NO. 24-_____

In the Supreme Court of the United States

ASHOK KUMAR CHEEJATI, ET AL.,

Petitioners,

v.

ANTONY BLINKEN, SECRETARY,
U.S. DEPARTMENT OF STATE, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether there is clear and convincing evidence that Congress intended 8 U.S.C. § 1252(a)(2)(B)(ii) to preclude judicial review of unlawful withholding claims?

2. Whether a statutory deadline is required to state a claim under 5 U.S.C. § 706(1) under the Administrative Procedure Act?

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

- Ashok Kumar Cheejati
- Sudheer Vempati
- Prabal Saxena
- Satya Siva Ram Valluri
- Amit Sawhney
- Karthik Rajashekaran
- Ramesh Reddy Jannapally
- Amarender Narlapuram
- Shridhar Yamijala
- Jigar Patel
- Manish Katiyar
- Akhil Kamma
- Amit Sawhney Divya Doma
- Anoop George
- Abdul Jaleel Gaffar
- Nishant Mathur
- Vasudeva Ashik Shanthigrama
- Ashwin Padmala
- Vikrant Bharadwaj
- Akshat Jasra
- Rahul Prakash Deshmukh
- Haragopal Chakravarthy
- Rohit Dhingra

- Tanuja Varkanthe
- Rashpal Singh Gill
- Seshu Gavara

Respondents and Defendants-Appellees below

- Antony Blinken, Secretary,
  U.S. Department of State
- Ur M. Jaddou, Director of U.S. Citizenship
  and Immigration Services

LIST OF PROCEEDINGS

Cheejati v. Blinken,
No. 4:23-cv-600 (E.D. Tex. Jun. 30, 2023)

Cheejati v. Blinken,
No. 23-40398 (5th Cir. Apr. 9, 2024)

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The United States Court of Appeals for the Fifth Circuit's opinion is reported at 106 F.4th 388. App.1a. The Eastern District of Texas's decision is not reported, but it can be found at 2023 WL 4303638. App.18a.

JURISDICTION

The Fifth Circuit denied Petitioners' petition for rehearing *en banc* on July 5, 2024. App.35a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1255(a)

> (a) Status as person admitted for permanent residence on application and eligibility for immigrant visa
>
> The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is

admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1252(a)(2)(B)(ii):

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

INTRODUCTION

Lawful permanent residency is a precious immigration benefit. Short of citizenship, it is a near complete membership in the United States polity. But Respondents United States Citizenship and Immigration Services and United States Department of State deprive tens of thousands of lawful nonimmigrants of such residency every fiscal year through inaction. Congress never intended inaction to lead to wastage of immigrant visas. Congress never intended inaction to leave noncitizens waiting decades for lawful permanent residency. And Congress never intended Courts to abdicate their Constitutional role in stopping this inaction. This petition presents two circuit splits related to the Respondents' refusals to make final decisions on Petitioners' applications for lawful permanent residency.

The circuits are first split on whether 8 U.S.C. § 1252(a)(2)(B)(ii) precludes judicial review of agency inaction. Specifically, the circuits are split on the proper interpretation of the words "decision" and "action" in § 1252(a)(2)(B)(ii). Here, The United States Court of Appeals for the Fifth Circuit held that § 1252(a)(2)(B)(ii) bars review over challenges to inaction. *Cheejati v. Blinken*, 106 F.4th 388 (5th Cir. 2024. But the Ninth Circuit recognized jurisdiction in the same case, *see Babaria, et al., v. Jaddou*, 87 F.4th 963 (9th Cir. 2023)[1] (exercising jurisdiction to hear unlawful withholding claim related to adjustment of status), while the Eighth Circuit refused jurisdiction. *Thigulla v. Jaddou*, 94

[1] A petition for certiorari is currently pending with this Court at No. 23-1268.

F.4th 770, 775 (8th Cir. 2024) (holding § 1252(a)(2)(B)(ii) precludes jurisdiction to hear unlawful withholding claim).[2] The identical issue is pending decision in three more circuits: *Gupta v. Jaddou*, Nos. 23-1828, 23-1813 (1st Cir.) (argument held April 1, 2024); *Geda v. Director of U.S. Citizenship and Immigration Servs*, No. 23-2195 (3rd Cir.) (argument held April 11, 2024); *Tulsiyan v. Director of U.S. Citizenship and Immigration Servs*, Nos. 23-12464, 23-12826 (11th Cir.) (pending argument); *Kale v. Jaddou*, No. 23-1799 (4th Cir.) (pending argument). Two other circuits have interpreted the words "decision" and "action" in a related provision in the Immigration and Nationality Act to mean opposite things. *Lovo v. Miller*, 107 F.4th 199 (4th Cir. Jul. 3, 2024) (holding the terms "decision" and "action" in 8 U.S.C. § 1182(a)(9)(B)(v) do not preclude challenges to inaction); *Soni v. Jaddou*, 103 F.4th 1271 (7th Cir. 2024) (holding the terms "decision" and "action" in § 1182(a)(9)(B)(v) preclude challenges to agency inaction). This petition presents the next evolution of this Court's jurisprudence related to § 1252(a)(2)(B)(II) in *Wilkinson v. Garland*, 601 U.S. 209 (2024), *Patel v. Garland*, 596 U.S. 328, 339 (2022), and *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 232 (2020).

The circuits are also split on a second issue presented in this case which is whether a statutory deadline is necessary to state a claim for unlawful withholding under 5 U.S.C. § 706(1) and *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) ("*SUWA*"). Here, the Fifth Circuit determined a statutory deadline was necessary to state a claim for unlawful

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[2] A petition for certiorari in a separate but identical case is pending with this Court seeking reversal of this opinion at No. 24-115.

withholding under § 706(1). But the Fourth, Sixth, Tenth, and District of Columbia Circuits do not require statutory deadlines to state a claim. *See Da Costa v. Immigr. Inv. Program Off.*, 80 F.4th 330, 344 (D.C. Cir. 2023); *Barrios Garcia v. U.S. Dep't of Homeland Sec.*, 25 F.4th 430, 454 (6th Cir. 2022); *Gonzalez v. Cuccinelli*, 985 F.3d 357, 374-76 (4th Cir. 2021); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). The decision at issue in this petition violates *SUWA* and basic mandamus principles.

These two circuit splits arise in the immigration context. Petitioners challenge the Respondents' unlawful refusal to make decisions on their pending Forms I-485, Application to Register Permanent Residence or Adjust ("green card application"). To file a green card application inside the United States, an immigrant visa must be "authorized to be issued" and "immediately available" to the applicant. 8 U.S.C. §§ 1255(a)(3) & (b). An immigrant visa is "authorized to be issued" if immigrant visas remain available in the annual visa inventory. *See* 8 U.S.C. §§ 1153(b), 1151, 1152. And an immigrant visa is "immediately available" if the applicant's immigrant visa was filed[3] on or before the "current" date on the monthly visa bulletin.[4] These two conditions must be met to file a green card application. 8 U.S.C. § 1255(a)(3). But the statute only requires that an immigrant visa be "authorized to be issued" at approval—meaning a visa number remains in the annual inventory. *Id.* Respondents U.S. Citizenship and Immigration Services ("CIS") and the U.S.

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[3] A "priority date" is, generally, the date an immigrant visa was filed on behalf of a beneficiary. *See* 8 C.F.R. § 204.5(b).

[4] *See generally* 9 FAM 503.4-3.

Department of State ("DOS") (together "the Agencies") are unlawfully withholding final action on Petitioners' green card applications by using subregulatory guidance to require an immigrant visa to be both available and current at approval in defiance of Congress.[5] USCIS Policy Guide, Vol. 7, Ch. 6, § C(4) (requiring an immigrant visa to be available and current at approval); Dep't of State – Bureau of Consular Affairs, Visa Bulletin, Vol. X, No. 90 (June 2024) ("Numbers are authorized for issuance only for applicants whose priority date is earlier than the final action date listed below." (emphasis in original)).

Petitioners challenge the Agencies outright refusals to make final decisions on their green card applications based on this unlawful policy. Petitioners are lawful, high-skilled nonimmigrants. App.2a. They have approved immigrant visas in the third employment-based preference ("EB-3"). *See* 8 U.S.C. §§ 1153(b)(2), (b)(3). But their immigrant visas are chargeable to

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[5] Congress has enacted every combination of these two conditions. It initially required immigrant visas to be available and current at both filing and approval. Immigration and Nationality Act, Pub. L. No. 414-163, § 245(a) (1952). Then it required an immigrant visa to be available and current only at approval. Immigration and Nationality Act, Pub. L. No. 86-648, § 10 (1960). Congress again amended the statute to require an immigrant visa to be available and current only at filing. An Act to Amend the Immigration and Nationality Act, P.L. 94-571 § 6 (Oct. 20, 1976) (emphasis added). This combination of the requirements remains in place today. 8 U.S.C. § 1255(a)(3) (2022) ("an immigrant visa is immediately available to [them] at the time [their] application is filed"); *see* H.R. 94-1553, Immigration and Nationality Act Amendments of 1976, p. 27 (1976) (stating the amendment was intended to "designate[] the date used in determining the availability of a visa number as the date the application is filed, rather than the approval date.").

