In the

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

No. 25-1207

ANUSHKA DUBEY, *et al.*,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 24 C 5286, Matthew F. Kennelly, *Judge*.

BRIEF OF THE APPELLEE

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Table of Contents

Page

Table of Authorities

Cases **Page(s)**

Statutes

Regulations

Jurisdictional Statement

The jurisdictional statement of plaintiffs-appellants is not complete and correct. Accordingly, defendant-appellee provides the following jurisdictional statement pursuant to Circuit Rule 28(b).

The plaintiffs in this case are five unrelated foreign nationals outside of the United States.[1] They each sought declaratory and injunctive relief vacating past inadmissibility findings made against them by officers within defendant-appellee, the United States Department of Homeland Security ("DHS"). R. 1 (original complaint).[2] To that end, plaintiffs brought three claims under the Administrative Procedure Act arising out of their attempted entries into the United States and past exclusions. R. 1 at 27–32.

While district courts generally have "federal question" jurisdiction under 28 U.S.C. § 1331, the district court granted DHS's motion to dismiss on February 3, 2025, after concluding that plaintiffs' APA challenge was barred by the jurisdiction-stripping provisions of 8 U.S.C. § 1252(a)(2)(A), which bars judicial review of any "order of removal pursuant to" the expedited-removal procedure outlined in 8 U.S.C. § 1225(b)(1)(A)(i). R. 21 at 11–12; *see also* Short Appendix ("App'x") at 11–12. A separate judgment was entered that same day. R. 22; App'x at 13. Plaintiffs filed a notice of appeal on February 10, 2025, within the 60 days allowed by Federal Rule of

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[1] This brief uses the term "foreign national" as equivalent to the statutory term of "alien" within the Immigration and Nationality Act ("INA").

[2] "R. __" refers to a numbered item on the district court's docket sheet that is included in the record on appeal.

Appellate Procedure 4(a)(1)(B). R. 23. This court thus has jurisdiction under 28 U.S.C. § 1291 to review the district court's final decision.

Issue Presented for Review

Whether the district court properly dismissed plaintiffs' complaint for the stated jurisdictional reason, if not on standing, nonreviewability, and lack of final-agency-action grounds.

Statement of the Case

I. Statutory and Regulatory History

A. CBP Screenings of Foreign Nationals at Ports of Entry

Every person who arrives in the United States is subject to inspection. *See United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). Thus, every foreign national seeking admission is subject to inspection by DHS's sub-agency, U.S. Customs and Border Protection ("CBP"), and has the burden of demonstrating their admissibility. *See* 8 U.S.C. § 1225(a)(3); *see also* 8 U.S.C. § 1361. This admission process involves two stages: (1) applying for a visa overseas in order to travel to the United States, and (2) then applying for admission at an approved port of entry. *See* T. Alexander Aleinikoff, *et al.*, *Immigration and Citizenship: Process and Policy* 480 (8th ed. 2016). As will be discussed more below, these two stages involve scrutiny by a United States Department of State consular officer for a visa, followed by a CBP inspections officer upon the applicant's request for admission at a port of entry. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 424–27 (D.C. Cir. 1977) (describing this "'double check' system"). And, in general, foreign nationals must possess appropriate

travel documents (a valid passport and a valid visa, if required) in order to board any vessel bound for the United States to apply for admission.

After arriving at a port of entry from abroad, CBP officers inspect each foreign national requesting admission under 8 U.S.C. § 1225. The officer will determine if an inadmissibility ground under 8 U.S.C. § 1182 applies and verify whether any database maintained by DHS has information about the individual. *Cf. Nwaorie v. CBP*, 395 F. Supp. 3d 821, 832 n.32 (S.D. Tex. 2019) (discussing one such database). These "inspections" by CBP may include "primary" or "secondary" inspections, but the distinction between "primary" and "secondary" is one of nomenclature—"secondary inspection is no less a matter of course and no less routine than the primary inspection." *United States v. Galloway*, 316 F.3d 624, 629 (6th Cir. 2003). Primary inspection is where the "passenger is usually asked questions regarding his trip, including the countries he has visited, any merchandise he has brought back, and the value of such merchandise. His answers are checked against his customs declaration form, and usually he is sent on his way." *Id.* In contrast, a "secondary inspection occurs when further information is required from a noncitizen and the individual is taken aside at the port of entry for further questioning." Kevin R. Johnson, *et al.*, *Immigration Law* 384 (2d ed. 2015).

B. The F-1 Nonimmigrant Student Visa Program and Optional Practical Training

The complaint asserts that plaintiffs previously lived in the United States as foreign students under the F-1 nonimmigrant student visa program. R. 1 at 1–2. The F-1 program allows foreign nationals to enter the United States to pursue a full

course of study at an approved school or educational program. *See* 8 U.S.C. § 1101(a)(15)(F)(i). To maintain F-1 status, a foreign student must "pursue a full course of study" or "engage in authorized practical training." 8 C.F.R. § 214.2(f)(5)(i). This optional practical training ("OPT") must be "directly related to [a student's] major area of study" in order to qualify as authorized training. 8 C.F.R. § 214.2(f)(10); *see also Wash. All. of Tech. Workers v. DHS*, 50 F.4th 164, 169–70 (D.C. Cir. 2022) (describing the OPT program for F-1 students). Outside of such practical-training programs, however, foreign students are subject to multiple employment restrictions. *See* 8 C.F.R. § 214.1(e) (nonimmigrants may not engage in productive employment without authorization); *id.* at § 214.2(f) (prohibiting F-1 nonimmigrants from employment, but not including work-study).

