No. 25-20073

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Maribel Sayegh de Kewayfati,
Plaintiff-Appellant,

v.

Pamela Bondi, U.S. Attorney General; Joseph B. Edlow, Director of U.S. Citizenship and Immigration Services; Kristi Noem, Secretary, U.S. Department of Homeland Security; Houston Asylum Office Director,
Defendants-Appellees,

Consolidated With

No. 25-20101

Marlen Sayegh de Maari,
Plaintiff-Appellant,

v.

Pamela Bondi, U.S. Attorney General; Joseph B. Edlow, Director of U.S. Citizenship and Immigration Services; Kristi Noem, Secretary, U.S. Department of Homeland Security; Houston Asylum Office Director,
Defendants-Appellees

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
D.C. No. 4:24-cv-180/4:23-cv-4129

BRIEF FOR THE DEFENDANTS-APPELLEES

BRETT A. SHUMATE
Assistant Attorney General

ANTHONY P. NICASTRO
Director
Office of Immigration Litigation

WILLIAM C. SILVIS
Assistant Director

MICHAEL CELONE
Senior Litigation Counsel

MARIE H. FEYCHE
Trial Attorney
Office of Immigration Litigation
General Litigation and Appeals Section
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 598-9724
Fax: (202) 305-7000
Email: Marie.Feyche@usdoj.gov

Attorneys for Defendants-Appellees

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CERTIFICATE OF INTERESTED PERSONS PURSUANT TO LOCAL RULE 28.2.1

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Plaintiffs-Appellants: Maribel Sayegh de Kewayfati and Marlen Sayegh Agam de Maari, represented by Javier Rivera, Esq. There are no other private (non-governmental) parties.

Defendants-Appellees: Pamela Bondi, U.S. Attorney General; Joseph B. Edlow, Director of U.S. Citizenship and Immigration Services; Kristi Noem, Secretary, U.S. Department of Homeland Security; Houston Asylum, Office Director; Brett A. Shumate, Assistant Attorney General, U.S. Department of Justice, Civil Division; Anthony P. Nicastro, Acting Director, U.S. Department of Justice, Civil Division, Office of Immigration Litigation – General Litigation and Appeals Section; William C. Silvis, Assistant Director, U.S. Department of Justice, Civil Division, Office of Immigration Litigation – General Litigation and Appeals Section; Michael Celone, Senior Litigation Counsel, Office of Immigration Litigation – General Litigation and Appeals Section; and Marie Feyche, Trial

Attorney, U.S. Department of Justice, Civil Division, Office of Immigration Litigation, General Litigation and Appeals Section.

Dated: August 1, 2025

/s/ Marie H. Feyche

Marie H. Feyche
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
General Litigation and Appeals Section
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 598-9724
Fax: (202) 305-7000
Email: Marie.Feyche@usdoj.gov

STATEMENT REGARDING ORAL ARGUMENT PURSUANT TO LOCAL RULE 28.2.3

It is Defendants-Appellees' position that oral argument would be helpful for the Court to resolve this appeal. *See* Fed. R. App. P. 34.

Dated: August 1, 2025

/s/ Marie H. Feyche
Marie H. Feyche
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
General Litigation and Appeals Section
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 598-9724
Fax: (202) 305-7000
Email: Marie.Feyche@usdoj.gov

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS PURSUANT TO LOCAL RULE 28.2.1 iv

STATEMENT REGARDING ORAL ARGUMENT vi

PURSUANT TO LOCAL RULE 28.2.3 vi

TABLE OF CONTENTS vii

TABLE OF AUTHORITIES ix

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

I. Statutory Background 2

a. *Affirmative Process* 2

b. *Defensive Process* 4

c. *Temporary Protected Status* 5

II. Factual Background 6

III. The District Court dismissed Plaintiff Maari's claim under Fed. R. Civ. P. 12(b)(1) and Plaintiff Kewayfati's claim under Fed. R. Civ. P. 12(b)(6). 7