India, which is interminably backlogged. App.3a. Due to 8 U.S.C. § 1152(a)(2)'s discriminatory[6] country caps, the visa bulletin reports that, as of October 1, 2024, EB-3 immigrant visas are only available and current for Indian-born applicants whose immigrant visa applications were filed on or before November 1, 2012. Dep't of State – Bureau of Consular Affairs, Visa Bulletin, Vol. X, No. 94 (October 2024).

In October of 2020, DOS permitted noncities with approved EB-3 visas chargeable to India with priority dates as late as December 2014. Dep't of State – Bureau of Consular Affairs, Visa Bulletin, Vol. X, No. 46 (October 2020). Petitioners filed their green card applications. App.7a. Nearly three years later, CIS had yet to adjudicate their applications. As of June 1, 2023, applications filed on or before June 15, 2012, were "current." But the Agencies announced that as of July 1, 2023, that date would retrogress to January 1, 2009. App.7a. Somehow visa numbers retrogressed by more than three years in less than a month. Based on their sub-regulatory guidance, the Agencies then refused to approve Petitioners' green card applications unless or until their priority date became current again. Petitioners challenged the unlawful withholding the final

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6 Section 1152 outlaws birthplace discrimination in the execution of the Immigration and Nationality Act. 8 U.S.C. § 1152(a) ("no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."). But it permits this otherwise-unlawful discrimination for purposes of applying statutory country caps. 8 U.S.C. § 1152(b) ("For the purposes of this chapter the foreign state to which an immigrant is chargeable shall be determined by birth within such foreign state[.]").

adjudication of their green card application based on their unlawful sub-regulatory policies. App.7a.

Petitioners' argument is simple: the Agencies are required to make a final decisions on their green card application; no statute or regulation requires an immigrant visa to be current for final agency action; thus, the Agencies are unlawfully withholding final agency action on their green card applications by requiring their immigrant visas to be current at final adjudication. App.9a. Before addressing the substance, the United States Court of Appeals for the Fifth Circuit dismissed it for lack of jurisdiction. App.14a. In the alternative, the Fifth Circuit held that Petitioners could not state a claim for unlawful withholding because the statute contained no deadline. App.15a. Both holds create circuit splits, and both holdings are wrong.

STATEMENT OF THE CASE

1. Petitioners filed suit on June 15, 2023. App.2a. The district court denied Petitioners motion for a preliminary injunction on the case as moot on June 30, 2023. App.18a. Petitioners filed a timely notice of appeal with the United States Court of Appeals for the Fifth Circuit.

4. The Fifth Circuit issued its panel decision on April 9, 2024, affirming the lower court's decisions. App.1a. Petitioners moved for rehearing en banc, and on July 5, 2024, the Fifth Circuit denied Petitioners request for rehearing en banc. App.35a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE JURISDICTIONAL CIRCUIT SPLIT.

1. This Court should grant certiorari, reverse the Fifth Circuit, and hold § 1252(a)(2)(B)(ii) does not preclude jurisdiction over unlawful withholding and unreasonable delay claims. To date, the Ninth Circuit recognized jurisdiction over Petitioners' claim, but the Eighth and Fifth Circuits have both held that 8 U.S.C. § 1252(a)(2)(B)(ii) precludes jurisdiction over the same claims. *Thigulla v. Jaddou*, 94 F.4th 770, 775 (8th Cir. 2024); *Cheejati v. Blinken*, 106 F.4th 388 (5th Cir. 2024). This case presents a vehicle to clarify how this Court's recent precedents interpreting § 1252(a)(2)(B)—*Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 232 (2020), *Patel v. Garland*, 596 U.S. 328, 339 (2022), and *Wilkinson v. Garland*, 601 U.S. 209 (2024)—apply to unreasonable delay and unlawful withholding claims.

2. Section 1252(a)(2)(B)(ii) does not preclude review over unlawful withholding or unreasonable delay claims because the statutory terms "decision" and "action" cannot be interpreted to mean "indecision" and "inaction." Section 1252(a)(2)(B)(ii) precludes judicial review over "any other decision or action . . . specified to be in the in the discretion" of the Agencies. *Id.* But "decision" or "action" cannot be interpreted to mean "indecision" or "inaction":

> When the statute was enacted in 1996, Black's Law Dictionary defined "decision" as "[a] determination arrived at after consideration of facts, and, in legal context, law." Webster's

> Dictionary similarly defined "decision" as "the act or process of deciding" or "a determination arrived at after consideration." And Black's Law Dictionary defined "action" as "conduct; behavior; something done[,]" while Webster's Dictionary variously defined it as "a deliberative or authorized proceeding," "the process of doing," and "a thing done[.]" Those definitions each point to some affirmative conduct, not mere inaction or delay. And they align with the intuition that the definition of a word like "action" would not typically include its logical opposite. So, while dictionary definitions are not always dispositive, here, they strongly indicate that neither delay nor inaction falls within the ordinary definition of "decision or action."

Lovo, 2024 WL 3280895, at *6 (internal citation omitted); *see Babaria*, 87 F.4th 963 (exercising jurisdiction over unlawful withholding claim). Because Petitioners challenge inaction and indecision, § 1252 (a)(2)(B)(ii) is inapposite.

3. Similarly, § 1252(a)(2)(B)(ii) do not preclude review of the Agencies' refusals to make final decisions because they are not exercises of discretion and § 1252 (a)(2)(B)(ii) applies only to *actual* exercises of discretion. An agency's inaction is not an exercise of discretion if it "is based solely on a belief that the agency lacked the lawful authority to do otherwise." *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 497 (9th Cir. 2018). "That is, where the agency's decision is based not on an exercise of discretion, but instead on a belief that any alternative choice was foreclosed by law," an agency is not

exercising discretion. *Id.* This Court held that the rescission of a discretionary, deferred action program was reviewable because the rescission was in part based on the mistaken belief the agencies lacked authority to implement all aspects of the deferred action program. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 16-19 (2020). Because the Agencies did not actually exercise their discretion, no statute precluding review of agency discretion barred judicial review. *Id.*

Here, the Retrogression Hold Policies are not an exercise of discretion to stop adjudicating adjustment of status applications with retrogressed priority dates; rather, the Agencies stop adjudicating them "based solely on the belief that" they lack authority to approve them. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). Because the Agencies do not believe they have authority or discretion to approve an adjustment of status application without a current immigrant visa, the Retrogression Hold Policies are not exercises of discretion and § 1252(a)(2)(B)(ii) is inapposite. Respondent CIS —and its litigation counsel—was recently admonished for arguing that a different agency action was both discretionary and mandatory, and they are doing the same here: "the Agency's position regarding its discretion is internally inconsistent." *N. Rockies Reg'l Ctr., LLC v. Jaddou*, ___F. Supp. 3d___, 2024 WL 3594297, at *5 (D. Mont. July 31, 2024). The Agencies seek to hide behind the term "discretion" at all costs. Because there is no indication the Agencies believe they have discretion to approve a non-current green card application, the Petitioners do not challenge an actual exercise of discretion and, therefore, the statutory preclusion for discretionary decisions is wholly inapposite.

4. Further, § 1252(a)(2)(B)(ii) cannot be interpreted to preclude review here without rendering superfluous portions of § 1252(a)(2)(B)(i). The relevant language in full provides:

> (B) Denials of discretionary relief
>
> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B). The Court made clear that Congress intended § 1252(a)(2)(B)(i) to have preclusive effect over "any" decisions related to applications under § 1255. *Patel v. Garland*, 596 U.S. 328, 339 (2022). Reading § 1252(a)(2)(B)(ii) to preclude review of Petitioners' legal challenges to the Agencies legal determination that it cannot approve green card applications without a current visa renders § 1252(a)(2)(B)(i)'s reference to § 1255(a) superfluous. If § 1252(a)(2)(B)(ii)

covers all decisions related to applications under § 1255 (a), there is no need for § 1252(a)(2)(B)(i).

