No.

In the Supreme Court of the United States

FATHI ELLTAIF SAAD ELLDAKLI, ET AL., PETITIONERS

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a status-adjustment decision by the United States Citizenship and Immigration Services constitutes final agency action within the meaning of the Administrative Procedure Act, 5 U.S.C. 704, when removal proceedings are not pending.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Fathi Elltaif Saad Elldakli; Naglla Kouni Salem Ghadar; Hadil Fathi El Elldakli; Ranim Fathi El Elldakli; and Taha Fathi El Elldakli.

Respondents are Merrick B. Garland, Attorney General; Alejandro N. Mayorkas, Secretary of Homeland Security; Ur M. Jaddou, Director, United States Citizenship and Immigration Services; John Allen, Texas Service Center Director, United States Citizenship and Immigration Services; Wallace L. Carroll, Houston Field Office Director, United States Citizenship and Immigration Services; United States of America; Department of Homeland Security; and United States Citizenship and Immigration Services.

RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

Elldakli v. *Garland*, Civ. No. 21-3320 (June 7, 2022)

United States Court of Appeals (5th Cir.):

Elldakli v. *Garland*, No. 22-20344 (Apr. 4, 2023)

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 2
Statutory provision involved ... 2
Statement ... 2
A. Background ... 4
B. Facts and procedural history ... 6
Reasons for granting the petition ... 10
A. The decision below conflicts with the decisions of other courts of appeals ... 12
B. The decision below is incorrect ... 17
C. The question presented is important and warrants review in this case ... 20
Conclusion ... 24
Appendix A ... 1a
Appendix B ... 14a

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. *Gardner*, 378 U.S. 136 (1967) ... 17
Aldarwich v. *Hazuda*, Civ. No. 15-755, 2016 WL 1089173 (C.D. Cal. Mar. 18, 2016) ... 23
Bennett v. *Spear*, 520 U.S. 154 (1997) ... 11, 12, 17, 18
Bowen v. *Massachusetts*, 487 U.S. 879 (1988) ... 17
Cabaccang v. *USCIS*, 627 F.3d 1313 (9th Cir. 2010) ... 14, 18
Cardoso v. *Reno*, 216 F.3d 512 (5th Cir. 2000) ... 9
Chehazeh v. *Attorney General*, 666 F.3d 118 (3d Cir. 2012) ... 23
Darby v. *Cisneros*, 509 U.S. 137 (1993) ... 19
Fairbanks North Star Borough v. *U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008), cert. denied, 557 U.S. 919 (2009) ... 23

Page

Cases—continued:

Free Enterprise Fund v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).......22
Home Builders Association of Greater Chicago v. *U.S. Army Corps of Engineers*, 335 F.3d 607 (7th Cir. 2003)...23
Hosseini v. *Johnson*, 826 F.3d 354 (6th Cir. 2016)................................13, 18, 19
Howell v. *INS*, 72 F.3d 288 (2d Cir. 1995) 15, 16
Iowa League of Cities v. *EPA*, 711 F.3d 844 (8th Cir. 2013)...23
Jama v. *Department of Homeland Security*, 760 F.3d 490 (6th Cir. 2014)...23
Kobach v. *U.S. Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014), cert. denied, 576 U.S. 1055 (2015)..................................23
McBrearty v. *Perryman*, 212 F.3d 985 (7th Cir. 2000).....16
McGuire v. *Nielsen*, 448 F. Supp. 3d 1213 (D.N.M. 2020)..............................23
National Parks Conservation Association v. *Norton*, 324 F.3d 1229 (11th Cir. 2003)...23
Nkihtaqmikon v. *Impson*, 503 F.3d 18 (1st Cir. 2007) 23
Patel v. *Garland*, 142 S. Ct. 1614 (2022) 2, 10, 24
Perez v. *USCIS*, 774 F.3d 960 (11th Cir. 2014) 14, 18
Pinho v. *Gonzales*, 432 F.3d 193 (3d Cir. 2005) 12, 13, 18, 19
Randall v. *Meese*, 854 F.2d 472 (D.C. Cir. 1988), cert. denied, 491 U.S. 904 (1989)....................................15
Sackett v. *EPA*, 566 U.S. 120 (2012) 17, 18
Trudeau v. *FTC*, 456 F.3d 178 (D.C. Cir. 2006).................23
U.S. Army Corps of Engineers v. *Hawkes*, 136 S. Ct. 1807 (2016) 17, 18

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 704...........2, 12, 19
Immigration and Nationality Act, 8 U.S.C. 1101-1537:
8 U.S.C. 1153(b)(2)(A) 5

Page

Statutes and regulations—continued:

8 U.S.C. 1153(b)(2)(B)(i) 5
8 U.S.C. 1159 13
8 U.S.C. 1182(a)(2)(A)(i)(I) 22
8 U.S.C. 1182(a)(2)(A)(i)(II) 22
8 U.S.C. 1227(a)(2) 22
8 U.S.C. 1227(a)(3)(A) 22
8 U.S.C. 1252(a)(2)(B)(ii) 9
8 U.S.C. 1255(a) 4, 13, 14, 15, 16
8 U.S.C. 1256(a) 6, 19
28 U.S.C. 1254(1) 2
Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 14
8 C.F.R. 245.2(a)(2)(i) 5
8 C.F.R. 245.2(a)(5)(ii) 5, 17, 19, 20
8 C.F.R. 245.2(a)(5)(iii) 14
8 C.F.R. pt. 246 6
8 C.F.R. 246.6 .... 6, 18
8 C.F.R. 1240.11(a) 5
8 C.F.R. 1240.11(e) 5
8 C.F.R. 1245.2(a)(5)(iii) 14

