No. 24-5260

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

Davinder Singh,

Plaintiff-Appellant,
v.
Alejandro Mayorkas, et al.,
Defendants-Appellees.

On Appeal from the U.S. District Court for the Middle District of Tennessee

No. 3:23-cv-00527, Hon. Eli Richardson

# BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION COUNCIL AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT AND 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

Leslie K. Dellon*
American Immigration Council
PMB 2026
2001 L St. NW Suite 500
Washington, DC 20036
Tel: (202) 507-7530
ldellon@immcouncil.org

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



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

*Attorneys for Amici Curiae*

*Not admitted to the Sixth Circuit Bar



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**CORPORATE DISCLOSURE STATEMENT UNDER 6 CIR. R. 26.1(a)**

Pursuant to 6 Cir. R. 26(a)(1), which applies Fed. R. App. P. 26.1 to all amici curiae in a civil case, I certify that the American Immigration Lawyers Association and the American Immigration Council are non-profit organizations that do not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of stock.

Dated: June 27, 2024

*/s/ Jonathan T. Weinberg*
Jonathan T. Weinberg



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## 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).



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## SUMMARY OF ARGUMENT

The district court 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 Mr. Singh's suit challenging USCIS's failure to act. Courts may not read statutory language to bar judicial review if a reasonable reading supporting review is available. In this case, the ordinary meaning of "decision or action" excludes a failure to act. Courts have repeatedly read identical language to exclude a failure to act. Judge Richardson's reliance on *Patel v. Garland*, 596 U.S. 328 (2022), misunderstood that decision. Finally, the court below erred in dismissing Mr. Singh's application for mandamus relief.

## I. ARGUMENT

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

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

In rejecting Mr. Singh's claim, Judge Richardson relied on – and quoted extensively from – two unpublished district court opinions. One of those opinions, *Soto v. Miller*, briefly asserted that USCIS has made decisions relevant to its processing of I-601A applications "such as decisions as to staffing and application procedures, including its first-in-first-out policy," and that challenges such as Mr. Singh's should be read as seeking review of those "decision[s] or action[s] . . .



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regarding a waiver." No. 1:23-cv-03016-EFS, 2023 WL 8850747, at *4 (E.D. Wash. Dec. 21, 2023). The other decision, *Soni v. Jaddou*, took a slightly different path to a similar result: challenges such as Mr. Singh's necessarily slow the processing of other waiver petitions, the judge reasoned, and thus seek "review of the agency's decisions and actions 'regarding'" those other, unrelated, petitions. No. 3:23-CV-50061, 2023 WL 8004292, at *3 (N.D. Ill. Nov. 17, 2023), *aff'd*, No. 23-3220, 2024 WL 2858964 (7th Cir. June 6, 2024).[2] *See* Opinion, RE 14, PageID#78-81.

The district judge's copy-paste of these district court opinions, though, ill-fits Mr. Singh's complaint and the record. First, it's important to note that Judge Richardson saw DHS as levying a "facial" jurisdictional attack in this case, so that the court was precluded from considering any matter outside the pleadings. Opinion, RE 14, PageID#74; *see Gentek Bldg. Prods. Inc. v. Sherman-Williams Co.*, 491 F.3d 320, 330-31 (6th Cir. 2007).

Yet the complaint in this case says nothing about any purported USCIS first-in-first-out policy, as the *Soto* court had imagined. Indeed, it says nothing suggesting that USCIS follows *any* consistent prioritization rule. Rather – as this

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[2] Subsequent to Judge Richardson's decision, the Seventh Circuit affirmed *Soni.* With minimal discussion and no citation, the court asserted that the agency's resource-allocation choices were collectively "an 'action regarding' waivers." 2024 WL 2858964, at *1.



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Court recently emphasized – at the motion-to-dismiss stage, "the machinery of the . . . adjudication processes is known only to USCIS. Clearly, discovery is critical to understanding whether the . . . process is a systematic line or not." *Barrios Garcia v. DHS*, 25 F.4th 430, 453 (6th Cir. 2022); *see also Doe v. Risch*, 398 F. Supp. 3d 647, 658 (N.D. Cal. 2019) (while USCIS asserted that plaintiff's application should wait in the queue, it submitted no evidence that it in fact maintained a queue).