5. Neither policies nor regulations can trigger § 1252(a)(2)(B)(ii). *Kucana v. Holder*, 558 U.S. 233, 237 (2010). Only a statute—as distinguished from regulation or policy—can trigger the jurisdictional bar at § 1252 (a)(2)(B)(ii). *Id.* The *Kucana* court interpreted § 1252 (a)(2)(B)(ii)'s "key words 'specified under this subchapter' refer to statutory, but not to regulatory, specifications" of discretion. *Id.* To this end it rejected the government's argument that a decision rendered discretionary by regulation was not reviewable under § 1252(a)(2)(B)(ii) because "[s]eparation-of-powers concerns, moreover, caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Id.*

The Agencies' subregulatory bases for their refusal to make final decisions are not statutes and, therefore, cannot trigger § 1252(a)(2)(B)(ii). The two courts that have declined jurisdiction highlight this error. The *Thigulla* court attempted to avoid *Kucana* rule by stating: "This case addresses whether the Attorney General acted within his discretionary, statutory authority by implementing and executing the Adjudication Hold Policy." *Thigulla*, 94 F.4th at 776. But footnote 10 of *Kucana* rejected this two-step argument when the amicus argued the Immigration and Nationality Act gave it discretion to implement regulations that rendered motions to reopen purely discretionary and, therefore, unreviewable under § 1252(a)(2)(B)(ii):

> The only statutory reference to discretion respecting motions to reopen appears in § 1229a(c)(7)(C)(iv)(III), which gives the Attor-

> ney General "discretion" to waive one of the statute's time limitations in extraordinary circumstances.
>
> Amicus urges that "the statutory language governing motions to reopen anticipates an exercise of Attorney General discretion when it states, '[t]he motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted.' "Brief for Court–Appointed Amicus Curiae in Support of Judgment Below 19, n. 8 (quoting § 1229a (c)(7)(B)). One can demur to the argument that Congress anticipated that decisions on reopening motions would be discretionary. Even so, the statutory proscription Congress enacted, § 1252(a)(2)(B)(ii), speaks of authority "specified"—not merely assumed or contemplated—to be in the Attorney General's discretion. "Specified" is not synonymous with "implied" or "anticipated." See Webster's New Collegiate Dictionary 1116 (1974) ("specify" means "to name or state explicitly or in detail"). *See also Soltane v. U.S. Dept. of Justice*, 381 F.3d 143, 147 (C.A.3 2004) (Alito, J.) ("[W]e do not think . . . that the use of marginally ambiguous statutory language, without more, is adequate to 'specif[y]' that a particular action is within the Attorney General's discretion for the purposes of § 1252(a)(2)(B)(ii).").

Kucana, 558 U.S. at 243 n.10. And the court here directly violated *Kucana* by expressly holding the regulations and actions of the Agencies trigger § 1252(a)(2)(B)(ii): "These regulations, and the conduct they direct DOS

and USCIS to undertake, are therefore 'action[s] of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General[.]'" *Cheejati*, 97 F.4th at 993. Neither subregulatory guidance nor regulations trigger § 1252(a)(2)(B)(ii) because they are not statutory.

6. Refusing jurisdiction here raises serious constitutional questions. *See Wilkinson v. Garland*, 601 U.S. 209 (2024). In *Wilkinson*, the Court addressed whether a mixed question of law and fact related to a denial of discretionary relief from removal was reviewable under § 1252(a)(2)(B)(i). *Wilkinson*, 601 U.S. at 221-223. In order for § 1252(a)(2)(B)'s preclusions to be constitutional, *Wilkinson* makes clear that § 1252(a)(2)(B) must be read in conjunction with the savings clause in § 1252 (a)(2)(D), which permits legal and constitutional challenges. *Id.* at 788 ("Two clear rules govern the interaction between § 1252(a)(2)(B)(i) (which strips jurisdiction over judgments regarding discretionary relief) and § 1252(a)(2)(D) (which restores it for legal questions)").

The Fifth Circuit's interpretation raises serious constitutional questions by precluding *all* legal and constitutional challenges to the Agencies refusals to act. Both violate the principles of *Wilkinson* because they apply § 1252(a)(2)(B) without the protections of § 1252(a)(2)(D). As a result, both cases' interpretations of § 1252(A)(2)(B) precluding any and all challenges to anything related to adjustment of status raise serious constitutional question. *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 232 (2020) (noting that interpreting jurisdiction-stripping to bar all challenges would lead to "serious constitutional questions"); *see also INS v. St. Cyr*, 533 U.S. 289, 313 (2001). Under *Cheejati* and *Thigullai*, the Agencies can withhold action on

any adjustment of status application for any reason—including race, religion, or retaliation—without judicial oversight. This is not an absurd hypothetical. *See, e.g.*, *Trump v. Hawaii*, 585 U.S. 667, 707 (2018) (reviewing legality of travel ban based on religion).

Reinforcing these concerns, Petitioners now have less judicial review rights than noncitizens who have been ordered removed. The Fifth Circuit described Petitioners' challenge as a legal challenge. *Cheejati*, 97 F.4th at 993-994. And *Wilkinson* holds that § 1252 (a)(2)(D) restores jurisdiction for this Court to review the legal challenges in removal proceedings. *Wilkinson*, 144 S. Ct. at 790. If Petitioners had been ordered removed, they could make their challenge. But because Petitioners are lawful, long-time nonimmigrants and green card applicants, they do not have a right to challenge the Retrogression Hold Policies. Thus, *Cheejati* and *Thigulla's* interpretation gives noncitizens in removal proceedings *more rights to judicial review* than noncitizens outside of removal proceedings.

This Court should grant certiorari to resolve the Circuit split and reinforce jurisdiction over unlawful withholding and unreasonable delay challenges.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CIRCUIT SPLIT OF WHETHER A STATUTORY DEADLINE IS NECESSARY TO STATE A CLAIM FOR UNLAWFUL WITHHOLDING OR UNREASONABLE DELAY.

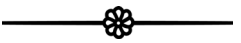
a. The Fifth Circuit alternatively held Petitioners could not state a claim because they identified no statutory deadline. App.17a. In *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004), the Court held that courts only have jurisdiction to compel "required" and

"discrete" actions under 5 U.S.C. § 706(1). But the Court did not hold that a statute must contain a mandatory deadline merely to state a claim for delay claims under § 706(1). *Barrios Garcia v. U.S. Dep't of Homeland Sec.*, 25 F.4th 430, 454 (6th Cir. 2022) ("The violation of a statutory deadline is not required to succeed on a § 706 (1) claim."); *see also Da Costa v. Immigr. Inv. Program Off.*, 80 F.4th 330, 344 (D.C. Cir. 2023); *Gonzalez v. Cuccinelli*, 985 F.3d 357, 374-76 (4th Cir. 2021); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). Whether the panel erred by requiring an unreasonable delay plaintiff to allege the violation of a statutory deadline to state a claim.

The Fifth Circuit violated *SUWA* and creates a circuit split with the United States Courts of Appeals for the D.C., Fourth, Sixth, and Tenth Circuits by requiring an delay plaintiff to allege a violation of a statutory deadline to be able to state a claim. *Barrios Garcia v. U.S. Dep't of Homeland Sec.*, 25 F.4th 430, 454 (6th Cir. 2022); *Gonzalez v. Cuccinelli*, 985 F.3d 357, 374-76 (4th Cir. 2021); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). The Administrative Procedure Act ("APA") empowers a court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). In *SUWA*, the Court dealt with the jurisdictional reach of § 706(1). *SUWA*, 542 U.S. at 61, ("We begin by considering what limits the APA places upon judicial review of agency inaction."). It determined that the APA only extends to agency actions that are "required" and "discrete." *Id.* at 62-64. But *SUWA* did not require a violation of a statutory deadline to state an unreasonable delay claim:

> Section 706(1) commands the federal courts to "compel agency action unlawfully withheld or unreasonably delayed." "[T]he distinction between agency action 'unlawfully withheld' and 'unreasonably delayed' turns on whether Congress imposed a date-certain deadline on agency action." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). By asking us to import a deadline-based "unlawfully withheld" determination to our "unreasonably delayed" analysis, the Government demands that we erase the words "unreasonably delayed" from § 706(1). This we cannot do. The Supreme Court has been clear: "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton*, 542 U.S. at 64, 124 S. Ct. 2373. That's it. The violation of a statutory deadline is not required to succeed on a § 706 (1) claim.

Barrios, 453-54. *see also Gonzalez*, 985 F.3d at 374-76; *Forest*, 174 F.3d at 1190. Nothing in *SUWA* or the APA requires an unreasonable delay plaintiff to allege the violation of a statutory deadline to state a claim. In stark contrast, the Fifth Circuit's decision holds that the Petitioners could not state a claim because they did not allege Appellee violated a statutory deadline. App.17a. This Court should grant certiorari to resolve this Circuit split.



CONCLUSION

For these reasons, this Court should grant certiorari, vacate the lower court's decision, and remand this case for further proceeding.

Respectfully submitted,

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October 2, 2024

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OPINIONS AND ORDERS

REHEARING ORDERS

OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (SUBSTITUTED OPINION JULY 5, 2024; ORIGINAL OPINION APRIL 9, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ASHOK KUMAR CHEEJATI; KARTHIK RAJASHEKARAN; NISHANT MATHUR; HARAGOPAL CHAKRAVARTHY; SESHU GAVARA; ET AL.,

Plaintiffs-Appellants,

v.

ANTONY BLINKEN, SECRETARY, U.S. DEPARTMENT OF STATE; UR M. JADDOU, DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants-Appellees.

No. 23-40398

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:23-CV-600

Before: RICHMAN, Chief Judge, and
OLDHAM and RAMIREZ, Circuit Judges.

IRMA CARRILLO RAMIREZ, *Circuit Judge*:

The opinion issued April 9, 2024[1] is WITHDRAWN, and the following opinion is SUBSTITUTED.

