No. 24-401

# In the Supreme Court of the United States

ASHOK KUMAR CHEEJATI, ET AL., PETITIONERS

*v.*

ANTONY J. BLINKEN, SECRETARY OF STATE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTIONS PRESENTED

Congress has authorized the Secretary of Homeland Security to adjust a noncitizen's status to that of a lawful permanent resident. See 8 U.S.C. 1255(a). United States Citizenship and Immigration Services may approve an adjustment application only if an immigrant visa is available to the applicant at the time of approval. Petitioners are a group of noncitizens who have challenged the lawfulness of that practice. The questions presented are:

1. Whether 8 U.S.C. 1252(a)(2)(B) deprives courts of jurisdiction over petitioners' challenge.

2. Whether an action to "compel agency action unlawfully withheld," 5 U.S.C. 706(1), provides a proper vehicle for litigating petitioners' challenge.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 106 F.4th 388. The memorandum opinion and order of the district court (Pet. App. 18a-34a) is available at 2023 WL 4303638.

## JURISDICTION

The judgment of the court of appeals was entered on July 5, 2024. A petition for rehearing was denied on the same date (Pet. App. 35a-36a). The petition for a writ of certiorari was filed on October 1, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Immigration and Nationality Act (INA or Act), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*), allows various categories of noncitizens to become lawful permanent residents. See 8 U.S.C. 1153 (2018 & Supp. IV

2022).[1] Petitioners seek permanent residency based on an offer of employment in the United States. See Pet. 6.

The path to employment-based permanent residence generally consists of three steps. See *Mantena* v. *Johnson*, 809 F.3d 721, 724-725 (2d Cir. 2015). First, the employer must obtain a labor certification—*i.e.*, a determination by the Department of Labor that, among other things, there are insufficient U.S. workers available to fill the job. See 8 U.S.C. 1182(a)(5)(A). Second, the employer must file a petition for an immigrant visa on behalf of the noncitizen and must obtain approval from U.S. Citizenship and Immigration Services (USCIS). See 8 U.S.C. 1154(a)(1)(F). Third, the noncitizen must obtain an immigrant visa from a consular officer, travel to the United States, and seek admission as a lawful permanent resident. See 8 U.S.C. 1201, 1225. Alternatively, if the noncitizen is already in the United States and is otherwise eligible, he may instead apply to USCIS to adjust his status to that of a lawful permanent resident. See 8 U.S.C. 1255(i).

The INA imposes worldwide and country-by-country caps on the number of immigrant visas that may be issued each year. See 8 U.S.C. 1151(d), 1152(a)(2) and (5). Noncitizens who receive adjustment of status instead of immigrant visas generally count toward those caps. See 8 U.S.C. 1255(a) and (b). Specifically, a noncitizen may apply for adjustment only if "an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. 1255(a). And upon "approval of an application for adjustment," the federal government must "reduce by one the number of [immigrant] visas author-

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 590 U.S. 222, 226 n.2 (2020) (citing 8 U.S.C. 1101(a)(3)).

ized to be issued" to the category to which the noncitizen belongs. 8 U.S.C. 1255(b).

The decision to grant adjustment of status lies in the "discretion" of the Secretary of Homeland Security and is subject to "such regulations as he may prescribe." 8 U.S.C. 1255(a); see 6 U.S.C. 557. Under the applicable regulations, a noncitizen may seek adjustment only if an immigrant visa is available when he files the application, see 8 C.F.R. 245.1(g)(1), and USCIS may grant adjustment only if an immigrant visa is available when it approves the application, see 8 C.F.R. 245.2(a)(5)(ii).

In some circumstances, an "immigrant visa that is available when the noncitizen applies to adjust status can become unavailable by the time the application is processed and ready to be approved." *Babaria* v. *Blinken*, 87 F.4th 963, 972 (9th Cir. 2023), cert. denied, No. 23-1268, 2024 WL 4426634 (Oct. 7, 2024). In those cases, final approval may be delayed until, for example, the next year's supply of immigrant visas becomes available. See *id.* at 974.