C. The H-1B Nonimmigrant Visa Program

Some of the plaintiffs in this case also participated in the H-1B nonimmigrant visa program. *See* R. 12-2, 12-4–5. The INA's H-1B visa program permits U.S. employers to employ nonimmigrants on a temporary basis in specialty occupations in the United States. *See* 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), § 1182(n); 20 C.F.R. Pt. 655, Subpts. H and I. The INA requires an employer seeking to hire a foreign national in a specialty occupation, as defined at 8 U.S.C. § 1184(i)(1), to first submit a Labor Condition Application ("LCA") to the United States Department of Labor ("DOL"). *See* 8 U.S.C. § 1182(n)(1). In the LCA, the employer attests that it will pay the H-1B worker the wage required by the statute. *See* 8 U.S.C. § 1182(n)(1)(A). If DOL certifies the LCA, the employer must then submit a copy of the certified LCA to

another of DHS's sub-agencies, U.S. Citizenship and Immigration Services ("USCIS"), along with a petition to classify the foreign worker as an H-1B nonimmigrant worker. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700(a)(3); 8 C.F.R. § 214.2(h)(4)(iii)(B)(1).

With the LCA in hand, a petitioning employer may file a nonimmigrant temporary worker petition Form I-129 on behalf of a prospective employee who is a foreign national. *See* 8 U.S.C. § 1184(c). If granted, that H-1B visa petition either grants the employee temporary status to the United States to "perform services . . . in a specialty occupation," 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(i), or to apply to a consular officer abroad for an H-1B visa, *see ITServe All., Inc. v. DHS*, 71 F.4th 1028, 1031–32 (D.C. Cir. 2023) (describing an example where a consular officer refused to issue an H-1B visa, and then "returned the petition to USCIS for review"). "Specialty occupation" is defined in the immigration context as requiring both "(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1). Regulations further define "specialty occupation." *See* 8 C.F.R. § 214.2(h)(4)(ii) (providing examples of fields that can include occupations requiring highly specialized knowledge).

D. Expedited Removal

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), replacing much of the INA with a new and

"comprehensive scheme for determining the classification of . . . aliens," *Camins v. Gonzales*, 500 F.3d 872, 879 (9th Cir. 2007), including "expedited removal." Prior to 1996, the INA included two types of proceedings in which foreign nationals could be denied the right to be in the United States: (1) deportation hearings, and (2) exclusion hearings. *Vartelas v. Holder*, 566 U.S. 257, 261 (2012). Under this setup, "non-citizens who had entered without inspection could take advantage of the greater procedural and substantive rights afforded in deportation proceedings, while non-citizens who presented themselves at a port of entry for inspection were subjected to more summary exclusion proceedings." *Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010).

Congress passed IIRIRA to address this "anomaly" by eliminating the concept of "entry" and exclusion and deportation proceedings, while creating instead a uniform "removal" procedure. *Id.*; *see also Vartelas*, 566 U.S. at 261–62. Removability now turns on whether a foreign national is admissible or has been "admitted" at a port of entry (discussed above). Foreign nationals arriving in the United States or present in the United States without having been admitted are now "applicants for admission," *id.*, § 1225(a)(1), and generally foreign nationals "seeking admission" who fail to "clearly and beyond a doubt" demonstrate an entitlement "to be admitted" are detained for a removal proceeding pursuant to 8 U.S.C. § 1229a.

Nevertheless, IIRIRA preserved some elements of the former distinction between exclusion and deportation, including through the statutory enactment of expedited removal proceedings, which ensures that the Executive Branch can both

"expedite removal of aliens lacking a legal basis to remain in the United States," *Kucana v. Holder*, 558 U.S. 233, 249 (2010); *see also* S. Rep. No. 104-249 (1996), and deter individuals from exposing themselves to the dangers associated with illegal immigration, H.R. Rep. No. 104-469, pt. 1, at 117 (1996). "Hence, the pivotal factor in determining" what sort of proceeding a foreign national is entitled to "will be whether or not the alien has been lawfully admitted." *Id.* at 225. Congress thus conferred sizable authority to Executive Branch officers while limiting judicial review to "expedite the removal from the United States of aliens who indisputably have no authorization to be admitted to the United States, while providing an opportunity for such an alien who claims asylum to have the merits of his . . . claim promptly assessed." H.R. Rep. No. 104-828, at 209–10 (1996).

The amended INA thus precludes judicial review over challenges to expedited removal orders that are issued pursuant to 8 U.S.C. § 1225(b)(1). 8 U.S.C. § 1252(a)(2)(A). That statute provides, without exception, that "no court shall have jurisdiction to review . . . the application of [8 U.S.C. § 1225(b)(1)] to individual aliens, including the determination made under section 1225(b)(1)(B) of this title." 8 U.S.C. § 1252(a)(2)(A)(iii).[3] Under this summary-removal mechanism, foreign nationals

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[3] In three other numbered paragraphs, the INA provides for no judicial review "except as provided in subsection (e)." 8 U.S.C. §§ 1252(a)(2)(A)(i), (ii), (iv). The statute then provides—"in subsection (e)"—for review in habeas corpus of three discrete questions that are not asserted here. 8 U.S.C. § 1252(e)(2). Specifically, such review is available, "but shall be limited to determinations of—(A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under such section, and (C) whether the petitioner can prove" that they have been lawfully admitted as a lawful permanent resident ("LPR"), asylee, or refugee. 8 U.S.C. § 1252(e)(2). These three situations are not present in this appeal.

without valid entry documentation or who make material misrepresentations shall be "order[ed] . . . removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. § 1158] or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i); *see id.* § 1182(a)(6)(C), (a)(7); *accord DHS v. Thuraissigiam*, 591 U.S. 103, 108–13 (2020) (discussing expedited removal); *Odei v. DHS*, 937 F.3d 1092, 1094 (7th Cir. 2019) (same).

E. The Visa-Issuance Process and the Doctrine of Nonreviewability

The decision to issue or refuse a visa rests with a State Department consular officer. *See* 8 U.S.C. § 1201(a)(1); 22 C.F.R. § 42.71, 42.81; 8 U.S.C. § 1361 (providing that the applicant has the burden of proof to establish eligibility for a visa "to the satisfaction of the consular officer").[4] With certain exceptions not relevant here, no visa "shall be issued to an alien" if "it appears to the consular officer" from the application papers "that such alien is ineligible to receive a visa . . . under section 1182 of this title, or any other provision of law," or if "the consular officer knows or has reason to believe" that the foreign national is ineligible. 8 U.S.C. § 1201(g); *see also* 22 C.F.R. § 40.6. 8 U.S.C. § 1182(a) identifies various "[c]lasses of aliens ineligible for visas or admission" to the United States. With some exceptions, Congress provides that a consular officer who denies a visa application based on a determination that the applicant is inadmissible will "provide the alien with a timely

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[4] *See also* 6 U.S.C. § 236(b)(1) (granting Secretary of Homeland Security authority "to refuse visas in accordance with law," with that authority to be "exercised through the Secretary of State"); 6 U.S.C. § 236(c)(1) (reserving Secretary of State's authority to direct a consular officer to refuse a visa if "such refusal" is "necessary or advisable in the foreign policy or security interests of the United States").

written notice that both states the determination and lists the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. § 1182(b)(1).