Appellants are a group of lawfully admitted Indian nationals who have applied for permanent residency. They sued Secretary of State Antony Blinken, in his official capacity ("DOS"), and United States Citizenship and Immigration Services Director Ur M. Jaddou, in her official capacity ("USCIS"), challenging their approach to distributing immigrant visas. Because subject-matter jurisdiction is lacking, we must VACATE and REMAND with instructions to dismiss.

I. Background

Appellants are nonimmigrants[2] legally present in the United States on employment-based visas chargeable to India. They have all filed Forms I-485 seeking adjustment of status to lawful permanent residents. Before an alien's status can be adjusted, a visa number must be available to him. As of June 2023, shortly before this suit was filed, DOS had estimated that visa numbers were immediately available to Appellants, so Appellants had all applied for status adjustments. But visa demand in mid-2023 was higher than expected, and ultimately, visa numbers were

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1 *Cheejati v. Blinken*, 97 F.4th 988 (5th Cir. 2024).

2 "The Immigration and Nationality Act distinguishes between immigrant and nonimmigrant aliens[.] . . . An alien falling into one of fifteen exclusionary categories is a nonimmigrant alien, a class generally delimited by a lack of intention to abandon his foreign country residence and entry into the United States for specific and temporary purposes." *LeClerc v. Webb*, 419 F.3d 405, 410 n.2 (5th Cir. 2005).

not immediately available to Appellants. As a result, Appellants' applications were held in abeyance until a visa number became available.

Appellants challenge the delay in adjudicating their I-485 applications. They maintain that DOS's and USCIS's policies of deferring adjudication of the applications until a visa number becomes available violate the clear language of the statute governing adjustment of status for nonimmigrants, 8 U.S.C. § 1255(a). They seek injunctive and declaratory relief under § 706(1) of the Administrative Procedure Act[3] (APA) and the federal Declaratory Judgment Act, 28 U.S.C. § 2201. Below, they moved for a preliminary injunction; that motion was denied, and they appeal that decision.

II. Standard of Review

We review the denial of a preliminary injunction for abuse of discretion, but any underlying legal principles are reviewed *de novo*. *Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006). Before reaching the merits of an appeal, however, "we must first assure ourselves of our own federal subject matter jurisdic-

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[3] Section 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed[.]

5 U.S.C. § 706.

tion." *La. Real Est. Appraisers Bd. v. FTC*, 917 F.3d 389, 391 (5th Cir. 2019) (per curiam) (internal quotations omitted) (quoting *Keyes v. Gunn*, 890 F.3d 232, 235 n.4 (5th Cir. 2018)); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (Federal courts have an "independent obligation to determine whether subject-matter jurisdiction exists[.]"). Issues of subject-matter jurisdiction are reviewed *de novo*. *Borden v. Allstate Ins. Co.*, 589 F.3d 168, 170 (5th Cir. 2009).

III. The Immigration and Nationality Act

The Immigration and Nationality Act (INA) governs visa allocation for foreign nationals wanting to enter the United States. In the INA, Congress conferred upon the Attorney General[4] the discretion to adjust the status[5] of an alien to lawful permanent resident:

> The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the

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[4] The Attorney General's authority under this provision has been delegated in relevant part to USCIS. *See, e.g.*, 6 U.S.C. §§ 271(b)(5), 455(c).

[5] Adjustment of status is a mechanism by which an alien's status may be changed to that of lawful permanent resident without requiring the alien to leave the United States. *See Marques v. Lynch*, 834 F.3d 549, 554 (5th Cir. 2016).

> alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(a).

The INA also sets the number of visas that can be allocated during each fiscal year, determined based on the type of visa and the country of origin of the applicant. *Id.* § 1152. These caps apply to both foreign nationals seeking to enter the United States and aliens currently in the United States who apply for an adjustment of status. To ensure the proper number of visas is issued, Congress permitted the Secretary of State to "make reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year within each of the categories [listed in the statute] and to rely upon such estimates in authorizing the issuance of visas." *Id.* § 1153(g). DOS looks to data from consular officers and USCIS to arrive at these estimates.[6]

DOS communicates these estimates to the public on the Visa Bulletin, which is published monthly on the DOS website, by reference to applicants' Final Action Dates. For purposes of a lawful nonimmigrant seeking adjustment of status, a Final Action Date is, in its simplest form, the date on which the applicant's current visa (for instance, his employment-based visa) was first obtained. The Visa Bulletin lists the latest

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[6] *See* U.S. DOS—Bureau of Consular Affairs, *Visa Bulletin for March 2024*, THE VISA BULLETIN, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2024/visa-bulletin-for-march-2024.html [https://perma.cc/42RQ-2KNC].

possible Final Action Date that would render an applicant eligible for a visa. In other words, any applicant with a Final Action Date earlier than the date listed on the Visa Bulletin can apply for a visa number, and DOS estimates that one will be immediately available to him. Section 1255(a)(3) therefore requires that, on the date an application for adjustment of status is filed, the applicant's Final Action Date must predate the one listed on the Visa Bulletin for the applicable visa category.

Occasionally, DOS will overestimate the number of available visas, or actual demand will outpace the projected demand upon which DOS's estimates were based. When this occurs, to avoid allocating too many visas, DOS will change the relevant Final Action Date to an earlier date to reflect the fact that fewer applicants will have a visa number available to them.[7] This process is called retrogression. When a Final Action Date retrogresses, it is possible that an individual applicant could have been eligible to apply for adjustment of status on one day, but ineligible the next. Typically, when the new fiscal year begins in October, more visa numbers will become available, and DOS will undo the retrogression, often resetting the relevant Final Action Date to the latest date previously listed. And when retrogression renders previously eligible

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[7] *Compare* U.S. DOS—Bureau of Consular Affairs, *Visa Bulletin for June 2023*, THE VISA BULLETIN, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-june-2023.html [https://perma.cc/BRE3-BLBS], *with* U.S. DOS—Bureau of Consular Affairs, *Visa Bulletin for July 2023*, THE VISA BULLETIN, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-july-2023.html [https://perma.cc/EDP3-JPXF].

applicants ineligible for approval, DOS and USCIS each have a policy of holding the application in abeyance until a visa number becomes available. The parties refer to these policies as the "retrogression hold policies."

Relevant to this appeal, the June 2023 Visa Bulletin listed the Final Action Date for determining visa number availability for Appellants as June 15, 2012.[8] But the following month, the Final Action Date retrogressed to January 1, 2009.[9] Visa numbers were available to all Appellants as of June 2023 because they all have Final Action Dates before June 15, 2012. But the July 2023 retrogression rendered them ineligible for adjustment of status. The March 2024 Visa Bulletin lists the relevant Final Action Date as July 1, 2012.[10]

Once an application for adjustment of status is approved, the Attorney General is statutorily required to "record the alien's lawful admission for permanent residence as of the date" of the approval, and DOS must "reduce by one the number of the preference visas authorized to be issued under sections 1152 and

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[8] *See* U.S. DOS—Bureau of Consular Affairs, *Visa Bulletin for June 2023*, THE VISA BULLETIN, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-june-2023.html [https://perma.cc/BRE3-BLBS].

[9] *See* U.S. DOS—Bureau of Consular Affairs, *Visa Bulletin for July 2023*, THE VISA BULLETIN, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-july-2023.html [https://perma.cc/EDP3-JPXF].

[10] *See* U.S. DOS—Bureau of Consular Affairs, *Visa Bulletin for March 2024*, THE VISA BULLETIN, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2024/visa-bulletin-for-march-2024.html [https://perma.cc/42RQ-2KNC].

1153 of this title within the class to which the alien is chargeable for the fiscal year then current." 8 U.S.C. 1255(b).

IV. Jurisdiction

DOS and USCIS contend that federal courts do not have jurisdiction to address Appellants' challenge because the jurisdiction-stripping provisions in the INA preclude it.[11]

The INA strips federal courts of jurisdiction to address many challenges brought in the context of immigration proceedings. Relevant here, 8 U.S.C. § 1252 dictates that:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal pro-

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[11] DOS and USCIS also argue that Appellants lack standing and the case has been rendered moot because (1) several of Appellants' I-485 applications have been approved and (2) the Final Action Date retrogression that rendered Appellants ineligible for adjustment of status has been reversed. We may address jurisdictional issues in any order we choose. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). It is not obvious from the pleadings or briefs that the controversy is moot for two reasons: (1) Appellants complain that the mere delay of their applications harmed them by reducing the time spent as lawful permanent residents, working towards becoming naturalized citizens, and (2) it is not clear whether some of the individuals who are now eligible have ultimately received approval of their applications. Accordingly, we begin and end with DOS's and USCIS's statutory argument.

> ceedings, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security[.]

8 U.S.C. § 1252(a)(2)(B). Subparagraph (D) contains an exception for review of "constitutional claims or questions of law raised upon a petition for review," *id.* § 1252(a)(2)(D), and has been interpreted as applying only when a petition for review is filed directly in the appropriate court of appeals, *see, e.g.*, *Mendoza v. Mayorkas*, No. 23-20043, 2023 WL 6518152, at *2 & n.1 (5th Cir. Oct. 5, 2023) (per curiam) (collecting cases).