SUMMARY OF THE ARGUMENT 8

STANDARDS OF REVIEW 9

I. Federal Rule of Civil Procedure 12(b)(1) 9

II. Federal Rule of Civil Procedure 12(b)(6) 10

ARGUMENT 11

I. USCIS's denials of Plaintiffs' asylum applications do not constitute final decisions and, as a result, the district courts lacked subject matter jurisdiction over Plaintiffs' Complaints. 11

a. *The Court lacks subject matter jurisdiction under Rule 12(b)(1).* 11

b. *Alternatively, Plaintiffs claims should be dismissed under Rule 12(b)(6) for failure to state a claim* 17

CONCLUSION 18

CERTIFICATE OF SERVICE 20

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT.....21

TABLE OF AUTHORITIES

Cases

Aben v. Garland,
113 F.4th 457 (5th Cir. 2024) 16

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 16

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 10

Bender v. Williamsport Area School District,
475 U.S. 534 (1986) 10

Bennett v. Spear,
520 U.S. 154 (1997) 9, 12

Biden v. Texas,
597 U.S. 785 (2022) 4

Cardona-Franco v. Garland,
35 F.4th 359 (5th Cir. 2022) 15

Dhakal v. Sessions,
895 F.3d 532 (7th Cir. 2018) ..... *passim*

Doe v. United States Citizenship & Immigration Servs.,
No. 20 CV 7263, 2021 U.S. Dist. LEXIS 69836 (N.D. Ill. Apr. 12, 2021) 12

Duarte v. Mayorkas,
27 F.4th 1044 (5th Cir. 2022) 5

Edionwe v. Bailey,
860 F.3d 287 (5th Cir. 2017) 10

Elldakli v. Garland,
64 F.4th 666 (5th Cir. 2023) 7, 11, 15, 17, 18

Flores v. Garland,
72 F.4th 85 (5th Cir. 2023) 9

Garcia v. United States Citizenship & Immigration Servs.,
No. 21-cv-2233, 2022 U.S. Dist. LEXIS 144249 (N.D. Tex. Aug. 12, 2022) 17

Lane v. Halliburton,
529 F.3d 548 (5th Cir. 2008) 10

Peoples Nat'l Bank v. Off. of the Comptroller of the Currency of the U.S.,
362 F.3d 333 (5th Cir. 2004) 9, 12

Petrenko-Gunter v. Upchurch,
No. 05-11249, 2006 U.S. App. LEXIS 24684 (5th Cir. Oct. 2, 2006) 17

Ramming v. U.S.,
281 F.3d 158 (5th Cir. 2001) 10

Sanchez v. Mayorkas,
141 S. Ct. 1809 (2012) 14

Sayegh de Kewayfati v. Garland,
No. 24-cv-00180, 2025 WL 347059 (S.D. Tex. Jan. 30, 2025) 7

Solarzano v. Mayorkas,
987 F.3d 392 (5th Cir. 2021) 14

Texas v. Becerra,
89 F.4th 529 (5th Cir. 2024) 9, 12

Umuzayire v. Ashcroft,
No. CIV.A.02-1338, 2003 WL 367743 (E.D. La. Feb. 14, 2003) 16

Statutes

5 U.S.C. § 704 12
8 U.S.C. § 1101(a)(42) 3
8 U.S.C. § 1158 (a)(2) 2
8 U.S.C. § 1158 (b)(1)(A) 3
8 U.S.C. § 1252 4
8 U.S.C. § 1254(a) 5, 14
8 U.S.C. § 1254(a)(1)(A) 5
8 U.S.C. § 1254(a)(1)(B) 5
8 U.S.C. § 1254(b)(2) 5
8 U.S.C. § 1254(c) 5
8 U.S.C. § 1331 1
28 U.S.C. § 1291 1

Rules

Fed. R. Civ. P. 12(b)(1) 1, 7, 11
Fed. R. Civ. P. 12(b)(6) ..... *passim*

Regulations

8 C.F.R. § 208.2(b) 4
8 C.F.R. § 208.4(b) 5
8 C.F.R. § 208.9(b) 3
8 C.F.R. § 208.14 3
8 C.F.R. § 208.14(a) 4
8 C.F.R. § 1003.1(b) 4

STATEMENT OF JURISDICTION

Pursuant to this Court's order, *Sayegh de Kewayfati v. Garland*, 4:24-cv-00180 (S.D. Tex.) ("Kewayfati") and *Sayegh Agam de Maari v. Garland*, 4:24-cv-4129 (S.D. Tex.) ("Maari") are consolidated on appeal. Dkt. No. 17. The district court had jurisdiction under 8 U.S.C. § 1331 as the operative Complaints challenged United States Citizenship and Immigration Service's ("USCIS's") decision to deny Appellants' I-589 Application for Asylum.