Miscellaneous:

Matter of Dhanasar, 26 I. & N. Dec. 884 (AAO 2016) 5, 8
USCIS, *I-140, Immigrant Petition for Alien Workers* <uscis.gov/i-140> (last updated July 7, 2023) 5
USCIS, *I-485, Application to Register Permanent Residence or Adjust Status* <uscis.gov/i-485> (last updated May 26, 2023) 5
USCIS, *Number of I-485 Applications to Register Permanent Residence or Adjust Status By Category, Case Status, and USCIS Field Office or Service Center Location January 1, 2023–March 31, 2023* <tinyurl.com/i485report> 21
USCIS, Policy Manual, vol. 7, pt. Q, ch. 1 <tinyurl.com/uscismanual1> (last updated July 20, 2023) 6, 19

Page

Miscellaneous—continued:

USCIS, Policy Manual, vol. 7, pt. Q, ch. 5 <tinyurl.com/uscismanual5> (last updated July 20, 2023) 6

Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 Harv. Latino L. Rev. 39 (2013) 21

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Fathi Elltaif Saad Elldakli; Naglla Kouni Salem Ghadar; Hadil Fathi El Elldakli; Ranim Fathi El Elldakli; and Taha Fathi El Elldakli respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 64 F.4th 666. The opinion of the district court (App., *infra*, 14a-19a) is not reported but is available at 2022 WL 2663855.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2023. On June 23, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 2, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 704 of Title 5 of the United States Code provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

STATEMENT

The United States Citizenship and Immigration Services (USCIS) has authority to adjust the status of certain nonimmigrants to lawful permanent residence. In *Patel* v. *Garland*, 142 S. Ct. 1614 (2022), this Court reserved the question whether a status-adjustment decision "made before the initiation of removal proceedings satisfies threshold finality and exhaustion requirements for review." *Id.* at 1626 n.3. The Court observed that "[t]here appears to be disagreement on this question in the courts of appeals." *Ibid.* The Fifth Circuit's decision squarely implicates that

conflict, and it does so in a case that threatens petitioners with potentially life-altering consequences because of a bureaucratic mistake.

Petitioners are a family that lawfully immigrated to the United States from Libya over a decade ago during that country's civil war. Petitioner Fathi Elltaif Saad Elldakli obtained a doctorate in petroleum engineering from Texas Tech University and has made significant advances in his field. He applied for an employment-based visa as a professional with an advanced degree. Petitioners then applied for adjustment of their status to lawful permanent residence, premised on Dr. Elldakli's obtaining an employment-based visa. But rather than processing those applications in the prescribed order, USCIS granted petitioners' applications for adjustment of status and then denied Dr. Elldakli's visa application. USCIS then issued a notice of intent to rescind Dr. Elldakli's adjustment of status.

The foregoing chain of events could leave petitioners worse off than when the process began. Rescission may retroactively make them unlawfully present and thus immediately subject to removal. Petitioners filed this case under the Administrative Procedure Act (APA), seeking an order setting aside the erroneous adjustment of their status and remanding with instructions to grant Dr. Elldakli's visa and adjust petitioners' status to lawful permanent residence.

The district court dismissed the case for lack of jurisdiction, and the court of appeals affirmed. It held that a status-adjustment decision does not constitute final agency action for purposes of the APA because it may eventually be revisited in removal proceedings, even if those proceedings are not pending. Judge Higginbotham concurred only in the judgment, calling into question the circuit precedent on which the majority relied and noting

that the court's decision conflicted with the decisions of other courts of appeals.

The court of appeals' decision is incorrect, and it implicates the conflict previously identified by this Court. The Third, Sixth, and Eleventh Circuits have all held that a status-adjustment decision constitutes final agency action if the decision cannot be revisited in pending removal proceedings. The Ninth Circuit has recognized the inverse of that rule—that a status-adjustment decision does *not* constitute final agency action if removal proceedings *are* pending. Adding to the disarray, several other courts of appeals have divided on the significance of removal proceedings to the reviewability of status-adjustment decisions under related timeliness doctrines. The Second Circuit has held that a status-adjustment decision is unreviewable for failure to exhaust administrative remedies if removal proceedings are pending; the D.C. Circuit has held that a status-adjustment decision is unripe for review if removal proceedings are pending; and the Seventh Circuit has held that a status-adjustment decision is unreviewable for failure to exhaust administrative remedies, regardless of whether removal proceedings are pending.

The courts of appeals are sorely in need of guidance from this Court. The petition for a writ of certiorari should be granted.

