No. 22-35203

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAGENDRA KUMAR NAKKA, NITHEESHA NAKKA, SRINIVAS THODUPUNURI, RAVI VATHSAL THODUPUNURI, RAJESHWAR ADDAGATLA, VISHAL ADDAGATLA, SATYA VENU BATTULA, SANDEEP BATTULA, SIVA PEDDADA, PAVANI PEDDADA, VENKATA PEDDADA, MIRIAM EDWARDS-BUDZADZIJA, AND ABIGAIL EDWARDS,

Plaintiffs-Appellants,

v.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES, and U.S. DEPARTMENT OF STATE,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
No. 3:19-cv-2099-YY
Hon. Michael H. Simon

APPELLANT'S REPLY BRIEF

Brent W. Renison
Parrilli Renison LLC
610 SW Broadway, Suite 505
Portland, Oregon 97205
(503) 780-2223
brent@entrylaw.com
Attorneys for Appellants

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INTRODUCTION

The Court has jurisdiction over Appellants' claims because this case presents questions of law and constitutional claims which are devoid of factual dispute and involve no discretionary aspect. There are, additionally, no removal proceedings at issue here. The Appellees' use of the national origin-based Visa Bulletin to determine Appellants' ages under the Child Status Protection Act violates the Equal Protection component of the Due Process Clause of the U.S. Constitution because it irrationally discriminates against children of Indian born parents who are equally if not better situated than children of other national origins. Further, with respect to the subclass of children who filed adjustment of status applications based on the Dates for Filing chart based on an immediately available visa number, Appellees' newly announced policies for the CSPA age lock calculation were final agency action and also legislative rules subject to notice and comment rulemaking requirements which were not adhered to.

ARGUMENT

I. The Court has subject matter jurisdiction over Appellants' claims under *Patel*, Ninth Circuit precedent, and the plain meaning of the statute.

Appellees argue that the Court and district court do not have subject matter jurisdiction over Appellants' claims pursuant to the jurisdiction-stripping statute at 8 U.S.C. § 1252(a)(2)(B)(i). Appellees base this argument on 1) the Supreme

Court's interpretation of § 1252(a)(2)(B)(i) in *Patel v. Garland*, 2) prior decisions by federal courts concluding that judicial review of "adjustment of status challenges" is barred by § 1252(a)(2)(B)(i), and 3) the plain meaning of the statutory language at § 1252(a)(2)(B)(i). *See* Br. Appellees, 20.

First, Appellees argue that the Supreme Court's holding in *Patel v. Garland*, 142 S. Ct. 1614 (2022) applies to "all judgments related to the denial of adjustment of status." *See* Br. Appellees, 22. While the Supreme Court's holding in *Patel* was broad, it did not go this far. The interpretation of § 1252(a)(2)(B)(i) in *Patel* is limited to a discrete and distinguishable situation in which adjustment of status may occur: "the granting of relief" related to a removal order. *Patel*, 142 S. Ct. at 1622, 1626–27. *Patel* does not extend, as Appellees would have it, to judgments related to *all* adjustment of status applications, even when those applications are not filed to seek relief from a removal order. The Supreme Court was explicit that the decision in *Patel* did not reach questions about the application of § 1252(a)(2)(B)(i) to USCIS decisions "made outside the removal context." *Patel*, 142 S.Ct. at 1626–27 ("The reviewability of such decisions is not before us, and we do not decide it."). Unlike *Patel*, Appellants' claims occur "outside the removal context." The Child Status Protection Act (CSPA) age calculation decision is not related to the granting of relief from a removal order. *See* Child Status Protection Act, Pub. L. No. 107-208,116 Stat. 927 (2002). Appellants do

not seek adjustment of status as relief from an order for removal, and no member of the class has been subject to removal proceedings. Instead, Appellants seek to adjust from nonimmigrant status to permanent resident status so that they may lawfully remain in the United States—the country where they were raised and educated—and with their families permanently. Under the Supreme Court's own reasoning, *Patel* does not bar this Court from reviewing Appellants' claims.