More broadly, the complaint in this case says nothing suggesting that the reason Mr. Singh's application has not been adjudicated lies in the agency's staffing, application procedures, or prioritization. All we actually know about Mr. Singh's application is that it has not been adjudicated though it has been pending since November 2021. Opinion, RE 14, PageID#69. Perhaps it was simply misplaced or misfiled; it's impossible to say.

Mr. Singh is not challenging the agency's treatment of any application other than his own. He is entitled, as Judge Richardson conceded, to timely consideration of that application. And having failed to get that timely consideration, his claim for review does not challenge any "decision or action" the Secretary has taken.

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

Judge Richardson correctly recognized that USCIS has made no "decision" regarding Mr. Singh's application. Opinion, RE 14, PageID#75 n.1. Rather, he explained, the dispute in this case is whether Mr. Singh is challenging a DHS



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"action." *See* Opinion, RE 14, PageID#76 (if "an unreasonable delay is [not] an 'action' . . . , then Section 1182(a)(9)(B)(v) is inapplicable and does not divest the Court of subject-matter jurisdiction").

To determine whether DHS had taken any relevant "action," Judge Richardson cited two definitions of that word: "the performance of some activity or deed, typically to achieve an objective" (Oxford English Dictionary), and "the process of doing something; conduct or behavior" (Black's Law Dictionary). Opinion, RE 14, PageID#79 (*quoting Soto,* 2023 WL 8850747, at *4), PageID#81 (*quoting Soni*, 2023 WL 8004292, at *2).

The district judge, though, failed to see the point of the definitions' focus on "action" as "the performance of some activity" or "the process of doing something." The definitions highlight the distinction between action ("doing something") and *in*action, the state of doing nothing. The question at this stage is whether the complaint alleges that DHS has done something or nothing. The answer is plain: The complaint does not include any allegation suggesting that DHS has taken any action whatsoever regarding Mr. Singh's application. The record facts, leaving an application unexamined and untouched, for reasons unknown on this record, is not action – it is *in*action.

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



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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 the 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 (among others), making the same argument it makes here. 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]

[3] In *Iddir v. INS,* 301 F.3d 492, 497 (7th Cir. 2002), although the government conceded jurisdiction, 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." By contrast, in *Bian v. Clinton*, the Fifth Circuit denied jurisdiction on questionable grounds before vacating its ruling as moot. 605 F.3d 249, 254 (5th Cir. 2010), *vacated as moot*, Nos. 9-10568, 9-10742, 2010 WL 3633770 (5th Cir. Sept. 16, 2010) (per curiam). The Fifth Circuit recently reaffirmed the reasoning of *Bian* in *Cheejati v. Blinken*, 97 F.4th 988, 993-94 (5th Cir. 2024).



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Courts adopting the majority view of the phrase "decision or action" made three points. First, the meaning of "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. USCIS*, 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)).

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 1050); *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



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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 [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]

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[4] Some district courts, including some in this Circuit, focused on a separate question: The § 1252(a)(2)(B)(ii) bar was limited to a "decision or action" the



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This final point is especially salient given the reasoning of the court in this case. Judge Richardson stressed that "although § 1182(a)(9)(B)(v) affords USCIS sole discretion as to *whether to grant* an I-601A application, USCIS does not have discretion as to *whether to adjudicate* the application." Opinion, RE 14, PageID#82 (cleaned up; emphasis added) (quoting *Soto*, 2023 WL 8850747, at *5). But in practice, the district court's 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 v. Mayorkas*, 776 F. Supp. 2d 927, 933 (D. Minn. 2011) (internal quotation marks omitted).

On Judge Richardson's reasoning, *any* government failure to act, whether intentional or unintentional, must be deemed 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 Mr. Singh's. If that failure of memory

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authority for which was discretionary, and so for those courts the key issue was whether the agency's obligation to adjudicate applications within a reasonable time was a matter of discretion. *See, e.g.*, *Labaneya v. USCIS*, 965 F. Supp. 2d 823, 827 (E.D. Mich. 2013). 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.



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is to be classified as an "action," then the word has been expanded beyond recognition.