As discussed, the INA provides that "[t]he status of an alien who was admitted or paroled into the United States . . . *may* be adjusted by the Attorney General, *in his discretion and under such regulations as he may prescribe*, to that of an alien lawfully admitted for permanent residence if" the alien meets the three criteria listed in the statute. 8 U.S.C. § 1255(a) (emphasis added).

In noting that § 1252(a)(2)(B) likely strips federal courts of jurisdiction to hear Appellants' suit, the district court cited to the Supreme Court's decision in *Patel v. Garland*, 596 U.S. 328, 338 (2022), which endorsed an expansive reading of § 1252(a)(2)(B). There, the petitioner's application for adjustment of

status was denied because he had previously misrepresented his citizenship when applying for a Georgia driver's license and was therefore ineligible for status adjustment. *Id.* at 334. He sought review of that denial. *Id.* at 335. In holding that federal courts lack jurisdiction to review factual findings upon which a discretionary decision is based, the Supreme Court emphasized the broad language used in § 1252(a)(2)(B)(i): "it prohibits review of *any* judgment *regarding* the granting of relief under § 1255[.] As this Court has repeatedly explained, the word 'any' has an expansive meaning." *Id.* at 338 (internal quotations omitted) (quoting *Babb v. Wilkie*, 589 U.S. 399, 405 n.2 (2020)). Section 1252(a)(2)(B)(ii) similarly uses the word "any": courts are without jurisdiction to review "*any* other decision or action of the Attorney General or the Secretary of Homeland Security . . . ." Under *Patel*, "any" operates to augment the purview of § 1252(a)(2)(B)(ii) to preclude judicial review of DOS's and USCIS's retrogression hold policies, which are practical applications of the discretion afforded the Attorney General in § 1255(a).

Also useful is our vacated decision in *Bian v. Clinton*, 605 F.3d 249 (5th Cir. 2010). The facts of *Bian* are virtually identical to those presented here: the petitioner was lawfully present in the United States on an employment-based visa and filed an I-485 application to adjust her status. *Id.* at 251. Because there were no visa numbers available to applicants in her visa category, the adjudication of her application was delayed. *Id.* Frustrated by the delay, the petitioner filed suit "seeking to compel [USCIS] to adjudicate her I-485 application for adjustment of immigration status." *Id.*

Bian held that federal courts lacked jurisdiction to hear the case because § 1252(a)(2)(B)(ii) precluded review of "the USCIS's pace of adjudication." *Id.* at 252–53. The court concluded that the word "action" in § 1252(a)(2)(B)(ii) would be superfluous if the provision stripped the courts of jurisdiction to review only final, discrete decisions. *Id.* at 253–54 ("If Congress had intended for only USCIS's ultimate decision to grant or deny an application to be discretionary—as distinguished from its interim decisions made during the adjudicative process—then the word 'action' would be superfluous."). Therefore, the conduct that the petitioner complained of in *Bian*—the same conduct to which Appellants object here—was an "action" undertaken by the Attorney General for purposes of § 1252(a)(2)(B)(ii).

Moreover, as *Bian* noted, § 1252(a)(2)(B)(ii) strips federal courts of jurisdiction to review *any discretionary* decision or action rendered by the Attorney General. Section 1255(a) expressly leaves not only the ultimate *decision* to adjust an applicant's immigration status but also actions taken in the course of the decision-making *process*—including the pace at which that process is undertaken—to the discretion of the Attorney General: applications for adjustment of status are adjudicated "in [the Attorney General's] discretion and under such regulations as he may prescribe." 8 U.S.C. § 1255(a). And we recently held, albeit in an unpublished case, that the pace of USCIS's adjudication is left to its discretion, with "no clear mandate" requiring USCIS to act within a certain timeframe. *Li v. Jaddou*, No. 22-50756, 2023 WL 3431237, at *1 (5th Cir. May 12, 2023). Accordingly, the discrete acts undertaken to render an adjustment decision and the

timing of those acts are determined by the Attorney General in his discretion, and that discretionary action cannot be reviewed by federal courts. 8 U.S.C. §§ 1252 (a)(2)(B)(ii), 1255.

Exercising his § 1255 authority, the Attorney General promulgated regulations to facilitate the adjustment of status decision-making process, including the regulations Appellants challenge here, such as 8 C.F.R. § 245.2. The retrogression hold policies are effectuated through discrete acts by DOS and USCIS, informed by these regulations. For instance, DOS amends the Visa Bulletin to establish a new Final Action Date, and USCIS decides to delay adjudicating the applications or, in other words, sets the status of an application to pending. *See Thigulla v. Jaddou*, 94 F.4th 770, 775 (8th Cir. 2024) (noting that "USCIS decided to delay adjudicating the [plaintiffs'] status adjustment applications" and that decision constituted an "action" for purposes of § 1252(a)(2)(B)(ii)). These regulations, and the conduct they direct DOS and USCIS to undertake, are therefore "action[s] of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General[.]" 8 U.S.C. § 1252(a)(2)(B)(ii). Although *Bian* was later vacated because a visa number became available to the petitioner and the case was rendered moot, we find its reasoning persuasive.

Our reading of § 1252(a)(2)(B) also comports with that of the only other circuit to address the issue. The Eighth Circuit recently concluded that it lacked subject-matter jurisdiction to hear a similar challenge. *Thigulla*, 94 F.4th at 777–78. In *Thigulla*, the plaintiffs sought to adjust their status from lawful nonimmigrants present in the United States on temporary work visas

to lawful permanent residents. *Id.* at 772. The plaintiffs' priority dates retrogressed, and USCIS delayed adjudication of their applications as a result. *Id.* at 772–73. The plaintiffs sued USCIS under the APA, seeking to compel it to promptly render a decision with respect to their applications. *Id.* at 773. Noting that only "clear and convincing" evidence of Congress's intent can overcome the presumption in favor of judicial review of agency decisions, the court considered the text of §§ 1252(a)(2)(B) and 1255. *Id.* at 773–75. The court concluded that "[t]he text of § 1252(a)(2)(B)(ii) and § 1255(a) is clear and convincing evidence that Congress intended to preclude judicial review of the Attorney General's discretionary decisions about the status adjustment process under § 1255(a), like the [retrogression hold policies]." *Id.* at 776. We find the Eighth Circuit's analysis persuasive and agree with its conclusion.

Appellants argue that § 1252(a)(2)(B)(ii) does not apply here because the statute's title indicates that it was intended to apply only to decisions related to removal. They cite to the Supreme Court's decision in *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991), for the proposition that the title of a statute can aid a court in resolving an ambiguity in the statutory language. But there is no ambiguity to be resolved here: § 1252(a)(2)(B) expressly states that it applies "regardless of whether the judgment, decision, or action is made in removal proceedings[.]" 8 U.S.C. § 1252(a)(2)(B). Several of our sister circuits have applied § 1252(a)(2)(B) in cases that did not involve removal. *See, e.g.*, *Al-Saadoon v. Barr*, 973 F.3d 794, 802 n.6 (8th Cir. 2020) ("[Petitioners'] argument that [§ 1252(a)(2)(B)] only applies to removal

proceedings is incorrect. The statute limits review 'regardless of whether the judgment . . . is made in removal proceedings.'"); *Abuzeid v. Mayorkas*, 62 F.4th 578, 586 (D.C. Cir. 2023) (no jurisdiction to review denial of petitioner's application for adjustment of status from student visa holder to lawful permanent resident); *Juras v. Garland*, 21 F.4th 53, 60 (2d Cir. 2021) (no jurisdiction to review withdrawal of application for admission to the United States); *Thigulla*, 94 F.4th at 777. And § 1255 applies in both removal proceedings and proceedings unrelated to removal; there is no evidence in the text of the statute that Congress intended to strip federal courts of jurisdiction as to one type of discretionary conduct, but not as to another.

We have previously noted "the general expectation that federal courts address subject-matter jurisdiction at the outset in the 'mine run of cases[.]'" *Sangha v. Navig8 ShipManagement Priv. Ltd.*, 882 F.3d 96, 100 (5th Cir. 2018) (quoting *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007)). Because § 1252(a)(2)(B)(ii) precludes federal courts from hearing challenges like this one, we must vacate the order denying the motion for preliminary injunction and remand with instructions to dismiss this case for lack of subject-matter jurisdiction.

V. APA

Alternatively, to the extent our jurisdictional conclusion is incorrect, Appellants are still not entitled to a preliminary injunction because they have not shown that they are likely to succeed on the merits of their APA claim.

Section 706 of the APA commands courts to "compel agency action unlawfully withheld or unreasonably

delayed[.]" 5 U.S.C. § 706(1). Appellants assert an "unlawful withholding" claim. "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All. (SUWA)*, 542 U.S. 55, 64 (2004) (emphasis in original). In other words, "[a] court's authority to compel agency action is limited to instances where an agency ignored 'a specific, unequivocal command' in a federal statute or binding regulation." *Fort Bend County v. U.S. Army Corps of Eng'rs*, 59 F.4th 180, 197 (5th Cir. 2023) (quoting *SUWA*, 542 U.S. at 63).