The final decision of the district court in *Kewayfati* was pursuant to Fed. R. Civ. P. 12(b)(6). It was issued on January 30, 2025. Plaintiff Kewayfati filed her timely appeal on February 28, 2025.

The final decision of the district court in *Maari* was pursuant to Fed. R. Civ. P. 12(b)(1). It was issued on March 14, 2025. Plaintiff Maari filed her timely appeal on March 26, 2025.

This Court has jurisdiction under 28 U.S.C. § 1291 because these two cases are direct appeals from the final decisions of the district court in the Southern District of Texas.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The denial of an asylum application does not constitute a final agency action under the Administrative Procedure Act ("APA"). In the two cases in this consolidated appeal, Plaintiffs challenged USCIS's denials of their

asylum application. Were Plaintiffs' claims subject to dismissal for lack of subject matter jurisdiction?

2. Alternatively, to the extent this Court determines that finality is not jurisdictional, did Plaintiffs fail to state a claim under the APA?

STATEMENT OF THE CASE

I. Statutory Background

There are two separate processes by which one can seek and obtain asylum protection in the United States. One is an affirmative process in which an applicant applies directly to USCIS, and the other is a defensive process by which a respondent requests asylum as a defense against removal in proceedings before in immigration court with the Executive Office for Immigration Review. Additionally, certain individuals who are granted Temporary Protected Status ("TPS") are bestowed certain protections under the law including, but not limited to, protection from removal.

a. Affirmative Process

If present in the United States, an alien seeking asylum must apply within one year after arriving in the United States unless she can establish changed circumstances which materially affect her eligibility for asylum or extraordinary circumstances relating to the delay in filing her application within one year of her last arrival in the United States. 8 U.S.C. § 1158(a)(2)(B), (D). The filing of a

completed Form I-589, Application for Asylum and for Withholding of Removal, is the first step of the affirmative process. After receipt of a properly filed application, an asylum officer will conduct a non-adversarial interview of the applicant to elicit all relevant and useful information bearing on the applicant's eligibility for asylum. 8 C.F.R. § 208.9(b).

Throughout the affirmative asylum process, the burden of proof is on the applicant to show that she is a "refugee," as defined in § 1101(a)(42) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(42). The applicant may qualify as a refugee either because she has suffered past persecution in her country of origin or because she has a well-founded fear of future persecution if she were to return to that country. *Id.* Based on Form I-589, the information provided by the applicant at the interview or otherwise, and any other information specific to the applicant's case, the asylum officer can approve, deny, dismiss or refer the matter to an Immigration Judge. 8 C.F.R. §§ 208.9(f) and 208.14. The granting of asylum is at the discretion of the Secretary of Homeland Security or the Attorney General, provided the applicant meets their burden of establishing that they are a refugee within the statutory definition. 8 U.S.C. § 1158 (b)(1)(A) (providing that the deciding official "*may grant asylum*") (emphasis added). The Supreme Court has repeatedly observed that "may" does not just suggest discretion, it "*clearly*

connotes" it. *See Biden v. Texas*, 597 U.S. 785, 802 (2022) (emphasis in original) (citations omitted).

b. Defensive Process

A defensive application for asylum occurs when removal proceedings have been brought against an alien, and the alien requests asylum as a defense against removal from the United States. 8 C.F.R. § 208.2(b). Removal proceedings are conducted in immigration court before an Immigration Judge.

