Nos.: 23-3378, 23-3379, 23-3397, 23-3520, 23-3523

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AARON CARLOS BELTRAN, et al.,
Plaintiffs-Appellants,
v.
LOREN K. MILLER, et al.,
Defendants-Appellees.

MARIA DEL CARMEN GRAJALES CORTES, et al.,
Plaintiffs-Appellants,
v.
LOREN K. MILLER, et al.,
Defendants-Appellees.

EDUARDO REYES SILVA, et al.,
Plaintiffs-Appellants,
v.
LOREN K. MILLER, et al.,
Defendants-Appellees.

LAURO YBARRA, et al.,
Plaintiffs-Appellants,
v.
LOREN K. MILLER, et al.,
Defendants-Appellees.

IVAN HERNANDEZ MACIAS, et al.,
Plaintiffs-Appellants,
v.
LOREN K. MILLER, et al.,
Defendants-Appellees.

AILA Doc. No. 24011103. (Posted 1/11/24)

On Appeal from the U.S. District Court for the District of Nebraska

(4:23-cv-03053-RFR)
(4:23-cv-03073-RFR)
(4:23-cv-03038-BCB)
(4:23-cv-03082-BCB)
(4:23-cv-03078-RFR)

BRIEF OF *AMICUS CURIAE* ON BEHALF OF THE AMERICAN IMMIGRATION COUNCIL AND AMERICAN IMMGRATION LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL

Jonathan T. Weinberg*
Wayne State University Law School
471 West Palmer Street
Detroit, MI 48202
Tel: (313) 577-3933
weinberg@wayne.edu

Jennifer R. Coberly*
American Immigration Lawyers Association
1331 G St. NW
Washington, DC 20005
Tel: (202) 507-7692
Jcoberly@AILA.org

Jonathan Levy*
American Gateways
314 E. Highland Mall Blvd., Suite 501
Austin, TX 78752
Tel: (512) 478-0546 ext. 212
JonathanL@americangateways.org

*Not admitted to the Eighth Circuit Bar

Katherine E. Melloy Goettel
Leslie K. Dellon*
American Immigration Council
1331 G St. NW Suite 200
Washington DC 20005
Tel: (202) 507-7552 (Goettel)
kgoettel@immcouncil.org
ldellon@immcouncil.org

Brian Scott Green
Law Office of Brian Green
9609 S University Boulevard, #630084
Littleton, CO 80130
Tel: (443) 799-4225
BrianGreen@greenUSimmigration.com

Michael E. Piston*
Attorney at Law
38-08 Union St., Suite 9A
Flushing, NY 11354
Tel: (646) 876-3772
michaelpiston4@gmail.com
Attorneys for Amici Curiae

AILA Doc. No. 24011103. (Posted 1/11/24)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTEREST OF AMICI CURIAE

The American Immigration Lawyers Association (AILA), founded in 1946, is a national, non-partisan, non-profit 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 U.S. Courts of Appeals and the U.S. Supreme Court.[1]

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, and protect the legal rights of noncitizens. The Council regularly litigates and advocates around issues involving access to immigration benefits, including agency delays in adjudication.

[1] No party's counsel authored this brief in whole or in part, nor contributed money intended to fund preparing or submitting this brief. No person other than *amici* or their counsel contributed money intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

AILA Doc. No. 24011103. (Posted 1/11/24)

SUMMARY OF ARGUMENT

The district courts erred in ruling that the last sentence of 8 U.S.C. § 1182(a)(9)(B)(v), barring judicial review of "a decision or action . . . regarding a waiver" under that provision, barred Appellants' suit challenging USCIS's failure to act. Courts may not read such statutory language to bar judicial review if a reasonable reading supporting review is available. In this case, the common-language understanding of "decision or action" excludes a failure to act. Courts, too, have repeatedly read identical language to exclude a failure to act. Judge Buescher's reliance on *Patel v. Garland*, 596 U.S. 328, 142 S. Ct. 1614 (2022), misunderstood that decision. Finally, the courts below erred in dismissing plaintiffs' applications for mandamus relief.

I. ARGUMENT

A. USCIS's failure to rule on a waiver application is not a "decision or action . . . regarding a waiver"

Judges Rossiter and Buescher dismissed plaintiffs' APA challenges because USCIS's inaction on plaintiffs' waiver applications was a "decision or action . . . regarding a waiver" barred from review by 8 U.S.C. § 1182(a)(9)(B)(v). They reasoned that plaintiffs' real challenge was to USCIS's "decision to momentarily allocate its resources to particular applications over others," including its determination to prioritize older applications over newer ones. App. 45; 1 R. Doc. 28, at 11; *see also* App. 67, 99, 246-47, 280; 2 R. Doc. 26, at 4, 3 R. Doc. 30, at 15,

AILA Doc. No. 24011103. (Posted 1/11/24)

4 R. Doc. 30, at 15-16, 5 R. Doc. 30, at 5.[2] After thus denaturing plaintiffs' complaints, they concluded that those prioritization choices were "decision[s] or action[s]" that could not be reviewed. That conclusion was flawed in multiple ways.