A. Background

1. Under Section 245 of the Immigration and Nationality Act (INA), as amended, a nonimmigrant alien may apply to adjust his status to lawful permanent resident. 8 U.S.C. 1255(a). To obtain lawful permanent residence, the alien must be "eligible to receive an immigrant visa" that is "immediately available to him at the time his application is filed." *Ibid.*

One such visa is the employment-based, second preference visa, commonly known as an EB-2 visa. Among the workers eligible for that visa are "qualified immigrants who are members of the professions holding advanced degrees or their equivalent." 8 U.S.C. 1153(b)(2)(A). In general, an applicant's "services in the sciences, arts, professions, or business [must be] sought by an employer in the United States." *Ibid.* The job requirement may be waived if it is "in the national interest." 8 U.S.C. 1153(b)(2)(B)(i). A waiver is in the national interest if "the foreign national's proposed endeavor has both substantial merit and national importance"; "the foreign national is well positioned to advance the proposed endeavor"; and "on balance, it would be beneficial to the United States to waive the requirements of a job offer." *Matter of Dhanasar*, 26 I. & N. Dec. 884, 889 (AAO 2016).

An applicant seeking an EB-2 visa must file a Form I-140 with USCIS. See USCIS, *I-140, Immigrant Petition for Alien Workers* <uscis.gov/i-140> (last updated July 7, 2023). A lawfully present applicant may seek adjustment of his status by filing a Form I-485 with USCIS. See USCIS, *I-485, Application to Register Permanent Residence or Adjust Status* <uscis.gov/i-485> (last updated May 26, 2023). By regulation, an individual may file an I-485 application for adjustment of status while an I-140 application for an EB-2 visa is pending. See 8 C.F.R. 245.2(a)(2)(i).

2. An individual who has been placed in removal proceedings may also apply for (or renew an application for) adjustment of status. See 8 C.F.R. 245.2(a)(5)(ii), 1240.11(a). Such an application is made to the immigration judge. See 8 C.F.R. 1240.11(a). The applicant has "the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion." 8 C.F.R. 1240.11(e).

3. If a person whose status is adjusted was not in fact eligible, the Attorney General "shall rescind the action taken granting an adjustment of status to such person." 8 U.S.C. 1256(a). By regulation, rescission proceedings are initiated by USCIS and adjudicated by an immigration judge. See 8 C.F.R. pt. 246. The immigration judge has two options at the end of a rescission proceeding: he may direct either that the proceeding be terminated if the alien is eligible for adjustment of status, or that the adjustment of status be rescinded. See 8 C.F.R. 246.6.

If an immigration judge rescinds adjustment of status, "the person shall thereupon be subject to all provisions of [the INA] to the same extent as if the adjustment of status had not been made." 8 U.S.C. 1256(a). USCIS has stated in guidance that, in "most instances," rescission "results in the person having no lawful status and not being in a period of authorized stay, and therefore subject to removal proceedings." USCIS, Policy Manual, vol. 7, pt. Q, ch. 1 <tinyurl.com/uscismanual1> (last updated July 20, 2023). USCIS has further stated in guidance that, "[u]pon rescission, USCIS places the person into removal proceedings under INA 240 with a Notice to Appear, unless he or she is otherwise in a lawful status or in a period of stay authorized by the [Secretary of Homeland Security]." *Id.*, vol. 7, pt. Q, ch. 5 <tinyurl.com/uscismanual5>.

B. Facts And Procedural History

1. Petitioner Fathi Elltaif Saad Elldakli entered the United States in 2011 on an F-1 nonimmigrant student visa. His wife, petitioner Naglla Kouni Salem Ghadar, and their three children, petitioners Hadil Fathi El Elldakli, Ranim Fathi El Elldakli, and Taha Fathi El Elldakli, en-

tered on F-2 nonimmigrant dependent visas. They emigrated from Libya, which was engulfed in civil war at the time. D. Ct. Dkt. 1, at 1-3; D. Ct. Dkt. 23, at 1.

Dr. Elldakli holds a doctorate in petroleum engineering from Texas Tech University, as well as a master's degree in petroleum engineering from Texas Tech, a master's degree in petroleum engineering from Heriot-Watt University in the United Kingdom, and a bachelor's degree in petroleum engineering from Tripoli University in Libya. While he lived in Libya, Dr. Elldakli worked for nearly a decade as an engineer. D. Ct. Dkt. 1, at 4, 11, 14, 21; D. Ct. Dkt. 1-1, at 50, 52-53.

Dr. Elldakli has conducted research on artificial-lift technology, which is used to improve petroleum production and reduce costs. In particular, Dr. Elldakli has researched improvements to gas-lift valves. As explained in one of the fifteen letters of support filed with his visa application, Dr. Elldakli "was the first researcher to develop the beveled seat" for gas-lift valves, which is expected to lead to "significant improvement in * * * oil production over the current design." Dr. Elldakli has tested his design, and an energy company submitted a letter confirming that it was considering the use of his work. Dr. Elldakli's articles have also been published in peer-reviewed journals and cited by scholars in the United States and around the world. D. Ct. Dkt. 1, at 11-14, 18, 21.

2. On December 14, 2017, Dr. Elldakli filed his I-140 application for an employment-based visa and a national-interest waiver of the job requirement. On August 21, 2018, petitioners filed I-485 applications for adjustment of their status to lawful permanent residence. Following an interview, USCIS approved the Elldakli family's applications for lawful permanent residence on March 28, 2019. At that time, Dr. Elldakli's visa application remained pending. App., *infra*, 3a; D. Ct. Dkt. 1, at 11, 19.