Here, Appellants have identified no unequivocal mandate with which USCIS has failed to comply. Appellants contend that the Government's past admissions that applicants are entitled to a decision regarding their applications for adjustment of status establish that the agency action at issue here is required. They also argue that requirement is set out in USCIS's own regulations. For example, 8 C.F.R. § 245.2(a)(5) provides that "the applicant shall be notified of the decision[.]" But this argument is unavailing because it does not establish a time period during which the applications must be adjudicated. Appellants do not posit that USCIS will *never* render a decision on their applications; they take issue with the pace at which those decisions are made. None of these regulations or admissions at oral argument establish that USCIS has failed to do something it is required to do.

Appellants cite to authority from other circuits for the proposition that *SUWA* did not create a statutory deadline requirement to assert a claim under § 706. But we have held, albeit in an unpublished opinion, that the challenge brought by Appellants did not give

rise to a claim under § 706 because "there is no clear mandate here such that we can say the USCIS was *required* to act within six months, or even within a year." *Li*, 2023 WL 3431237, at *1. Appellants have not sufficiently alleged that any binding authority requires USCIS to adjudicate applications for adjustment of status differently than it is currently adjudicating them. For that reason, Appellants cannot show a likelihood of success on the merits of their APA claim, so they are not entitled to a preliminary injunction.

VI. Conclusion

For these reasons, we hold that § 1252(a)(2)(B)(ii) prevents us from hearing a challenge to DOS's and USCIS's retrogression hold policies, as they are actions undertaken by the Attorney General and expressly left to his discretion under § 1255(a). The district court's decision is VACATED, and the case is REMANDED with instructions to dismiss for lack of subject-matter jurisdiction.

CONCURRANCE IN PART

Andrew S. Oldham, *Circuit Judge*, concurring in part:

I agree with the majority that we lack jurisdiction over this case. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). I would simply dismiss, rather than render an alternative, hypothetical judgment on the merits. *See United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 647–48 (1874) ("Judicial jurisdiction implies the power to hear and determine a cause" and render "judgment in a court of competent jurisdiction."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998) ("For a court to [reach the merits] when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."); *Spivey v. Chitimacha Tribe of Louisiana*, 79 F.4th 444, 449 (5th Cir. 2023) (holding absence of jurisdiction forecloses any judgment on the merits).

MEMORANDUM OPINION AND ORDER, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION (JUNE 30, 2023)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ASHOK KUMAR CHEEJATI, ET AL.

v.

ANTONY BLINKEN, SECRETARY, UNITED STATES DEPARTMENT OF STATE, ET AL.

Civil No. 4:23-CV-600-SDJ

Before: Sean D. JORDAN, U.S. District Judge.

MEMORANDUM OPINION AND ORDER

Plaintiffs in this case are thirty-two Indian nationals with approved immigrant visas, each of whom has applied for an adjustment of status to become a lawful permanent resident of the United States—that is, a green card holder. Plaintiffs have sued the United States Department of State (DOS) and United States Citizenship and Immigration Services (USCIS), generally complaining of undue delays in the adjudication of their green-card applications.

But before the Court today is a much larger ask than an order compelling the accelerated disposition of these Plaintiffs' green-card applications. Plaintiffs

have filed their "Motion for a Temporary Restraining Order or Preliminary Injunction," (Dkt. #4), seeking emergency injunctive relief that would fundamentally alter the United States' existing system for allocating immigrant visas. Specifically, Plaintiffs ask the Court to enjoin the DOS and USCIS from applying what Plaintiffs characterize as DOS and USCIS's "Retrogression Hold Policies." As will be explained further, the complained-of retrogression is part of DOS and USCIS's processes concerning the timing of green-card adjudication when the demand for visas, whether by category of visa or country of the applicant's origin, exceeds the supply of available visas.

The motion will be denied because Plaintiffs' claims are unlikely to succeed on the merits—indeed the Court likely lacks subject-matter jurisdiction to decide the claims—and Plaintiffs also cannot meet any of the other requirements for injunctive relief.

The proposed legal theory underlying Plaintiffs' request turns on the Administrative Procedure Act (APA), which allows courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). However, "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64, 124 S. Ct. 2373, 159 L.Ed.2d 137 (2004) ("*SUWA*"). "A court's authority to compel agency action is limited to instances where an agency ignored 'a specific, unequivocal command' in a federal statute or binding regulation." *Fort Bend Ctny. v. U.S. Army Corps of Eng'rs*, 59 F.4th 180, 197 (5th Cir. 2023) (quoting *SUWA*, 542 U.S. at 63). Because the "Retrogression Hold Policies" do not run afoul of any "specific, une-

quivocal command" of federal law, Plaintiffs' APA-based challenge has no chance of success. And, unsurprisingly, the same challenges to so-called DOS and USCIS "retrogression hold" policies have already been asserted and rejected by courts across the country.[1]

Equally unpersuasive are Plaintiffs' allegations of irreparable harm, which turn entirely on (1) speculation that elimination of the complained-of retrogression process would speed up the adjudication of their green-card applications, which may or may not be true, and (2) alleged inconveniences associated with their current immigrant status that do not rise to the level of irreparable harm. Given the meritless nature of Plaintiffs' claims and their lack of irreparable harm, as compared to the dramatic alteration in immigrant-visa-adjudication procedures proposed in their motion, the balance of equities weighs heavily against Plaintiffs. Likewise, the disruption to established visa-adjudication procedures contemplated by Plaintiffs would disserve the public interest. Accordingly, their request for injunctive relief will be denied.

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[1] *See, e.g.*, *Museboyina v. Jaddou*, No. 4:22-CV-3169, 2022 WL 4608264, at *3–*5 (D. Neb. Sept. 30, 2022) (finding that plaintiffs had failed to establish a likelihood of success in their challenge against so-called visa retrogression policies); *Babaria v. Blinken*, No. 22-CV-05521-SI, 2022 WL 10719061, at *5–6 (N.D. Cal. Oct. 18, 2022) (same); *Mukkavilli v. Jaddou*, No. 22-CV-2289, 2023 WL 4029344, at *10 (D.D.C. June 15, 2023) (dismissing for lack of subject-matter jurisdiction unlawful withholding claims involving the same retrogression policies at issue here).

I. Background

A. Plaintiffs Seek Lawful Permanent Residence in the United States.

Plaintiffs are lawful immigrants from India. They moved here under the EB-3 employment visa, which applies to a broad category of "[s]killed workers," "professionals," and "other workers." 8 U.S.C. § 1153(b)(3). And they have all applied for lawful permanent residence in the Unites States by requesting an adjustment of status from USCIS through a Form I-485; thus, they have applied for what is "colloquially known as a 'green card.'" *Mantena v. Johnson*, 809 F.3d 721, 723, 725 (2d Cir. 2015).

B. Adjustment of Status and Visa Retrogression

The Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101–1537, governs how aliens[2] obtain

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[2] Although the Government and Plaintiffs have used the term "noncitizen" in their filings, rather than "alien," the Court sees no reason to depart from the language employed by Congress in the applicable statutory law. *See, e.g.*, 8 U.S.C. § 1101(a)(3) ("The term 'alien' means any person not a citizen or national of the United States."). There are several good reasons why this is so. First, as noted by Judge Bea of the Ninth Circuit, the words "noncitizen" and "alien" do not carry the same meaning. *Avilez v. Garland*, 69 F.4th 525, 543 (9th Cir. 2023) (Bea, J., concurring) (observing that "alien" and "noncitizen" are not "interchangeable").

Second, it is the prerogative of Congress to choose the precise language used in federal statutes, and it makes good sense to apply federal laws using the same terminology employed by the Legislature. *See id.* at 544 (Bea, J., concurring) (observing that courts should "hew closely to the laws as they are written, both in form and in substance"). As relevant here, the term "alien" has appeared throughout the INA since it was enacted, and although Congress has routinely amended statutes addressing immigration

immigrant visas to seek admission into and permanently reside in the United States. At issue here is Title 8 U.S.C. § 1255, which provides the Secretary of Homeland Security with discretionary authority, under such regulations as the Secretary may prescribe, to adjust the status of certain aliens to lawful permanent residence.[3]

Section 1255(a) provides several prerequisites that must be satisfied before the Secretary may exercise his discretion to confer permanent residence status, which include the following: "(1) the alien makes an application for such adjustment, (2) the alien is eligible to

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issues, to the present day it also has consistently used the word "alien" to describe individuals who are not U.S. citizens or nationals. *See, e.g.,* Energy Security & Lightering Independence Act of 2022, Pub. L. No. 117-360, January 5, 2023, 136 Stat. 6292 (amending "the Immigration and Nationality Act to include *aliens* passing in transit through the United States to board a vessel on which the *alien* will perform ship-to-ship liquid cargo transfer operations within a class of nonimmigrant *aliens*, and for other purposes." (emphases added)).

