United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED
March 3, 2022

Lyle W. Cayce
Clerk

No. 18-20784

KARLA YESENIA DUARTE,

Plaintiff—Appellant,

versus

ALEJANDRO MAYORKAS, *in his official capacity as the* SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; LEE CISSNA, *in his official capacity as the* DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; MARK SIEGL, *in his official capacity as the* DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES HOUSTON FIELD OFFICE

Defendants—Appellees,

CONSOLIDATED WITH

No. 19-20046

SELVIN IXEL RIVERA ISAULA,

Plaintiff—Appellant,

v.

ALEJANDRO MAYORKAS, *in his official capacity as the* SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; LEE CISSNA, *in his official capacity as the* DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; MARK SIEGL, *in his official capacity as the*

No. 18-20784
c/w Nos. 19-20046, 19-20168, and 19-20213

DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES HOUSTON FIELD OFFICE

Defendants—Appellees,

CONSOLIDATED WITH

No. 19-20168

HILMA HAYDEE JEZEK,

Plaintiff—Appellant,

versus

ALEJANDRO MAYORKAS, *in his official capacity as the* SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; LEE CISSNA, *in his official capacity as the* DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; MARK SIEGL, *in his official capacity as the* DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES HOUSTON FIELD OFFICE

Defendants—Appellees,

CONSOLIDATED WITH

No. 19-20213

JESUS CRUZ,

Plaintiff—Appellant,

No. 18-20784
c/w Nos. 19-20046, 19-20168, and 19-20213

v.

ALEJANDRO MAYORKAS, *in his official capacity as the* SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; LEE CISSNA, *in his official capacity as the* DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; MARK SIEGL, *in his official capacity as the* DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES HOUSTON FIELD OFFICE

Defendants—Appellees.

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-2165
USDC No. 4:18-CV-2992
USDC No. 4:18-CV-2428
USDC No. 4:18-CV-3973

Before DENNIS, GRAVES, and WILLETT, *Circuit Judges*.

JAMES L. DENNIS, *Circuit Judge*:

Karla Duarte, Selvin Ixel Rivera Isaula, Hilma Haydee Jezek, and Jesus Cruz (collectively, "the Appellants") are Honduran immigrants who were ordered deported but then granted Temporary Protected Status ("TPS") after the Attorney General determined aliens could not be safely returned to Honduras in the aftermath of a 1999 hurricane. The U.S. Citizenship and Immigration Service ("USCIS")[1] later issued "advance

[1] After the Appellants were ordered deported and granted TPS, Congress passed the Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (2002), which transferred many immigration enforcement and administration functions vested in the Attorney General to the Secretary of Homeland Security, under whom USCIS is organized.

parole" documents to the Appellants that authorized them to temporarily travel abroad. Following their return, the Appellants each filed an application with USCIS to adjust his or her immigration status to that of a Lawful Permanent Resident. USCIS administratively closed the Appellants' cases, finding that it lacked jurisdiction because, notwithstanding their recent readmittance to the country, the Appellants were not "arriving aliens" within the meaning of the relevant regulations.

The Appellants each brought suit in federal district court challenging USCIS's decision as arbitrary and capricious under the Administrative Procedures Act ("APA"). In three of the four cases, the district court concluded that it lacked jurisdiction to hear the challenge because the Appellants were indirectly attacking their respective deportation orders. In the fourth case, the district court converted the Government's motion to dismiss into a motion for summary judgment and granted the motion without comment, seemingly finding that USCIS's determination was correct on the merits. On appeal, the cases were consolidated before this court.