Five months later, on September 4, 2019, USCIS denied Dr. Elldakli's I-140 visa application. The director of the USCIS Texas Service Center, exercising authority delegated by the Attorney General, found that Dr. Elldakli was a member of the professions holding an advanced degree but did not qualify for a national-interest waiver. D. Ct. Dkt. 1-2.

Dr. Elldakli timely appealed to the Administrative Appeals Office (AAO). While that appeal was pending, on May 12, 2020, USCIS issued a notice of intent to rescind his status. The notice acknowledged that USCIS had erroneously granted petitioners' applications for adjustment of status because Dr. Elldakli's visa application had yet to be approved. App., *infra*, 3a; D. Ct. Dkt. 23, at 2.

On June 8, 2020, Dr. Elldakli filed a response to the notice of intent to rescind his status. In his response, he asked USCIS to stay rescission proceedings pending the AAO's decision; condition any rescission on reopening petitioners' I-485 applications for adjustment of status and ensuring that they would remain lawfully present while those applications were resolved; or refer the matter to an immigration judge for "equitable relief." D. Ct. Dkt. 1-6, at 5-6.

On August 12, 2021, the AAO dismissed Dr. Elldakli's appeal. Applying its test for granting national-interest waivers, the AAO found that Dr. Elldakli's proposed endeavor had "substantial merit and national importance" but that "the record is insufficient to demonstrate that [Dr. Elldakli] is well positioned to advance his proposed endeavor." D. Ct. Dkt. 1-3, at 3, 6; see *Matter of Dhanasar*, 26 I. & N. Dec. at 889.

3. Petitioners then filed an action in the United States District Court for the Southern District of Texas. They alleged that it was arbitrary and capricious under the APA for USCIS to grant their I-485 applications for

adjustment of status before Dr. Elldakli's I-140 visa application had been granted and that it was arbitrary and capricious for USCIS to deny Dr. Elldakli's visa application. They also moved for a temporary restraining order preventing USCIS from rescinding their status and directing USCIS to reopen their applications for adjustment of status and grant Dr. Elldakli's visa application. App., *infra*, 3a; D. Ct. Dkts. 1, 2.

The district court denied the motion for a temporary restraining order and dismissed the case. App., *infra*, 14a-19a. The court concluded that the INA had stripped the federal courts of jurisdiction to review USCIS's adjustment of petitioners' status because it was a "discretion[ary]" decision. *Id.* at 18a (quoting 8 U.S.C. 1252 (a)(2)(B)(ii)). The court also concluded that it lacked jurisdiction to review USCIS's denial of Dr. Elldakli's visa application because there was no final agency action for purposes of the APA. *Ibid.*

4. The court of appeals affirmed the district court's dismissal on the ground that "there is no final agency action." App., *infra*, 5a. Following the reasoning of several district courts, the court of appeals concluded that it "does not have subject matter jurisdiction to review a status-adjustment decision by the USCIS * * * because the alien retains the right to *de novo* review of that decision in his final removal proceedings," even if no proceedings are pending. *Id.* at 7a; see *id.* at 6a n.6 (collecting cases). The court also cited its own precedent for the proposition that a status-adjustment decision is not reviewable if the alien "has not yet exhausted [his] administrative remedies" in removal proceedings. *Id.* at 7a (alteration in original) (quoting *Cardoso* v. *Reno*, 216 F.3d 512, 518 (2000)).

Judge Higginbotham filed an opinion concurring in the judgment. He considered the precedent cited by the

majority to "control the issue." App., *infra*, 7a. He nevertheless called that precedent a "misstep," because "removal proceedings do not properly function as an administrative appeal given that most noncitizens who enter this country on nonimmigrant visas follow the law and do not prompt the government to charge them with removability." *Id.* at 8a.

As Judge Higginbotham explained, to "receive additional review under the court's rationale, nonimmigrants like [Dr.] Elldakli would need to become removable by, for example, overstaying their visas"; the government would need to "charge them as removable"; and the alien "would need to for[go] voluntary departure and face a potential ten-year bar on re-admission to the United States." App., *infra*, 9a. Judge Higginbotham further observed that "the government all but admits that USCIS committed error in this process by granting [Dr.] Elldakli's I-485 petition while his I-140 petition was still pending." *Id.* at 8a. And Judge Higginbotham noted that the majority's decision conflicted with decisions of the Second, Third, Sixth, and Ninth Circuits and was in accord only with a decision of the Seventh Circuit. *Id.* at 11a-2a & nn.16-17.

5. While petitioners' appeal was pending in the court of appeals, an immigration judge denied Dr. Elldakli's request to stay rescission proceedings while USCIS adjudicated his new I-140 visa application. The immigration judge rescinded Dr. Elldakli's status on February 22, 2023. Dr. Elldakli appealed that decision to the Board of Immigration Appeals on March 8, 2023. That appeal is ongoing; no removal proceedings are pending. C.A. Dkt. 52, at 2; C.A. Dkt. 55, at 1.