Third, as demonstrated by the continued and pervasive use of the term by Congress in this context, "[t]here's no need to be offended by the word 'alien.' It's a centuries-old legal term found in countless judicial decisions." *Khan v. Garland*, 69 F.4th 265, 272 (5th Cir. 2023) (Ho, J., concurring in judgment); *see also id.* (Ho, J., concurring in judgment) ("[W]e always read words in their proper context. And in the context of immigration law, we use 'alien,' not to disparage one's character—or to denote one's planetary origin—but to describe one's legal status. . . . [There is] no need to bowdlerize statutes or judicial decisions that use the word 'alien' by substituting terms like 'non-citizen'").

[3] Although the statute refers to the Attorney General, authority has been transferred to the Secretary of Homeland Security. *See* 6 U.S.C. §§ 271(b)(5), 557; 8 C.F.R. § 245.2(a); *Dong v. Chertoff*, 513 F. Supp. 2d 1158, 1162 n.3 (N.D. Cal. 2007).

receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. § 1255(a). When the INA was first enacted in 1952, the requirements for eligibility under this section included a requirement that a visa be immediately available both at the time of filing and at the time of adjudication of the application. INA, Pub. L. No. 414-163, § 245(a) (1952). In 1960, Congress amended Section 1255(a) to delete the requirement that a visa number be available at the time of filing. INA, Pub. L. No. 86-648, § 10 (1960). Then, in 1976, Congress reinstated the statutory requirement that a visa be available at the time of filing and removed the requirement that a visa be immediately available at the time of adjudication of the application. INA, Pub. L. No. 94-571, § 6 (Oct. 20, 1976). Plaintiffs assert that, by removing the statutory requirement that a visa number be immediately available at the time of adjudication, Congress prohibited the government from imposing such a requirement.

For their part, DOS and USCIS have pointed to 8 U.S.C. § 1255(b) as evidence that Congress requires visas to be allocated at the time of approval. They further argue that this requirement is inconsistent with Plaintiffs' argument. Section 1255(b) requires that, upon approval of an application for adjustment of status:

> [T]he Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference visas authorized to be

> issued under sections 1152 and 1153 of this title within the class to which the alien is chargeable for the fiscal year then current.

8 U.S.C. § 1255(b). As DOS and USCIS note, because Section 1255(b) mandates that, after an adjustment of status application is approved, the Secretary of State must "reduce by one" the number of relevant visas that can be issued, it is a logical necessity that—when no visas are currently available to be reduced from the visa pool—an adjustment of status application must remain pending until a new visa becomes available. *See Museboyina v. Jaddou*, No. 4:22-CV-3169, 2022 WL 4608264, at *4 (D. Neb. Sept. 30, 2022) ("The Secretary obviously could not make such a reduction in the number of preference visas authorized if they are not available."). Thus, DOS and USCIS have confirmed that an applicant's status will be adjusted only if the applicant has properly filed an I-485 application, a visa number was immediately available at the time of filing, and a visa number is immediately available at the time of adjudication. (Dkt. #17 at 5) (citing 8 U.S.C. § 1255(a)–(b); 8 C.F.R. §§ 245.1(g), 245.2(a)(2)(i)(A)–(C) and (a)(5)(ii)); *see also Koppula v. Jaddou*, No. 1:22-CV-844-RP, 2023 WL 3470904, at *2 (W.D. Tex. May 15, 2023).

DOS further notes that it is responsible for allocating immigrant visas within the limits set by Congress. 22 C.F.R. § 42.51. Congress has provided for DOS to "make reasonable estimates of the anticipated number of visas to be issued during any quarter of any fiscal year . . . and to rely upon such estimates in authorizing the issuances of visas." 8 U.S.C. § 1153(g). When demand for immigrant visas in a particular category (in this case, EB-3 visas for Indian nationals) exceeds the

number of visas available, DOS considers the category oversubscribed and imposes a "final action date." Only applicants with priority dates before the final action date are considered to have visa numbers available and can apply and be approved for visas. DOS publishes the cut-off dates in its monthly visa bulletin. The final action date will move forward as more visas become available; however, if demand rises above the number of visas available the dates may move backwards. This backwards movement is known as retrogression.

When a particular category retrogresses, an applicant whose priority date was previously before the cut-off may find that his priority date is now after the cut-off. Even if that applicant filed his I-485 while a visa was available, USCIS will not approve the adjustment until the cut-off date once again progresses beyond the applicant's priority date. Until that time, the application remains pending.

C. Plaintiffs File Suit to Avert Retrogression.

Here, Plaintiffs' pending adjustment of status applications will be retrogressed as of July 1, 2023. That means the final action date for Plaintiffs EB-3 preference category, chargeable to India, will move backward from June 15, 2012, to January 1, 2009.

To prevent their pending applications from being "retrogressed," Plaintiffs filed a complaint and their emergency motion with the Court. (Dkt. #1, #4). The complaint asserts claims under the APA and requests the following rulings: (1) that USCIS be directed to adjudicate the pending adjustment of status applications within six months; (2) that DOS be directed to issue visa numbers following approval of those applications; and (3) that the "Retrogression Hold Policies"

be declared unlawful. (Dkt. #1 ¶¶ 113–21). The emergency motion requests that the Court enter a preliminary injunction broadly prohibiting DOS and USCIS from enforcing the retrogression hold policies pending a ruling on summary judgment.[4] (Dkt. #4 at 18). The Government has appeared in the case and responded to the emergency motion. (Dkt. #17).

It is not entirely clear from Plaintiffs' filings how long their applications for adjustment of status have been pending. But it appears that most of them have been pending for at least several months and that some of them may have been pending for a longer period of time. *See, e.g.*, (Dkt. #4 at 3) (indicating that USCIS "has been working on adjudicating" Plaintiffs' adjustment of status forms "[o]ver the last couple of years").

II. Legal Standard

A preliminary injunction is an "extraordinary and drastic remedy." *Anderson v. Jackson*, 556 F.3d 351, 360 (5th Cir. 2009) (quotation omitted). To issue such relief, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (quotation omitted). And only when the movant has "clearly carried the

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[4] As an alternative to a preliminary injunction, the emergency motion also requests a temporary restraining order. Temporary restraining orders are treated as "accelerated" preliminary-injunction motions and evaluated under the same factors. *Sharing Servs. Glob. Corp. v. Oblon*, No. 4:20-CV-989-SDJ, 2021 WL 3410670, at *1 (E.D. Tex. Jan. 8, 2021). Because the Court denies the requested preliminary injunction, it follows that the requested temporary restraining order must be denied as well.

burden of persuasion" should a court grant preliminary injunctive relief. *Anderson*, 556 F.3d at 360.

In order to obtain a preliminary injunction, a movant must establish the following factors: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). If the movant fails to establish any one of these factors, the movant cannot obtain injunctive relief. *See Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 196 (5th Cir. 2003) (explaining that a preliminary injunction "should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements" (quotation omitted)).

Preliminary injunctions are "particularly disfavored" when they impose "mandatory" relief against a party: meaning, that they require the party to do more than simply maintain the status quo. *See Roark v. Individuals of Fed. Bureau of Prisons, Former & Current*, 558 F.App'x 471, 472 (5th Cir. 2014) (per curiam) (quoting *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)); *see also Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971) (per curiam) ("The purpose of a preliminary injunction is to preserve the status quo and thus prevent irreparable harm. . . ."). And here, Plaintiffs seek injunctive relief not in order to maintain the status quo, but rather to force DOS and USCIS to dramatically alter established processes for allocating immigrant visas.

III. Discussion

Plaintiffs have not established the necessary grounds for entering a preliminary injunction. The Court begins by addressing whether Plaintiffs have established a strong likelihood of success on the merits. The Court then turns to the remaining factors for evaluating a preliminary injunction motion.

A. Likelihood of Success on the Merits

Far from establishing a strong likelihood of success on the merits, Plaintiffs' filings demonstrate the opposite: that the case will likely be dismissed at the outset for lack of subject-matter jurisdiction.

To prevail on an unlawful withholding claim under the APA, Plaintiffs must demonstrate not only that the Defendants failed to perform discrete actions, but also that the Defendants were indisputably required to perform those actions under the relevant statutes. *See* 5 U.S.C. § 706(1); *SUWA*, 542 U.S. at 64 (holding that a claim for unlawfully withheld government action "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."). If the relevant statutes impose no clear duty on the Defendants to act—or if the relevant statutes commit that decision to the "agency's discretion" or expressly "preclude[d] [judicial] review"—then the Court must dismiss any challenge to Defendants' refusal to act for lack of subject matter jurisdiction. 5 U.S.C. § 706(1). "A court's authority to compel agency action is limited to instances where an agency ignored 'a specific, unequivocal command' in a federal statute or binding regulation." *Fort Bend Cnty.*, 59 F.4th at 197 (quoting *SUWA*, 542 U.S. at 63); *see also Mysaev v. U.S. Citizenship & Immigr. Servs.*, No. 3:22-

CV-0371-B, 2022 WL 2805398, at *4 (N.D. Tex. July 18, 2022) ("[J]urisdiction under the APA is appropriately exercised only if [the alien] can establish that the Defendants had a clear, non-discretionary duty to adjudicate his [adjustment of status] application within a certain period.").