Both the Supreme Court and this court have recognized the doctrine of consular nonreviewability. *See, e.g.*, *Dep't of State v. Muñoz*, 602 U.S. 899, 908 (2024). Among other things, the doctrine "bars judicial review of visa decisions made by consular officials abroad." *Yafai v. Pompeo*, 912 F.3d 1018, 1020–21 (7th Cir. 2019) (quoting *Matushkina v. Nielsen*, 877 F.3d 289, 294 (7th Cir. 2017)). This doctrine preceded passage of the APA, and is thus an exception to the presumption of judicial review as contemplated in the APA. *Morfin v. Tillerson*, 851 F.3d 710, 711 (7th Cir. 2017); *see also Baaghil v. Miller*, 1 F.4th 427, 434–35 (6th Cir. 2021); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1160–62 (D.C. Cir. 1999). In the visa context, the rule is "that decisions to issue or withhold a visa are not reviewable in court unless Congress says otherwise." *Matushkina*, 877 F.3d at 294 (quotations omitted). And this rule even extends to prohibit indirect attacks on a visa denial because the doctrine applies equally "to suits where a plaintiff seeks to challenge a visa decision indirectly." *Matushkina*, 877 F.3d at 295.

In other words, the doctrine of nonreviewability applies *regardless* of whomever within the Executive Branch decides to deny entry to a foreign national, consistent with case law from over a century. *See United States v. Ju Toy*, 198 U.S. 253, 261 (1905) (observing how "the decision of the Secretary of Commerce and Labor is *conclusive*" regarding the admissibility of a habeas petitioner's argument that he should be admitted due to his insistence that he was a U.S. citizen (emphasis added));

Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895) ("The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come into this country, and to have its declared policy in that regard *enforced exclusively through executive officers, without judicial intervention*, is settled by our previous adjudications." (emphasis added)); *see also Pak v. Biden*, 91 F.4th 896, 901 (7th Cir. 2024) ("Because Plaintiffs' claims cannot be divorced from a substantive challenge to *the Executive's* discretionary decisions [as to their exclusions], we must presume that their claims are unreviewable." (emphasis added)).

By way of historical review, the doctrine has been applied to protect exclusionary decisionmaking by the President, *Trump v. Hawaii*, 585 U.S. 667, 703–04 (2018), the Attorney General, *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Secretary of the Treasury, *Bautista-Rosario v. Mnuchin*, 568 F. Supp. 3d 1, 6–7 (D.D.C. 2021), CBP determinations, *see Matushkina*, 877 F.3d at 295–96, and to Immigration and Naturalization Service determinations made at the border, *Doan v. INS*, 160 F.3d 508, 509 (8th Cir. 1998). *All* of these cases involved non-"consular" officers as defendants and discussed deferring to the Executive Branch's exclusionary determinations as a separation-of-powers matter. *See Yafai*, 912 F.3d at 1020 ("Congress has delegated the power to determine who may enter the country to the *Executive Branch*, and courts generally have no authority to second-guess the

Executive's decisions." (emphases added)); *see also Pak*, 91 F.4th at 900 ("The doctrine . . . stems from these separation-of-powers principles.").

This broad interpretation of the doctrine makes sense because an "unadmitted and nonresident alien" has "no constitutional right of entry to this country." *Mandel*, 408 U.S. at 762; *see also Fiallo v. Bell*, 430 U.S. 787, 792, 794–95 (1977). In fact, "it is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution." *Agency Int'l Dev. v. All. Open Soc'y Int'l, Inc.*, 591 U.S. 430, 434 (2020); *see also Muñoz*, 602 U.S. at 908 (holding that a foreign national co-plaintiff "cannot invoke the exception himself, because he has no 'constitutional right of entry to this country as a nonimmigrant or otherwise'" (quoting *Mandel*, 408 U.S. at 762)). As a consequence, and aside from a narrow exception for potential constitutional claims brought by U.S. resident plaintiffs, courts may not review Executive Branch decisions to exclude foreign nationals "unless expressly authorized by law," *Knauff*, 338 U.S. at 542–43; *see also Pak*, 91 F.4th at 901 (similar); *El-Hadad v. United States*, 377 F. Supp. 2d 42, 46 (D.D.C. 2005) ("It is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."). And Congress has never authorized such review. It has instead expressly *rejected* such a cause of action "to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa." 6 U.S.C. § 236(f).

II. District Court Proceedings

The plaintiffs in this case are five separate Indian nationals. R. 1 at 2-6. According to the complaint, they were previously admitted into the United States as F-1 foreign students and were either working (or had previously worked) in the United States through the OPT program discussed above. *See id.* Most relevant to this case is how each was previously recruited and hired by three companies while they were working through the OPT program, Apex IT Systems, Inc. ("Apex"); Wireclass Technologies LLC ("Wireclass"); and Integra Technologies LLC ("Integra"). These companies illegitimately allowed plaintiffs to continue with the OPT program for F-1 students but without performing *any* genuine work study. *See id.* Plaintiffs later moved on from their "work studies" with Apex, Wireclass, or Integra; two continued as F-1 students on OPT, but with different companies, *see id.* at 2–4, 23; R. 12-1; R. 12-3, and three worked for other employers after changing to H-1B status as specialty occupation workers, *see* R. 1 at 2–6; R. 12-2; R. 12-4; R. 12-5.