REASONS FOR GRANTING THE PETITION

The decision below is the latest in an entrenched conflict that this Court acknowledged in *Patel* v. *Garland*, 142

S. Ct. 1614 (2022). The court of appeals held that a status-adjustment decision does not constitute final agency action as long as that decision could eventually be revisited in removal proceedings, even if those proceedings are not imminent. The Third, Sixth, and Eleventh Circuits have squarely reached the opposite conclusion, and the Ninth Circuit has conditioned its holding that a status-adjustment decision was nonfinal on the pendency of removal proceedings. More broadly, the Seventh Circuit has interpreted the exhaustion requirement in a way that mirrors the court of appeals' interpretation of the finality requirement here, while the Second and D.C. Circuits have interpreted exhaustion and ripeness doctrines, respectively, in a way that parallels the Third, Sixth, and Eleventh Circuits' interpretation of finality doctrine.

The decision below is also incorrect. A status-adjustment decision constitutes final agency action because it "mark[s] the consummation of the agency's decisionmaking process." *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks and citation omitted). The possibility that the government may someday choose to initiate removal proceedings does not render a status-adjustment decision nonfinal. And to the extent the court of appeals' holding rests on failure to exhaust administrative remedies, that doctrine is inapplicable here.

The question presented is of critical importance to noncitizens seeking adjustment of status, especially those such as petitioners whose status has been incorrectly adjusted. Removal proceedings are hardly inevitable, and when no removal proceeding is pending, it cannot be that USCIS's status-adjustment decision remains tentative until some indefinite, theoretical time when removal proceedings might arise. What is more, the court of appeals' decision has the bizarre effect of incentivizing nonimmigrant aliens to break the law by overstaying their visas so

the adjustment of their status can be revisited. The petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

Under Section 10(c) of the Administrative Procedure Act, "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. 704. "As a general matter, two conditions must be satisfied for agency action to be 'final.'" *Bennett*, 520 U.S. at 177. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177-178 (internal quotation marks and citation omitted). "And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (internal quotation marks and citation omitted). The decision below implicates an acknowledged conflict regarding whether a status-adjustment decision marks the consummation of USCIS's decisonmaking process when removal proceedings are not imminent, and it contributes to broader disarray concerning the reviewability of those decisions under the APA.

1. In contrast with the decision below, the Third, Sixth, and Eleventh Circuits have held that a status-adjustment decision constitutes a final agency action when the decision cannot be revisited in pending removal proceedings. And the Ninth Circuit has taken the inverse view, holding that a status-adjustment decision does not constitute final agency action when removal proceedings are pending.

a. In *Pinho* v. *Gonzales*, 432 F.3d 193 (2005), the Third Circuit held that a status-adjustment decision "is final where there are no deportation proceedings pending in which the decision might be reopened or challenged."

Id. at 202. The plaintiff in that case filed an APA action after one of USCIS's predecessor agencies denied his application for adjustment of status to permanent residence under Section 245 of the INA. See *id.* at 197. The Third Circuit noted that "the agency offered no further procedures that [the plaintiff] could invoke to have his claim of statutory eligibility heard." *Id.* at 200.

The Third Circuit specifically explained that the "possibility" of removal proceedings is not "sufficient to render the [agency's] eligibility determination 'tentative or interlocutory,'" for the "simple" reason that, "if the agency does not seek to deport the immigrant, there can never be an appeal within the agency by which any higher level of administrative authority can be invoked to review the legal determination." *Pinho*, 432 F.3d at 201. To permit the agency to "retain[] sole control over whether an individual's purely legal claim—one which has not been made non-reviewable by statute—may ever be brought before the courts" would be "plainly at odds not only with the APA, but also with broader principles of separation of powers." *Id.* at 202.

b. The Sixth Circuit reached the same conclusion in *Hosseini* v. *Johnson*, 826 F.3d 354 (2016). The plaintiff in that case was denied adjustment of status under 8 U.S.C. 1159, which provides a parallel path to lawful permanent residence for asylees. See 826 F.3d at 356. The court held that, "where no removal proceedings are pending, the agency's denial of an application for status adjustment under § 1159 marks the consummation of the agency's decision-making process." *Id.* at 362. Like the Third Circuit, the Sixth Circuit reasoned that an "applicant who is not in removal proceedings, and who may never have removal proceedings, has no opportunity to receive * * * judicial review." *Id.* at 360. And like the Third Circuit, the Sixth Circuit considered it "perverse" that the agency

would "retain sole control" over the reviewability of its own decision. *Id.* at 362 (internal quotation marks and citation omitted).

c. The Eleventh Circuit similarly held that a status-adjustment decision constitutes final agency action in *Perez* v. *USCIS*, 774 F.3d 960 (2014). There, USCIS denied the plaintiff's application for status adjustment under the Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161. See 774 F.3d at 962. The plaintiff was placed in removal proceedings, but because he was found to be an "arriving alien," he could not relitigate the denial of his application for adjustment of status. *Id.* at 966; 8 C.F.R. 245.2(a)(5)(iii), 1245.2(a)(5)(iii). The Eleventh Circuit concluded that, because there was no other "avenue through which [the plaintiff] could have sought review of the USCIS determination," the decision was a final agency action for purposes of the APA. *Perez*, 774 F.3d at 966.