Here, Plaintiffs have not established that there is any "unequivocal command" in federal law for DOS and USCIS to adjudicate their green-card applications by a particular date or to adjudicate those applications without regard to the current availability of visas. To the contrary, Section 1255(a) confers broad authority on the Secretary to approve adjustment of status applications at his "discretion" and "under such regulations as he may prescribe," if the applicant meets certain requirements. 8 U.S.C. § 1255(a). As the Fifth Circuit explained in *Bian v. Clinton*, Section 1255 "does not specify a deadline or even a time frame for adjudication of applications, instead committing not only the USCIS's decision but also any 'regulations' necessary for making such a decision to agency discretion." 605 F.3d 249, 253 (5th Cir. 2010), *vacated as moot*, No. 09-10568, 2010 WL 3633770 (5th Cir. Sept. 16, 2010).[5] The *Bian* Court further concluded that the

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[5] *Bian* was admittedly vacated as moot and therefore lacks precedential value. *Balfour Beatty Constr., L.L.C. v. Liberty Mut. Fire Ins. Co.*, 968 F.3d 504, 516 n.20 (5th Cir. 2020) (citing *Asgeirsson v. Abbott*, 696 F.3d 454, 459 (5th Cir. 2012)). Even so, the Court treats its reasoning as persuasive, as have other district courts in this circuit. *See, e.g.*, *Chuttani v. U.S. Citizenship & Immigr. Servs.*, No. 3:19-CV-02955-X, 2020 WL 7225995, at *3 n.22 (N.D. Tex. Dec. 8, 2020) (treating *Bian* as "[a]t the very least, . . . highly persuasive."); *Khokha v. U.S. Citizenship & Immigr. Servs.*, No. 3:21-CV-2577-L, 2021 WL 5742329, at *3 (N.D. Tex. Dec. 2, 2021) ("While this decision by the Fifth Circuit was subsequently

Government's discretion extended not only to its ultimate decision, but also to its adjudicative process: including its policy of refusing to grant "adjustments of status until visa numbers be available"—precisely the same policy challenged in this case. *Id.* at 253–55. Thus, the court upheld USCIS's refusal to approve an adjustment of status under that policy even though the agency conceded that the alien otherwise met the statutory requirements for approval. *Id.* at 251; *see also Koppula*, 2023 WL 3470904, at *2 (dismissing for lack of subject-matter jurisdiction plaintiffs' claims seeking to compel action on pending adjustment of status applications).[6]

There is also nothing in Section 1255(a)'s text that precludes the retrogression procedures complained-of by Plaintiffs, or the premise of the procedure that Plaintiffs' applications, like those of other similarly situated applicants, will be adjusted only when a visa number is immediately available at the time of adjudication. Recall that Section 1255(a) allows for an adjustment when "(1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an

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vacated when motions to dismiss the appeal as moot were filed, the undersigned finds this well-reasoned decision persuasive."); *Dommaraju v. Thompson*, No. 3:21-CV-2585-S, 2021 WL 5104375, at *1 (N.D. Tex. Oct. 28, 2021) ("[W]hile the Fifth Circuit vacated that appeal and opinion due to mootness, its logic remains sound and persuasive.").

[6] In a recent unpublished decision, the Fifth Circuit again found that USCIS is under "no clear mandate" to adjudicate adjustment of status applications at any particular pace. *Li v. Jaddou*, No. 22-50756, 2023 WL 3431237, at *1 (5th Cir. May 12, 2023) (per curiam). The court upheld dismissal under Rule 12(b)(6) without addressing the question of subject-matter jurisdiction. *Id.*

immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. § 1255(a). According to Plaintiffs, because in 1976 Congress deleted the additional requirement that an immigrant visa be immediately available to an applicant at the time of approval, DOS and USCIS are prohibited from conditioning the allocation of the adjustment on the availability of a visa at the time of approval. Plaintiffs misread the statute's plain text. The requirements of Section 1255(a) establish a *floor*, not a *ceiling*, on the considerations for approval of an application for adjustment; that is to say, the statute provides that the Secretary "may" adjust an applicant's status only "if" the applicant meets the stated requirements in Section 1255(a). Beyond those requirements, Section 1255(a) "says nothing about whether a visa must be available at the time an application is approved." *Museboyina*, 2022 WL 4608264, at *4; *Babaria v. Blinken*, No. 22-CV-05521-SI, 2022 WL 10719061, at *5 (N.D. Cal. Oct. 18, 2022) (same).

Because no statutory language supports their argument, Plaintiffs "spin[] out an argument based on § 1255(a)'s structure and history," concluding it was Congress's intent knowingly to reject the requirement to have a current visa number at approval. *Mukkavilli v. Jaddou*, No. 22-CV-2289, 2023 WL 4029344, at *10 (D.D.C. June 15, 2023). Like other courts that have considered this argument, the Court "declines to draw inferences about Congress's intent, especially where those inferences stem from statutory silence." *Id.* (citing *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496–97, 213 L.Ed.2d 847 (2022)).

For all of these reasons, Plaintiffs have little or no likelihood of success on the merits.[7]

B. The Remaining Preliminary Injunction Factors

It follows from the Court's reasoning on the first preliminary injunction factor that Plaintiffs cannot meet the remaining three factors either. To begin, Plaintiffs have not demonstrated a risk of irreparable harm. Irreparable harms mean those harms for which "there is no adequate remedy at law." *See Louisiana v. Biden*, 55 F.4th 1017, 1033–34 (5th Cir. 2022) (quotations omitted). A harm does not qualify as irreparable when it is "merely possible" that the harm will occur, as opposed to "likely," or when the harm amounts to "speculat[ion]" or "unfounded fear." *Id.* (quotations omitted); *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013).

Here, Plaintiffs cannot establish that they suffered *any* harm, let alone an irreparable one. That is so because Plaintiffs are not entitled to relief from the complained-of retrogression policies for all the reasons explained above: namely, because the agencies have sweeping discretion in establishing the policies by

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[7] DOS and USCIS have also argued, and the Court agrees, that subject-matter jurisdiction may also be absent under 8 U.S.C. § 1252. Specifically, Defendants assert that the Supreme Court's recent decision in *Patel v. Garland*, 142 S.Ct. 1614, 212 L.Ed.2d 685 (2022), confirms that 8 U.S.C. § 1252(a)(2)(B) strips the Court of subject-matter jurisdiction to review a decision relating to an adjustment of status under 8 U.S.C. § 1255. The Court will request briefing from the parties on this issue concerning the potential dismissal of this case.

which they adjudicate adjustment of status applications. *Supra* Part III(A). And when an adjustment of status application is approved, that approval is a matter of grace, not a matter of right. *Id.*

Plaintiffs' alleged harms are also speculative and far from irreparable. Notably, a delay in obtaining lawful permanent residency will not cause Plaintiffs to be removed from the country so long as they maintain their employment authorizations. Likewise, that Plaintiffs' visas will retrogress does not mean that they will be "kicked out of the line" for lawful permanent residence. *Banerjee v. U.S. Citizenship & Immigr. Servs.*, No. 4:21-CV-3293, 2021 WL 4918183, at *3 (D. Neb. Oct. 21, 2021). To the contrary, Plaintiffs will keep their spots in line and may become eligible again for lawful permanent residence when new visas become available. It is therefore entirely possible that the Court's refusal to enjoin the retrogression policies will have no effect on the timing by which Plaintiffs' applications are adjudicated. In the meantime, Plaintiffs will not suffer any injuries except for the alleged inconveniences associated with maintaining their current immigration status. If those injuries are irreparable, Plaintiffs have not explained how. It is also entirely possible that the agencies will ultimately *deny* Plaintiffs' adjustment of status applications—a possibility that renders Plaintiffs' alleged harms even more speculative.

Finally, the balance of equities and public interest factors also cut against the requested preliminary injunction. It would be both inequitable and offend the public interest to enjoin the Defendants from enforcing policies that are statutorily committed to their discretion and beyond the scope of judicial review.

IV. Conclusion

Plaintiffs' Motion for a Temporary Restraining Order or Preliminary Injunction, (Dkt. #4), is **DENIED**.

So ORDERED and SIGNED this 30th day of June, 2023.

/s/ Sean D. Jordan
United States District Judge

ORDER DENYING PETITION FOR REHEARING EN BANC, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (JULY 5, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ASHOK KUMAR CHEEJATI; KARTHIK RAJASHEKARAN; NISHANT MATHUR; HARAGOPAL CHAKRAVARTHY; SESHU GAVARA; ET AL.,

Plaintiffs-Appellants,

v.

ANTONY BLINKEN, SECRETARY, U.S. DEPARTMENT OF STATE; UR M. JADDOU, DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants-Appellees.

No. 23-40398

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:23-CV-600

Before: RICHMAN, Chief Judge, and OLDHAM and RAMIREZ, Circuit Judges.

ON PETITION FOR REHEARING AND REHEARING EN BANC

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.