1. The record does not support the district courts' characterization of USCIS's inaction.

The district courts' reasoning depends on a characterization of USCIS inaction that is unsupported in the record. Both district judges correctly ruled that USCIS's § 1182(a)(9)(B)(v) attack on the court's jurisdiction was a "facial" one, App. 40, 67, 86, 233, 279; 1 R. Doc. 28, at 6, 2 R. Doc. 26, at 4, 3 R. Doc. 30, at 2, 4 R. Doc. 30, at 2, 5 R. Doc. 30, at 4, so that the court was barred from considering any matter outside of the pleadings. That determination is binding on this Court. *Croyle v. United States*, 908 F.3d 377, 380-81 (8th Cir. 2018) ("This court is bound by the district court's characterization of the Rule 12(b)(1) motion.").

Yet the pleadings say nothing about any purported USCIS determination that it must prioritize older applications over newer ones. Nothing in the pleadings suggests that USCIS follows *any* prioritization rule. *See Doe v. Risch*, 398 F. Supp. 3d 647, 658 (N.D. Cal. 2019) (while USCIS asserted that plaintiff's application

[2] Page numbers cited are to the ECF pagination. The record cites are 1 R. for *Beltran*, 2 R. for *Grajales Cortes*, 3 R. for *Reyes Silva*, 4 R. for *Ybarra*, and 5 R. for *Hernandez Macias*.

AILA Doc. No. 24011103. (Posted 1/11/24)

should wait in the queue, it submitted no evidence that it was even maintaining a queue).

More broadly, the pleadings say nothing about *why* plaintiffs' applications have not been adjudicated. All we know is that plaintiffs' applications have not been adjudicated after pending for a significant period of time. We don't know whether that inaction is the product of any deliberate choices, and if so, what those choices were. Under the district courts' reasoning, no matter the basis for the agency's inaction, the fact that the agency's failure to adjudicate plaintiffs' applications happens in the context of its performing some larger set of tasks makes the agency's inaction a "decision or action" barred from review. That reads the statutory bar far too broadly.

2. The government's failure to act is not a "decision or action."

Both district judges erred in their statutory interpretation. While they relied on dictionary definitions of words in the statutory text, they misread or misapplied those definitions.

Judge Buescher emphasized a dictionary definition that defined "action" to include "a deliberative or authorized proceeding." App. 98-99, 245-46; 3 R. Doc. 30, at 14-15, 4 R. Doc. 30, at 14-15. He then reasoned that everything that happened after the agency received a waiver application, including its keeping the

AILA Doc. No. 24011103. (Posted 1/11/24)

application unexamined and unadjudicated, was part of its "proceedings" concerning that application. *Id.* But that definition was inapposite.

Judge Buescher referenced the following dictionary definition of "action":

> **1:** a deliberative or authorized proceeding:
> **a** (1): a legal proceeding by which one demands or enforces one's right in a court of justice
> (2): a judicial proceeding for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense -- usually distinguished from *special proceeding*
> (3): the right to bring or maintain such a legal or judicial proceeding — see SUIT
> (1): an award by a judicial body
> (2): an act or decision by an executive or legislative body (as of a government or a political party) or by a supranational agency
> <the *action* taken by Congress followed a lengthy debate>

"Action," Unabridged Merriam-Webster Dictionary On-line, https://unabridged.merriam-webster.com/unabridged/action (last visited Dec. 28, 2023).

Nothing there supports Judge Buescher's approach. USCIS's adjudication of waiver applications is not a lawsuit in a court of justice. And the definition makes plain that the "action" of a government body is its culminating decision with legal effect, not the intermediate process leading up to it: The dictionary authors, after all, distinguished an "action taken by Congress" from the "lengthy debate" that preceded it. So if anything, this definition establishes the error in Judge Buescher's approach.

AILA Doc. No. 24011103. (Posted 1/11/24)

Judge Rossiter began on sounder ground. Quoting Black's Law Dictionary, he saw a "decision" as a "determination [made] after consideration of the facts and the law" and an "action" as "the process of doing something." App. 45; R. 1 Doc. 28, at 11. Yet the very focus on action as "the process of doing something" highlights the distinction between action and *in*action, the state of doing nothing. Leaving plaintiffs' applications unexamined and untouched, for reasons unknown on this record, is *in*action.

Multiple courts have already recognized this distinction in an analogous context. USCIS's argument that the words "decision or action" somehow encompass agency *in*action is not new. Years ago, the agency made that argument with respect to the same phrase in a different jurisdiction-stripping provision of the INA, 8 U.S.C. § 1252(a)(2)(B)(ii). Those arguments failed then, and they should now.

Section 1252(a)(2)(B)(ii) denies courts jurisdiction to review any USCIS "decision or action" designated by statute as discretionary (subject to a variety of exceptions). When plaintiffs filed lawsuits challenging USCIS's failure to rule on their applications to adjust their status to that of lawful permanent resident, the government asserted that bar, making the same argument it makes here. The government said that actions "including the pace of adjudications [are] immune from judicial review." *Al-Rifahe v. Mayorkas*, 776 F. Supp. 2d 927, 932 (D. Minn.