d. Although the Ninth Circuit has not addressed the finality of a status-adjustment decision when removal proceedings were not pending, it has used similar reasoning to hold that a status-adjustment decision does *not* constitute final agency action if removal proceedings *are* pending. See *Cabaccang* v. *USCIS*, 627 F.3d 1313, 1316 (2010). The plaintiffs in that case brought an action under the APA after USCIS denied their applications for adjustment of status under Section 245 of the INA, and the Department of Homeland Security later initiated removal proceedings. See *id.* at 1314-1315. The Ninth Circuit reasoned that, "[d]uring their pending removal proceedings, the [plaintiffs] have the right to renew their applications to adjust status." *Id.* at 1315-1316. In particular, the plaintiffs would "have the opportunity to fully develop their arguments" and the immigration judge would have "unfettered authority to modify or reverse USCIS's de-

nial." *Id.* at 1316. The court thus concluded that "USCIS's denial of the [plaintiffs'] applications [was] not yet a final agency action." *Ibid.*

2. Three other courts of appeals have divided on the reviewability of status-adjustment decisions under the related doctrines of exhaustion and ripeness. Like the Third, Sixth, Ninth, and Eleventh Circuits, the Second and D.C. Circuits have conditioned the reviewability of status-adjustment decisions on the pendency of removal proceedings (formerly known as deportation proceedings). By contrast, the Seventh Circuit—like the court of appeals here—has rejected the significance of removal proceedings.

a. The D.C. Circuit has held that a challenge to a status-adjustment decision was not ripe because deportation proceedings were pending. See *Randall* v. *Meese*, 854 F.2d 472, 481 (1988), cert. denied, 491 U.S. 904 (1989). In that case, one of USCIS's predecessor agencies had denied the plaintiff's request for adjustment of status under Section 245, and the government subsequently initiated deportation proceedings. See 854 F.2d at 475-477. The D.C. Circuit concluded that the case was not ripe because judicial review was "likely to stand on a much surer footing when the deportation proceedings have concluded." *Id.* at 481 (internal quotation marks and citation omitted).

b. The Second Circuit has drawn a similar line based on the pendency of deportation proceedings in the context of exhaustion. In *Howell* v. *INS*, 72 F.3d 288 (1995), the Second Circuit held that the district court "lacked jurisdiction to review the [agency's] denial of [the plaintiff's] application for adjustment of status once deportation proceedings commenced, because she failed to exhaust her administrative remedies." *Id.* at 293. After marrying a United States citizen, the plaintiff had unsuccessfully applied for adjustment of status under Section 245. See *id.*

at 289. The plaintiff then filed a complaint seeking review of the agency's decision under the APA. See *ibid.* While that case was pending, the government initiated deportation proceedings. See *id.* at 290. The court reasoned that deportation proceedings provided "the opportunity, pursuant to the regulations, to renew [the plaintiff's] application for adjustment of status before an immigration judge." *Id.* at 293. And the court expressly reserved the question of whether administrative remedies would have been exhausted "when such proceedings have not yet commenced." *Id.* at 293 n.5.

Judge Walker concurred only in the result. In his view, exhaustion was not required, but the case was not ripe because deportation proceedings were pending. See 72 F.3d at 294. As he put it, "[o]nce deportation proceedings have begun * * * there is no final agency action." *Ibid.*

c. By contrast, the Seventh Circuit has held that a status-adjustment decision is unreviewable regardless of whether removal proceedings are pending. In *McBrearty* v. *Perryman*, 212 F.3d 985 (2000), the Seventh Circuit concluded that a lawsuit challenging a denial of status-adjustment under Section 245 was "premature" because the plaintiffs "could obtain review * * * if and when the immigration service institute[d] removal (i.e., deportation) proceedings against them." *Id.* at 987. Although the Seventh Circuit applied exhaustion doctrine in *McBrearty*, its reasoning is precisely the same as the court of appeals' in the decision below. In addition to the conflict between the court of appeals and the Third, Sixth, Ninth, and Eleventh Circuits, there is thus longstanding confusion involving the Second, Seventh, and D.C. Circuits as well.

B. The Decision Below Is Incorrect

Although full consideration of the merits of the finality question is unnecessary at this stage, the court of appeals' finality analysis rests on a fundamental "misstep." App., *infra*, 8a (Higginbotham, J., concurring in the judgment). The APA's review provision is "generous" and "must be given a hospitable interpretation." *Bowen* v. *Massachusetts*, 487 U.S. 879, 904 (1988) (internal quotation marks and citation omitted). Accordingly, this Court has "long taken" a "'pragmatic' approach * * * to finality." *U.S. Army Corps of Engineers* v. *Hawkes*, 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Laboratories* v. *Gardner*, 378 U.S. 136, 149 (1967)). Because removal proceedings are not pending, USCIS's status-adjustment decision "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined" and "from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (internal quotation marks and citations omitted). The decision thus constitutes a final agency action for purposes of the APA.

1. The decision adjusting petitioners' status marks the consummation of USCIS's decisionmaking process. A grant of lawful permanent residence is neither "tentative" nor "interlocutory." *Bennett*, 520 U.S. at 178. The result of adjustment is to record the applicant's permanent residence as of "the date of the order approving the adjustment of status." 8 C.F.R. 245.2(a)(5)(ii). It is made after "extensive factfinding." *Hawkes*, 136 S. Ct. at 1813. And it is "not subject to further [a]gency review," except in collateral proceedings. *Sackett* v. *EPA*, 566 U.S. 120, 127 (2012); see *Hawkes*, 136 S. Ct. at 1814. Indeed, by regulation, "[n]o appeal lies from the denial of an application." 8 C.F.R. 245.2(a)(5)(ii).

