as a computer programmer for three years, from October 9, 2009, through September 30, 2012, under an H-1B classification. After USCIS approved the petition, but before Deo ever applied to the Department of State for her H-1B visa, Deo entered the United States as a B-2 Nonimmigrant Visitor. USCIS ultimately revoked its approval of the petition, and NGT appealed to the Administrative Appeals Office ("AAO"). The administrative appeal was dismissed in November 2012, and a motion to reconsider was denied in October 2014. By the time NGT and Deo filed suit in federal court for the first time in July 2015, the validity period had long since expired, and there were no longer any H-1B visa numbers available for the relevant fiscal years. The parties and the district court, however, did not address mootness during that first federal action, and the matter was remanded to the agency in September 2017. *Next Generation Tech., Inc. v. Johnson ("NGT I")*, 328 F. Supp. 3d 252 (S.D.N.Y. 2017). On remand, the AAO sent NGT a Notice of Intent to Dismiss the appeal, as well as a Request for Evidence to which NGT responded, and the AAO affirmed the denial in July 2019 and dismissed the appeal.

In this second federal action filed in February 2021, NGT and Deo seek review of the July 2019 agency denial of their petition and request a declaration that USCIS's actions on remand were unlawful as well as an order directing the government to "reinstate" Deo's alleged H-1B status "immediately."[2] (Dist. Ct. ECF No. 1).

C. The Magistrate Judge's Report and Recommendation

The government moved to dismiss the complaint (Dist. Ct. ECF No. 27), and on May 12, 2022, the magistrate judge (Robert W. Lehrburger, M.J.) issued a report and recommendation recommending that the district court dismiss the complaint for lack of subject matter jurisdiction (Dist. Ct. ECF No. 31 ("R&R")). The R&R first concluded that the government was not precluded from raising mootness because not only was it not addressed in *NGT I*, but challenges to subject matter jurisdiction cannot be waived or forfeited. (R&R at 9–11). Next, the R&R concluded that NGT's and Deo's claims were moot because, first, the validity period for the revoked petition at issue had expired in 2012, and, second, there were no longer any H-1B visa numbers available for the validity period at issue. (R&R at 12–23). The R&R expressly rejected the contention that *nunc pro tunc* relief was available, as not only was the LCA submitted with the petition stale, but courts had held such extraordinary relief was unavailable in similar visa cases. (R&R at 15–18). The R&R also distinguished this case, where the visa period

2. In *NGT I*, however, the district court already concluded that it could not "reinstate" Deo's H-1B status "because Deo was never an H-1B visa holder." 328 F. Supp. 3d at 263.

had expired and the visa cap was reached approximately ten years before the R&R, from a case cited by NGT and Deo in which the H-1B lottery had occurred, but the visa cap had not actually been reached. (R&R at 22). Finally, the R&R concluded that the exception to mootness for actions capable of repetition yet evading review did not apply because NGT and Deo "d[id] not set forth any factual basis for the claim that they will be victimized again," instead only speculating. (R&R at 23–24).[3]

The R&R advised the parties that they had fourteen days to file written objections to the R&R, and it concluded with an express warning that "Failure to file timely objections will result in a waiver of objections and will preclude appellate review." (R&R at 27 (citing 28 U.S.C. § 636(b)(1) and Federal Rules of Civil Procedure 6(a), 6(d), and 72))).

D. The District Court's Decision

NGT and Deo did not object to the R&R within the fourteen-day period set by 28 U.S.C. § 636(b)(1), but after retaining new counsel, they sought a *nunc pro tunc* extension of the time to make objections. (Dist. Ct. ECF No. 33). With the consent of the government, NGT and Deo filed a late objection to the R&R on July 29, 2022. (Dist. Ct. ECF No. 37). In their objection, they raised for the first time several arguments that were not raised before the

3. Because the magistrate judge found subject matter jurisdiction lacking, the R&R did not separately address the government's motion to dismiss for failure to state a claim under Rule 12(b)(6). (R&R at 25–26 & n.17).

magistrate judge in opposition to the government's motion to dismiss,[4] but they did not object to the magistrate judge's recommendation that the action be dismissed as moot due to the lack of available H-1B visa numbers—indeed, there is no mention of available visa numbers in the objection. (Dist. Ct. ECF No. 37).