Because we hold that the Appellants' claims are not indirect challenges to their deportation orders, we REVERSE the district courts that dismissed the Appellants' cases for lack of subject matter jurisdiction. However, we conclude that USCIS was correct that the Appellants are not "arriving aliens" within the meaning of the relevant regulation. Although we agree with our partially dissenting colleague as to the ultimate result on this latter question, we differ in our reasons for reaching that conclusion. Most

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6 U.S.C. § 557 now provides that, for any function occurring after the Homeland Security Act's effective date, statutory references concerning the transferred powers shall be deemed to refer to the Department of Homeland Security. Thus, although many statutes relevant to this case make reference to the Attorney General, some of them actually apply to immigration authorities within the Department of Homeland Security.

notably, we determine that USCIS erred by characterizing the Appellants' travel and reentry as advance parole because Congress has statutorily provided that TPS beneficiaries returning from authorized travel abroad must be admitted into the country in the same immigration status they held prior to departure. Because the Appellants were not parolees waiting for their applications to be processed prior to departing the country, their statuses could not be converted to those of paroled aliens upon their return. Rather, the Appellants were fully admitted into the country upon their return and thus were not arriving aliens when they submitted their applications for adjustment of status. Accordingly, we affirm the district court's grant of summary judgment to the Government.

I.

A.

The Appellants are natives and citizens of Honduras who were ordered deported from the United States prior to April 1, 1997.[2] On January 5, 1999, the U.S. Attorney General designated Honduras for TPS after determining that extensive damage from Hurricane Mitch had made it unsafe to return aliens to the country. Designation of Honduras Under Temporary Protected Status, 64 Fed. Reg. 524 (Jan. 5, 1999). TPS is a statutorily created

[2] Prior to 1997, immigration statutes recognized a distinction between "deportation" proceedings, involving aliens who had gained "entry" into and were present in the United States, and "exclusion" proceedings, involving aliens who had not yet effected an "entry" into the country within the meaning of the law. Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1080 n.61 (1998); *accord United States v. Ramirez-Carcamo*, 559 F.3d 384, 387 (5th Cir. 2009). Although the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 consolidated deportation and exclusion proceedings into a single category of "removal" proceedings, *see* Pub. L. No. 104–208, § 304(a), 110 Stat. 3009, § 304(a) (1996), the Appellants' deportation proceedings commenced before the law's April 1, 1997 effective date. *See id.* at § 309(a). We therefore use the term deportation rather than removal when referring to the Appellants' cases.

designation that affords eligible aliens temporary protection from deportation or removal until conditions in their home country allow for their safe return. *See* 8 U.S.C. § 1254a. Each of the Appellants applied for and was granted TPS, and, accordingly, they were permitted to remain in the United States.

While under TPS, each of the Appellants had an I-130 visa petition filed on his or her behalf by a U.S.-citizen or legal-permanent-resident relative, and USCIS approved each petition, thereby establishing that each Appellant had a family connection that would allow him or her to apply for legal immigration.[3] Each appellant also sought and obtained permission from USCIS to travel outside of the United States; USCIS issued each a 512L Authorization for Parole of an Alien into the United States, which the parties refer to as an "advance parole" document, and the Appellants used these official papers to travel abroad and then reenter the country.

Following their returns, each appellant filed with USCIS a Form I-485, Application to Register Permanent Residence or Adjust Status, seeking to adjust his or her immigration status to that of a lawful permanent resident pursuant to their approved I-130 visa petitions. Under 8 C.F.R. § 1245.2(a)(1), the Immigration Court—a component of the Department of Justice—has exclusive jurisdiction over any applications for adjustment of status filed by an alien who had previously been placed in deportation proceedings unless the applicant is an "arriving alien," in which case exclusive jurisdiction lies with USCIS—a component of the Department of Homeland Security. USCIS determined that the Appellants had previously been placed in deportation proceedings and were not "arriving aliens" within the meaning of the regulation, and the agency thus concluded the Appellants

[3] Only the record in Duarte's case contains a copy of the I-130 approval notice. However, we assume all allegations in the other Appellants' complaints to be true for purposes of our review. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

were required to file their applications with the Immigration Court if they wished for the applications to be adjudicated. USCIS accordingly administratively closed each of the Appellants' Form I-485 applications based on a lack of jurisdiction.

B.