Appellees further rely on the Supreme Court's observation in *Patel* that Congress *may* have intended to bar judicial review of USCIS decisions of adjustment of status applications until removal proceedings have been initiated. Br. Appellees, 23. As an initial matter, the majority's musings on this issue are dicta. *Patel*, 142 S.Ct. at 1626–27 ("The reviewability of such decisions is not before us, and we do not decide it."). Further, the majority noted a sizeable circuit split on the question of whether federal courts have jurisdiction over appeals of adjustment of status applications before the initiation of removal proceedings. *Id.* at 1626 n.4. Critically, the Ninth Circuit has found that courts *do* have jurisdiction to review USCIS adjustment of status decisions if removal proceedings have not been initiated. *See, e.g.*, *Chan v. Reno*, 113 F.3d 1068, 1071 (9th Cir. 1997) (finding jurisdiction to review appeal of INS denials of adjustment of status applications under the Child Status Protection Act); *Tang v. Reno*, 77 F.3d 1194, 1196 (9th Cir. 1996) (finding jurisdiction to review appeal of INS denials of

adjustment of status applications); *Jaa v. U.S. I.N.S.*, 779 F.2d 569, 571 (9th Cir. 1986) (same); *Cabaccang v. USCIS*, 627 F.3d 1313, 1317 (9th Cir. 2010) (finding jurisdiction over adjustment of status denials that "did not involve removal proceedings . . . because there is no appeal to a superior administrative authority." *Cabaccang* was also cited by *Patel*, 142 S.Ct. at 1626 n.4). Ninth Circuit precedent affirms this Court's jurisdiction over Appellants's claims.

The plain language of § 1252(a)(2)(B)(i) further supports this Court's jurisdiction over Appellants' claims. As Appellees note, § 1252(a)(2)(B) is titled "Denials of discretionary relief." That section falls under 8 U.S.C. § 1252, which is titled "Judicial review of *orders of removal*" (emphasis added). Section 1252(a)(2)(B) explicitly applies only to judicial review of the "granting of relief" under § 1255. The plain meaning of § 1252(a)(2)(B)(i) and the surrounding statutory structure demonstrate that § 1252(a)(2)(B)(i) applies only to factual judgments regarding "the granting of relief under section . . . 1255" to removal orders, not to routine USCIS adjudications of adjustment of status applications that are not related to removal orders, or the seeking of relief from removal orders.

Even if § 1252(a)(2)(B)(i) applied to Appellants' claims, this Court would nonetheless have jurisdiction because Appellants raise "constitutional claims and questions of law," not questions of fact. Section 1252(a)(2)(B)(i) strips courts only of the "jurisdiction to review *facts*." *Patel*, 142 S.Ct. at 1627 (emphasis added).

There is no dispute about the facts in this case.[1] There is also no reasonable dispute that courts have jurisdiction over questions of law or constitutional claims. *Id.* at 1623 ("Section 1252(a)(2)(D) . . . preserves review of constitutional claims and questions of law."). The Supreme Court has recognized that the "application of a legal standard to undisputed or established facts"—here, Appellants' priority dates and the use of the visa charts to determine CSPA age pursuant to the USCIS Policy Manual and Foreign Affairs Manual—is a question of law. *See Guerrero-Lasprilla v. Barr*, 140 S.Ct. 1062, 1068, 1070 (2020) (holding that 8 U.S.C. § 1252(a)(1) does not bar federal review of the application of legal standards to undisputed facts); *Martinez v. Clark*, 36 F.4th 1219, 1227 (9th Cir. 2022) ("As for 'questions of law,' we may review the 'application of a legal standard to undisputed or established facts.'") (citing *Guerrero-Lasprilla*, 140 S.Ct. at 1068). Like the claims in *Guerrero-Lasprilla* and *Martinez*, Appellants' claims are questions of law and constitutional claims. Even if *Patel* and § 1252(a)(2)(B)(i) applied to Appellants' claims, this Court nonetheless has jurisdiction to review questions of law and constitutional claims raised by Appellants.

[1] The government brief does not address the *Patel* opinion's distinction between judicial reviewability of questions of fact versus questions of law and constitutional claims.

II. Appellees' application of the Worldwide Visa Bulletin to calculate Appellants' age under the Child Status Protect Act violates the Due Process Clause of the Fifth Amendment and does not survive rational basis review.