2. Petitioners are citizens of India who have applied for adjustment of status. See Pet. App. 2a. Immigrant visas were available at the time their applications were submitted, but became unavailable later—delaying approval of the applications. See *id.* at 2a-3a.

Petitioners filed this suit in the U.S. District Court for the Eastern District of Texas, claiming that the government had violated the INA by requiring an immigrant visa to be available when USCIS approves an adjustment application, not just when a noncitizen files the application. See Pet. App. 23a-24a. They invoked a provision of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, that authorizes a court

to "compel agency action unlawfully withheld." 5 U.S.C. 706(1); see Pet. App. 28a.

The district court denied petitioners' motion for a preliminary injunction. See Pet. App. 18a-34a. It first determined that petitioners were unlikely to succeed on the merits. See *id.* at 28a-32a. The court explained that a party who seeks to "compel agency action unlawfully withheld," 5 U.S.C. 706(1), must show that the agency was "indisputably required to perform" the action, Pet. App. 28a, but that petitioners could not show that USCIS was required to adjudicate their adjustment applications "by a particular date or * * * without regard to the current availability of visas," *id.* at 29a. It also determined that the equities weighed against injunctive relief. See *id.* at 32a-33a. In a footnote, the court stated that "subject-matter jurisdiction may also be absent under 8 U.S.C. § 1252" and that the court would "request briefing from the parties on this issue concerning the potential dismissal of the case." *Id.* at 32a n.7.

3. The Fifth Circuit vacated the district court's order and remanded the case with instructions to dismiss for lack of jurisdiction. See Pet. App. 1a-17a.[2]

The court of appeals determined that, under 8 U.S.C. 1252(a)(2)(B)(ii), the district court lacked jurisdiction over petitioners' suit. See Pet. App. 8a-14a. That provision precludes courts from reviewing any "decision or action of the * * * Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of * * * the Secretary." 8 U.S.C. 1252(a)(2)(B)(ii). The court held that "the discrete acts

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[2] The court of appeals withdrew its initial opinion and substituted another one when it denied petitioners' petition for panel rehearing or rehearing en banc. Pet. App. 2a, 35a-36a. The following description tracks the substituted opinion.

undertaken to render an adjustment decision and the timing of those acts" are "discretionary" actions covered by that judicial-review bar. Pet. App. 11a-12a.

The court of appeals then held, in the alternative, that petitioners were not likely to succeed on the merits of their APA claim. See Pet. App. 14a-16a. The court explained that a suit to "compel agency action unlawfully withheld," 5 U.S.C. 706(1), may proceed only if "an agency ignored 'a specific, unequivocal command' in a federal statute or binding regulation." Pet. App. 15a (citation omitted). The court concluded that petitioners had "identified no unequivocal mandate with which USCIS has failed to comply." *Ibid.* It noted that a DHS regulation required USCIS to notify an applicant of its decision, see 8 C.F.R. 245.2(a)(5), but the court determined that petitioners' reliance on that regulation was misplaced because the regulation "does not establish a time period during which the applications must be adjudicated," Pet. App. 15a.

Judge Oldham issued an opinion concurring in part. See Pet. App. 17a. He stated that, because the court of appeals lacked subject-matter jurisdiction, it should not have issued "an alternative, hypothetical judgment on the merits." *Ibid.*

**ARGUMENT**

Petitioners renew their contention (Pet. 9-16) that 8 U.S.C. 1252(a)(2)(B) did not deprive the district court of subject-matter jurisdiction over their suit. They also contend (Pet. 16-18) that they may bring a suit to "compel agency action unlawfully withheld," 5 U.S.C. 706(1), without showing that USCIS violated a statutory or regulatory deadline for adjudicating their applications. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision

of this Court or of any other court of appeals. Earlier this Term, this Court denied two other petitions for writs of certiorari that presented related questions. See *Chalamalesetty* v. *Jaddou*, No. 24-115, 2024 WL 4743084 (Nov. 12, 2024); *Babaria* v. *Jaddou*, No. 23-1268, 2024 WL 4426634 (Oct. 7, 2024). The same result is warranted here.