Per the complaint, the plaintiffs each departed the United States of their own accord and then attempted to return by applying for admission at various airport ports of entry. *See* R. 1 at 1–6; *see also* R. 12-1–5. During separate primary inspections at different airports on different dates, CBP directed each of the plaintiffs into secondary inspection, interviewed them, and concluded that each had committed fraud or made a willful misrepresentation of material fact (that is, lied to either a consular officer, CBP officer, or both) about accepting OPT and previously being affiliated with either Apex, Wireclass, or Integra. On this basis, four of the plaintiffs

were ordered expeditiously removed to India, *see* R. 12-1–2 & 12-4–5, while plaintiff Gaurav Ghase was allowed to withdraw his application for admission in lieu of a formal order of expedited removal being entered against him, *see* R. 12-3.

Plaintiffs filed their complaint in June 2024. R. 1. They generally alleged that DHS's purported findings (either USCIS's information communicated to CBP, CBP's own inadmissibility findings as recorded in their expedited removals against them, or both) were arbitrary and capricious under the APA, and that they were, in fact, admissible to the United States as either F-1 or H-1B nonimmigrants. *See id.* at 32. They brought three claims: (1) that DHS's construction of 8 U.S.C. § 1182(a)(6)(C)(i) as applied to them is unlawful under the APA, *id.* at 27–29; (2) that DHS's inadmissibility findings (either actual or purported) violated the APA because they are, in effect, inadmissibility determinations in tension with USCIS's policy manual, *id.* at 29–31; and (3) that the inadmissibility findings made against them (made by either USCIS or CBP) were "procedurally irregular" and failed to consider specific evidence or arguments of the plaintiffs, *id.* at 31–32.

On February 3, 2025, the district court dismissed the complaint for lack of subject matter jurisdiction. R. 21; App'x 1–12. The district court arrived at this conclusion by refusing to address all the asserted bases for nonjusticiability (such as lack of final agency action), *see id.* at 12, but nonetheless rejected defendants' arguments relating to misjoinder, *id.* at 5–6, standing, *id.* at 6–8, and nonreviewability, *id.* at 8–10. The district court ultimately concluded that plaintiffs' claims were, in fact, challenges to their past expedited removals. *See id.* at 12

("[E]ach plaintiff is expressly challenging a determination by DHS that they were inadmissible. That was the determination upon which CBP relied in excluding them and ordering them removed[.]"). The district court therefore held that plaintiffs' claims were jurisdictionally barred by 8 U.S.C. § 1252(a)(2)(A), which bars judicial review of any "order of removal pursuant to" the expedited removal procedure outlined in 8 U.S.C. § 1225(b)(1)(A)(i). This appeal followed.

Summary of the Argument

The district court properly dismissed plaintiffs' complaint because plaintiffs were challenging the expedited removals that courts are barred from reviewing under 8 U.S.C. § 1252(a)(2)(A). *See Thuraissigiam*, 591 U.S. at 112; *Odei*, 937 F.3d at 1094–95. In this regard, plaintiffs' litigation strategy is similar to the nonjusticiable visa refusal discussed by this court in *Matushkina*, where the plaintiff wished to avoid dismissal by insisting that she was not challenging the visa refusal itself (the last-in-time agency action), but was instead challenging the underlying determinations that were the bases for that visa refusal. Yet this court concluded that courts are "not required to take a plaintiff's word that she is not challenging the visa denial." *Matushkina*, 877 F.3d at 295. The same is true here with respect to expedited removals, as this court has already held that § 1252(a)(2)(A)(i)'s expansive language shields "'any *individual determination* . . . arising from or relating to the implementation or operation of an [expedited] order of removal pursuant to § 1225(b)(1).'" *Odei*, 937 F.3d at 1094–95 (emphasis added), *quoting* § 1252(a)(2)(A)(i).

Alternatively, because this court "may affirm the district court's dismissal on any ground supported by the record, even if different from the grounds relied upon by the district court," *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 597 (7th Cir. 2001), the dismissal below can be affirmed because of three additional justiciability defects.[5] First, without ever discussing when they intend to come to the United States, plaintiffs have failed to allege a requisite injury-in-fact. This is fatal to their case because an *imminent* injury is necessary to support standing for Article III jurisdiction in cases asking for forward-looking, injunctive relief. *See, e.g.*, *Morgan v. Fed. Bureau of Prisons*, 129 F.4th 1043, 1048–49 (7th Cir. 2025). Second, plaintiffs' claims are also not justiciable under the nonreviewability doctrine—which applies beyond just consular decisionmaking and insulates inadmissibility decisions made by the Executive Branch more generally. *See Hawaii*, 585 U.S. at 703–04 (discussing how the doctrine has been applied "to broad executive action"); *Matushkina*, 877 F.3d at 295 (applying the doctrine to determinations not made by consular officers). And finally, even if this court were to distinguish antecedent determinations allegedly made by USCIS from the inadmissibility determinations made by CBP (which led to plaintiffs' expedited removals) and conclude that those prior determinations should be subject to APA review, plaintiffs' APA claims would still fail because those are

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[5] In this regard, there is no merit in plaintiffs' assertion that the "government has not appealed the denied portions of its motion" to dismiss. Br. 2. As will be discussed in more detail below, defendant disagrees with various aspects of the district court's *opinion*, but it would be passing strange for any defendant to appeal a *judgment* of dismissal. *Cf. Stephens v. Heckler*, 766 F.2d 284, 287 (7th Cir. 1985) (appellate courts review "judgments, not opinions").

admittedly not challenges to *final* agency actions (which here were the expedited removals). *See Dhakal v. Sessions*, 895 F.3d 532, 540–41 (7th Cir. 2018). In sum, the district court's judgment should be affirmed.

Argument

I. Standard of Review

This court reviews dismissals for lack of jurisdiction *de novo* and may affirm on any ground in the record. *Dhakal v. Sessions*, 895 F.3d at 536.