AILA Doc. No. 24011103. (Posted 1/11/24)

2011). The overwhelming majority of courts rejected the government's argument. *See, e.g., Boussana v. Johnson*, No. 14-cv-3757, 2015 WL 3651329, at *5 (S.D.N.Y. June 11, 2015) ("the overwhelming majority of district courts") (quoting *Hassane v Holder*, No. C10-314Z, 2010 WL 2425993, at *3 (W.D. Wash. June 11, 2010)).[3]

Courts adopting the majority view made three points. First, they said, the meaning of the words "decision or action" was plain. "The plain language of [§ 1252(a)(2)(B)(ii)] addresses 'decision or action' on immigrant matters, not inaction, which is the subject of [this] Complaint." *Saini v. U.S. Citizenship & Immigr. Servs.*, 553 F. Supp. 2d 1170, 1174 (E.D. Cal. 2008) (quoting *Fu v. Gonzalez*, No. C 07-0207, 2007 WL 1742376, at *4 (N.D. Cal. May 22, 2007).

---

[3] Cases presenting the question came before this Court twice, but in both cases the government conceded jurisdiction and this Court proceeded to the merits. *See Irshad v. Johnson*, 754 F.3d 604, 607-08 (8th Cir. 2014); *Debba v. Heinauer*, 366 Fed. Appx. 696, 699 (8th Cir. 2010).

In *Iddir v. INS,* 301 F.3d 492, 497 (7th Cir. 2002), although the government made a similar concession, the court addressed the jurisdictional issue *sua sponte* and found that the government had taken no relevant "decision or action" when it failed to act on plaintiffs' applications until after they were time-barred. More recent decisional law, *see Patel v. Garland*, 596 U.S. 328 (2022), raises the issue whether review in that case should have been barred by still another restriction on judicial review, 8 U.S.C. § 1252(a)(2)(B)(i), but nothing in *Patel* casts doubt on the Seventh Circuit's understanding that agency inaction is not a "decision or action." In *Bian v. Clinton*, 605 F.3d 249, 254 (5th Cir. 2010), the Fifth Circuit denied jurisdiction on questionable grounds, but then vacated that ruling as moot. Nos. 9-10568, 9-10742, 2010 WL 3633770 (5th Cir. Sept. 16, 2010) (per curiam).

AILA Doc. No. 24011103. (Posted 1/11/24)

The court in *Saleem v Keisler* elaborated: "Of course, a 'decision' means that something must be decided. Although an 'action' has a broader meaning, it too suggests that some conclusion has been made about the appropriate course to take." 520 F. Supp. 2d 1048, 1051 (W.D. Wis. 2007). "[I]t would require an Orwellian twisting of the word to conclude that it means a failure to adjudicate." *Id.* at 1052. That approach would "contradict[] . . . common sense." *Patel v. Barr*, Civ. No. 20-3856, 2020 WL 4700636, at *5 (E.D. Pa. Aug. 13, 2020) (quoting *Saleem*, 520 F. Supp. 2d at 1051); *see also, e.g., Asmai v. Johnson*, 182 F. Supp. 3d 1086, 1091-92 (E.D. Cal. 2016); *Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1138 (D. Ariz. 2008); *Kamal v. Gonzales*, 547 F. Supp. 2d 869, 874-75 (N.D. Ill. 2008); *Lindems v. Mukasey*, 530 F. Supp. 2d 1044, 1046 (E.D. Wis. 2008); *Liu v. Novak*, 509 F. Supp. 2d 1, 5-7 (D.D.C. 2007).

Second, the government's argument that "action" covered its entire process of considering an application was a "red herring." *Saleem*, 520 F. Supp. 2d at 1052; *see also Liu*, 509 F. Supp. 2d at 6. The government's argument would have force, courts said, if plaintiffs were challenging intermediate actions (such as ordering background checks) that the government took in considering their applications. *Kamal*, 547 F. Supp. 2d at 874. "But plaintiff is not challenging any interim action of defendants, only their failure to act." *Saleem*, 520 F. Supp. 2d at 1052. To uphold the government's argument in this context would be "illogically

AILA Doc. No. 24011103. (Posted 1/11/24)

[to] hold that 'inaction' is tantamount to 'action.'" *Kashkool*, 553 F. Supp. 2d at 1138; *see also Aslam v. Mukasey*, 531 F. Supp. 2d 736, 741 (E.D. Va. 2008); *Liu*, 509 F. Supp. 2d at 6.