In an order dated March 18, 2023, the district court (Paul G. Gardephe, J.) overruled NGT's and Deo's objections to the R&R and adopted the recommendation to dismiss the complaint for lack of subject matter jurisdiction. (ECF No. 67, Special Appendix ("SPA") 67–85).

With respect to NGT's and Deo's objection to mootness, the district court concluded that NGT's and Deo's alleged intention to file a new LCA does not defeat mootness: as the magistrate judge determined, because the LCA is a necessary component of an I-129 petition and the LCA here was valid from October 2009 to September 2012, reinstatement of the approval of the I-129 would not be an "effectual remedy." (SPA 76–78). The district court further ruled that the magistrate judge was correct in concluding that *nunc pro tunc* relief is not available regarding an

4. Among those new arguments, NGT and Deo signaled an intent to submit a new LCA within two weeks, which they argued defeated mootness; next, they contended that attorney's fees and damages were still available; and finally, they argued that the "capable of repetition" exception to mootness applied because Deo "would start accruing an unlawful presence in the United States." (Dist. Ct. ECF No. 37, at 2–8).

I-129 petition with an expired validity period. (SPA 78–79). Also regarding mootness, the district court noted that NGT's and Deo's arguments regarding attorney's fees and damages were improperly raised for the first time in an objection to the R&R, and even if considered, were unpersuasive. (SPA 77, 79).

The district court next observed that NGT and Deo did not object to the magistrate judge's recommendation that the action be dismissed because "the lack of available H-1B visa numbers renders the parties' dispute moot." (SPA 80). Reviewing the recommendation for clear error, the district court agreed with the magistrate judge that NGT and Deo had no redressable injury in light of the visa cap for the relevant time period having been "reached long ago." (SPA 80–81).

The district court also rejected NGT's and Deo's assertion that the government was precluded from raising mootness because it did not so argue in *NGT I*. (SPA 81–83). The district court agreed that *NGT I* did not decide the question of mootness, and in any event, "subject matter jurisdiction can never be waived" and is not subject to estoppel. (SPA 82–83).

Finally, the district court rejected NGT's and Deo's argument that it should apply the exception to mootness for cases capable of repetition yet evading review. (SPA 83). Not only was the assertion "speculative" and without "any factual basis," but the contention that Deo would suffer harm on account of accruing unlawful presence was not made before the magistrate judge. (SPA 84).

Thus, the district court concluded, NGT and Deo had not demonstrated a reasonable expectation that they would be subjected to the same actions again. (SPA 84).

Final judgment was entered on March 20, 2023. (Dist. Ct. ECF No. 43). This appeal followed. (Dist. Ct. ECF No. 44). NGT and Deo filed their opening brief in this Court on October 20, 2023. (ECF No. 67 ("Br.")).

ARGUMENT

NGT and Deo Waived Appellate Review of the District Court's Ruling That This Action is Moot Because No Visa Numbers Remain for the Relevant Time Period

This appeal should be dismissed, or the district court's judgment should be summarily affirmed, because NGT and Deo failed to object to a dispositive point addressed by the magistrate judge's R&R, namely, the lack of visa numbers remaining for the relevant time period. Moreover, they fail to advance any argument in opposition to the point in their brief to this Court, mentioning it only in passing. They have therefore forfeited the argument, on a point that is necessary for them to prevail, twice over.

This court has "adopted the rule that that failure to object timely to a magistrate judge's report may operate as a waiver of any further judicial review of the decision, as long as the parties receive clear notice of the consequences of their failure to object." *United States v. Male Juvenile (95-CR-1074)*, 121 F.3d 34, 38–39 (2d Cir. 1997). NGT and

Deo received clear notice of the consequences should they fail to object, and thus the Court should apply its waiver rule here. *See*, *e.g.*, *Smith v. Campbell*, 782 F.3d 93, 102 (2d Cir. 2015) (declining to reach arguments because appellant failed to object to report and recommendation in district court).

Although NGT and Deo filed objections to the R&R, the district judge correctly noted that their objections did not address an independent ground for dismissal recommended by the magistrate judge, namely, "that the lack of available H-1B visa numbers renders the parties' dispute moot." (SPA 80). Instead, their objection focused on several new issues raised for the first time after the magistrate judge issued the R&R, and the objection made no mention of previously available visa numbers. (Dist. Ct. ECF No. 37). NGT and Deo have therefore waived appellate review as to that independent ground for dismissal as moot. *See Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010) ("[A] party waives appellate review of a decision in a magistrate judge's Report and Recommendation if the party fails to file timely objections designating the particular issue."); *Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003) ("a party's failure to object to any purported error or omission in a magistrate judge's report waives further judicial review of the point"); *Boddie v. Davis*, 242 F.3d 364 (2d Cir. 2000) ("[B]y failing to object[] to that part of the magistrate's report dismissing his claims against McNeal, Boddie waived his right to appellate review of the issue."). Because this issue is dispositive, the appeal should be dismissed on this ground alone.