1. Petitioners' challenge to the court of appeals' jurisdictional holding does not warrant further review.

a. Under Section 1252(a)(2)(B), the district court lacked jurisdiction over petitioners' suit. Clause (i) of that provision states that "no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under [8 U.S.C. 1255]," the section that authorizes adjustment of status. 8 U.S.C. 1252(a)(2)(B)(i). In *Patel* v. *Garland*, 596 U.S. 328 (2022), this Court explained that Clause (i) bars judicial review of any "decisions relating to the granting or denying" of adjustment. *Id.* at 337 (citation omitted); see *id.* at 338-340. The agency's decision not to grant adjustment until an immigrant visa becomes available is a decision "relating to the granting or denying" of that relief. *Id.* at 337 (citation omitted); see *Bouarfa* v. *Mayorkas*, No. 23-583 (Dec. 10, 2024), slip op. 11 (noting that Clause (i) bars review of "threshold determinations"). Clause (i) thus bars judicial review of such a decision.

Clause (ii) separately provides that "no court shall have jurisdiction to review * * * any other decision or action of * * * the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of * * * the Secretary of Homeland Security." 8 U.S.C. 1252(a)(2)(B)(ii). Because Section 1255 provides that the Secretary "may" grant adjustment "in his discretion," 8 U.S.C. 1255(a), the "decision"

or "action" of granting or declining to grant adjustment is "specified" to be "in the discretion" of the Secretary, 8 U.S.C. 1252(a)(2)(B)(ii). See *Bouarfa*, slip op. 6-7 (relying in part on Congress's use of "may" in holding that 8 U.S.C. 1155 grants discretion and is not subject to judicial review). Thus, as the court below and the Eighth Circuit have held, Clause (ii) likewise bars judicial review of the decision not to grant adjustment until an immigrant visa becomes available. See Pet. App. 8a-14a; *Thigulla* v. *Jaddou*, 94 F.4th 770, 774-778 (8th Cir. 2024).

In the decision below, the court of appeals relied on Clause (ii). See Pet. App. 10a-14a. But the government may rely on both clauses in defending the court's judgment. A prevailing party may "defend its judgment on any ground," "whether or not that ground was relied upon, rejected, or even considered" by the courts below. *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). That is particularly so when, as here, the case concerns the scope of a court's subject-matter jurisdiction.

Petitioners glancingly suggest (Pet. 12-13) that, "[i]f [Clause (ii)] covers all decisions related to applications under § 1255," then the court of appeals' reliance on Clause (ii) would render the reference to Section 1255 in Clause (i) "superfluous." But petitioners do not address why Clause (i) does not indeed bar review of their challenge to what the agency sees as a threshold determination for the exercise of discretion to adjust a noncitizen's status under Section 1255(a).

b. Petitioners instead focus (Pet. 9-16) on Clause (ii), but their contentions about that provision lack merit.

Petitioners contend that Clause (ii) is inapplicable because it bars judicial review of a "decision or action,"

8 U.S.C. 1252(a)(2)(B)(ii), while petitioners characterize their suit as "challeng[ing] inaction and indecision," Pet. 10. But USCIS has acted here: It has affirmatively decided that petitioners' applications should remain pending and should not be granted until immigrant visas become available. That decision to process petitioner's application at a particular pace is a discretionary decision shielded from judicial review, not inaction. See *Bouarfa*, slip op. 7 (noting that "discretion is a two-way street," such that the discretion to take some action includes the discretion not to take that action). To be sure, USCIS has not yet taken "*final* agency action" on petitioners' applications. Pet. 8 (emphasis added). But Clause (ii) refers to "any" action, not just to "final" action. 8 U.S.C. 1252(a)(2)(B)(ii).

Petitioners also contend (Pet. 11) that Clause (ii) does not apply because USCIS's policy rests on the agency's view that petitioners are statutorily ineligible for adjustment, rather than on an "exercise of discretion." But Clause (ii) does not use the phrase "exercise of discretion." It instead uses the phrase "any other decision or action of * * * the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion" of the Secretary. 8 U.S.C. 1252(a)(2)(B)(ii). The "authority" for the "decision or action" here is "specified" "to be in the discretion" of the Secretary: The Secretary "may" grant adjustment "in his discretion," 8 U.S.C. 1255(a).