Finally, the consequences of the government's position would be undesirable – indeed, nonsensical. *Saini*, 553 F. Supp. 2d at 1174. "If the pace of the Secretary's decision were immune from judicial review, the Executive Branch could unilaterally impose a *de facto* moratorium on all adjustment of status applications simply by delaying a final decision." *Aslam*, 531 F. Supp. 2d at 741; *see also Kamal*, 547 F. Supp. 2d at 877 n.7; *Lindems*, 530 F. Supp. 2d at 1046. Giving the agency that free pass would frustrate Congress's intention to make adjustment available to deserving applicants, and the same is true for unlawful presence waivers.[4]

This final point is especially salient given the reasoning of the courts in this case. Both Judges Rossiter and Buescher saw a crucial difference between USCIS's "discretion over *how* to resolve an application and [its] discretion over

[4] Some district courts, including some in this Circuit, relied on a fourth argument: that the § 1252(a)(2)(B)(ii) bar was limited to a "decision or action" the authority for which was discretionary, and that without regard to other issues, the agency's obligation to adjudicate applications within a reasonable time was not a matter of discretion. *See, e.g., Al-Rifahe v. Majorkas*, 776 F. Supp. 2d 927, 933 (D. Minn. 2011). That language is not present in § 1182(a)(9)(B)(v). That some courts relied on this point, though, does not undercut the reasoning of the many other courts holding squarely that the word "action" excludes a failure to adjudicate.

AILA Doc. No. 24011103. (Posted 1/11/24)

whether it resolves an application." App. 44-45 (quoting *Khan v. Johnson*, 655 F. Supp. 3d 918, 926 (C.D. Cal. 2014) (emphasis in original)); 1 R. Doc. 28, at 10-11; *see also* App. 99, 246; 3 R. Doc. 30, at 15, 4 R. Doc. 30, at 15. But in practice, their holding dissolves that distinction. It provides "blanket cover for USCIS' decision to withhold adjudication of [plaintiff's] application indefinitely," which amounts to "a grant of permission for inaction, and a purposeful disregard of the potential for abuse thereof, on immigration matters." *Al-Rifahe*, 776 F. Supp. 2d at 933 (internal quotation omitted).

On the reasoning of Judges Rossiter and Buescher, *any* government failure to act, whether intentional or unintentional, is transformed by the magic of semantics into a resource-allocation choice and thus an "action . . . regarding a waiver" that is insulated from review. Yet at this early stage of the case, for all we know, agency file clerks have simply forgotten the location of a box of applications, including plaintiffs'. If that failure of memory is to be classified as an "action," then the word has been expanded beyond recognition.

3. If § 1182(a)(9)(B)(v) *can* reasonably be read to permit judicial review in this case, it must be read to permit judicial review.

Judge Rossiter made clear in his *Beltran* opinion that he saw merit in both sides' arguments; at the same time, neither approach was "entirely satisfying." App. 44; 1 R Doc. 28, at 10. On balance, he found the government's reasoning more persuasive, and hence he adopted that approach. That was error. The

AILA Doc. No. 24011103. (Posted 1/11/24)

Supreme Court and this Circuit have been emphatic that if § 1182(a)(9)(B)(v) *can* reasonably be read to permit judicial review, it *must* be read to permit review.

The APA provides sweepingly that people aggrieved by agency misconduct are "entitled to judicial review thereof." 5 U.S.C. § 702. They are entitled to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). The APA provides limited exceptions to that broad cause of action – in particular, APA review is not available when "statutes preclude judicial review." *Id.* § 701(a)(1). In this case, the government has invoked § 1182(a)(9)(B)(v) as such a "statute[] preclud[ing] judicial review."

When the government asserts that a statute precludes review, though, that argument must surmount a high hurdle. A statute will not be read to bar judicial review, in a particular case, unless clear and convincing evidence of Congress's intent establishes that it *cannot* reasonably be read otherwise. In *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020), the Supreme Court explained: "[W]hen a statutory provision 'is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.'" *Id.* at 1069 (quoting *Kucana v. Holder*, 558 U.S. 233, 251 (2010)). Any contrary reading must be supported by clear and convincing evidence of Congress' intent. *Id.* at 1069-70.

AILA Doc. No. 24011103. (Posted 1/11/24)

Courts should be reluctant, the Supreme Court has explained, to leave an agency's compliance with the law in its own hands – for "legal lapses and violations occur, and especially so when they have no consequence." *Mach Mining v. EEOC*, 575 U.S. 480, 489 (2015). It is thus a "'well-settled' and 'strong'" rule that the applicability of any statute precluding review must be beyond reasonable dispute. *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quoting *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496, 498 (1991)); s*ee also Smith v. Berryhill*, 139 S. Ct. 1765, 1776-77 (2019); *Gutierrez de Martinez v. Lamago*, 515 U.S. 417, 434 (1995); *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 63-64 (1993).[5]

Justice Alito provided a governing principle in *Cuozzo Speed Tech. v. Lee*, 579 U.S. 261 (2016): "If a provision can reasonably be read to permit judicial review, it should be." *Id.* at 289 (Alito, J., concurring in part and dissenting in part). This Court has underlined that rule. *See Foster v. U.S. Dep't of Agric.*, 68 F.4th 372, 378 (8th Cir. 2023), *cert. pet. filed*, No. 23-133 (Aug. 10, 2023) (an agency may only overcome the presumption of review if there is "no 'substantial doubt' that Congress intended to bar review"); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003 (8th Cir. 2008) (*en banc*) (because a statute precluding review did not

[5] In *Patel v. Garland*, 569 U.S. 328 (2022), the Court read an immigration statute to preclude review, but it did so on the basis of an express finding that the statute was unambiguous and that its plain meaning was sufficiently clear as to overcome the presumption.