Appellants have already conceded that caselaw supports the use of rational basis review over Appellants' claims, even though Appellants' claims involve national origin discrimination in the immigration context that would be "unacceptable if applied to citizens."[2] Br. Appellants, 12–13; *Fiallo v. Bell*, 430

[2] Nonetheless, Appellants urge the court to apply a higher standard of scrutiny to cases such as this where noncitizen plaintiffs have strong ties to the U.S., such as duration of stay, family ties, and education, and where plaintiffs are physically present in the U.S. Such factors have previously been used to justify the application of higher scrutiny of procedural due process claims in the immigration context. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 28–30 (1982); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596–99 (1953); *Yamataya v. Fischer*, 189 U.S. 86, 99–102 (1903). Several federal district courts recently applied strict scrutiny to criminal statutes in the immigration context. *See, e.g.*, *U.S. v. Machic-Xiap*, 552 F. Supp. 3d 1055, 1060–64 (D. Oregon 2021) (applying the *Arlington Heights* standard to the illegal re-entry statute, 8 U.S.C. § 1326);*U.S. v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1001–03, 1027 (applying the *Arlington Heights* standard to the illegal re-entry statute, § 1326, and finding that the statute violates the Equal Protection Clause of the Fifth Amendment) (D. Nevada 2021). Further, leading scholars have for decades commented on the disturbing results of "immigration exceptionalism" and the government's reliance on the plenary power doctrine, a centuries-old relic of the same Supreme Court that decided *Plessy v. Ferguson* and spawned by racism against noncitizens primarily from Asia, to justify discrimination against noncitizens even into our modern era. *See, e.g.*, David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. Rev., 594–99 (2017) ("Still today, the federal government's immigration laws contain explicit gender distinctions, ideological bars, associational restrictions, and per-country limitations that inure to the detriment of specific nationalities."); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255, 288–92, 307 ("[N]either precedent nor policy warrants retaining this remarkable departure from the fundamental principle of constitutional review."); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 554–55 ("It is noteworthy, if not striking, that the [plenary power] doctrine, a product of the same era as *Plessy v. Ferguson*, has faded so little with the passage of time."); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1, 5–6 (1998) ("The Supreme Court's immigration jurisprudence represents the last vestige of an antique period of American law. . . . Four decades

U.S. 787, 792 (1977). Appellants further note that the application of the rational basis standard in *Tapia-Acuna* was overruled, not the standard of review itself. Br. Appellants, 10; *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981); *Abebe v. Mukasey*, 554 F.3d 1203, 1209 (9th Cir. 2009) (Clifton, J., concurring) ("The majority doesn't quarrel with the legal rule of *Tapia-Acuna*, that the Equal Protection Clause prohibits irrational disparities in treatment."). Nonetheless, Appellees' application of the Visa Bulletin to calculate Appellants' ages under the Child Status Protect Act does not survive rational basis review.

Appellees assert that their use of the Visa Bulletin to calculate Appellants' ages survives rational basis review because 1) the age-out protections at § 1153(h) reflect Congress's "balance of providing some relief against aging out" versus the availability of visas to other applicants, 2) Congress's goal of promoting diversity, and 3) protecting the United States labor market. Br. Appellees, 32–33.

As an initial matter, Appellees mischaracterize the nature of Appellants' claims regarding the age calculation under the Child Status Protection Act. CSPA, Pub. L. No. 107-208,116 Stat. 927; 8 U.S.C. § 1153(h). Appellants claim that the "use of the national origin-based Visa Bulletin chart to determine [Appellants'] age for CSPA purposes" violates the Due Process Clause of the Fifth Amendment. ER

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after [*Brown v. Board of Education*], the plenary power doctrine is said to make racial discrimination in the immigration context lawful per se.").

92–96. Appellants are not challenging the age calculations laid out by Congress in CSPA, as Appellees allege. Br. Appellees 25–26. In fact, Appellants argue that Appellees' use of the national origin-based Visa Bulletin chart itself violates Congress's comprehensive statutory scheme under CSPA and AC21 for calculating Appellants' ages. ER 93–96, Br. Appellants, 27–28.