**3. The word "regarding" does not change the analysis.**

Judge Richardson recognized that the words "action and decision imply 'some affirmative action, not inaction or a failure to act.'" Opinion, RE 14, PageID#79 (quoting *Soni*, 2023 WL 8004292, at *3). Yet he ruled that the word "regarding" in § 1182(a)(9)(B)(v) tipped the scales, giving that provision a plain meaning barring judicial review. Opinion, RE 14, PageID#79.That, he explained, was because "regarding" has a "broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." Opinion, RE 14, PageID#81 (quoting *Soto*, 2023 WL 8850747, at *4, in turn quoting *Patel*, 596 U.S. at 339). This was error.

As the language Judge Richardson quoted specifies, the word "regarding" has meaning: It encompasses not only a particular matter, but also things "relating to" that matter. So § 1182(a)(9)(B)(v)'s preclusion of review for a "decision or action by the [Secretary] regarding a waiver" can be accurately rephrased as barring review of a decision or action by the Secretary *relating to* a waiver. It would cover, for example, a decision by the Secretary to call for a security check, or new fingerprints, before a waiver were granted.



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But none of this changes the fact that, under the text of the statute, two things must be true before the bar on judicial review applies. First, a plaintiff must be seeking review of some "decision or action." Second, that decision or action must be "regarding a waiver." Both of those components are necessary. If the Secretary has taken no decision or action, there can be no bar to judicial review.

Nothing in *Patel*, 596 U.S. at 339, is to the contrary. In that case, DHS had denied Mr. Patel's application for adjustment of status. When he sought review, the government relied on 8 U.S.C. § 1252(a)(2)(B)(i)'s bar on judicial review of "any judgment regarding the granting of relief under section . . . 1255." Mr. Patel argued that the word "judgment" covered only discretionary decisions, and hence the statute did not stop a court from hearing his challenge to one of the agency's factual findings. *Patel*, 596 U.S. at 338.

The Court disagreed. It began by explaining 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." *Patel*, 596 U.S. at 337. Rejecting Mr. Patel's position, the Court held "that 'judgment' means any authoritative decision." *Id.* at 338-39. Having established that there was a "judgment" – i.e., an authoritative decision rejecting Mr. Patel's adjustment application – it was plain that Mr. Patel's challenge related to that judgment, so there was no jurisdiction to



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hear it. *Id.*; *see also Enriquez-Perdomo v. Newman*, 54 F.4th 855, 865 n.6 (6th Cir. 2022).

In this case, unlike in *Patel*, there is no "decision or action" to review, and therefore there is no jurisdictional bar. One hundred percent of nothing is still nothing. If Mr. Singh is not seeking review of a decision or action, no amount of language barring the same, no matter how "broadening," sweeping, or unequivocal, can apply to his 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" the granting of relief under 8 U.S.C. § 1255. A lawsuit is not a television sitcom: one cannot have a lawsuit regarding nothing. *Cf. Seinfeld: The Pitch* (NBC television broadcast Sept. 16, 1992).

Because USCIS has taken no action at all in this case, it cannot have taken an action "regarding" something. *Patel* thus has no bearing on this lawsuit.

#### 4. 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 Richardson recognized that "numerous" courts have agreed with Mr. Singh on the proper interpretation of § 1182(a)(9)(B)(v). Opinion, RE 14, PageID#77 & n.3. He found "support" for both theories of § 1182(a)(9)(B)(v);



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neither one was "beyond reasonable debate." Opinion, RE 14, PageID#81. "[O]n balance," though, he found the government's reasoning more persuasive. Opinion, RE 14, PageID#81. Accordingly, he adopted that interpretation of the statute. That was error. The 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." *Id.*

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*, 589 U.S. 221 (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



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executive determinations generally are subject to judicial review.'" *Id*. at 229 (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 228-30.

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*, 589 U.S. at 229 (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).

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 Enriquez-Perdomo v. Newman*, 54 F.4th 855, 865 n.6 (6th Cir. 2022); *Barrios Garcia*, 25 F.4th at 442.[5]

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[5] In *Patel v. Garland*, 596 U.S. 328 (2022), the Supreme Court read an immigration statute to preclude review, but – as this Court recognized in *Enriquez-Perdomo* – 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. *See* 54 F.4th at 865 n.6.



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Applying the rule to this case, the answer is plain. Section 1182(a)(9)(B)(v) is certainly "reasonably susceptible" to Mr. Singh's interpretation, *Kucana*, 558 U.S. at 251, as Judge Richardson recognized. Opinion, RE 14, PageID#81. The fact that numerous 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.

