No. 23-115

# 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*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTION PRESENTED

Whether the district court had jurisdiction to review petitioners' challenge to a decision by U.S. Citizenship and Immigration Services granting petitioners' applications, under 8 U.S.C. 1255(a), for adjustment of their status to that of lawful permanent residence in the United States.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 64 F.4th 666. The opinion of the district court (Pet. App. 14a-19a) is not published in the Federal Supplement 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, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Secretary of Homeland Security has discretionary authority to adjust the sta-

tus of certain noncitizens in the United States to that of lawful permanent residence. See 8 U.S.C. 1255(a).[1] The Secretary has delegated that adjustment authority to U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security.

As relevant here, a noncitizen who is in the United States and seeks to become a lawful permanent resident (LPR) through adjustment of status under Section 1255(a) must be admissible to the United States for permanent residence, be the beneficiary of an approved immigrant visa petition, have an immigrant visa number immediately available to him or her, and be otherwise statutorily eligible and merit a favorable exercise of discretion. See 8 U.S.C. 1255(a)-(c); 8 C.F.R. 245.2(a)(2)(i) and (5)(ii). If USCIS approves the adjustment-of-status application, the noncitizen becomes an LPR and obtains what is colloquially known as a "green card."

In most circumstances, a noncitizen whose application for adjustment of status has been denied by USCIS and who is subsequently placed in removal proceedings before the Executive Office for Immigration Review (EOIR) within the Department of Justice may "renew his or her application" for adjustment of status in those proceedings. 8 C.F.R. 1245.2(a)(5)(ii); see 8 C.F.R. 1245.2(a)(1)(ii). If an immigration judge (IJ) denies the renewed application for adjustment of status and enters an order of removal, the noncitizen may appeal that order to the Board of Immigration Appeals (Board) as a

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)). Although Section 1255(a) refers to the Attorney General's power to adjust status, the initial adjudication of an adjustment-of-status petition has been transferred to the Secretary of Homeland Security. See 6 U.S.C. 271(b)(5), 557.

matter of right. 8 C.F.R. 1003.1(b). If the Board affirms the IJ's order of removal and the order denying the application for adjustment of status, that order becomes administratively final. 8 U.S.C. 1101(a)(47)(B)(i). A noncitizen may obtain judicial review of the Board's decision by filing a petition for review in the appropriate court of appeals. 8 U.S.C. 1252(a)(1); see 8 U.S.C. 1252(a)(5) ("[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal[.]").

b. Congress has substantially limited judicial review of agency decisions regarding adjustment of status. The INA provides, as relevant here, that "[n]otwithstanding any other provision of law * * * and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1255 of this title." 8 U.S.C. 1252(a)(2)(B)(i). That jurisdiction-stripping "prohibition 'encompasses any and all decisions relating to the granting or denying' of discretionary relief" under Section 1255. *Patel* v. *Garland*, 142 S. Ct. 1614, 1621 (2022) (citation omitted); see *id.* at 1622. Congress has, however, added a proviso specifying that Section 1252(a)(2)(B) does not preclude judicial review of "constitutional claims or questions of law" that are "raised upon a petition for review [of a final order of removal] filed with an appropriate court of appeals." 8 U.S.C. 1252(a)(2)(D).

2. This case concerns petitioners' challenge to USCIS's decisions to *grant* their applications for adjustment of status.

In December 2017, petitioner Fathi Elltaif Saad Elldakli was in the United States on a nonimmigrant visa and filed on his own behalf an I-140 petition for an immigrant visa, seeking a National Interest Waiver as an advanced degree professional pursuant to 8 U.S.C. 1153(b)(2)(B) and 8 C.F.R. 204.5(k). Pet. App. 2a, 15a. USCIS issued a Request for Evidence to address deficiencies in the visa petition, and Dr. Elldakli submitted a response. *Id.* at 15a.

In August 2018, while that visa petition was still pending, Dr. Elldakli and his family (collectively, petitioners) submitted Applications to Register Permanent Residence or Adjust Status, pursuant to Section 1255(a). Pet. App. 15a. Those applications (each on Form I-485) for adjustment of status were dependent on the granting of Dr. Elldakli's then-pending visa petition. *Ibid.*

In March 2019, following an interview, USCIS issued approval notices granting petitioners LPR status in the employment-based second preference category with the National Interest Waiver. Pet. App. 15a. That approval, however, was premature, because Dr. Elldakli's visa petition had not yet been adjudicated, much less granted. *Id.* at 3a.