II. The District Court Correctly Concluded That It Lacked Jurisdiction over Plaintiffs' APA Claims.

As indicated above, IIRIRA removes courts' jurisdiction to review an order of removal pursuant to 8 U.S.C. § 1225(b)(1) (that is, an expedited removal order) "except as provided in" Section 1252(e). 8 U.S.C. § 1252(a)(2)(A)(i). Subsection (e), in turn, removes courts' jurisdiction to provide relief "[w]ithout regard to the nature of the action or claim," save for two specific carve outs: (1) limited habeas corpus proceedings under § 1225(e)(2); and (2) limited systemic challenges under § 1225(e)(3). *See id.* §§ 1225(e)(1)–(3). The plaintiffs' claims here were brought under the APA. *See* R. 1 at 27–32. But the APA does not provide a cause of action if (1) "statutes preclude judicial review," or (2) "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a); *see also Soni v. Jaddou*, 103 F.4th 1271, 1273 (7th Cir. 2024) (discussing how the APA's "grant of authority comes with an exception: it does not apply when 'statutes preclude judicial review'" (quoting § 701(a)(1)). And because plaintiffs' claims here attack inadmissibility determinations that "aris[e] from or relat[e] to the implementation or operation of an

order of removal under Section 1225(b)(1)" and the "application of [section 1225(b)(1)] to individual aliens," no court has jurisdiction to review the inadmissibility findings at the heart of plaintiffs' complaint. 8 U.S.C. § 1252(a)(2)(A)(i) & (iii); *cf. Soni*, 103 F.4th at 1273 (noting how another jurisdictional provision precludes judicial review "so by its own terms the APA drops out").

In *Odei*, for example, this court reviewed the case of a man who arrived at O'Hare International Airport, where CBP officials determined that his visa was not valid for the purposes he intended to use it, and thus cancelled his visa and found him inadmissible under 8 U.S.C. § 1182(a)(7). 937 F.3d at 1092. The foreign national then withdrew his request for admission and voluntarily departed. *Id.* at 1094. Despite never actually being issued an order of expedited removal, this court affirmed the district court's determination that it lacked subject matter jurisdiction under 8 U.S.C. § 1252 to review CBP's inadmissibility determinations. *Id.* Specifically, this court determined that it was barred from considering whether the foreign national was actually admissible or entitled to any relief from removal. *Id.* at 1095. Further, the *Odei* court found that an order of removal was synonymous with an order of deportation, and because the term "order of deportation" refers to *both* a decision "ordering deportation" and an order "concluding that the alien is deportable," the inadmissibility determination was covered by the bar on judicial review for expedited removal orders. *Id.* at 1094 (citing *Mejia Galindo v. Sessions*, 897 F.3d 894, 987 (7th Cir. 2018)); *see also* 8 U.S.C. § 1101(a)(47)(A) (defining "order of deportation").

As for the distinction between an actual order of expedited removal versus the finding of inadmissibility itself, the *Odei* court found it immaterial to the question of subject matter jurisdiction that the plaintiff had withdrawn his request for admission at the port of entry (as, for example, plaintiff Ghase did in this case), rather than be put through formal expedited removal proceedings and ordered removed on paper. *Id.* Because an "order of removal" also encompassed an *order concluding that a foreign national was removable*, "the courts lack jurisdiction to review orders to remove and also orders that an alien *is removable*." *Id.* at 1094 (emphasis added). This latter category is the most akin to plaintiffs' attacks on the underlying inadmissibility findings at the heart of their expedited removal orders, and this case is therefore equally covered by *Odei*. The CBP officers in *Odei* "determined that Odei was inadmissible under § 1182(a)(7) and cancelled his visa. Under § 1225(b)(1)(A)(i), the Department of Homeland Security was required to remove him once he dropped his asylum claim. Though that never happened because Odei withdrew his application for admission, the initial determination that he was inadmissible under § 1182(a)(7) and § 1225(b)(1)(A)(i) was nonetheless an 'order of removal'" that the court was precluded from reviewing. *Id.* Plaintiffs' challenges to their exclusions stemming from their expedited-removal orders, along with the incorporated inadmissibility findings *behind* those removals, were therefore correctly dismissed by the district court. *See* R. 21 at 11–12; App'x at 11–12.

Plaintiffs disagree with this chain of reasoning by going beyond what is included in their complaint and insisting "that they do not challenge or seek to

overturn *CBP officers'* decisions to remove them," but only "the fraud findings used to justify the orders of removal[.]" Br. 8 (emphasis added). In other words, plaintiffs argue that this case is different from *Odei* because there was no allegation in that case that USCIS (rather than just CBP) made any finding of inadmissibility. *See id.* at 9. This approach is wrong for at least three reasons. First, although the plaintiffs now argue that they are attacking inadmissibility determinations made by USCIS, the complaint never made that assertion (and indeed, as a matter of fact, such determinations were not made by USCIS). *See* R. 1 at 2–5 ("Defendant DHS made a determination that Plaintiff[s] . . . w[ere] inadmissible to the United States and annotated this in its electronic records."). Thus, plaintiffs inappropriately recast their entire argument as challenging the "USCIS decisions" that USCIS did not actually make. *See Kennedy v. Venrock Assocs.*, 348 F.3d 584, 594 (7th Cir. 2003) ("[A] plaintiff cannot amend his complaint in his appeal brief."). This is improper because although plaintiffs "can allege (hypothesize) new facts on appeal, such facts are irrelevant if not consistent with the complaint." *Holman v. Indiana*, 211 F.3d 399, 405 (7th Cir. 2000); *see also Cody v. Harris*, 409 F.3d 853, 859 (7th Cir. 2005) (holding that a plaintiff cannot amend a complaint in their appeal brief).

Second, pointing to USCIS and not CBP is a distinction without a difference where Congress never made any such distinction in 8 U.S.C. § 1252(a)(2)(A). Instead, the INA provides that "no court shall have jurisdiction to review . . . *any individual determination* or to entertain any other cause or claim arising from *or relating to* the implementation or operation of an order of removal pursuant to section 1225(b)(1)."

§ 1252(a)(2)(A)(i) (emphases added); *see also Khan v. Holder*, 608 F.3d 325, 329–30 (7th Cir. 2010) (explaining the operation of the jurisdictional bar). As the Supreme Court has explained, "the word 'any' naturally carries 'an expansive meaning.'" *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 362–63 (2018) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). It "refer[s] to a member of a particular group or class without distinction or limitation" and, in this way, "impl[ies] *every* member of the class or group." *Id.* (alteration and emphasis in original) (quoting *Oxford English Dictionary* (3d ed., Mar. 2016)). And, as this court has explained when interpreting another one of the INA's jurisdiction-stripping provisions, "[n]o review means no review; the statute does not need to list all of the many potential legal theories that are not reviewable." *Soni*, 103 F.4th at 1273.