It is true that § 1553(h) reflects congressional balancing of the need to provide relief to applicants at risk of aging out while maintaining availability of visas for other applicants. *Id.*; H.R. Rep. No. 45-107, at 10 (2001) (statement of Rep. Gekas). And it is also true that § 1553(h) was enacted to "correct" the "long-festering problem" of ageing out, H.R. Rep. No. 45-107, at 10, and to reinforce "the underlying premise of the immigration policy in this country, which is a reunification of families." H.R. Rep. No. 45-107, at 10 (statement of Rep. Jackson Lee). This is why Appellees' interpretation of § 1153(h) and their use of the Visa Bulletins to determine CSPA age violates Congress's statutory scheme. By using national origin based Visa Bulletins to calculate Appellants ages under CSPA, and then to deny Appellants their rightful status as derivative beneficiaries of the principal beneficiary (their parent), to deny them their place in line, and ultimately to deny them permanent residency, Appellees resurrect the age-out problem that

Congress enacted CSPA to solve.[3] *Id.*; ER 92–96. Appellees' interpretation of § 1153(h) and application of the visa bulletin contradicts Congress's mandate and balanced statutory scheme. This, therefore, is not a legitimate rationale justifying discrimination against Appellants, and it does not satisfy even the low bar of rational basis review.

Appellees also assert that utilizing the worldwide column of the Final Action Dates would "run around the statutory scheme." Br. Appellees, 32. But the use of a national origin-based Visa Bulletin to lock a child's age under CSPA cripples Appellants' chances of remaining with their family and the country they call home, results in far worse treatment of Appellants than of other similarly situated applicants based purely on their national origin, and is not sufficiently legitimate to justify Appellees discrimination against Appellants on the basis of their national origin.

Further, Appellants' plea for relief would not displace any other applicants who are in line for visas. The visa allocation system is already set up in such a way as to create a backlog. *See* WILLIAM A. KANDEL, CONG. RESEARCH SERVICE, R46291, THE EMPLOYMENT-BASED IMMIGRATION BACKLOG 1 (2020) ("The

[3] "[W]e now repeat the message that it's time to adjust the status of the youngsters who are affected by it . . . This bill seeks to correct that to say that if, indeed, the application was filed, the process began while the child was a minor, that even if that child turns 21, that . . . child would not be shifted into the preference more-strict category . . . but rather be considered at the time of the application as a minor, thereby receiving permanent status. So *that's a simple act of justice*. . . ." H.R. Rep. No. 45-107, at 10 (statement of Rep. Gekas) (emphasis added).

employment-based immigrant backlog exists because the annual number of foreign workers whom U.S. employers hire and then sponsor to enter the employment-based immigration pipeline has regularly exceeded the annual statutory allocation of green cards."). Interpreting CSPA in a way that does not result in Appellants aging out would only recognize their rightful place in line. It would not displace any other applicants who have places further back in line than Appellants. Recognizing Appellants' rightful place in that line does not "run around the statutory scheme," disturb any other applicants' place in line, or disrupt the calculation of supply and demand for immigrant visas.

Second, Appellees justify their national origin discrimination on the grounds that the per-country numerical visa caps reflected in the Visa bulletin supports the "overall goal of promoting immigration diversity." Br Appellees, 33-34. This goal is not supported by Appellees' interpretation of § 1153(h) and the implementation of the USCIS Policy Manual and the Department of State Foreign Affairs Manual. Appellants have already recognized that the use of the national origin-based Visa Bulletin charts is permissible to serve the limited and legitimate interest of applying per country limits equally. ER, 93. Appellees' interpretation and implementation does not further the goal of promoting diversity because it results in hundreds of thousands of children, who are disproportionately Chinese and Indian, to either self-deport from the country they call home, attempt to navigate

the labyrinth of U.S. immigration bureaucracy without the benefits stemming from their rightful status as derivative dependents of their parent (which does not guarantee even eventual access to permanent residency or even nonimmigrant status), or remain in the U.S. without lawful status and accept the consequences that flow from unauthorized status. JILL H. WILSON & WILLIAM A. KANDEL, CONG. RESEARCH SERVICE, IN11844, LEGAL DREAMERS 1–2 (2022); *see also, e.g.*, Hafsa Fathima, *They Came to the U.S. As Children, But At 21, Their Legal Status Runs Out*, National Public Radio (Aug. 4, 2021, 8:21 AM), https://www.npr.org/2021/08/01/ 1023393351/documented- dreamers-live-their-whole-lives-in-the-u-s-then-face-deportation-at-2. By contrast, applicants from non-oversubscribed countries do not face this difficult, life-altering choice for no other reason than the country of their citizenship. The result is that a derivative child from India or China, such as Appellants, can move to the U.S. as a toddler and still age out, with the agency failing to recognize the special, longstanding ties that child has developed to the U.S.—ties which Congress recognized and sought to protect in enacting CSPA and AC21, H.R. Rep. No. 45-107, at 10—but a derivative child from the United Kingdom who moved to the U.S. at the age of 18 who has far greater ties to the United Kingdom than to the U.S. does not age out and obtains permanent residency. This result is a consequence of Appellees' interpretation and implementation of § 1153(h), not of supply and demand. The

result is not only entirely irrational, it also directly contravenes Congress's intent and statutory scheme, violates Appellants' constitutional right to equal protection under the law, and is not sufficiently legitimate to justify national origin discrimination against Appellants.