Immigration Judges hear defensive asylum cases in an adversarial courtroom-like proceeding. Those present include the alien (and his attorney, if represented) and an attorney from Immigration and Customs Enforcement ("ICE"). After hearing both sides, the Immigration Judge determines whether the individual is eligible for asylum. 8 C.F.R. § 208.14(a). If eligibility is found, the Immigration Judge will determine whether the alien is eligible for any other form of relief from removal. If no eligibility is found, the Immigration Judge will order the individual to be removed from the United States.

The Immigration Judge's decision can be appealed to the Board of Immigration Appeals ("BIA") and then directly to the United States Court of Appeals. 8 U.S.C. § 1252; 8 C.F.R. § 1003.1(b).

If proceedings are initiated without there having been an affirmative asylum procedure before an Asylum Officer, the alien will submit an asylum application for the first time to the Immigration Judge. 8 C.F.R. § 208.4(b).

c. Temporary Protected Status

TPS provides certain protections to nationals of certain TPS-designated countries currently present in the United States. *See* 8 U.S.C. § 1254a. Protections include protection from removal and eligibility for a work authorization. *See id.* at § 1254(a)(1)(A) and (1)(B).

Upon an emergency abroad, the Department of Homeland Security may designate a country for TPS. *See* 8 U.S.C. §1254a(b). The designation of a country is initially done for 6-18 months but may be extended upon a review. *See id.* at § 1254(b)(2), (c). Upon designation of the country, aliens present in the United States may apply for TPS. *See id.* at § 1254(c). If granted, the alien may receive work authorization and if the alien maintains legal TPS will not be removable. *See generally* 8 U.S.C. § 1254a.

However, TPS is only temporary, and "essentially freezes an alien's position within the immigration system . . . it is not itself a 'pathway to family reunification, permanent residency, or citizenship.'" *See Duarte v. Mayorkas*, 27 F.4th 1044, 1053 (5th Cir. 2022) (quoting *Dhakal v. Sessions*, 895 F.3d 532, 538 (7th Cir. 2018)).

II. Factual Background.

Both Appellants are citizens of Venezuela who filed asylum applications and have active TPS.

Plaintiff-Appellant Marlen Sayegh Agam de Maari, a native and citizen of Venezuela, filed her asylum application on June 17, 2014. Maari ROA 48. Plaintiff Maari attended her asylum interview on January 17, 2024. Maari ROA 48. On January 30, 2024, Defendants issued a Notice of Intent to Deny ("NOID") and gave Plaintiff Maari the opportunity to respond. Maari ROA 48. Plaintiff Maari responded timely. Maari ROA 48. Defendants denied Plaintiff Maari's asylum application on March 4, 2024, for the reasons listed in the NOID. Maari ROA 48. Plaintiff Maari and her family currently hold TPS. Maari ROA 147. Due to Plaintiff Maari's and her family's active TPS, USCIS did not refer Plaintiff Maari's asylum application to immigration court to begin removal proceedings. Maari ROA 147.

Plaintiff-Appellant Maribel Sayegh de Kewayfati, a native and citizen of Venezuela, filed her asylum application on June 16, 2014. Kewayfati ROA 52. Plaintiff Kewayfati attended her asylum interview on January 20, 2024. Kewayfati ROA 52. On July 18, 2024, Defendants issued a NOID and gave Plaintiff Kewayfati the opportunity to respond. Kewayfati ROA 52. Plaintiff Kewayfati responded timely. Kewayfati ROA 52. USCIS denied Plaintiff Kewayfati's asylum application on September 30, 2024. Kewayfati ROA 52. Plaintiff Kewayfati and her family

currently hold TPS. Kewayfati ROA 246. Due to Plaintiff Kewayfati's and her family's active TPS, USCIS did not refer Plaintiff Kewayfati's asylum application to immigration court to begin removal proceedings. Kewayfati ROA 246.

III. The District Court Dismissed Plaintiff Maari's Claim Under Fed. R. Civ. P. 12(b)(1) and Plaintiff Kewayfati's Claim Under Fed. R. Civ. P. 12(b)(6).