Third, plaintiffs' interpretive approach also conflicts with the language set forth in 8 U.S.C. § 1252(e). That statute outlines limited exceptions to the jurisdictional bar on expedited removals, noting that courts have jurisdiction to inquire only "whether such an order in fact was issued and whether it relates to the petitioner." But the statute explicitly underscores how "[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal." 8 U.S.C. § 1252(e)(5); *see also Kahn*, 608 F.3d at 330. Plaintiffs' preferred approach of allowing for APA claims against underlying or antecedent inadmissibility determinations would undermine the "no review" provision. This is because every plaintiff would simply avoid the jurisdictional bar via artful pleading—attacking the underlying reasons behind expedited removals, as long as it could be claimed that

information from another agency was communicated to CBP. That is the exact opposite of what Congress wanted in this context and is not how statutory interpretation is supposed to work. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (citation omitted)); *United States v. Gamez*, 89 F.4th 608, 611 (7th Cir. 2024) (applying the same canon); *see also* A. Scalia & B. Garner, *Reading Law* 174–79 (2012) (summarizing canon against surplusage).

III. Without Any Specific Plans or Intentions to Come to the United States in the Near Future, Plaintiffs Lack Standing.

Alternatively, the district court was incorrect to conclude that plaintiffs had standing in this case.[6] This is because there was no allegation that any of the plaintiffs intend to return to the United States (much less any specific dates). This matters because an injury in fact must not only be "concrete and particularized," but also "actual or imminent." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). As this court has put it, "to establish injury in fact when seeking prospective injunctive relief, a plaintiff must allege a 'real and immediate' threat of future violations of their rights." *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1074 (7th Cir. 2013). This is a typical problem in APA lawsuits where the plaintiffs do not allege any direct harm or impact upon themselves in the near

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[6] Because both § 1252(a)(2)(A) and standing are jurisdictional, this court has the discretion to "address jurisdictional issues in any order [it] choose[s.]" *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 4 (2023); *see also Church Mut. Ins. Co. v. Frontier Mgmt.*, 124 F.4th 1047, 1051–52 (7th Cir. 2025).

future. *See Murthy v. Missouri*, 603 U.S. 43, 58 (2024) ("[B]ecause the plaintiffs request forward-looking relief, they must face a real and immediate threat of repeated injury." (quotations omitted)). Without any plan to come to the United States in the complaint, even plaintiffs' past exclusions, visa refusals, or inadmissibility findings do not create a sufficient injury because "[p]ast exposure to illegal conduct does not in itself show a present case or controversy[.]" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

In this case, the complaint does not ever allege that plaintiffs have plans (concrete or otherwise) to come to the United States or what will happen *if* they re-apply for a visa. In rejecting the defendant's argument on this point as "utterly lacking in merit," the district mistakenly makes the *assumption* that plaintiffs have established an intent to return, R. 21 at 7; App'x at 7, despite not even including an allegation to that effect in their complaint. But, as the Supreme Court has explained, "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of [an] 'actual or imminent' injury." *Defenders*, 504 U.S. at 564 (emphasis in original). In *Defenders*, for example, the Supreme Court specifically ruled that to prove future travel plans, plaintiffs must provide a "description of concrete plans." *Id.* (holding that plaintiffs could not establish future harm when they merely alleged that they intended to travel again "in the future," but failed to provide any "current plans"). So too here—without any description of when (or even if) plaintiffs plan to attempt to come back to the United States, they do not have standing to seek declaratory or injunctive relief

because a "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty, Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis added).

The district court's assumptions about future injury were unwarranted. This is because the district court explicitly relied upon past injury, noting how "each of the [plaintiffs] was stopped, and removed, *while at a port of entry after returning to the United States*."[7] *Id.* (emphasis in original). The district court believed that this was "enough to establish an intent to return that was thwarted." *Id.* In addition, the district court mistakenly relied on cases where "the lost opportunity to obtain permanent residency or adjustment of status . . . amounts to an injury in fact." *Id.* (citations omitted).

But that "injury" is not even present here because the plaintiffs in this case only intended to work in the United States on *temporary*, nonimmigrant visas, and both "permanent residency" and "adjustment of status" are for LPRs (or colloquially, green card holders)—persons who intend to reside in the United States indefinitely. *See Park v. Barr*, 946 F.3d 1096, 1099 (9th Cir. 2020) (per curiam) (distinguishing between temporary nonimmigrant categories and immigrant LPRs, as the latter category is for foreign nationals who intend to remain here indefinitely). And this is for good reason for many of the plaintiffs—as the F-1 student visa classification

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[7] Technically, plaintiffs never "return[ed] to the United States," as the district court described. R. 21 at 7; App'x at 7. This is because they were not yet admitted. *See, e.g.*, *Thuraissigiam*, 591 U.S. at 139–40 (explaining what is known as the "entry fiction," and how, because of this doctrine, foreign nationals do not have a procedural due process right to judicial review of any allegedly flawed determination made in their expedited removals, even though the foreign national in that case had made it 25 yards into U.S. territory before he was caught by CBP officials).

requires nonimmigrants to maintain a residence in their country of citizenship with *no intention of abandoning it*. *See* 8 U.S.C. § 1101(a)(15)(F); *see also Elkins v. Moreno*, 435 U.S. 647, 665 (1978) ("By including restrictions on intent in the definition of some nonimmigrant classes, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States was to immigrate permanently.").