As one court recently put it: While the government's definition of "action" in § 1182(a)(9)(B)(v) "may be a reasonable interpretation of the term, that interpretation is not sufficiently clear to overcome the presumption in favor of judicial review. When there is ambiguous language within a statute and Congress' intent is unclear, the court should assume that Congress intended to allow for judicial review." *Novack v. Miller*, No. 23-CV-10635-AK, 2024 WL 1346430, at *4 (D. Mass. Mar. 29, 2024).

**5. The decision below misunderstood APA review of agency inaction.**

The district court opinions that Judge Richardson relied on appear to have been driven in large part by a concern that a decision in the plaintiff's favor would displace the consideration of other applications. The Seventh Circuit affirmed in *Soni* on the basis that "[s]etting priorities—for example, how many employees to assign to processing applications under this [the unlawful presence waiver] clause, as opposed to handling other duties—is an 'action regarding waivers.'" 2024 WL



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2858964, at *1. Those opinions assume that to reach a decision will force the court to opine on matters such as agency staffing and resource allocation that are beyond the court's ken. To avoid that, the courts reasoned, it was necessary to stretch § 1182(a)(9)(B)(v)'s jurisdictional bar.

This reading is at war with the statutory text, which bars review when a plaintiff seeks to challenge "*a* decision or action"—that is, a single, focused, decision. That statutory bar can have no applicability to a case like this, in which even on the government's theory of the case, Mr. Singh's challenge is to an undifferentiated mass of resource-allocation choices.

But more fundamentally, the approach mistakes the mechanisms that administrative law has put in place to address this issue. Concerns about resource allocation are present whenever a plaintiff seeks review of agency inaction or delay. Yet Congress, in enacting the APA in 1946, was emphatic that those concerns do not trump the agency's obligation to address and remedy the sort of delay presented in this case. Administrative law does take those concerns into account – but as part of the merits analysis, not as a ground for denying jurisdiction.

#### i. Congress designed the APA to address the problem of agency delay.

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



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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).[6] Congress thus 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*

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[6] The House and Senate Reports describe the version of the APA enacted in 1946. Pub. L. No. 79-404, 60 Stat. L. 237, 240 (1946). Congress later recodified 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. 1380, 89th Cong., 2d Sess. 18 (1966).



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*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.[7]

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.

[7] 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). As the *Soni* court, endorsed by Judge Richardson, recognized, that argument is meritless. Opinion, RE 14, PageID#78 (*quoting Soni*, 2023 WL 8004292, at *2). 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.



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#### ii. The district court should address concerns about agency resource allocation on remand, after discovery, via the *TRAC* factors.

Does judicial review mean that courts must simply ignore concerns about agency resource allocation? Not at all. This Court, when faced with a claim that agency action has been unreasonably delayed, as in this case, resolves such a suit on the merits by applying the six-factor analysis of *Telecomms. Rsch. Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*). *See, e.g.*, *Barrios Garcia v. DHS*, 25 F.4th 430, 451 (6th Cir. 2022). In that analysis, courts are explicitly directed to consider "the effect of expediting delayed action on agency activities of a higher or competing priority." *Id*. at 451-52 (quoting *TRAC*, 750 F.2d at 80). They consider other factors as well: the timetable, if any, that Congress has set; the "nature and extent of the interests prejudiced by delay"; and the nature of the underlying law ("delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake"). *Id*.

*Barrios Garcia* provides a good recent illustration. There, plaintiffs had applied for "U" visas. Their lawsuits claimed that DHS had unreasonably delayed placing them on the U-visa waitlist and adjudicating their work-authorization applications. DHS claimed that judicial review was barred by 8 U.S.C. § 1252(a)(2)(B)(ii). This Court disagreed, explaining that "the statute is ambiguous enough to sustain the APA's presumption of judicial review." 25 F.4th at 445.