The court of appeals incorrectly concluded that the possibility of future removal proceedings made the status-

adjustment decision nonfinal. As Judge Higginbotham observed, "most noncitizens who enter this country on nonimmigrant visas follow the law and do not prompt the government to charge them with removability." App., *infra*, 8a (opinion concurring in the judgment). And as other courts of appeals have recognized, "if the agency does not seek to deport the immigrant, there can never be an appeal within the agency by which any higher level of administrative authority can be invoked." *Pinho*, 432 F.3d at 201; see *Hosseini*, 826 F.3d at 360; *Perez*, 774 F.3d at 966; *Cabaccang*, 627 F.3d at 1315-1316.

Nor does the pending rescission proceeding make the adjustment of status nonfinal. As this Court has recognized, the "possibility" that a decision may be revisited "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Hawkes*, 136 S. Ct. at 1814; see *Sackett*, 566 U.S. at 127. And unlike removal proceedings, a rescission hearing does not provide petitioners with an "opportunity to fully develop their arguments" or provide the immigration judge with "unfettered authority to modify or reverse" the status-adjustment decision. *Cabaccang*, 627 F.3d at 1316. By regulation, an immigration judge has only two options: terminating the proceeding or rescinding the alien's status. 8 C.F.R. 246.6. The first requirement for finality is thus satisfied here.

2. With respect to the second finality requirement, the court of appeals did not appear to dispute that USCIS's decision constitutes an action by which "rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (internal quotation marks and citations omitted). The decision to adjust an applicant's status plainly determines the applicant's right to "permanent residence" in the United

States. 8 C.F.R. 245.2(a)(5)(ii). And the denial of adjustment deprives an applicant of "the right to live permanently in the United States," "the right to apply for and be granted naturalization," and a "green card" that, if granted, would "reflect his right to live and work in the United States permanently." *Hosseini*, 826 F.3d at 362; see *Pinho*, 432 F.3d at 203.

Even a rescinded adjustment of status may create permanent legal consequences. By statute, a person whose status has been rescinded "shall thereupon be subject to all provisions of [the INA] to the same extent as if the adjustment of status had not been made." 8 U.S.C. 1256(a). According to the USCIS Policy Manual, in "most instances," rescission "results in the person having no lawful status and not being in a period of authorized stay, and therefore subject to removal proceedings." USCIS, Policy Manual, vol. 7, pt. Q, ch. 1; see *id.*, vol. 7, pt. Q, ch. 5; App., *infra*, 4a n.2. The adjudication of a status-adjustment application thus constitutes final agency action within the meaning of the APA.

3. Although the Fifth Circuit referred to exhaustion of administrative remedies, the decision below cannot be sustained on that basis. Section 10(c) states that, "[e]xcept as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined * * * an appeal to superior agency authority." 5 U.S.C. 704. In other words, "where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby* v. *Cisneros*, 509 U.S. 137, 154 (1993).

Exhaustion doctrine does not bar review here for three principal reasons. *First*, USCIS does not require an appeal. Quite to the contrary, when adjustment of status is denied, "[n]o appeal lies." 8 C.F.R. 245.2(a)(5)(ii). *Second*, there is no "superior agency authority" in removal or rescission proceedings; USCIS is part of the Department of Homeland Security, while immigration judges are part of the Department of Justice. See App., *infra*, 11a n.12 (Higginbotham, J., concurring in the judgment). *Third*, removal and rescission proceedings are initiated by the government, not the applicant, and thus cannot constitute an appeal by the applicant.

* * * * *

In sum, the possibility of separate proceedings to remove petitioners or rescind the adjustment of their status does not render the status-adjustment decision tentative or interlocutory. And those proceedings manifestly affect petitioners' legal rights and carry legal consequences. The court of appeals thus erred by concluding that USCIS's status-adjustment decision does not constitute final agency action.

C. The Question Presented Is Important And Warrants Review In This Case

The decision below allows enormously consequential agency errors to go uncorrected, and it has the absurd effect of affording more procedure to those who break the law than those who follow it. This case is an optimal vehicle for the Court's review.

1. Denying review of status-adjustment decisions would allow errors of profound significance to go uncorrected. USCIS prematurely approved the I-485 applications filed by petitioners, who have been lawful residents of the United States for more than a decade. As a result

of the agency's blatant mistake, petitioners' status as lawful permanent residents is now subject to recission. By erroneously granting adjustment of status and then rescinding that status, USCIS may cause them to have been unlawfully present as of the date of the erroneous grant, and that consequence could subject them to removal through no fault of their own. See p. 6, *supra*.

Although precise statistics are not readily available, such errors surely occur with some frequency. In the first three months of 2023 alone, USCIS approved 159,497 applications for adjustment of status and denied 12,189. See USCIS, *Number of I-485 Applications to Register Permanent Residence or Adjust Status By Category, Case Status, and USCIS Field Office or Service Center Location January 1, 2023–March 31, 2023* <tinyurl.com/i485-report>. An additional 851,928 applications remained pending. See *ibid*.