Relatedly, the district court's former basis for finding injury here is the same defect that was present in *Murthy*, *Clapper*, and *Defenders* discussed above—past injuries are not enough to show the requisite continuing or imminent injury for forward-looking injunctive relief. *See Morgan*, 129 F.4th at 1048; *Simic v. City of Chicago*, 851 F.3d 734, 738 (7th Cir. 2017) ("[A] past injury alone is insufficient to establish standing for purposes of prospective injunctive relief."). As the Third Circuit has explained, "[w]hen a plaintiff seeks retrospective (backward-looking) relief in the form of money damages, they can establish standing through evidence of a past injury." *Yaw v. Del. River Basin Comm'n*, 49 F.4th 302, 317–18 (3d Cir. 2022). "But when a plaintiff seeks prospective (forward-looking) relief in the form of an injunction or a declaratory judgment, they must show that they are 'likely to suffer future injury.'" *Id.* at 318 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

This requirement of imminent future injury is crucial because there is nothing to stop plaintiffs from attempting another future admission into the United States. They may apply whenever they like for another F-1 or H-1B visa before a consular

officer. But they have not done so (and are only suing DHS); perhaps because they *assume* that a consular officer will deny their visa applications after having now been expeditiously removed from U.S ports of entry.[8] And that is because of how they will not have a viable claim against any such potential visa refusal based on the doctrine of nonreviewability (discussed below). *See Tao Han v. Tarango*, No. 23-cv-6159, 2024 WL 3186556, at *2 (N.D. Cal. June 25, 2024) (dismissing case because "the doctrine of consular nonreviewability bars Mr. Han's claims" and noting that "Mr. Han's decision to sue USCIS rather than the State Department does not insulate his claims from the doctrine of consular nonreviewability"); *see also Thatikonda v. DHS*, No. 21-cv-1564, 2022 WL 425013, at *6 (D.D.C. Feb. 11, 2022) ("[The plaintiff]'s suit is barred by the doctrine of consular nonreviewability. Just as it made no difference that Matushkina challenged the CBP finding of inadmissibility, it makes no difference here that [the plaintiff] purports to attack a USCIS finding."); *Xiao Jia Luo v. Coultice*, 178 F. Supp. 2d 1135, 1139 (C.D. Cal. 2001) ("Although Plaintiffs have brought suit against the INS, through the Director of a local service center, their real quarrel is with the consular officials in China who denied their applications."). To

[8] This goes for all plaintiffs except Ghase, whose latest visa application was denied in April 2024. https://ceac.state.gov/CEACStatTracker/Status.aspx (last accessed May 22, 2025) (select "Non-Immigrant Visa (NIV)" in the "Visa Application Type" field; select "India, Hyderabad" in the "Select a Location" field; input "2024095 171 0009" in the "Application ID or Case Number" field; input "S2785280" for the "Passport Number" field, *see* R. 12-3 at 1; and input "Ghase" into the "First 5 Letters of Surname" field). This court may take judicial notice of the State Department's publicly available information on its website. *See, e.g., Orgone Cap. III, LLC v. Daubenspeck*, 912 F.3d 1039, 1043–44 (7th Cir. 2019).

avoid that outcome, plaintiffs obscure basic facts about themselves and do not say when, if ever, they would like to come to the United States.

In *Defenders*, for example, the plaintiffs challenged a regulation interpreting the Endangered Species Act. 504 U.S. at 555. The Court found that affidavits of two environmental group members contained no facts "showing how damage to the species will produce 'imminent' injury to [the affiants]" and the members' "'some day' intentions" to return to the foreign countries to try to see the endangered animals did "not support a finding of the 'actual or imminent' injury." 504 U.S. at 564. The *Defenders* Court also rejected the general contention that the plaintiffs used the "ecosystem" without stating that they "use[d] the area affected by the challenged activity." *Id.* at 565–66. Applying this principle to the instant case, it is not enough that an injury *may* occur to plaintiffs at some indeterminate point; it must be reasonably imminent. *See Clapper*, 568 U.S. at 409.

Without ever discussing *when* plaintiffs wish to come to the United States, or when (if ever) they might like to apply for permanent residency here (presumably after they no longer wish to be F-1 students or temporary H-1B specialty-occupation workers), the complaint alleges only a generalized grievance with how the defendants made an inadmissibility finding against plaintiffs in the *past*. That is not enough for *prospective* injunctive relief. *See, e.g.*, *Hummel v. St. Joseph Cnty. Bd of Comm'rs*, 817 F.3d 1010, 1017 (7th Cir. 2016) (no standing for injunctive relief under the Americans with Disabilities Act where plaintiffs had no plans to return to an allegedly non-compliant courthouse).

IV. The Nonreviewability Doctrine Likewise Makes This Case Nonjusticiable.

This case is similarly nonjusticiable based on the doctrine of nonreviewability, and the district court erred in rejecting this basis for dismissal. *See* R. 21 at 8–10; App'x at 8–10. As discussed above, the doctrine of nonreviewability recognizes that Executive Branch officers have the *exclusive* authority to review foreign nationals' admissibility. *See* 8 U.S.C. §§ 1104(a), 1201(a), (g); *see also Lem Moon Sing*, 158 U.S. at 545 (Congress may entrust the "final determination" of whether a foreign national may enter the United States "to an executive officer," and "if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine" it). This case is thus nonreviewable under this longstanding separation-of-powers principle.

The district court disagreed (overlooking cases such as *Lem Moon Sing*—which was decided before visas were even required for travel to the United States) by cabining the doctrine to consular decisionmaking or decisions about visas. R. 21 at 8–10; App'x at 8–10. But one of the plaintiffs (Ghase) *did* return to India and had his visa application denied by a consular officer based on his expedited removal. *See supra* n.8. It is true, of course, that courts usually recognize the doctrine within the context of consular officers' decisionmaking on visas. *See, e.g.*, *Muñoz*, 602 U.S. at 907. But the doctrine's more commonly used labeling stems merely from how consular decisionmaking is the most frequent context for exclusionary decisions. *See, e.g.*, *Van Ravenswaay v. Napolitano*, 613 F. Supp. 2d 1, 3 (D.D.C. 2009) (applying the doctrine where plaintiff argued that he was challenging the authority of the Secretary

of State, not the consular officer's decision). And multiple decisions show that the doctrine applies more broadly to the Executive Branch's inadmissibility determinations rather than just *consular officers*'. *See, e.g.*, *Hawaii*, 585 U.S. at 702–03 (applying the doctrine to the President); *Mandel*, 408 U.S. at 769–70 (applying the doctrine to the Attorney General).