Finally, Appellees claim that the Visa Bulletin protects the national labor market. Br. Appellees, 34. Again, Appellees interpretation and implementation of the Visa Bulletins to calculate CSPA age does not further this goal. The principal beneficiary's immigrant petition generally requires the approval of a labor certification by the Department of Labor. *See* 8 U.S.C. § 1882(a)(5) (laying out the labor certification requirements and qualifications for immigrants). Congress has never imposed a labor market test for derivative beneficiaries such as Appellants. Finally, the prospective economic impact of allowing Appellants to reside permanently in the U.S. is well-documented as a boon, not a threat, to the U.S. labor market. *See, e.g.*, David J. Bier, *New Bill Prevents Forced Departure of Documented Dreamers*, Cato Institute (July 1, 2021, 11:17 AM), https://www.cato.org/blog/new-bill-prevents-forced-departure-documented-dreamers ("These young immigrants are often among the most talented people in the United States today, and letting documented dreamers live and work permanently will create *tens of billions of dollars* in economic growth for the United States.") (emphasis added). Appellees' interest in protecting the labor

market does not justify the use of the Visa Bulletins to deny Appellants' their rightful place in line, and ultimately to deny them permanent residency, based solely on their national origin.

In sum, Appellees application of the Worldwide Visa Bulletin to calculate Appellants' age under the Child Status Protect Act violates the Due Process Clause of the Fifth Amendment.

III. Appellees incorrectly assert that the District Court correctly dismissed Appellants' challenges to the 2018 update to the USCIS Policy Manual and 2019 update to the DOS FAM.

Though the District Court found that the 2018 update to the U.S. Citizenship and Immigration Services (USCIS) Policy Manual (Manual) and the 2019 update to the DOS FAM were not final agency actions subject to judicial review under the APA and that the updates were not legislative rules subject to notice and comment, these findings, contrary to Appellee's assertions, were incorrect.[4]

1. The pertinent updates to the USCIS Policy Manual and the DOS FAM were final agency actions.

Appellees assert that neither the USCIS Policy Manual, as a whole, nor the DOS FAM, are final agency actions. This obscures the issue at hand. Appellants

[4] The District Court's Findings and Recommendation and Appellee's Brief rely on a belief that the changes were in line with the legislative history of CSPA and a White House Report. This belief is incorrect. The White House recommended the change to bring predictability and security to those in appellants'

circumstances: nonimmigrant workers and their families. The Recommendation read,

> Later this year, State, in consultation with DHS, will revise the monthly Visa Bulletin to better estimate immigrant visa availability for prospective applicants, providing needed predictability to nonimmigrant workers seeking permanent residency. The revisions will help ensure the maximum number of available visas is issued every year, while also minimizing the potential for visa retrogression. These changes will allow more individuals seeking LPR status to work, change jobs, and accept promotions. By increasing efficiency in visa issuance*, individuals and their families who are already on the path to becoming LPRs will have increased security that they can stay in the United States, set down roots, and more confidently seek out opportunities to build lives in our country.*

THE WHITE HOUSE, MODERNIZING & STREAMLINING OUR LEGAL IMMIGRATION SYSTEM FOR THE 21ST CENTURY (2015), at 29, https://obamawhitehouse.archives.gov/sites/default/files/docs/final_visa_modernization_report1.pdf (emphasis added).

The report later specifically addressed CSPA, only recommending DHS "publish final guidance that indicates the basis under which extraordinary circumstances may exist" which permit certain beneficiaries who failed "to seek to acquire LPR status within one year of visa availability due to circumstances beyond the applicants' control." *Id.* at 43. The report explained CSPA "can protect 'child status for numerous immigration benefits, including in . . . employment-based categories . . . ." Nothing in the Recommendation indicated changes to CSPA calculations.