The prospect of review in removal proceedings is far too speculative to provide a meaningful safeguard. Prosecutorial discretion is a necessary component of immigration enforcement, as the government has the capacity to remove only a small fraction of the removable population living in the United States. By one estimate, the government "has the resources to remove about 400,000 people per year, or about 4% of the deportable population living in the United States." Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 Harv. Latino L. Rev. 39, 42 (2013).

Nor is prosecutorial discretion the only variable. As Judge Higginbotham observed in his separate opinion, to "receive additional review" under the majority's rationale, (1) "nonimmigrants like Elldakli would need to become removable by, for example, overstaying their visa"; (2) the

government would need to "decide to charge them as removable"; (3) the nonimmigrants "would need to for[go] voluntary departure and face a potential ten-year bar on re-admission to the United States"; and (4) the government would need to execute its "complete control over the decision to institute removal proceedings." App., *infra*, 9a-10a. It is intolerable that review of such a consequential decision depends on such a convoluted chain of events.

2. In addition, the court of appeals' decision undermines a fundamental tenet of the immigration laws by incentivizing law-breaking to obtain review. At almost every turn, Congress has singled out lawbreakers for adverse immigration consequences. See, *e.g.*, 8 U.S.C. 1182 (a)(2)(A)(i)(I) (making inadmissible aliens convicted of crimes "involving moral turpitude"); 8 U.S.C. 1182(a) (2)(A)(i)(II) (making inadmissible aliens convicted of certain offenses "relating to a controlled substance"); 8 U.S.C. 1227(a)(2) (making removable aliens convicted of certain crimes "involving moral turpitude," "aggravated felon[ies]," and offenses related to controlled substances). Even relatively minor infractions, such as the failure to notify the government of an address change, can render a person removable. See 8 U.S.C. 1227(a)(3)(A).

In this case, the court of appeals effectively invited petitioners to break the law to obtain review of USCIS's error. Individuals with nonimmigrant visas will not enter removal proceedings unless they commit a violation, such as by overstaying their visas. See App., *infra*, 9a (Higginbotham, J., concurring in the judgment). An alien should not be required to "bet the farm" by breaking the law and risking removal. *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 490 (2010) (citation omitted).

3. This case is an excellent vehicle for the Court's review. The question presented was passed upon below and

is plainly recurring, as evidenced by the numerous lower-court decisions addressing the issue. See, *e.g.*, pp. 12-16, *supra*; App., *infra*, 6a n.6 (collecting cases); *McGuire* v. *Nielsen*, 448 F. Supp. 3d 1213, 1250 (D.N.M. 2020); *Aldarwich* v. *Hazuda*, Civ. No. 15-755, 2016 WL 1089173, at *6 (C.D. Cal. Mar. 18, 2016).

There is no obstacle to resolving the question presented here. To be sure, the circuits have differed on whether the finality requirement goes to a court's jurisdiction. Compare App., *infra*, 7a (jurisdictional); *Kobach* v. *U.S. Election Assistance Commission*, 772 F.3d 1183, 1189 (10th Cir. 2014) (same), cert. denied, 576 U.S. 1055 (2015); *Fairbanks North Star Borough* v. *U.S. Army Corps of Engineers*, 543 F.3d 586, 591 (9th Cir. 2008) (same), cert. denied, 557 U.S. 919 (2009); *Home Builders Association of Greater Chicago* v. *U.S. Army Corps of Engineers*, 335 F.3d 607, 614 (7th Cir. 2003) (same); and *National Parks Conservation Association* v. *Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003) (same), with *Jama* v. *Department of Homeland Security*, 760 F.3d 490, 494 n.4 (6th Cir. 2014) (not jurisdictional); *Iowa League of Cities* v. *EPA*, 711 F.3d 844, 863 n.12 (8th Cir. 2013) (same); *Chehazeh* v. *Attorney General*, 666 F.3d 118, 125 n.11 (3d Cir. 2012) (same); *Nkihtaqmikon* v. *Impson*, 503 F.3d 18, 33 (1st Cir. 2007) (same); and *Trudeau* v. *FTC*, 456 F.3d 178, 184 (D.C. Cir. 2006) (same).

The better view is that the finality requirement is jurisdictional. Respondents did not dispute that proposition before the court of appeals (nor, indeed, did they challenge finality at all), and it is far from clear that they will dispute that proposition before this Court. Cf. Resp. Cert. Br. at 19, *Sanchez* v. *Mayorkas*, No. 20-315 (Dec. 9, 2020) (arguing that there were "no jurisdictional or other procedural obstacles" preventing review of a denial of status adjustment). To the extent they do so, however, the issue

is fairly encompassed within the question presented here, and the parties can readily address it in any ensuing merits briefing.

* * * * *

The conflict among the courts of appeals on the finality of status-adjustment decisions is longstanding and has been recognized by this Court. Further percolation would serve no purpose. This Court should ensure that "obvious bureaucratic missteps," *Patel*, 142 S. Ct. at 1637 (Gorsuch, J., dissenting), do not result in the removal of a law-abiding family that sought permanent residence based on educational attainment and contributions to American society.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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