On April 10, 2024, Plaintiff Maari filed her Amended Complaint alleging that denial of Plaintiff's asylum application is arbitrary, capricious, and contrary to the INA. Maari ROA 44-58. On July 18, 2024, the Defendant-Appellees' ("Defendants") filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), or alternatively, pursuant to Fed. R. Civ. P. 12(b)(6). *Sayegh Agam de Maari v. Noem*, No. 23-cv-4129, ECF No. 11 (S.D. Tex.). On March 10, 2025, the magistrate judge recommended granting the Defendants' motion to dismiss for lack of subject matter jurisdiction because Plaintiff Maari's asylum application constitutes a final, non-reviewable agency action. Maari ROA 147. The district court adopted the magistrate judge's memorandum and recommendation and granted Defendants' Motion to Dismiss, citing to *Dhakal v. Sessions*, 895 F.3d 532 (7th Cir. 2018), *Elldakli v. Garland*, 64 F.4th 666 (5th Cir. 2023), and Order Granting Motion to Dismiss, *Sayegh de Kewayfati v. Garland*, No. 24-cv-00180, 2025 WL 347059 (S.D. Tex. Jan. 30, 2025) when explaining that the denial of asylum does not constitute a final

agency action when the individual retains valid TPS and thus, without final agency action, the Court lacks jurisdiction. Maari ROA 147-148.

On November 5, 2024, Plaintiff Kewayfati filed her Amended Complaint alleging that the denial of Plaintiff's asylum application is arbitrary, capricious, and contrary to the INA. Kewayfati ROA 48-58. On November 19, 2024, Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), or alternatively, pursuant to Fed. R. Civ. P. 12(b)(1). *Sayegh de Kewayfati v. Noem*, No. 24-cv-00180, ECF No. 7 (S.D. Tex.). On January 30, 2025, the district court granted Defendants' motion to dismiss under Fed. Rule. Civ. P. 12(b)(6). Kewayfati ROA 247. The district court relied on *Dhakal v. Sessions*, 895 F.3d 532 (7th Cir. 2018) when holding that the denial of asylum does not constitute a final agency action when the individual retains valid TPS and without final agency action, USCIS's decisions to deny Plaintiffs' asylum applications are not reviewable final agency actions. Kewayfati ROA 245-247.

SUMMARY OF THE ARGUMENT

The denial of Plaintiffs' asylum applications are not final agency actions under the APA. As a result, the district court correctly dismissed the Complaints of Maari and Kewayfati in this consolidated appeal. Maari ROA 147-148; Kewayfati ROA 245-247.

An agency action is final when the action "marks the consummation of the agency's decision-making process," and the action is one "by which rights or obligations have been determined, or from which legal consequences will flow." *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Texas v. Becerra*, 89 F.4th 529, 538 (5th Cir. 2024). Under Fifth Circuit case law, finality is jurisdictional. *Peoples Nat'l Bank v. Off. of the Comptroller of the Currency of the U.S.*, 362 F.3d 333, 336 (5th Cir. 2004). The denial of an asylum application does not constitute final agency action under the APA. *Dhakal v. Sessions*, 895 F.3d 532, 538 (7th Cir. 2018).

As a result, the district court in *Maari* correctly dismissed the Complaint for lack of subject matter jurisdiction and this ruling should be affirmed. In *Kewayfati*, although the court dismissed under Rule 12(b)(6) for failure to state a claim, this Court should affirm the dismissal in this case based on the alternative ground that the district court lacked subject matter jurisdiction.

STANDARDS OF REVIEW

I. Federal Rule of Civil Procedure 12(b)(1)

This Court reviews questions concerning a district court's subject-matter jurisdiction *de novo*. *Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023). Federal district courts are empowered to hear only those cases that are within the judicial power of the United States as defined by Article III of the Constitution and which have been entrusted to them by a jurisdictional grant authorized by Congress.

Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001). In ruling on a Rule 12(b)(1) motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

II. Federal Rule of Civil Procedure 12(b)(6)

This Court reviews *de novo* a dismissal of a complaint for failure to state a claim, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Edionwe v. Bailey*, 860 F.3d 287, 291 (5th Cir. 2017). Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. As the Court noted in *Ashcroft v. Iqbal*, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. 662, 678 (2009).