At first, the additional chart was intended to, when additional visas were available, allow more individuals to file for adjustment of status. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *When to File Your Adjustment of Status Application for Family-Sponsored or Employment-Based Preference Visas: October 2017*, https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/when-to-file-your-adjustment-of-status-application-for-family-sponsored-or-employment-based-20 (portion entitled "New Visa Bulletin Charts").

make no assertion about these manuals as whole documents, but instead challenge particular updates made to the USCIS Policy Manual in 2018[5] and the DOS FAM in 2019[6] as final agency actions reviewable under the APA.

When determining whether an agency action is final, the key inquiry is "whether the agency completed its decision-making process and whether the result of that process will directly affect the parties." Br. Appellees, 37 (citations omitted).

a. The changed amounted to the consummation of the Agency's decision-making process.

When a rule or information manual only "facilitate[s] the *beginning* of [a] review process for proposed" agency action, when it does not itself proscribe a decision regarding agency action or impose obligations, and when the guidance "would be subsumed in any final rule issued," the rule or information manual is not final agency action. *Whitewater Draw Nat. Res. Conservation Dist. V. Mayorkas*, 5 F.4th 997, 1008 (9th Cir. 2021), *cert denied sub nom. Whitewater Draw v. Mayorkas*, 142 S. Ct. 713 (2021) (9th Cir. July 19, 2021) (emphasis in original).

The changes made to the USCIS Policy Manual and DOS FAM are unlike those described in *Whitewater* and are instead final agency action. The relevant

[5] Specifically, 7 USCIS-PM A.7 was changed.
[6] The Department of State revision to 9 FAM 502.1-1(D)(4).

portion of the USCIS Policy Manual provides, "[w]hile an adjustment applicant may choose to file an adjustment application based on the Dates for Filing chart, USCIS uses the Final Action Dates chart to determine the applicant's age at the time of visa availability for CSPA age calculation purposes." 7 USCIS-PM A.7.4. The implementation of a new method for age calculation constituted a final action because it instituted a new legal effect, imposing new obligations onto USCIS officers, and legal consequences for applicants subject to CSPA.[7] The aforementioned provision regarding CSPA and the Final Action Date chart goes beyond mere guidance. It specifies the legal status, and thus, the overall decision for applicants subject to CSPA who meet all other requirements for adjustment of status. Though Appellees cite the "About the Policy Manual" portion of the USCIS website to establish the Manual "does not remove [USCIS officers'] discretion in making adjudicatory decisions," in the context of the change to the Manual at issue regarding CSPA age calculations, no contrary decision can be made by an officer that would "subsume" the Manual's rule on this point. *See* Br. Appellees, 39 (quoting, USCIS, *Policy Manual: About the Policy Manual*, https://www.uscis.gov/policy-manual (last visited Aug. 26, 2020)). Therefore,

[7] Notably, Appellees sidestepped the argument Appellees raised regarding conflicting meanings of "available," created through the changes at issue here. Br. Appellants, 13–15. Appellees reiterate the varying uses of "available" but do not explain the conflict, hiding behind the finite number of visas though, as discussed *infra* 24, country caps were not seen as a barrier to CSPA calculations from 2002 to 2018, and no reason is offered for why they should be now.

contrary to Appellee's assertion, this portion of the manual does tell the adjudicator to decide petitions in a specific manner as far as the CSPA age calculation is concerned. *See* Br. Appellees, 40.

The circumstances surrounding Plaintiff Abigail Edwards' case illustrates this point, evidencing the finality of the rule. Plaintiff Edwards' petition was approved, despite the Manual's rule and the resulting Final Action Date applicable to her case. The government has not contested that this is a mistake according to the relevant portion of the Manual, and, as the District Court Findings and Recommendations explained, the District Court could "'firmly predict' that the contested agency rules will be applied to Derivative Beneficiary Edwards in the future and that 'she will be served with a notice of intent to rescind her LPR status.'" *Accord*, Defs.' Second Mot. to Dismiss, 19–20, ECF 36; ER 23 (internal citations omitted). This demonstrates that the change to the Manual imposed obligations upon USCIS and failure to follow those obligations will result in the sanction-like revocation of status for Abigail Edwards and other similarly situated applicants. Rather than a "guide . . . as to how to interpret" CSPA, the changed rule amounts to the final word on CSPA age calculations. Br. Appellees, 39–40. Therefore, the Court has jurisdiction over Appellants' challenge under the APA.

b. The changes were actions from which legal consequences flow rather than interpretive changes.

