

No. 25-1101

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MOZHGAN ASGHARI, ASHKAN HAJI HOSSEINZADEH,

Plaintiffs-Appellants,

v.

MARCO RUBIO, in his official capacity as Secretary of State of the United States of America, ROBERT JACHIM, in his official capacity as Director of Screening, Analysis and Coordination,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of California
No. 2:24-cv-06055-MCS-MAR (Hon. Mark C. Scarsi)

**CONSENTED TO *AMICUS CURIAE* BRIEF ON BEHALF OF AMERICAN
IMMIGRATION LAWYERS ASSOCIATION AND AMERICAN
IMMIGRATION COUNCIL IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4)(A), *amici curiae* certify that they have no parent corporations or any publicly held corporations owning 10% or more of its stock.

DATE: June 30, 2025

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INTEREST OF AMICI CURIAE¹

The American Immigration Lawyers Association (“AILA”), founded in 1946, is a national, nonpartisan, nonprofit association with more than 16,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice. AILA’s members practice regularly before the Department of Homeland Security, immigration courts, and the Board of Immigration Appeals, as well as before the federal courts. AILA has participated as amicus curiae in numerous cases before the U.S. Courts of Appeals and the U.S. Supreme Court.

The American Immigration Council is a nonprofit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of immigrants in the United States. The Council regularly litigates and advocates around issues

¹ *Amici* state that no party’s counsel authored the brief in whole or in part; that no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the amici curiae, their members, and their counsel contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. P. 29(a)(4)(E).

All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

involving access to immigration benefits, including issues of judicial review in the immigration context.

INTRODUCTION

Mozhgan Asghari, a United States citizen, filed a petition in 2021 to admit her fiancé to the United States so that they could be married and live in this country. The Department of Homeland Security approved the petition, and her fiancé received a visa interview at the U.S. embassy in Ankara, Turkey. After that interview, however, the embassy informed Asghari and her fiancé that their case was in “administrative processing.” Asghari and her fiancé find themselves in limbo; the case has remained in “administrative processing” to this day.

Asghari and her fiancé have filed a lawsuit seeking APA and mandamus relief, with the goal of compelling agency action “unreasonably delayed.” 5 U.S.C. § 706(1). The government has thrown up a fistful of arguments in response. While *amici* believe that plaintiffs’ positions are correct across the board, we focus this brief on two of the government’s responses.

First, the government argues that the Department of State (“DOS”) has already made a final decision, so that plaintiffs have already gotten the relief they seek. As the district court recognized, this is incorrect. DOS regulations, policy manual, and public-facing communications all confirm that the designation of a visa application for administrative processing under 8 U.S.C. § 1201(g) is merely a decision not to

grant a visa application *immediately*; the application remains open pending further processing. It is a decision to delay, and thus is the opposite of a final decision.

Second, the government argues that suits challenging its unreasonable delay in adjudicating visa applications are barred by the doctrine of consular nonreviewability. As the district court recognized, this, too, is incorrect. The Administrative Procedure Act (“APA”) assures individuals the right to challenge agency action that is unreasonably delayed. In the face of harmful government action, such APA review is presumptively available and exceptions are narrow and rare. The doctrine of consular nonreviewability is not such an exception and does not bar judicial review of unreasonably delayed visa decisions.

ARGUMENT

A. The District Court was correct when it found an INA § 221(g) refusal is not a final visa decision.

1. DOS regulations and interpretive guidance support the non-finality of INA § 221(g) refusals.

When a visa applicant applies for a visa, consular officers have three options. First, they may grant the visa. *See* Immigration and Nationality Act (“INA”) § 221(a)(1)(B), 8 U.S.C. § 1201(a)(1)(B). Second, they may deny the visa on the ground that the applicant is ineligible for the visa. *See* INA §§ 212, 214(b), 8 U.S.C. §§ 1182, 1184(b); *see also* 9 FAM 403.10-3. Third, they may refuse the visa under INA § 221(g), 8 U.S.C. § 1201(g). “INA 221(g) refusals require the applicant to wait

for the results of additional administrative processing or comply with a request for additional documentation or information within one year of the visa interview.” 9 FAM 403.10-3(A)(5). As the quoted language from the DOS Foreign Affairs Manual makes clear, § 221(g) refusals are not final; they contemplate “additional administrative processing” or requests for additional evidence.