In September 2019, USCIS denied Dr. Elldakli's visa petition. Pet. App. 3a, 15a. Dr. Elldakli filed an appeal of that visa denial with the USCIS Administrative Appeals Office (AAO). *Ibid.* In May 2020, while the administrative appeal was pending, USCIS issued a Notice of Intent to Rescind Dr. Elldakli's LPR status. *Ibid.* The notice indicated that USCIS had granted the LPR status in error because, at that time, the underlying visa petition had not yet been adjudicated. *Id.* at 3a.

In August 2021, the AAO affirmed USCIS's denial of Dr. Elldakli's visa petition. *Id.* at 3a, 16a.

3. Petitioners filed this suit in the United States District Court for the Southern District of Texas under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. 2201 *et seq.* See D. Ct. Doc. 1, at 1, 6 (Oct. 9, 2021). They alleged that USCIS had acted arbitrarily and capriciously in denying Dr. Elldakli's visa petition, and asked the district court to order USCIS to approve that petition. *Id.* at 11-19, 23. Petitioners also alleged that USCIS had acted arbitrarily and capriciously in approving their applications for adjustment of status before the visa petition had been approved, and asked the court to order USCIS to reopen the previously approved adjustment applications. *Id.* at 22-23.

The government filed a motion to dismiss, which the district court granted. See Pet. App. 14a-19a. The court determined that it did not have jurisdiction to review the denial of the visa petition because Dr. Elldakli still had the opportunity to file a motion for reconsideration or reopening before the AAO, and there was therefore no final agency action. *Id.* at 18a. With regard to USCIS's decisions granting petitioners' adjustment-of-status applications, the court determined that it lacked jurisdiction to review those decisions under Section 1252(a)(2)(B)(i). *Id.* at 18a-19a.

4. Petitioners appealed, challenging only the district court's determination that Section 1252(a)(2)(B)(i) stripped it of jurisdiction to review USCIS's decisions approving petitioners' applications for adjustment of status. See Pet. C.A. Br. 1 (identifying the sole issue presented for review as "[w]hether the district court erred in finding that it lacked jurisdiction under

8 U.S.C. § 1252(a)(2)(B)(i) over determinations made by [USCIS] with respect to I-485, Applications for Adjustment of Status to that of a Lawful Permanent Resident"); see also *id.* at 5 (summary of argument); Gov't C.A. Br. 1.[2]

The court of appeals affirmed the district court's judgment on an alternative ground that had not been raised by the parties or addressed by the district court. Pet. App. 1a-13a. Although the district court had discussed final agency action only with respect to the denial of the visa application, *id.* at 18a, the court of appeals concluded that USCIS's decisions approving petitioners' applications for adjustment of status did not constitute final agency action for purposes of the APA, *id.* at 6a-7a. In support of that conclusion, the court cited cases from within the Fifth Circuit holding that USCIS decisions denying applications for adjustment of status "are not final removal actions under the INA because [noncitizens] may renew status-adjustment requests upon commencement of removal proceedings." *Id.* at 6a; see *id.* at 6a nn.5-6 (collecting authorities). The court "adopt[ed] that reasoning," holding that it "does not have subject matter jurisdiction to review a status-adjustment decision by the USCIS under either

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[2] At one point in its opinion, the court of appeals described the issue on appeal as "whether the district court erred in dismissing the claim to review USCIS's decision to deny Elldakli's I-140 petition for want of subject matter jurisdiction." Pet. App. 4a. That description appears to have been an inadvertent misstatement. As the citations in the text reflect, petitioners raised on appeal only USCIS's decisions regarding their I-485 applications for adjustment of status, not USCIS's denial of Dr. Elldakli's I-140 petition for an immigrant visa. And the court of appeals' analysis likewise focused on the adjustment-of-status decisions, not the denial of the visa petition. See *id.* at 4a-7a.

the APA or the INA because the [noncitizen] retains the right to *de novo* review of that decision in his final removal proceedings." *Id.* at 7a.