When an action has "independent legal effect," demonstrating "the agency's intention to bind either itself or regulated parties," it is final agency action. *Safer Chemicals, Healthy Families v. EPA*, 943 F.3d 397, 416–18 (9th Cir. 2019) (quoting *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191 1223 (D.C. Cir. 1996)). Therefore, "[c]oncrete effects and legal consequences" point to finality. *Advanced Integrative Med. Science Inst. v. Garland*, 24 F.4th 1249, 1257 (9th Cir. 2022).

Concrete effects and legal consequences arise when a rule imposes "obligations and sanctions in the event of violation." *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1084–85 (9th Cir. 2003) (finding the DEA's rule banning the sale of various products containing hemp was "final"). For example, in *Bennett v. Spear*, 520 U.S. 154 (1997), the Fish and Wildlife Service issued a biological opinion in accordance with the Endangered Species Act of 1973 (ESA), 87 Stat. 884, as amended, 16 U.S.C. § 1531 *et seq.* which advised the Bureau of Reclamation regarding how the Bureau's proposed action would affect the endangered species or habitat listed as "threatened" or "endangered" by the Secretary of the Interior. *Bennett*, 505 U.S. at 157–58. There, the independent legal effect requirement was met because the action at issue "alter[ed] the legal regime to which the action agency [was] subject, authorizing it to take the

endangered species if (but only if) it complie[d] with the prescribed conditions." *Bennett*, 505 U.S. at 178.

Similarly, the changes at issue here altered the legal regime, authorizing USCIS to grant visas to applicants, if (but only if) the USCIS officer complies with the newly prescribed visa chart determinations. Prior to these changes (and a change in 2015), the legal framework was as follows: there was one Visa Bulletin chart which established the date at which an employment-based immigrant could file to adjust their status to that of lawful permanent resident (LPR), and that same date was used to calculate the child's age under CSPA. The single chart determined the child's legal age under CSPA, the date at which they could apply for LPR status, and made clear the child could, if found to meet all other requirements, adjust status if that date was current at the date of filing. But after the 2015 addition of a second chart, the 2018 change prescribed the use of that second chart to determine CSPA ages, altering the obligations of USCIS officers and the legal consequences facing appellants and those similarly situated. ER 16.

The agency action at issue here is akin to the agency action in *Poet Biorefining*, where the requirements set forth in the Guidance were final agency action because they reflected a "settled agency position which ha[d] legal consequences" for EPA officials who were allocating renewable identification

numbers (RINs) and for the companies seeking EPA approval to generate the RINs. *Poet Biorefining, LLC v. EPA*, 970 F.3d 392, 406 (D.C. Cir. 2020).

The use of this second chart for CSPA calculations reflects a settled agency position with legal consequences. The chart does not serve as guidance regarding factors to consider or aspects officers might note in their decision. Instead, USCIS definitively uses the chart to determine the age of applicants, which, for individuals subject to CSPA, amounts to a determination of their legal status.

Prior to the implementation of the 2018 change to the USCIS Policy Manual, applicants were legally "children" based on one chart. Their age was locked as of the date they filed because availability was determined based on the permitted filing date and, as the plain language of the statute specifies, "a determination of whether an alien satisfies the age requirement . . . shall be made using . . . the date on which an immigrant visa number became available for the alien's parent . . . ."[8] 1153(h)(1), (h)(1)(A). After the 2018 change, applicants were legally "children" based on a new framework and individuals who would have had legal status under the old framework became, under the new framework, ineligible for the legal

[8] In addition, 8 U.S.C. § 1153(e)(1), regarding the Order of consideration for visas, provides, "Immigrant visas made available under (a) [Preference allocation for family-sponsored immigrants] or (b) [Preference allocation for employment-based immigrants] shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the Attorney General . . . ."

derivative status as "child," ineligible for adjustment of status, and often even deportable. The new framework has serious legal consequences.

IV. The pertinent updates to the USCIS Policy Manual and the DOS FAM were legislative rules subject to notice and comment rulemaking.

The pertinent updates to the USCIS Policy Manual and the DOS FAM are not merely interpretive. "Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Perez v. Mortgage Bankers Ass'n.*, 575 U.S. 92, 95 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)). The updates at issue here, as evidenced by the discussion of Plaintiff Edwards' case above, do have the force and effect of law and are not accorded such weight in the adjudicatory process.