ARGUMENT

I. USCIS's denials of Plaintiffs' asylum applications do not constitute final decisions and, as a result, the district courts lacked subject matter jurisdiction over Plaintiffs' Complaints.

The district courts correctly found in both cases that USCIS's denials of Plaintiffs' asylum applications are non-final and therefore not reviewable under the APA. Maari ROA 147-148; Kewayfati ROA 245-247. The Seventh Circuit's decision in *Dhakal* persuasively holds there is no final agency action here, 895 F.3d at 534, and the Fifth Circuit's decision in *Elldakli* reinforces that there is no final agency action, 64 F.4th at 670. The district court correctly found that USCIS's denials are not final decisions here under this case law. Accordingly, Plaintiffs' complaints were properly dismissed under Fed. R. Civ. P. 12(b)(1) (*Maari*) and Fed. R. Civ. P. 12(b)(6) (*Kewayfati*).

a. The Court lacks subject matter jurisdiction under Rule 12(b)(1).

Defendants' denial of Plaintiffs' asylum applications are not final agency actions within the APA, and therefore this Court lacks subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Federal courts have continuing obligation to consider their own jurisdiction as a threshold question. *See Elldakli*, 64 F.4th at 669 (citations omitted). The APA only allows for a cause of action if the alleged action is a final agency action. *See* 5 U.S.C. § 704; *see also Peoples Nat'l Bank v. Off. of the Comptroller of the Currency of the U.S.*, 362 F.3d 333, 336 (5th Cir. 2004) ("If there

is no final agency action, a federal court lacks subject matter jurisdiction.") (citation and quotation omitted).

The Supreme Court has determined that two prongs must be met to find that an agency action is final. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also Texas v. Becerra*, 89 F.4th 529, 538 (5th Cir. 2024). First, the alleged action "must mark the 'consummation' of the agency's decisionmaking process…it must not be of merely tentative or interlocutory nature." *See Bennett*, 520 U.S. at 178. Second, the alleged action "must be one by which 'rights or obligations have been determined, 'or from which legal consequences will flow.'" *Id.*

The Seventh Circuit in *Dhakal*, dealing with nearly identical circumstances, persuasively held that a denial of the asylum application without referral to the immigration court is not a final agency action within the APA. *Dhakal v. Sessions*, 895 F.3d 532, 538 (7th Cir. 2018)*; see also Doe v. United States Citizenship & Immigration Servs.,* No. 20 CV 7263, 2021 U.S. Dist. LEXIS 69836, at *4 (N.D. Ill. Apr. 12, 2021) (holding that denial of asylum applications while the applicants still maintained valid visas and thus were not referred to immigration court was not a final agency action). In *Dhakal*, the Seventh Circuit held that Plaintiff had not met either one of the two prongs in determining whether an action is a final agency action. *Dhakal,* 895 F.3d at 540. Under the first prong, the court found that since the applicant still had the defensive immigration process to go through, the "executive

branch simply has not completed its review of ... [the alien's] claims and consequently has not made a final decision regarding his immigration status and eligibility for asylum." *Id.* at 540. Additionally, the court found that under the second prong, the decision to deny the asylum application did not have legal implications because the applicant was in TPS. *Id.* Thus, for someone like Dhakal with TPS who has not undergone removal proceedings, the agency "simply has not completed its review ... and consequently has not made a final decision regarding his immigration status and eligibility for asylum." *Id.* The denial maintained the "status quo *for the time being*." *Id.*

As in *Dhakal*, upon the denial of Plaintiffs' asylum applications, USCIS did not refer the applications to an immigration court to begin removal proceedings because Plaintiffs maintain valid TPS. Maari ROA 147; Kewayfati ROA 246. While Plaintiffs maintain valid TPS, the effects of the denied asylum applications do nothing to change their ability to remain in the country and obtain work authorization. Additionally, when the TPS designation for Plaintiffs' country is terminated, Plaintiffs will have another opportunity to seek asylum during the defensive immigration process, the removal process. Lastly, Plaintiffs can seek review of their asylum application denials by withdrawing their valid TPS. An individual chooses to apply to be in TPS and affirmatively applies for such status; the government does not require an individual to seek or maintain this status. *See*

Dhakal, 895 F.3d at 537-38; *see also* 8 U.S.C. § 1254a. Upon the withdrawal of their valid TPS, Plaintiffs will each be issued a Notice to Appear and can then renew their requests for asylum relief in the immigration court proceedings.