Judge Higginbotham concurred in the judgment. Pet. App. 7a-13a. He explained that if he were writing on a clean slate, he would have treated USCIS's decisions on the adjustment-of-status applications as final, but that he believed circuit precedent required a contrary result. *Id.* at 8a; see *id.* at 8a-13a.

5. After petitioners filed their complaint in district court, U.S. Immigration and Customs Enforcement, a component of DHS, filed a Notice of Intent to Rescind LPR Status in Dr. Elldakli's case with the immigration court pursuant to 8 U.S.C. 1256. Pet. C.A. Br. 11-12. While petitioners' APA challenge was pending in the Fifth Circuit, an IJ rescinded Dr. Elldakli's LPR status. See Pet. 10; see also C.A. Doc. 52, at 2 (Mar. 3, 2023). Dr. Elldakli appealed the IJ's decision to the Board, and those proceedings remain pending. See Pet. 10; C.A. Doc. 55, at 1 (Mar. 15, 2023).

**ARGUMENT**

The district court correctly recognized that it lacked jurisdiction to review petitioners' APA challenge to USCIS's decisions granting their applications, under 8 U.S.C. 1255(a), for adjustment of status. See Pet. App. 18a-19a. Those agency decisions constitute "judgment[s] regarding the granting of relief under section * * * 1255," 8 U.S.C. 1252(a)(2)(B)(i), and are therefore insulated from judicial review.

The court of appeals instead resolved the case on the ground that USCIS's decisions approving petitioners' applications for adjustment of status were not final agency action. Pet. App. 6a-7a. That reasoning was incorrect: While some courts have held that a *denial* of

an application for adjustment of status is not final because a noncitizen can renew the application for adjustment of status in later removal proceedings, no similar basis exists for holding that an *approval* of adjustment of status is not final. Nevertheless, because Section 1252(a)(2)(B)(i) stands independently as a clear bar to petitioners' suit, and because the unusual factual circumstances of this case would not present the Court with an opportunity to address any circuit conflict regarding the finality of USCIS decisions denying applications for adjustment of status, further review is not warranted.

1. Section 1252(a)(2)(B)(i) strips the courts of "jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1255." 8 U.S.C. 1252(a)(2)(B)(i). That prohibition applies "[n]otwithstanding any other provision of law" and "regardless of whether the judgment, decision, or action is made in removal proceedings." 8 U.S.C. 1252(a)(2)(B). By its terms, it plainly applies to the USCIS decisions at issue here, which granted petitioners relief under Section 1255—namely, adjustment of status. As the district court explained: "Any judgment regarding the granting of relief under Section 1255, which provides the statutory authority for I-485 applications, is in the category of discretionary decisions that no court has jurisdiction to review." Pet. App. 18a-19a (citing 8 U.S.C. 1252(a)(2)(B)(i)). Although Congress has reserved "review of constitutional claims or questions of law," that proviso applies only when those questions are raised in a court of appeals in a "petition for review" of a final order of removal. 8 U.S.C. 1252(a)(2)(D). It is accord-

ingly unavailable in an APA challenge like the one petitioners brought in this case.[3]

In the court of appeals, petitioners contended that "the bar [in Section 1252(a)(2)(B)(i)] to reviewing a 'judgment regarding the granting of relief' applies only to discretionary decisions," and that the bar therefore does not preclude their claims that they were statutorily ineligible for adjustment of status at the time USCIS granted their applications. C.A. Reply Br. 2 (citation omitted). But this Court's decision in *Patel* v. *Garland*, 142 S. Ct. 1614 (2022), rejected a similar argument. The Court explained that Section 1252(a)(2)(B)(i) "prohibits review of *any* judgment *regarding* the granting of relief under § 1255," and it therefore "applies to judgments 'of whatever kind' under § 1255, not just discretionary judgments or the last-in-time judgment." *Id.* at 1622 (citation and some internal quotation marks omitted); see *id.* at 1621 (agreeing that Section "1252(a)(2)(B)(i)'s prohibition 'encompasses any and all decisions relating to the granting or denying' of discretionary relief" under Section 1255) (citation omitted).