Appellees quote *Shalala*, 514 U.S. at 99, to explain interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." Br. Appellees, 40. However, the context of *Shalala* matters. There, the regulations at issue "ensure[d] the existence of adequate provider records but [did] not dictate [the Secretary's] own . . . determinations." *Id.* at 92–93. The regulation offered directions to providers regarding the maintenance of their records and conveyed the Secretary would, using the information provided, arrive at a decision. *Id.* at 93. Nothing about the regulation bound the Secretary to particular decisions. *Id.* at 94. Therefore, the rule was deemed interpretive. *Id.* at 101. *Shalala* dealt with an interpretive rule

that was merely meant to advise the public, whereas the changes to the USCIS Policy Manual and DOS FAM do more than advise—they dictate USCIS officer decisions regarding CSPA age calculations, and therefore, decisions regarding individual applications.

Appellees contend the changes at issue are interpretive because the chart "merely explains how the agency implements the [CSPA] age calculation . . . ."[9] Br. Appellees, 41. However, before the 2018 change, "the date which an immigrant visa number becomes available" meant the date the applicant was instructed to file, but after the change, "available" has one meaning for filing purposes and an entirely different meaning for age calculation. Unlike *Shalala*, the change here has the force and effect of law and binds USCIS officers to specified determinations regarding the CSPA age calculation, definitively determining the legal status of applicants subject to CSPA.

Appellees additionally point to *Lin Liu v. Smith*, 515 F. Supp. 3d 193 (S.D.N.Y. 2021), which discussed the changes to the Manuals at issue here. In *Lin Liu*, the district court explained, "[a]n interpretive rule, instead of creating legal

[9] "[A] determination of whether an alien satisfies the age requirement . . . shall be made using—the age of the alien on the date which an immigrant visa number becomes available for such alien (or . . . the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire . . . permanent residenc[y] within one year of such availability; reduced by the number of days in the period during which the applicable petition described in paragraph (2) was pending."
8 U.S.C. § 1153(h)(1).

effects, thus puts the public on notice of pre-existing legal obligations or rights." *Lin Liu*, 515 F. Supp. 3d at 199 (quoting *NRDC v. Wheeler*, 955 F.3d 68, 83 (D.C. Cir. 2020)). Respectfully, the District Court for the Southern District of New York wrongfully applied that principle to the changes at issue. Further, as discussed in Appellants' Opening Brief, the decision in *Lin Liu* was based upon a presumption about CSPA age calculations that is not based in the law. Appellant's Br., 25.

After the changes to the Manuals, the age calculation for derivative children essentially returned to the pre-CSPA calculation, altering the rights of derivative applicants. The change to the Manual imposed new obligations on USCIS officers: to disregard the pre-existing rights set forth by CSPA and by calculation according to the first chart and to instead use the second chart to determine the legal rights of the derivative applicants. Therefore, the rule did not put the public on notice of pre-existing legal obligations or rights—it changed pre-existing legal rights.

Though Appellees raise concerns that the pre-2018 calculation runs the risk of disregarding that there are "only a finite number of visas available," the drafters of CSPA purposely crafted the CSPA to "solve the age-out problem without displacing others who have been waiting in other visa categories . . . ." H.R. Rep. No. 107-45, at 13. Locking the age based on an available visa does not conflict with the country-specific limits mandated by Congress. It did not prior to the implementation of a second chart in 2015, and it did not prior to the 2018 and 2019

changes. Appellants do not ask the government to act against Congressional intent—just the opposite. Appellants seek the government to, in line with congressional intent, revert to the CSPA calculations in place prior to the 2018 and 2019 changes. The former calculation was in line with the intent of CSPA, as highlighted above. If the government wishes to change the CSPA calculations substantially, Appellants seek the government's compliance with the notice and comment procedures Congress outlined in the APA.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and remanded for consideration of Plaintiff's claims.

Date: September 1, 2022

Parrilli Renison LLC

/s/ Brent W. Renison
Brent W. Renison

Attorneys for Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

II.CERTIFICATE OF COMPLIANCE FOR BRIEFS

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Cir. R. 32-1 because this brief contains 5,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Parrilli Renison LLC

/s/ Brent W. Renison
Brent W. Renison
Attorneys for Appellants