Dhakal continues to be the most on-point legal decision. In their brief, Plaintiffs attempt to distinguish *Dhakal.* Plaintiffs cite to *Solarzano v. Mayorkas*, 987 F.3d 392, 399 (5th Cir. 2021) and *Sanchez v. Mayorkas*, 141 S. Ct. 1809, 1813 (2012) in attempt to bolster their argument that TPS is "a lawful status, not an amorphous place holder" and thus these individuals should be given an opportunity for review. *See* Plaintiffs' Brief ("Pls.' Br."), ECF No. 24 at 12. Plaintiffs' reliance on these decisions is misplaced for several reasons. First, *Solorzano* and *Sanchez* both deal with the question of whether individuals with valid TPS are considered lawfully admitted and thus eligible to adjust to lawful permanent resident status. *See id.*; *see also Sanchez*, 141 S. Ct. at 1813; *Solarzano*, 987 F.3d at 399. Status and admission are "distinct concepts in immigration law," *Sanchez*, 141 S.Ct. at 1813, and are not relevant to the analysis here—determining if there has been a final agency action. Second, Defendants have never argued that Plaintiffs do not maintain lawful status. Rather, Defendants argue that Plaintiffs, by virtue of being in TPS, should not gain an additional opportunity for review of their asylum applications at this time. At bottom, Plaintiffs have not provided any textual or case support to show that TPS holders, who have also applied for asylum should be given an additional

review of a denial of their asylum application, beyond the paths already provided to asylum applicants through the affirmative and defensive asylum immigration process.

The *Dhakal* decision is in accord with a recent Fifth Circuit opinion on final agency action in the context of immigration proceedings. *See Elldakli v. Garland*, 64 F.4th 666 (5th Cir. 2023). In *Elldakli*, the Fifth Circuit reasoned that status-adjustment decisions by the USCIS are not a final agency action under the INA because aliens retain the right to de novo review of those decisions in their removal proceedings. 64 F.4th at 670. The same reasoning applies here: decisions on Plaintiffs' asylum applications are not final agency actions because they can renew the asylum request if and when they are placed in removal proceedings. Any denial of asylum in the removal process can eventually be challenged in the U.S. Court of Appeals. *See, e.g., Cardona-Franco v. Garland*, 35 F.4th 359, 362 (5th Cir. 2022). Plaintiffs' brief incorrectly places great weight on the fact that they cannot immediately challenge the asylum denial. *See* Pls.' Br. at 10-11. In denying an attempt to review an aspect of an asylum denial, another district court in this Circuit held that "dismissing plaintiffs' claims at this stage does not deny her judicial review, but merely defers it to a later date . . . . When plaintiff's visa status changes at some point in the future, as it inevitably will, and she is no longer able to remain in the country legally, she is guaranteed the opportunity to access the appellate

review she seeks." *Umuzayire v. Ashcroft*, No. CIV.A.02-1338, 2003 WL 367743, at *4 (E.D. La. Feb. 14, 2003) (citing *Chung v. Smith*, 640 F. Supp. 1065, 1068–69 (S.D.N.Y.1986)). This reasoning applies here. Plaintiffs can proceed through the defensive asylum process when they are no longer in TPS. The Court therefore lacks subject matter jurisdiction over Plaintiffs' claims.