As alluded to above, plaintiffs' attempt to dress up their challenge to CBP's inadmissibility determinations via a discussion of USCIS, or the potential of a consular officer denying a visa (as with plaintiff Ghase), still runs into the doctrine. *See Pak*, 91 F.4th at 901 (rejecting an end-run around the doctrine via "repackaging"); *Tao Han*, 2024 WL 3186556, at *2 ("The doctrine . . . applies whether [plaintiff] is challenging the consular office's visa denial, the USCIS fraud finding underpinning the visa denial, or the USCIS refusal to waive [his] inadmissibility."). And this is so because "plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established" and "Congress has delegated conditional exercise of this power to the *Executive*," *Mandel*, 408 U.S. at 770, not just to consular officers.

Further, this court has already ruled that the nonreviewability doctrine applies outside of consular decisionmaking and in this same context. *See Matushkina*, 877 F.3d at 295–96 (applying the doctrine where a CBP inadmissibility determination was challenged). That decision is not alone. *See Doan*, 160 F.3d at 509 (applying the doctrine to an inadmissibility decision of the former Immigration and Naturalization Service, which was an office within the United States Department

of Justice); *Algzaly v. Blinken*, No. 21-16375, 2022 WL 2235785, at *2 (9th Cir. June 22, 2022) ("Bringing an APA claim against USCIS rather than the State Department, does not overcome the consular nonreviewability doctrine." (citing cases)). In sum, "effort[s] to avoid the doctrine of consular nonreviewability" by not suing the "State Department or U.S. consular officials," and only "challeng[ing] the inadmissibility determination that is the basis for the unfavorable visa decision," do not avoid the doctrine of nonreviewability. *Matushkina*, 877 F.3d at 295.

Nor does any exception to the doctrine apply. Far from the review that plaintiffs demand under the APA, courts have engaged in only a limited review of an inadmissibility determination when *a U.S. citizen* presents a cognizable constitutional interest burdened by that decision. *See Muñoz*, 602 U.S. at 902. And even then, courts have only reviewed that determination to confirm that the Executive Branch gave a "facially legitimate and bona fide" reason. *Mandel*, 408 U.S. at 769. As there is no constitutional right of *any* U.S. citizen involved here, this "narrow exception" is irrelevant. *Pak*, 91 F.4th at 901. In short, nonreviewability truly means "no review," and applies here to bar plaintiffs' claims.

V. Plaintiffs' APA Claims Fail Because They Are Admittedly Not Challenging a "Final Agency Action."

Finally, setting aside the justiciability problems discussed above, plaintiffs' claims could have also been dismissed because the purported information (or determinations), even if they were communicated by USCIS to CBP, are not final agency actions. As briefly discussed above, "the APA allows judicial review . . . *only* over 'final agency action.'" *Dhakal*, 895 F.3d at 539 (emphasis added) (quoting 5

U.S.C. § 704). Two conditions must be satisfied for agency action to be "final": "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). The former requirement cannot be met here for anything preceding the expedited removal orders (the last-in-time agency actions for all plaintiffs except plaintiff Ghase—whose own final agency action was a visa refusal in April 2024) if the court credits the plaintiffs' argument that there are two "final" agency actions here by DHS (that is, one communication of inadmissibility made by USCIS, and the other inadmissibility determination made by CBP at ports of entry) because their "rights and obligations ha[d not yet] been determined." *Id.*

In the immigration context, this court has consistently ruled that there is no final agency action under the APA where a plaintiff can still seek the same relief by another agency. *See Dhakal*, 895 F.3d at 540–41; *McBrearty v. Perrymany*, 212 F.3d 985, 987 (7th Cir. 2000) (explaining that the plaintiffs' "suit was premature" because "they could obtain review of the district director's decision by the Board of Immigration Appeals if and when the immigration service institutes removal (i.e., deportation) proceedings against them"); *see also Kashani v. Nelson*, 793 F.2d 818 (7th Cir. 1986); *Massignani v. INS*, 438 F.2d 1276 (7th Cir. 1971) (per curiam). And this court's jurisprudence is not alone in this regard. *See Elldakli v. Garland*, 64 F.4th 666, 670–71 (5th Cir. 2023). The same is true here. Although defendants

maintain that the only inadmissibility determinations for plaintiffs were made here by CBP during the expedited removal process, USCIS information communicated to CBP before that time cannot be "final" where, as here, CBP took the baton from USCIS.[9]

To recap, plaintiffs applied for admission to the United States before CBP at various ports of entry across the country—where they were interviewed thoroughly by DHS employees (CBP officers) before being found inadmissible and expeditiously removed (save for plaintiff Ghase's withdrawal of his application for admission, along with his later visa refusal by a consular officer) based on those interviews. *See* R. 12-1–5. As a result, even the allegation that USCIS made a prior inadmissibility determination before CBP ordered that plaintiffs be expeditiously removed would not be the "final" agency action and plaintiffs' claims to that effect could have thus been dismissed on this basis alone. *See McBrearty*, 212 F.3d at 986–87. Moreover, the plaintiffs may still apply for another visa in the future. *Cf. Elldakli*, 64 F.4th at 670–71 (noting how "the alien retains the right to *de novo* review . . . in his final removal proceedings" and "[t]hus, he has not yet exhausted his administrative remedies" (cleaned up)). And if plaintiffs respond by arguing that another visa application before a consular officer would be futile (using plaintiff Ghase's recent visa denial as an example), that argument would only serve to strengthen the nonreviewability

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[9] Relatedly, the complaint does not even mention whether plaintiffs have applied for any waiver of inadmissibility to further exhaust their options. *See* R. 1 at 26 (mistakenly discussing the lawful-permanent-resident adjustment process, even though plaintiffs had only previously held temporary, nonimmigrant F-1 or H-1B visas before CBP cancelled those visas at ports of entry).

argument outlined above—as plaintiffs would then be attacking the underlying bases for visa denials. *See Matushkina*, 877 F.3d at 295.

Conclusion

For the foregoing reasons, this court should affirm the judgment of the district court.

Respectfully submitted,

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This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 8,780 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Certificate of Service

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