The Foreign Affairs Manual describes this process in some detail. *See generally* 9 FAM 306.2. The consular officer should issue a refusal under INA § 221(g) where the visa applicant has made a formal application but “admissibility cannot be established without additional evidence, further clearance, a namecheck, or some other reason.” 9 FAM 403.10-3(B)(b). As already noted, § 221(g) refusals require the applicant to either “wait for the results of additional administrative processing or comply with a request for additional documentation or information within one year of the visa interview.” 9 FAM 403.10-3(A)(5). “[W]hen additional evidence is presented, or administrative processing is completed,” consular officers can grant the visa. 9 FAM 306.2-2(A)(a). While the first grounds for overcoming a refusal require some additional action by the applicant (providing more information), “administrative processing” simply allows the consular officer additional time to complete their processing and investigation. In other words, when consular officers enter a § 221(g) refusal, their work is not complete. *See* 9 FAM 306.2-2(A)(a)(2)(a).

This stands in stark contrast to the situation of applicants whose visas have been refused for ineligibility. Those applicants have no right to reconsideration; they must submit a new application and fee if they wish to reapply. *See* DOS, Bureau of Consular Affs., Visa Denials, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visa-denials.html> (found under the “Can I Reapply for a Visa?” drop-down) (last visited June 13, 2025). But an applicant who has received a § 221(g) refusal does not need to pay a new fee and submit a new application. No new fee is necessary because the old application was never denied. *See id.* (“If you reapply for a visa after being found ineligible, *with the exception of 221(g) refusals*, you must submit a new visa application and pay the visa application fee again.”) (emphasis added); *see also* 9 FAM 601.8-3(B)(5)(1) (same).

Similarly, 9 FAM 403.10-4(A) makes plain that no matter how much time has passed since a § 221(g) refusal, if the cause of the delay is “a lack of U.S. Government action”—that is, the case has been languishing in administrative processing—then the old application remains active. Only if the consulate directs a visa applicant to submit additional information and the applicant fails to respond for an entire year will the application lapse from active consideration, requiring the noncitizen to resubmit it with a new fee. *See id.*

If more evidence were needed, DOS’ public-facing website makes the nature of a § 221(g) refusal plain. The website explains that officers “may determine that

additional information from sources other than the applicant may help establish an applicant's eligibility for a visa," in which case the officer will refuse the visa under § 221(g) and initiate administrative processing. DOS, Bureau Consular Affs., Administrative Processing Information, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/administrative-processing-information.html> (last visited June 13, 2025); *see also* U.S. Embassy and Consulates in Türkiye, <https://tr.usembassy.gov/administrative-process-iv/> (last visited June 26, 2025) (explaining that a § 221(g) refusal means "your case is pending further action"). The agency advises applicants that administrative processing "takes additional time after your interview" and that "times can vary based on individual circumstances." DOS, Bureau Consular Affs., Administrative Processing Information (found under the "INA Section 221(g) – Incomplete Application or Supporting Documentation" dropdown). The DOS writes that "[u]pon completion of the case-specific administrative processing," the consular officer may then conclude that the applicant is qualified for the visa. *Id.* Once the administrative processing is complete, "the embassy or consulate will contact you." *Id.* Until that time, though, the application is under consideration. It certainly has not been finally denied.

In light of all this, the government's position that a § 221(g) refusal is a final decision is unreasonable. Section 221(g) refusals are the *beginning* of a process of giving a visa application more deliberate consideration. Visa applications are in

active consideration throughout the process initiated by a § 221(g) refusal. What plaintiffs ask in this case, though, is that the process come to an end.

2. The weight of caselaw confirms that a § 221(g) refusal is not final.

Courts both within and outside of the Ninth Circuit have upheld the interpretation that a § 221(g) refusal is not a final decision, recognizing the lack of finality in § 221(g)'s statutory language and DOS regulations and interpretations.² First, the Ninth Circuit in *Patel v. Reno* found that a visa refusal for administrative processing “is not a final decision.” 134 F.3d 929, 932 (9th Cir. 1997). In reaching the same conclusion, other courts have described administrative processing as having “the effect of placing [a noncitizen’s] application in administrative limbo.” *Jafarzadeh v. Blinken*, No. 1:23-cv-0770 KJM CDB, 2024 WL 3937417, at *3 (E.D. Cal. Aug. 26, 2024).