AILA Doc. No. 24011103. (Posted 1/11/24)

"specifically address" certain agency actions, review of those acts was still available).

Applying the rule to this case, the answer is plain. Section 1182(a)(9)(B)(v) is certainly "reasonably susceptible" to plaintiffs' interpretation. *Kucana*, 558 U.S. at 251. The government's contrary interpretation is not free of "substantial doubt." *Foster*, 68 F.4th at 378. The fact that a majority of courts interpreting the phrase "decision or action" have agreed that it excludes agency inaction of the sort challenged here, is conclusive proof that that phrase reasonably can be so read. That is all plaintiffs need to prove.

4. "Long-held principles about the proper scope of judicial review" support review here; they do not cut against it

Judge Rossiter suggested below that "long-held principles about the proper scope of judicial review of agency action" support the government's position in this case. App. 45; 1 R. Doc. 28, at 11. He reasoned that a ruling in plaintiffs' favor would involve judicial superintendence of government resource-allocation choices, and that courts were ill-suited to second-guess such choices, finding that the agency's failure to adjudicate plaintiffs' applications is immune from judicial review. App. 45-46; 1 R. Doc. 28, at 11-12.[6]

[6] Judge Rossiter cited *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007), and *Heckler v. Chaney*, 470 U.S. 821 (1985). But the former case was one in which the Court did in fact review the agency's failure to act, and the latter was one in which

AILA Doc. No. 24011103. (Posted 1/11/24)

This was precisely backwards. Congress, in enacting the APA in 1946, was emphatic that it was empowering courts to countermand agency inaction and delay. Foundational principles of administrative law do not cut against judicial review in this case; rather, they underscore its importance.

i. Congress designed the APA so as to enable review of agency delay and inaction.

Title 5 U.S.C. § 706, the operative section of the APA, has two parts. The first subsection, 5 U.S.C. § 706(1), requires courts to "compel agency action unlawfully withheld or unreasonably delayed," while the second subsection directs a court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious" or otherwise impermissible. 5 U.S.C. § 706(2).

Congress enacted the two parts of § 706 to ensure that *both* agency action and agency inaction were subject to judicial review. It did so mindfully: Among its goals was ensuring that "no agency shall in effect deny relief or fail to conclude a case by mere inaction, or proceed in dilatory fashion to the injury of the persons concerned." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 264 (1946).[7] Congress thus

---

the Court found the agency's enforcement choices to be "committed to [its] discretion by law." 5 U.S.C. § 701(a)(2). *Chaney*, 470 U.S. at 838-39. Congress gave DHS no discretion simply to ignore I-601A applications.

[7] The House and Senate Reports describe the version of the APA enacted in 1946. Pub. L. No. 79-404, 240 Stat. L. 237, 240 (1946). Congress later recodified

AILA Doc. No. 24011103. (Posted 1/11/24)

sought to "assure the complete coverage of every form of agency power, proceeding, action *or inaction*" (emphasis added). *Id.* at 255; S. Rep. No. 752, 79th Cong., 1st Sess.198 (1945).

Congress was motivated by the same goal of holding agencies to account for inaction and delay when it drafted the definitions section of the Act. Language in 5 U.S.C. § 704 provided that courts could review "agency action." For purposes of the APA, the drafters defined "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*." 5 U.S.C. § 551(13) (emphasis added). They thus "cover[ed] comprehensively every manner in which an agency may exercise its power," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001), including an agency's failure to act.[8]

Title 5 of the U.S. Code, changing some statutory language. That recodification was intended "to restate [prior law] without substantive change." Enactment of Title 5, United States Code, S. Rep. No. 1344, 89th Cong., 2d Sess. 18 (1966).

[8] The government has argued in this case that 5 U.S.C. § 551(13) supports its claim that USCIS's failure to act was a "decision or action" within the meaning of 8 U.S.C. § 1182(a)(9)(B)(v). That argument is meritless. App. 97-98; 3 R. Doc. 30, at 13-14. The 5 U.S.C. § 551(13) definition applies only to the APA, and is not relevant to interpretation of 8 U.S.C. § 1182(a)(9)(B)(v) – a provision in an entirely different statute serving different purposes enacted at a different time by a different Congress. Further, a definition of "agency action" does not control the different phrase "decision or action." But most fundamentally, Congress crafted the language of § 551(13) with the explicit goal of ensuring agencies' accountability for their failures to act. Congress did not intend it as a route to immunizing them for those failures.