Although this rule is nonjurisdictional and can be excused in the interest of justice, *Male Juvenile*, 121 F.3d at 39, no such relief is warranted here. Even if they had not waived appellate review by failing to object to the relevant conclusion in the R&R, NGT and Deo also failed to advance any argument on appeal challenging the district court's conclusions that no visa numbers were available for the relevant time period and therefore no relief could be granted. While NGT and Deo acknowledge that the district court "correctly pointed out that the H-1B numerical cap for Ms. Deo's requested validity period had been reached by December 2009" (Br. 30), nowhere in their brief do they challenge the district court's conclusion that the lack of available visa numbers rendered this dispute moot.[5] They have therefore waived review of this issue a second time. *See Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) ("Issues not sufficiently argued will be deemed waived and ineligible for appellate review."); *Cohen v. American Airlines, Inc.*, 13 F.4th 240, 247 (2d Cir. 2021); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("stating an issue without advancing an argument . . . did not suffice" to raise argument for appellate review).

5. NGT and Deo respond to the district court's admittedly correct conclusion that the cap had been reached by noting that Deo had submitted "an amended petition in 2010 that was pending approval." (Br. 30). But the amended petition is irrelevant to the question at issue in this motion, which is whether by the time this action was filed, the cap had been exceeded and therefore no visa could be granted. *See also* R&R at 15 n.10 (noting that the 2010 petition "did not contain any additional or new information . . . beyond what was filed in the initial LCA and Form I-129").

Nor is there any manifest injustice warranting an exercise of discretion to consider the waived issue. As NGT and Deo recognize, they are free to enter the lottery to submit a new petition and a new LCA for an unexpired time period. But where the government "lacks the statutory authority to grant the relief sought by plaintiffs under the [visa] program"—which is true in this case because the statutory numerical cap was reached years ago—"plaintiffs' claims are . . . moot." *Mohamed v. Gonzales*, 436 F.3d 79, 80–81 (2d Cir. 2006) (case is moot due to statutory time limit on granting of visas); *accord Li v. Kerry*, 710 F.3d 995, 1001–02 (9th Cir. 2013) (case involving EB-3 immigrant visa is moot where annual limit on number of visas has already been reached).[6] And that is still the case even if "administrative delays and errors are to blame for an alien not receiving a visa number on time." *Li*, 710 F.3d at 1002; *accord Mohamed*, 436 F.3d at 81 (case is moot even if "sheer bureaucratic ineptitude or intransigence" is to blame for failure to grant visa); (*contra* Br. 31 (alleging Deo could have completed application process except for agency's actions)).[7]

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6. EB-3 visas, like H-1B visas, involve skilled workers seeking admission to the United States, and require (among other things) the prospective employer to seek a DOL labor certification and then file a petition with USCIS. 710 F.3d at 997.

7. NGT and Deo cite the Declaratory Judgment Act, which permits a court to "'declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.'" (Br. 34, 37–38 (quoting 28 U.S.C. § 2201)). But that statute only applies "[i]n a case of actual controversy," 28 U.S.C. § 2201, and therefore cannot provide relief in a moot case, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118,

NGT and Deo have not identified any manifest injustice. While they point to the possible adverse immigration consequences of Deo having accrued unlawful status, the district court correctly noted that that argument was not raised before the magistrate judge and therefore has itself been waived. (SPA 84); *see Fischer v. Forrest*, 968 F.3d 216, 221 (2d Cir. 2020); *see also Pan Am. World Airways v. Int'l Bhd. of Teamsters*, 894 F.2d 36, 40 n.3 (2d Cir. 1990). In any event, that alleged injustice would not be remedied by retroactively granting a visa with validity from 2009 through 2012.

Consequently, the Court should dismiss this appeal or summarily affirm the district court's judgment.

126–27 (2007); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240–41 (1937).

Appendix G

CONCLUSION

The appeal should be dismissed or the district court's judgment should be summarily affirmed.

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New York, New York

Respectfully submitted,

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