² See, e.g., *Sheikhalizadehjehed v. Gaudiosi*, No. 2:24-CV-1136 SCR, 2024 WL 4505648, at *5 (E.D. Cal. Oct. 16, 2024); *Ali v. Ordeman*, No. 2:23-cv-2822 CKD, 2024 WL 2274912, at *4 (E.D. Cal. May 20, 2024); *Abassi v. Gaudiosi*, No. 1:23-cv-01573-CDB, 2024 WL 1995246, at *4 (E.D. Cal. May. 6, 2024); *Ferdowski v. Blinken*, No. 8:23-cv-01123-JWH-KES, 2024 WL 685912, at *4 (C.D. Cal. Feb. 12, 2024); *Kiani v. Blinken*, No. CV 23-5069-GW-JCx, 2024 WL 658961, at *5 (C.D. Cal. Jan. 4, 2024); *Shahijani v. Laitinen*, No. 2:23-cv-03967-RGK-MRW, 2023 WL 6889774, at *3 (C.D. Cal. Oct. 6, 2023); *Billoo v. Baran*, No. 2:21-cv-05401-CBM-(JPRx), 2022 WL 1841611, at *4 (C.D. Cal. Mar. 18, 2022); *Gonzalez v. Baran*, No. 2:21-cv-05902-CAS-ASx, 2022 WL 1843148, at *2 (C.D. Cal. Jan. 11, 2022); *Mohamed v. Pompeo*, No. 19-01345, 2019 WL 4734927, at *4 (E.D. Cal. Sept. 27, 2019).

Those few decisions that have found that § 221(g) refusals are final are both non-binding and unpersuasive. In *Karimova v. Abate*, an unpublished opinion from the Court of Appeals for the District of Columbia Circuit, the court held that a § 221(g) denial is a final agency decision. No. 23-5178, 2024 WL 3517852, at *4 (D.C. Cir. July 24, 2024) (unpublished). The court first looked at the text of the INA and noted that consular officers must either issue or deny visas. *Id.* But its reliance on the INA stopped there. It did not, and could not, cite to any statutory support in the INA to conclude that § 221(g) denials are final. Nor did the regulations support its answer. While the court cited to 22 C.F.R. § 42.81(a) (concerning refusal of immigrant visas), that regulation contains no language stating that a refusal for administrative processing constitutes a final agency decision.

The *Karimova* court did not engage with the rest of the DOS guidance described above. Rather, without peeling back the label of “refusal,” the *Karimova* court assumed that the binary choice between “grant” or “refuse” must mean that a refusal is a final denial. *Karimova*, 2024 WL 3517852, at *4; *but see Network Optix Inc. v. Rubio*, No. 2:24-cv-06505-SK, 2025 WL 1122358 (C.D. Cal. Feb. 14, 2025) (rejecting DOS’ “hyper technocratic” binary position as a “forced, false choice”); *Momeni v. Blinken*, No. 2:24-CV-04879-ODW (AGRX), 2024 WL 5112234, at *4 (C.D. Cal. Dec. 13, 2024) (“Rather than simply accepting the label of ‘Refused,’ courts should consider what is actually happening in a specific case to determine

whether an agency has discharged its duty.”); *Hassan v. Dillard*, No. 24-CV-1351 (KMM/LIB), 2024 WL 4979476, at *5 (D. Minn. Dec. 4, 2024) (“Simply describing the decision as final does not make it so.”). This unpublished decision, and others finding that a § 221(g) refusal for administrative processing are “final,” are unpersuasive, and the district court correctly rejected Defendants’ reliance on them.

B. The District Court correctly held the doctrine of consular nonreviewability does not apply.

The district court correctly held that the doctrine of consular nonreviewability does not bar the court’s review of the visa delay claim. District Court Or. at 6. The notion that the DOS can indefinitely suspend a visa application in administrative limbo, leaving applicants waiting for years without judicial review, stretches the doctrine of consular nonreviewability beyond its original purpose.

1. The purpose of the doctrine of consular nonreviewability does not apply to visa delay actions.

Under the doctrine of consular nonreviewability, a court will not review “a consular officer’s denial of a visa.” *See Dep’t of State v. Munoz*, 602 U.S. 899, 907–08 (2024). Congress has “plenary power to make rules for the admission [and exclusion] of aliens.” *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (internal quotations omitted). When Congress, in turn, “delegates this plenary power to the Executive, the Executive’s decisions are likewise generally shielded from

administrative or judicial review.” *Andrade–Garcia v. Lynch*, 820 F.3d 1076, 1080–81 (9th Cir. 2016).

But where the consular officer has not made any decision granting or denying a visa, the consular nonreviewability doctrine does not apply. Challenges to a consular officer’s failure to make any decision at all do not interfere with the executive branch’s delegated authority. *See Al-Gharawy v. U.S. Dep’t of Homeland Sec.*, 617 F. Supp. 3d 1, 10 (D.D.C. 2022) (“Control over a consular officer’s visa determinations . . . is not the same as control over the timing by which the consular officer considers the applications presented to her.”). Rather, judicial review in such cases simply ensures that consular officers act on such applications without unreasonable delay, as Congress has required. Rather than encroaching on Congress’ delegation of authority to the executive branch, a delay lawsuit seeks to enforce a consular officer’s statutory duty to adjudicate. *See* 8 U.S.C. § 1202(b) (“All immigrant visa applications *shall be reviewed and adjudicated* by a consular officer.”) (emphasis added).