Petitioners invoke (Pet. 13) this Court's decision in *Kucana* v. *Holder*, 558 U.S. 233 (2010), but that decision is inapposite. In *Kucana*, this Court held that Clause (ii) applies only to "determinations made discretionary by statute," not to "determinations declared discretionary by [the government] through regulation." *Id.* at

237. Here, the INA itself makes adjustment discretionary; again, it states that the Secretary "may" grant adjustment "in his discretion." 8 U.S.C. 1255(a).

Finally, petitioners err in suggesting (Pet. 15-16) that the canon of constitutional avoidance justifies a contrary reading of Section 1252(a)(2)(B). Under that canon, a court may interpret "ambiguous statutory language" to "avoid serious constitutional doubts." *Iancu* v. *Brunetti*, 588 U.S. 388, 397 (2019) (citation omitted). But Section 1252(a)(2)(B)'s language is unambiguous in depriving the courts of jurisdiction over petitioners' suit. Cf. *Patel*, 596 U.S. at 346-347 (finding Section 1252(a)(2)(B)(i) too "clear" about stripping jurisdiction to permit any "resort to the presumption of reviewability"); *Bouarfa*, slip op. 11-12 (same with respect to Section 1252(a)(2)(B)(ii)). And that restriction does not raise any constitutional doubts, for "Congress has the constitutional authority to define the jurisdiction of the lower federal courts." *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993). Petitioners cite (Pet. 15-16) a line of cases suggesting that a statute limiting federal courts' jurisdiction to review petitions for writs of habeas corpus may, in some circumstances, raise constitutional concerns, see, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 300-305 (2001), but this case does not involve habeas corpus.

c. Petitioners contend (Pet. 9) that "the Ninth Circuit recognized jurisdiction" over suits comparable to this one in *Babaria* v. *Blinken*, 87 F.4th 963, 972 (2023), cert. denied, No. 23-1268, 2024 WL 4426634 (Oct. 7, 2024). Petitioners argue (Pet. 16) that this Court should grant review in order to resolve the purported conflict between that decision and the Fifth and Eighth Circuits' decisions rejecting jurisdiction.

As the government has explained in previous briefs opposing certiorari, no such circuit conflict exists. See Br. in Opp. at 7-8, *Chalamalesetty*, *supra* (No. 24-115); Br. in Opp. at 7-8, *Babaria*, *supra* (No. 23-1268). In *Babaria*, neither the parties nor the court of appeals addressed whether Section 1252(a)(2)(B) precluded the district court from exercising jurisdiction. See Br. in Opp. at 7, *Babaria*, *supra* (No. 23-1268). "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 144 (2011); see *United States* v. *Dunn*, 728 F.3d 1151, 1156 (9th Cir. 2013) ("[T]hese cases do not resolve the question of our jurisdiction because they do not expressly discuss the issue.").

The Ninth Circuit thus did not decide whether Section 1252(a)(2)(B) barred judicial review of the claims in *Babaria*. Its decision therefore cannot conflict with the Fifth and Eight Circuits' decisions that Section 1252(a)(2)(B)(ii) does bar judicial review of such claims.

Petitioners observe (Pet. 4) that, at the time of the filing of the petition for a writ of certiorari, the First Circuit was considering a challenge to USCIS's practice of approving adjustment applications only when immigrant visas are available. The First Circuit has since issued its decision in that case. See *Gupta* v. *Jaddou*, 118 F.4th 475 (2024). The court "assume[d] there [we]re no statutory bars to the exercise of jurisdiction," *id.* at 482, and ruled in favor of the government on the merits of the appellants' APA claim, see *id.* at 483-486. Cf. *Waleski* v. *Montgomery, McCracken, Walker & Rhoads, LLP*, 143 S. Ct. 2027, 2027 (2023) (Thomas, J., dissenting from the denial of certiorari) (noting that some

courts of appeals have concluded that they may exercise "hypothetical jurisdiction" to avoid resolving questions of "statutory jurisdiction"). Because the First Circuit did not reach the jurisdictional issue, its decision does not conflict with the decision below.