Plaintiffs have failed to direct the Court to any case where a court found jurisdiction to review a denial of an asylum application while the individual maintained TPS. Indeed, Plaintiffs have not cited to a single case where a district court has reviewed an asylum denial in any circumstance. This is because asylum denials are reviewed at the court of appeals after immigration court proceedings have occurred. *See, e.g., Aben v. Garland*, 113 F.4th 457 (5th Cir. 2024) (denying petition for review); *see also Umuzayire v Ashcroft*, 2003 WL 367743, *2-4 (E.D. La. Feb. 14, 2003) (holding that the court lacked jurisdiction to review asylum claim because asylum claims can be raised in removal proceedings and then appealed to the BIA, and judicial review of an adverse decision by the BIA lies exclusively in the appropriate court of appeals).

Lastly, although *Dhakal* found subject matter jurisdiction, other courts, including the Fifth Circuit, have found that a lack of final agency action in the immigration context divests the court of subject matter jurisdiction. *See Elldakli*, 64 F.4th 666; *see also Petrenko-Gunter v. Upchurch*, No. 05-11249, 2006 U.S. App.

LEXIS 24684, at *3-4 (5th Cir. Oct. 2, 2006) (per curium) ("Because an individual denied an adjustment of status can renew that request for adjustment of status upon the commencement of removal proceedings, [] [the applicant] has not yet exhausted her administrative remedies.") *see also Garcia v. United States Citizenship & Immigration Servs.*, No. 3:21-CV-2233-G, 2022 U.S. Dist. LEXIS 144249, at *19 (N.D. Tex. Aug. 12, 2022) (holding that USCIS's denial of the I-485 application was not a final agency action under the APA since the applicant had another chance of renewing their application through the removal process).

This Court should therefore find that Defendants' denial of Plaintiff's asylum application is not a final agency action within the APA and therefore the Court lacks subject matter jurisdiction, as the district court in *Maari* held.

b. Alternatively, Plaintiffs claims should be dismissed under Rule 12(b)(6) for failure to state a claim.

The district court in *Keyayfati* dismissed Plaintiff Kewayfati's complaint on the merits under Fed. R. Civ. P. 12(b)(6). Kewayfati ROA 245-247 (citing *Dhakal*, 895 F.3d at 538). In *Dhakal*, the district court dismissed the case for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *Dhakal*, 895 F.3d at 538. On appeal, the Seventh Circuit agreed that USCIS's denial of plaintiff's asylum application is not a final agency action and affirmed the dismissal, modifying it to reflect that the decision is on the merits rather than jurisdictional. *Id.* at 540. The Seventh Circuit reasoned that no statute precludes jurisdiction over the claim, but

dismissal is proper under Fed. Rule Civ. P 12(b)(6) because finality is "a necessary precondition to our ability to review agency action under the APA." *Id.* at 538-39. As explained *supra* Argument § I, USCIS's denial of an asylum application does not meet either prong required for finality. In this Circuit, lack of finality is jurisdictional, rather than a basis for dismissal under Rule 12(b)(6). *See supra* Argument § I; *Elldakli*, 64 F.4th 666. In the alternative, if this Court finds jurisdiction, the dismissal in *Kewayfati* should be affirmed on the basis that Plaintiff Kewayfati's complaint failed on the merits under Fed. R. Civ. P. 12(b)(6).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decisions dismissing the Plaintiffs' Complaints for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) or, alternatively, under Fed. R. Civ. P. 12(b)(6).

Dated: August 1, 2025

Respectfully submitted,

BRETT A. SHUMATE
Assistant Attorney General
Civil Division

ANTHONY P. NICASTRO
Acting Director

WILLIAM C. SILVIS
Assistant Director

MICHAEL CELONE
Senior Litigation Counsel

By: */s/ Marie H. Feyche*
MARIE H. FEYCHE
Trial Attorney
Office of Immigration Litigation
U.S. Department of Justice
Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 598-9724
Fax: (202) 305-7000
Email: Marie.Feyche@usdoj.gov

Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2025, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Marie H. Feyche

Marie H. Feyche
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 598-9724
Fax: (202) 305-7000
Email: Marie.Feyche@usdoj.gov

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Dated: August 1, 2025

/s/ Marie H. Feyche

Marie H. Feyche
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 598-9724
Fax: (202) 305-7000
Email: Marie.Feyche@usdoj.gov