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But that was not the end of the Court's opinion. Proceeding to the next stage of its analysis, it considered the *TRAC* factors, and thus the district courts' resource-allocation concerns. On that basis, it reversed the district courts' dismissal on the pleadings. *Id.* at 454-55. It noted that plaintiffs' interests were urgent and weighty. And it explained: "DHS may indeed be resource- and personnel-depleted. But . . . [d]iscovery is warranted to better assess 'the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency.'" *Id.* at 454 (*quoting Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003)). The Court continued: "We sympathize with the burdens that agencies shoulder," but to reject plaintiffs' claims simply to preserve agency autonomy over resource allocation would "wipe the APA off the books." *Id*. at 454-55.[8]

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[8] This Court found that the district court had jurisdiction to hear plaintiffs' claim that "USCIS has unreasonably delayed the adjudication of their U-visa applications." 25 F.4th at 455. By contrast, it rejected a challenge to the government's delay in issuing plaintiffs work authorization. *See id*. While the agency had a mandatory duty to adjudicate the U visa applications (placing meritorious applicants on a "U visa waitlist" to wait for visa numbers to be available), this Court noted, it had no such duty to issue work authorization in advance of that determination. *See id.* In this case, USCIS has a non-discretionary duty to adjudicate all I-601A applications, as discussed *infra* at § I.C. Mr. Singh seeks only to compel the agency to fulfill its legal duty to act on his application and issue a decision.



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Judge Richardson, in other words, addressed his concerns about resource allocation at the wrong stage of the analysis. He should be directed to consider them as part of his *TRAC* analysis, after discovery, on remand.

### B. Even if there is no jurisdiction to hear an APA unreasonable delay claim, jurisdiction exists under the Mandamus and Venue Act.

Even if the Court holds that the district court lacks jurisdiction to decide Mr. Singh's claim for unreasonable delay pursuant to the APA, the district court would still have jurisdiction under the Mandamus and Venue Act (MVA), 28 U.S.C. § 1361. Jurisdiction exists because the prohibition on judicial "review" contained in 8 U.S.C. § 1182(a)(9)(B)(v) does not apply to actions under the MVA, where, as here, the Act is not being used to overcome the decision of an agency or its officer(s), but rather to command the agency to do something that it has a duty to do, but is not doing.

"'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). But issuing an order in the nature of mandamus need not involve the review of a "decision" by USCIS. This case illustrates that point: Mr. Singh has asked the district court not to review an agency decision, but to order it to make one.



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Since a petition in the nature of mandamus does not seek review of an agency's decision, but rather simply asks the court to order the agency to do something which it (or one of its officers) has not done, it does not implicate § 1182(a)(9)(B)(v)'s bar on "review" by the courts.

The district court declined to even consider the applicability of the MVA to this matter, deciding instead to "frame its analysis in terms of the APA, cognizant that the material aspects of the analysis and—even more to the point—the outcome would be the same if the Court were to choose to follow the rubric of a Mandamus [and Venue] Act claim." Opinion, RE 14, PageID#73. But if this Court should uphold the district court's ruling that APA review is barred here, then the outcome would ***not*** be the same if the court were to decide this matter under the MVA, since requesting an order under the MVA does not constitute judicial review of a USCIS decision.

The district court cited the *Soto* opinion for the proposition that where a plaintiff seeks both mandamus and APA relief, the court may address the APA claim only. *Soto*, 2023 WL 8850747, at *3. The *Soto* opinion, *see id.*, in turn cited *Indep. Mining Co. v. Babbitt,* 105 F.3d 502, 507 (9th Cir. 1997), which relied entirely on the fact that in *Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 230 n.4 (1986), the Supreme Court had analyzed a mandamus suit under the APA.



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But *Japan Whaling* is inapposite. In that case, the Secretary of Commerce had made an official determination that limited Japanese whaling would not diminish the effectiveness of the International Convention for the Regulation of Whaling. Plaintiffs, seeking a contrary determination, brought a mandamus action. 478 U.S. at 228. The Court explained that that action was "in essence" one for review under the APA; because relief was in fact available under the APA, there was no need to address the mandamus claim. *See id.* at 230 n.4.

This case is different, for Mr. Singh's complaint does not seek review of any agency action. More importantly, *Japan Whaling* only stands for the proposition that a court need not address a mandamus claim when APA review is *available*; it does not support the conclusion that a court may ignore a mandamus claim when it denies APA relief.

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

USCIS has urged in other litigation that even if there is no jurisdictional bar to lawsuits like Mr. Singh's, those lawsuits must still fail because the law does not obligate it to adjudicate their applications. This too is incorrect.

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 (1983). So it is with the regulations and policies that create



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USCIS's non-discretionary duty to adjudicate all applications for provisional unlawful-presence waivers.