AILA Doc. No. 24011103. (Posted 1/11/24)

By coupling § 706(1)'s direction that courts compel "unreasonably delayed" agency action with the broad § 551(13) definition, Congress ensured the availability of judicial review when an agency "violate[s] the legislative policy and cause[s] harm to private interests by failing to" take action it is required to take. Final Report [to Congress] of Attorney General's Committee on Administrative Procedure 76 (1941), https://www.regulationwriters.com/downloads/apa1941.pdf. It thus vindicated the concern expressed in *ICC v. U.S. ex rel. Humboldt S.S. Co.*, 224 U.S. 474 (1912), cited in *Attorney General's Manual on the Administrative Procedure Act* 108 (1947): Absent judicial review, an agency could through inaction "nullify its most essential duties." 224 U.S. at 484.

In sum, "long-held principles about the proper scope of judicial review" do not support putting a thumb on the scale of barring review here. Quite the contrary – the proper thumb-on-the-scale favors Congress's goal of ensuring that "no agency shall in effect deny relief or fail to conclude a case by mere inaction, or proceed in dilatory fashion to the injury of the persons concerned." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 264 (1946).

ii. This case should be disposed of on the merits via the *TRAC* factors.

Courts considering claims that agency action has been unreasonably delayed, as in this case, resolve those suits by applying the six-factor analysis of *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 80 (D.C.

AILA Doc. No. 24011103. (Posted 1/11/24)

Cir. 1984) (*TRAC*) ("[T]he court should consider the effect of expediting delayed action on agency activities of a higher or competing priority."); *see Irshad v. Johnson*, 754 F.3d 604, 607 (8th Cir. 2014). On remand, these cases should be decided using those *TRAC* factors.

If there is a proper place for Judge Rossiter's concerns about judicial oversight of government resource-allocation, those are to be considered in the context of the *TRAC* factors, not in the application of a jurisdictional bar to prevent the cases from being heard at all. This Court has recognized this principle in the past. Twice, when cases challenging USCIS's failure to adjudicate adjustment applications came before this Court, the government—perhaps recognizing the weakness of the jurisdictional objection it had raised before the district court—declined to raise that argument on appeal. *Irshad*, 754 F.3d at 606-07; *Debba v. Heinauer*, 366 Fed. Appx. 696, 699 (8th Cir. 2010). This Court declined to address the jurisdictional issue *sua sponte*. *See Irshad*, 754 F.3d at 606-07; *Debba*, 366 Fed. Appx. at 699. Instead, it proceeded to the merits, and decided those cases on that basis. The trial courts should do the same here.

AILA Doc. No. 24011103. (Posted 1/11/24)

5. *Patel* is inapplicable to construing "decision or action" in § 1182(a)(9)(B)(v)

Judge Buescher found that *Patel* "strips the courts of jurisdiction to review how the agency processes a waiver."[9] App. 244. But in *Patel*, the Court found that there had been a "judgment," and applied 8 U.S.C. § 1252(a)(2)(B)(i)'s bar on review of "any *judgment* regarding the granting of relief under section . . . 1255 of this title" (emphasis added). *Patel*, 596 U.S. at 336-40. No such language exists here.

The analysis in *Patel* begins with the statement that "[t]he outcome of this case largely turns on the scope of the word 'judgment,' an issue on which the parties and *amicus* have three competing views." *Id.* at 337. The Court agreed with the a*micus* "that 'judgment' means any authoritative decision." *Id.* Accordingly, the Court held that "[f]actual findings fall within this category, . . . so the courts lack jurisdiction to review them." *Id.*

But here, unlike in *Patel*, there is no decision or action by USCIS to review, *see supra* Section II, and therefore no jurisdictional bar. Even 100% of nothing is still nothing. If the plaintiffs are not seeking review of a decision or an action, no amount of language barring the same, no matter how "broadening," sweeping, or

[9] Judge Rossiter doesn't appear to have relied upon *Patel v. Garland* in deciding that he lacked subject matter jurisdiction to review the complaints here. *See, e.g.*, JA 012.

AILA Doc. No. 24011103. (Posted 1/11/24)

unequivocal, can apply to their lawsuit. This is why the Court in *Patel* spent nearly its entire substantive discussion showing that what it was being asked to review was in fact a "judgment." Why, one wonders, did the Supreme Court care so much about this technicality? The answer is that if there were no judgment, then there could be no judgment "regarding" something. A lawsuit is not a television sitcom: one cannot have a lawsuit regarding nothing. *Cf. Seinfeld: The Pitch* (NBC broadcast Sept. 16, 1992).

So here too. Because USCIS has taken no "action" and no "decision" on any of the plaintiffs' Forms I-601A, it cannot have taken an action or decision regarding anything. *Patel* thus has no bearing on these lawsuits.

B. The lower courts erred in failing to use their mandamus authority to compel a decision on plaintiffs' applications.

1. Judge Rossiter erred in failing to see mandamus relief as a "command" rather than "judicial review."

Even if the Court holds that the district courts do not have jurisdiction under the APA, jurisdiction could be established by the Mandamus Act, 28 U.S.C. § 1361. Mandamus is not "judicial review." Rather than "review" of an agency or officer's decision, a writ of mandamus is a command. *See, e.g.*, *State of Minn. by Likins v. Weinberger*, 359 F. Supp. 789, 792 (D. Minn. 1973). "'Judicial review' contemplates that a court will review a decision issued by another tribunal." *Cardiosom, L.L.C. v. United States*, 115 Fed. Cl. 761, 774-75 (2014). In the cases

AILA Doc. No. 24011103. (Posted 1/11/24)

before this Court, however, the agency has issued no decisions on plaintiffs' applications to review.