In the court of appeals, petitioners invoked the *dissenting* opinion in *Patel*, C.A. Reply Br. 2-3, and they emphasized (see *id.* at 1) the *Patel* majority's statement that it was not deciding the "reviewability" of "USCIS denials of discretionary relief" before the initiation of removal proceedings. *Patel*, 142 S. Ct. at 1626. But pe-

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[3] Because the provision in Section 1252(a)(2)(D) does not apply in APA cases, this Court's resolution of *Wilkinson* v. *Garland*, No. 22-666 (argument scheduled for Nov. 28, 2023), will not affect the appropriate outcome of this case. While *Wilkinson* also involves the application of Section 1252(a)(2)(B)'s judicial review bar, the question presented in *Wilkinson* is whether a particular agency determination falls within Section 1252(a)(2)(D)'s limited exception to Section 1252(a)(2)(B)'s judicial review bar.

titioners acknowledged the Court's statement that "foreclosing judicial review unless and until removal proceedings are initiated would be consistent with Congress' choice to reduce procedural protections in the context of discretionary relief." C.A. Reply Br. 1 (quoting *Patel*, 142 S. Ct. at 1626-1627). And petitioners did not reconcile *Patel*'s construction of the statutory text with their attempt to read the jurisdictional bar as being inapplicable to nondiscretionary aspects of a determination about the granting of adjustment of status under Section 1255.

Nor is there any current disagreement in the courts of appeals about the reviewability, outside of a removal proceeding, of a USCIS decision about adjustment of status. Since *Patel*, multiple courts of appeals have recognized that Section 1252(a)(2)(B)(i) precludes an APA challenge to USCIS's nondiscretionary determination about a noncitizen's eligibility for adjustment of status. The D.C. Circuit held that "[t]hat result is dictated by the plain meaning of the statute and by the reasoning of *Patel*." *Abuzeid* v. *Mayorkas*, 62 F.4th 578, 585 (2023). Similarly, the Seventh Circuit concluded that Section 1252(a)(2)(B)(i) "is an immigration-specific jurisdictional limitation that trumps the APA's general grant of judicial review and deprives the federal courts of jurisdiction," and found that reading was "further support[ed]" by *Patel*. *Britkovyy* v. *Mayorkas*, 60 F.4th 1024, 1028 (2023). Unpublished decisions of the Ninth and Eleventh Circuits have reached the same result. See *Herrera* v. *Garland*, No. 21-17052, 2022 WL 17101156, at *1 (9th Cir. Nov. 22, 2022); *Doe* v. *Secretary, U.S. Dep't of Homeland Security*, No. 22-11818, 2023 WL 2564856, at *1-*3 & n.2 (11th Cir. Mar. 20,

2023) (per curiam).[4] While those other cases have involved allegedly improper *denials* of adjustment of status, their recognition that Section 1252(a)(2)(B)(i) bars APA review of USCIS's nondiscretionary eligibility determinations is equally applicable to petitioners' challenge to allegedly improper *grants* of adjustment of status.

2. Although the district court correctly determined that Section 1252(a)(2)(B)(i) stripped it of jurisdiction, see Pet. App. 18a-19a, the court of appeals did not address the significance of that provision. Instead, the court of appeals determined that the APA does not authorize review of petitioners' claims in the first place because the agency actions that they challenge were not final. *Id.* at 4a-7a. That reasoning was incorrect.

As the court of appeals recognized, some courts have determined that "[s]tatus-adjustment decisions by the USCIS" are not "final agency action[s]" if noncitizens have the option to "renew [their] status-adjustment requests upon commencement of removal proceedings." Pet. App. 6a; see *id.* at 6a nn.5-6. On that basis, they have determined that USCIS's *denial* of an application

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[4] Ten days after it decided this case, the same panel of the Fifth Circuit recognized in another case that "*Patel* heavily implies that * * * [noncitizens] not in removal proceedings may have no ability to challenge any USCIS decision regarding adjustment of status outside of removal proceedings." *Hernandez* v. *Jaddou*, 65 F.4th 265, 267 n.1 (2023). The panel concluded, however, that it was bound by pre-*Patel* circuit precedent to permit review of the limited question whether USCIS had the authority to adjudicate particular adjustment-of-status applications. *Id.* at 266 (discussing *Duarte* v. *Mayorkas*, 27 F.4th 1044 (5th Cir. 2023)). Here, however, petitioners seek to challenge USCIS's decision to grant their adjustment-of-status applications, not the antecedent determination about the agency's own jurisdiction.