The provisional unlawful presence waiver statute does not address whether USCIS must render decisions on all I-601A applications. Instead, the statute sets forth the condition precedent to a waiver being granted to an applicant—a discretionary finding that refusing to admit the applicant "would result in extreme hardship to the citizen or lawfully resident spouse or parent." 8 U.S.C. § 1182(a)(9)(B)(v).

However, 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 (1954). Agencies must follow their own "existing valid regulations," even where government officers have broad discretion, such as in the area of immigration. *Id.* at 268; *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 *Wilson v. Commissioner of Social Security*, the Sixth Circuit recognized that "[i]t is an elemental principle of administrative law that agencies are bound to follow their own regulations." 378 F.3d 541, 545 (6th Cir. 2004) (citing *Vitarelli v. Seaton,* 359 U.S. 535, 545 (1959)); *Service v. Dulles,* 354 U.S. 363, 372 (1957);



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and *Accardi,* 347 U.S. at 267); *see also Sch. Dist. 2 Fractional, Athens Twp., Calhoun Cnty., Mich. v. United States*, 229 F.2d 681, 686 (6th Cir. 1956) (holding that an administrative regulation "binds the administrator" equally with others).

The governing regulations at 8 C.F.R. § 212.7(e) provide details respecting the processing of I-601A applications and require that they be adjudicated. Subsection (e)(8) specifically requires 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 "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).[9]

Correspondingly, the USCIS Policy Manual repeatedly confirms that the agency *must* decide the key issues in every I-601A application and, indeed, all extreme hardship waiver applications:

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[9] 8 C.F.R. § 103.2(b)(19) governs required USCIS notifications of adjudications of benefits applications or requests.



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- "[T]he officer *must* ensure that the applicant meets all of the statutory requirements for the waiver . . . . If the applicant is eligible, the officer *must* then determine whether the applicant warrants a favorable exercise of discretion."[10]
- "The officer *must* make extreme hardship determinations based on the factors, arguments, and evidence submitted."[11]
- "If the officer finds the requisite extreme hardship, the officer *must* then determine whether USCIS should grant the waiver as a matter of discretion based on an assessment of the positive and negative factors relevant to the exercise of discretion."[12]

The agency's repeated use of mandatory language in its regulations and Policy Manual, which require both intermediate decisions and a final exercise of discretion, provides textual and structural support for the *Accardi* doctrine

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[10] U.S Citizenship and Immigration Services, *Policy Manual*, Vol. 9, Pt. B, Ch. 3, https://www.uscis.gov/policy-manual/volume-9-part-b-chapter-3 (last accessed June 25, 2024) (emphasis added).

[11] U.S Citizenship and Immigration Services, *Policy Manual,* Vol. 9, Pt. B, Ch. 5, https://www.uscis.gov/policy-manual/volume-9-part-b-chapter-5 (last accessed June 25, 2024) (emphasis added).

[12] U.S Citizenship and Immigration Services, *Policy Manual,* Vol. 9, Pt. B, Ch. 7, https://www.uscis.gov/policy-manual/volume-9-part-b-chapter-7 (last accessed June 25, 2024) (emphasis added).



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requirement that the regulations requiring adjudication of provisional unlawful-presence waiver applications be given effect.

## II. CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court and remand the case.

Dated: June 27, 2024

Respectfully submitted,

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

Leslie K. Dellon*
American Immigration Council
PMB 2026
2001 L St. NW Suite 500
Washington, DC 20036
Tel: (202) 507-7530
ldellon@immcouncil.org

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

Michael E. Piston
Attorney at Law
38-08 Union St., Suite 9A
Flushing, NY 11354
michaelpiston4@gmail.com

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

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

*Not admitted to the Sixth Circuit Bar



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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 6,350 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

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.

DATED: June 27, 2024

*<u>/s/ Jonathan T. Weinberg</u>*
Jonathan T. Weinberg



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**CERTIFICATE OF CONSENT**

I hereby certify, pursuant to Fed. R. App. P. 29(a)(2), that counsel for Appellant and counsel for Appellees consented to *amici curiae* filing a brief in this matter.

Dated: June 27, 2024

*/s/ Jonathan T. Weinberg*
Jonathan T. Weinberg



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**CERTIFICATE OF SERVICE**

I hereby certify that on June 27, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth 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: June 27, 2024

*/s/ Jonathan T. Weinberg*
Jonathan T. Weinberg



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