Appellants' mandamus action does not seek judicial review, and so Judge Rossiter erred in concluding that "the issues presented by the plaintiffs' action for APA and mandamus relief with regard to Beltran's I-601A application are barred from our review by the jurisdiction-stripping provision in § 1182(a)(9)(B)(v)", App. 029, without engaging in any separate analysis of the plaintiffs' mandamus claims. App. 252.

2. Judge Buescher erred in dismissing Appellants' mandamus petitions for failure to state a claim upon which relief can be granted.

Judge Buescher's decisions dismissed plaintiffs' claims for mandamus relief for failure to state a claim under Rule 12(b)(6), finding that "there are no allegations in the Complaint that USCIS is failing to adjudicate any I-601A applications at all or failing to adjudicate Plaintiffs' application in particular." App. 251. But this is not true. Paragraphs of all five complaints, starting with paragraph 28, aver that the USCIS has failed (and is failing) to adjudicate the plaintiffs' applications. *E.g.*, App. 011, 055, 076, 115, and 267-268. Since the claim that there were no such allegations in appellants' complaints is the only "fact" Judge Buescher cited in support of his conclusion that the relief they sought was not extraordinary, this holding should be reversed as contrary to the record.

AILA Doc. No. 24011103. (Posted 1/11/24)

Judge Buescher was of the view that "[a] duty to 'adjudicate' is the opposite of a 'ministerial' duty, as required for mandamus relief." App. 251 (citing *Mitchael v. Colvin*, 809 F.3d 1050, 1054 (8th Cir. 2016)). But this is inconsistent with *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004), in which the Supreme Court explained that a court may "compel an agency 'to perform a ministerial or non-discretionary act, *or* to take action upon a matter, without directing how it shall act." *Norton*, 542 U.S. at 64 (emphasis added). Plaintiffs are asking that USCIS be compelled to decide their waiver applications, without directing how the agency shall act.

It is well-established that mandamus can be used to order an adjudication. "The authority of an appellate court to issue mandamus to an agency is analogous to its authority to issue the writ to District Courts," *TRAC*, 750 F.2d at 76 n.28 (citing *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1179 (D.C. Cir. 1979) (Leventhal, J., concurring)); *McClellan v. Carland*, 217 U.S. 268, 278-281 (1910); *Ex Parte Bradstreet*, 32 U.S. (7 Pet.) 634, 645-46(1833); *Ex Parte Crane*, 30 U.S. (5 Pet.) 190, 191-94, 8 L. Ed. 92 (1831). At least seven other circuits have followed *TRAC* to find that a court may use its mandamus authority to order an administrative agency to comply with its duty under 5 U.S.C. § 555(b) to adjudicate a matter within a reasonable time, as the appellants demand here. *See, e.g, Gonzalez v. Cuccinelli*, 985 F.3d 357, 375 (4th Cir. 2021); *Cmty. Voice v. EPA*

AILA Doc. No. 24011103. (Posted 1/11/24)

(In re Cmty. Voice), 878 F.3d 779, 783, 786 (9th Cir. 2021); *Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065, 1075 (7th Cir. 2020); *NRDC, Inc. v. FDA*, 710 F.3d 71, 84 (2d Cir. 2013); *Howard v. Solis*, 570 F.3d 752, 757 (6th Cir. 2009); *NRDC v. EPA (In re NRDC)*, 956 F.3d 1134, 1138-39 (3d Cir. 1998); *Towns of Wellesley, Concord and Norwood, Mass. v. FERC,* 829 F.2d 275, 277 (1st Cir. 1987). This Court has agreed that "[m]ost circuits have adopted the mandamus approach to agency delay issues; we assumed it was jurisdictionally appropriate in *Irshad v. Johnson*, 754 F.3d 604, 607-08 (8th Cir. 2014)." *See Org. for Competitive Mkts. v. United States Dep't of Agric.*, 912 F.3d 455, 462 (8th Cir. 2021).

Given this weight of authority, this Court should vacate the decisions below and remand this matter to the district court to apply the *TRAC* factors in making a decision on defendant's motion to dismiss.[3] *See Gonzalez*, 985 F.3d at 375-376 (reversing the district court's dismissal of a mandamus action for failure to state a claim because "at this point we cannot rely on the agency's allegations to find as a matter of law that this factor necessarily favors the agency").

C. USCIS has a non-discretionary duty to adjudicate all applications for provisional unlawful-presence waivers.

USCIS urges that even if there is no jurisdictional bar to the lawsuits, they must still fail because the law does not obligate it to adjudicate provisional unlawful-presence waiver applications. This, too, is incorrect based on the

AILA Doc. No. 24011103. (Posted 1/11/24)

language of the regulation, which includes the term "will." *See* 8 C.F.R. §§ 103.2(b)(19); 212.7(e)(9)(1).