This Court has recognized the difference between challenges to “a consular officer’s discretionary decision to grant or deny a visa petition,” which is “not subject to judicial review,” and suits that instead invoke “the consulate[‘s] duty to act.” *Patel v. Reno*, 134 F.3d 929, 931-33 (9th Cir. 1997). In the latter case, where “the consulate had a duty to act [on a visa application] and . . . has failed to act in

accordance with that duty,” this Court has explained that judges must enforce the law. *Id.*; see also, e.g., *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry*, 168 F. Supp. 3d 268, 290 (D.D.C. 2016) (“However, as Plaintiffs point out, the doctrine of consular nonreviewability is not triggered until a consular officer has made a decision with respect to a particular visa application”). As the court explained in *Al-Gharawy*, 617 F. Supp. 3d at 11, “[p]laintiffs do not ask that the Court review a decision rendered by a consular officer; they merely ask that the Court require the consular officer to render a decision—regardless of what that decision might be.”

This distinction is consistent with the relief sought in a visa *delay* action, rather than a visa *denial* action. In a delay action under the Mandamus Act and APA, a plaintiff does not seek to constrain a consular officer’s judgment, but seeks to enforce a mandatory, nondiscretionary duty. See, e.g., *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099–1100 (D.C. Cir. 2003) (discussing the nature of mandamus and APA delay claims). Nothing in a delay action compels an officer to grant a visa. Rather than constrain the executive branch’s delegated authority, a visa delay action compels DOS’ congressionally prescribed duties under the INA, Mandamus Act, and APA. Judicial review in such cases is “expressly authorized by law.” *Munoz*, 602 U.S. at 908 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)). For these reasons, the District Court

correctly found that the doctrine of consular nonreviewability does not apply to the plaintiffs' visa delay action.

2. Applying the doctrine of consular nonreviewability to delay actions would result in unchecked agency action unintended by Congress.

More concerning, to apply the doctrine of consular nonreviewability to cases of visa delay would insulate the DOS from judicial review of all its functions, making the agency above judicial oversight. Consular nonreviewability is a doctrine of judicial deference, not a jurisdictional bar. *See Trump v. Hawaii*, 585 U.S. 667, 682 (2018) (“[T]he Government does not point to any provision of the INA that expressly strips the Court of jurisdiction over plaintiffs’ claims.”). There are few ideals in the American legal system as fundamental as judicial review of the government at large. *Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”). While Congress may allow agencies to exercise discretion, there remains a presumption of judicial review absent clear and convincing evidence of congressional intent to preclude judicial review. *See Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020); *see also Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 803 (2024)

(noting a “deep-rooted historic tradition that everyone should have his own day in court”).

In this case, there is no evidence that Congress intended to insulate *all* DOS actions from judicial review. The APA expressly grants courts the power to review agency actions, and the Mandamus Act allows courts to order nondiscretionary agency action. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391 (2024) (“[T]he APA delineates the basic contours of judicial review of such [agency] action.”). The APA plainly states that courts have authority to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). The statute also imposes a nondiscretionary duty on the DOS to process visa applications within a ‘reasonable period of time.’ 5 U.S.C. § 555(b). DOS’ issuance of a § 221(g) refusal for administrative processing amounts to unreasonable delay and thus is reviewable under the APA § 706(1) and the Mandamus Act. Ultimately, despite being involved with foreign affairs, the DOS is still an administrative agency of the U.S. Government subject to the APA and the Mandamus Act. And like all agencies, the DOS must perform its functions fairly, in good-faith, and in a reasonable amount of time.

Finally, judicial review of DOS’ unreasonable delay furthers the policy purposes of the APA. Eliminating the possibility of judicial review of untimely decision-making creates perverse incentives for the DOS to avoid its duty to the

public. *See United States v. Morton Salt Co.*, 338 U.S. 632, 643 (1950) (the APA was enacted as a “check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices”). Indeed, the plaintiffs’ claim aligns with the policy purpose of the APA: “When agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates.” *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam), *quoted in ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1137 (9th Cir. 1998). The doctrine of consular nonreviewability—a judicially-created doctrine—should not bar judicial review under the clear letter and purpose of the APA.

CONCLUSION

For the reasons given in this brief and in plaintiffs’ briefs, this case should be remanded so that the district court can adjudicate plaintiffs’ claim of unreasonable delay.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rule 29(a)(5) because it contains 3,316 words.

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 11 in 14-point Times New Roman font.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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