for adjustment of status cannot be challenged in an APA suit. See, *e.g.*, *Robledo* v. *Mayorkas*, No. 21-424, 2022 WL 2824647, at *2-*3 (M.D. La. July 19, 2022); *Nama* v. *USCIS*, No. 20-cv-3362, 2022 WL 1189889, at *2-*5 (N.D. Tex. Apr. 21, 2022); see also Pet. App. 6a n.6 (collecting additional cases); cf. *McBrearty* v. *Perryman*, 212 F.3d 985, 987 (7th Cir. 2000) (holding that challenges to denials of applications for adjustment of status "w[ere] premature, since, as the plaintiffs acknowledge, they could obtain review of the district director's decision by the Board of Immigration appeals if and when the immigration service institutes removal * * * proceedings against them").

That reasoning, however, is plainly inapplicable to noncitizens like petitioners whose applications for adjustment of status have been granted. Unlike a noncitizen whose application has been denied, a noncitizen in petitioners' position ordinarily cannot "renew his or her application" in removal proceedings before an IJ, 8 C.F.R. 1245.2(a)(5)(ii), because there is no need to renew an application after USCIS has already resolved it favorably. Nor are there any other "administrative remedies" that the noncitizen must "exhaust[]" in connection with a favorably resolved application for adjustment of status. Pet. App. 6a (citation omitted). Accordingly, principles of administrative exhaustion and finality do not stand as a bar to petitioners' claims, and the court of appeals should instead have relied on Section 1252(a)(2)(B)(i) in affirming the district court's dismissal of those claims.[5]

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[5] Noncitizens seeking to challenge USCIS's grants of their applications for adjustment of status under the APA would also need to demonstrate that they "suffer[ed] legal wrong" or were "adversely affected or aggrieved" by the agency's favorable resolution of their

3. Contrary to petitioners' contention (Pet. 12), review in this case is not warranted to resolve any disagreement in the lower courts "regarding whether a status-adjustment decision marks the consummation of USCIS's decisionmaking process when removal proceedings are not imminent."

All of the other cases on which petitioners rely (Pet. 12-17) in asserting a circuit conflict involved noncitizens whose applications for adjustment of status had been denied. See *Hosseini* v. *Johnson*, 826 F.3d 354, 357 (6th Cir. 2016); *Perez* v. *USCIS*, 774 F.3d 960, 962 (11th Cir. 2014) (per curiam); *Cabaccang* v. *USCIS*, 627 F.3d 1313, 1314-1315 (9th Cir. 2010); *Pinho* v. *Gonzales*, 432 F.3d 193, 198 (3d Cir. 2005); *McBrearty*, 212 F.3d at 986; *Howell* v. *INS*, 72 F.3d 288, 289 (2d Cir. 1995); *Randall* v. *Meese*, 854 F.2d 472, 477 (D.C. Cir. 1988), cert. denied, 491 U.S. 904 (1989).

As just discussed, however, petitioners are differently situated because their applications for adjustment of status were granted and therefore cannot be "renew[ed]" in removal proceedings in the same manner as an application that was previously denied. 8 C.F.R. 1245.2(a)(5)(ii). A decision by this Court holding that USCIS's approvals of petitioners' applications for adjustment of status were final agency actions accordingly would not resolve any disagreement in the lower courts

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applications. 5 U.S.C. 702. It is not clear that petitioners could satisfy that requirement. If a noncitizen's LPR status is ultimately rescinded by the Board, he will revert back to the status, if any, that he possessed when he applied for adjustment of status. See 8 U.S.C. 1256(a). In Dr. Elldakli's case, he possessed F-1 nonimmigrant status when he applied for adjustment of status, and his family members possessed F-2 nonimmigrant status. F-1 and F-2 nonimmigrants are admitted for "duration of status." 8 C.F.R. 214.2(f)(5).

about whether denials of applications for adjustment of status likewise constitute final agency actions.

Moreover, any such disagreement is likely to become effectively academic following this Court's decision in *Patel*, *supra*. As explained above, pp. 8-11, *supra*, the Court's reasoning in *Patel* reinforces the conclusion that Section 1252(a)(2)(B)(i) strips courts of jurisdiction over APA suits challenging USCIS's nondiscretionary determinations about noncitizens' eligibility for adjustment of status under Section 1255. It is therefore immaterial, as a practical matter, whether such suits satisfy the separate requirements of finality and administrative exhaustion.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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