It has long been understood that "language of an unmistakably mandatory character" such as "will" or "must" creates rights and duties. *Hewitt v. Helms*, 459 U.S. 460, 471-72, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). So it is with the regulations that create USCIS's non-discretionary duty to adjudicate all applications for provisional unlawful-presence waivers. Subsection (e)(8) specifically states that "USCIS *will adjudicate* a provisional unlawful presence waiver application in accordance with this paragraph and section 212(a)(9)(B)(v) of the Act [8 U.S.C. § 1182(a)(9)(B)(v)]. If USCIS finds that the [noncitizen] is not eligible for a provisional unlawful presence waiver, or if USCIS determines in its discretion that a waiver is not warranted, USCIS *will deny* the waiver application." 8 C.F.R. § 212.7(e)(8) (emphases added). Similarly, 8 C.F.R. § 212.7(e)(9)(1) provides that the "USCIS *will* notify the [noncitizen] and the [noncitizen]'s attorney of record or accredited representative of the decision in accordance with 8 CFR 103.2(b)(19)" (emphasis added).[2]

Where, as here, the government has promulgated "[r]egulations with the force and effect of law," those regulations "supplement the bare bones" of federal statutes. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265, 4 S.Ct. 499, 98 L.Ed. 681 (1954). Agencies must follow their own existing valid

AILA Doc. No. 24011103. (Posted 1/11/24)

regulations, even where government officers have broad discretion, such as in the area of immigration. *Id*. at 268 ("[W]e are not here reviewing and reversing the manner in which discretion was exercised. . . . Rather, we object to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations."); *see also Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("[I]t is incumbent upon agencies to follow their own procedures . . . even where [they] are possibly more rigorous than otherwise would be required"); *In re U.S.*, 197 F.3d 310, 315 (8th Cir. 1999) ("[T]he *Accardi* case has come to stand for the proposition that administrative agencies may not take action inconsistent with their internal regulations when it would affect individual rights")[1]; *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005) (same).

DHS's repeated use of mandatory language—*i.e.*, the term "will"—in its regulations provides textual and structural support for the *Accardi* doctrine requirement that the regulations requiring adjudication of provisional unlawful-presence waiver applications be given effect.

II. CONCLUSION

For the foregoing reasons, the decisions of the district courts should be reversed.

AILA Doc. No. 24011103. (Posted 1/11/24)

Dated: December 29, 2023

Respectfully submitted,

/s/ Katherine E. Melloy Goettel
Katherine E. Melloy Goettel
Leslie K. Dellon*
American Immigration Council
1331 G St. NW Suite 200
Washington DC 20005
Tel: (202) 507-7552 (Goettel)
kgoettel@immcouncil.org
ldellon@immcouncil.org

Jonathan T. Weinberg*
Wayne State University Law School
471 West Palmer Street
Detroit, MI 48202
Tel: (313) 577-3933
weinberg@wayne.edu

Jennifer R. Coberly*
American Immigration Lawyers Association
1331 G. St. NW
Washington, DC 20005
Tel: (202) 507-7692
Jcoberly@AILA.org

Jonathan Levy*
American Gateways
314 E. Highland Mall Blvd., Suite 501
Austin, TX 78752
Tel: (512) 478-0546 ext. 212
JonathanL@americangateways.org

Brian Scott Green
Law Office of Brian Green
9609 S University Boulevard, #630084
Littleton, CO 80130
Tel: (443) 799-4225
BrianGreen@greenUSimmigration.com

Michael E. Piston*
Attorney at Law
38-08 Union St., Suite 9A
Flushing, NY 11354
Tel: (646) 876-3772
michaelpiston4@gmail.com

*Not admitted to the Eighth Circuit Bar

Attorneys for Amici Curiae American Immigration Council and American Immigration Lawyers Association

AILA Doc. No. 24011103. (Posted 1/11/24)

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29 because the brief contains 5,840 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365, in 14-point Times New Roman.

Pursuant to 8th Cir. R. 25, I certify that the brief has been scanned for viruses and is virus free.

DATED: December 29, 2023

/s/ Katherine E. Melloy Goettel
Katherine E. Melloy Goettel

AILA Doc. No. 24011103. (Posted 1/11/24)

CERTIFICATE OF CONSENT

I hereby certify, pursuant to Federal Rule of Appellate Procedure 29(a)(2), that counsel for Appellant and counsel for Appellee consented to *amici curiae* filing a brief in this matter.

DATED: December 29, 2023 */s/ Katherine E. Melloy Goettel*
Katherine E. Melloy Goettel

AILA Doc. No. 24011103. (Posted 1/11/24)

CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

DATED: December 29, 2023 */s/ Katherine E. Melloy Goettel*
Katherine E. Melloy Goettel

AILA Doc. No. 24011103. (Posted 1/11/24)