Petitioners also note (Pet. 4) that the Third, Fourth, and Eleventh Circuits are currently considering challenges to USCIS's practice of approving adjustment applications only when immigrant visas are available. See *Geda* v. *Director of USCIS*, No. 23-2195 (3d Cir. argued Apr. 11, 2024); *Kale* v. *Jaddou*, No. 23-1799 (4th Cir. docketed Aug. 3, 2023); *Tulsiyan* v. *Director of USCIS*, No. 23-12464 (11th Cir. oral argument scheduled for Jan. 16, 2025). If those courts' decisions eventually create a circuit conflict, this Court could decide at that time whether to grant certiorari. But for now, further review is unwarranted.

2. Petitioners' challenge to the court of appeals' alternative merits holding also does not warrant this Court's review.

a. As a threshold matter, this case is a poor vehicle for considering the merits. As discussed above, Section 1252(a)(2)(B) deprives federal courts of jurisdiction over this case. In general, a court that lacks jurisdiction may not reach the merits. See *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 93-102 (1998).

Petitioners' suit faces other jurisdictional obstacles as well. In the court of appeals, the government argued that petitioners lack standing and that this suit is moot because immigrant visas are now available to them. See Pet. App. 8a n.11. Because the court found that it is "not obvious from the pleadings or briefs that the controversy is moot," it focused on the government's statutory argument. *Ibid.* But this Court would need to resolve

that issue as well before it could properly reach the merits.

Further, this case arises out of an appeal from the district court's denial of a preliminary injunction. See Pet. App. 3a. The court of appeals did not definitively resolve the merits; rather, it held that petitioners are not "likely to succeed on the merits of their APA claim." *Id.* at 14a. That posture provides an additional reason to deny review. See *Harrel* v. *Raoul*, 144 S. Ct. 2491, 2492-2493 (2024) (statement of Thomas, J.).

b. Even putting aside those threshold problems, petitioners' second question presented does not warrant this Court's review. The APA directs courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). "Failures to act are sometimes remediable under the APA, but not always." *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004). A claim alleging that an agency has unlawfully withheld action "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Id.* at 64.

In the decision below, the court of appeals concluded that petitioners' unlawful-withholding claim could not proceed because petitioners could not identify a specific legal requirement with which USCIS failed to comply. See Pet. App. 15a. Petitioners relied on a regulation providing that an applicant for adjustment "shall be notified of the decision" on the application. *Ibid.* (quoting 8 C.F.R. 254.2(a)(5)). As the court observed, however, that regulation "does not establish a time period during which the applications must be adjudicated." *Ibid.* Petitioners accordingly cannot show that USCIS has "unlawfully withheld" agency action. 5 U.S.C. 706(1). And while petitioners now assert (Pet. 17) unreasonable de-

lay, the court of appeals understood petitioners to have "assert[ed] an 'unlawful withholding' claim," not an unreasonable-delay claim. Pet. App. 15a. The First Circuit has also concluded that "USCIS's decision to hold in abeyance applications [for adjustment of status] that lack an immediately available visa" does not support "a claim under the APA for unlawful withholding [or] unreasonable delay." *Gupta*, 118 F.4th at 487.

Petitioners err in arguing (Pet. 17-18) that the court of appeals' decision conflicts with the decisions of other courts of appeals. Two of the decisions that petitioners cite concerned unreasonable-delay claims, not unlawful-withholding claims. See *Barrios Garcia* v. *U.S. Dep't of Homeland Sec.*, 25 F.4th 430, 443 (6th Cir. 2022); *Da Costa* v. *Immigrant Investor Program Office*, 80 F.4th 330, 340 (D.C. Cir. 2023). In petitioners' third case, a court rejected an unlawful-withholding claim on the ground that the agency was not required to act at all. See *Gonzalez* v. *Cuccinelli*, 985 F.3d 357, 374 (4th Cir. 2021). And in their remaining case, the court determined that an agency had unlawfully withheld action by failing to comply with a specific statutory requirement —namely, a statutory provision requiring it to act before a stated deadline. See *Forest Guardians* v. *Babbitt*, 164 F.3d 1261, 1274 (10th Cir. 1998).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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