Each of the Appellants filed actions in federal district court challenging USCIS's closure of their cases as arbitrary, capricious, and contrary to law in violation of the APA, 5 U.S.C. § 706(2)(A). In each instance, the Government filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction, or, alternatively, under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The Government contended that, if the court ordered USCIS to adjudicate the Appellants' applications for adjustment of status and USCIS then granted the applications, it would render the Appellants' outstanding deportation orders unenforceable, meaning the relief the Appellants sought was "inextricably linked" to the validity of their deportation orders. Because 8 U.S.C. § 1252(a)(5), (b)(9), and (g) strip district courts of jurisdiction to hear direct and indirect challenges to a final deportation order, the Government argued that the district courts were without jurisdiction to hear the Appellants' claims.

Alternatively, the Government argued that even if the district courts had jurisdiction to hear the Appellants' challenge, the claims should be dismissed because USCIS's decision was correct on the merits. Although an alien returning to the country on advanced parole is ordinarily an "arriving alien," the Government conceded, the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 ("MTINA") specifically provide that *a TPS beneficiary* who returns from temporary authorized travel abroad "shall," barring certain crimes, "be inspected and

admitted in the same immigration status the alien had at the time of departure." Pub. L. 102-232, § 304(c)(1)(A), 105 Stat. 1733 (1991).[4] Because the Appellants were not "arriving aliens" at the time of their departure, the Government contended that they were not "arriving aliens" upon their return, and USCIS was therefore correct that the Appellants' unterminated removal proceedings deprived it of jurisdiction over their applications for adjustment of status.

In Isaula's, Jezek's, and Cruz's cases, the district courts granted the Government's 12(b)(1) motions and dismissed the cases for lack of subject matter jurisdiction. By contrast, the district court in Duarte's case held a hearing on the Government's motion to dismiss, then issued a final judgment without an opinion. The final judgment stated that the court was converting the Government's motion into a motion for summary judgement in order to allow it to incorporate what it had learned in the oral argument and briefing for the hearing. The court then granted summary judgment to the Government on the merits, stating that it would not order USCIS to reopen Duarte's proceedings.[5] Each of the Appellants timely appealed.

II.

This court reviews both a district court's decision to dismiss a case for lack of subject matter jurisdiction and a district court's grant of summary

[4] This provision of MTINA was not codified in the U.S. Code. Nonetheless, the parties do not dispute its legal force.

[5] The parties expressed some confusion during oral argument as to whether the district court in Duarte's case also concluded that it lacked subject matter jurisdiction. However, our precedents establish that a grant of summary judgment is an adjudication on the merits, and summary judgment is not a vehicle to dispose of a case for lack of jurisdiction. *See Stanley v. Cent. Intelligence Agency*, 639 F.2d 1146, 1157–58 (5th Cir. 1981).

judgment *de novo*. *John Corp. v. City of Houston*, 214 F.3d 573, 576 (5th Cir. 2000); *In re La. Crawfish Producers*, 852 F.3d 456, 462 (5th Cir. 2017).

III.

A.

The district courts in *Isaula*, *Jezek*, and *Cruz* held that 8 U.S.C. § 1252(a)(5), (b)(9), and (g) deprived them of jurisdiction over the Appellants' challenges. 8 U.S.C. § 1252(a)(5) specifies that the only means of obtaining judicial review of a final order of removal, deportation, or exclusion is by filing a petition with a federal court of appeals.

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e).

8 U.S.C. § 1252(a)(5). 8 U.S.C. § 1252(b)(9) further provides that such a petition is also the only way of obtaining judicial review of a question of law or fact that arises from a removal, deportation, or exclusion proceeding.

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

Id. § 1252(b)(9). And 8 U.S.C. § 1252(g) specifically removes all other jurisdiction from courts to hear any challenge to the exercise of immigration officials' prosecutorial discretion in deciding which aliens to place in removal proceedings and which removal orders to execute.

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Id. § 1252(g).

Courts generally hold that these provisions operate to strip district courts of jurisdiction over any action directly or indirectly attacking a final order of deportation, exclusion, or removal.[6] *See Duron v. Johnson*, 898 F.3d 644, 647 (5th Cir. 2018) ("Section 1252(b)(9) operates as an unmistakable zipper clause designed to consolidate and channel review of all legal and factual questions that arise from the removal of an alien through the preordained administrative process." (internal quotations and citations omitted)); *Cardoso v. Reno*, 216 F.3d 512, 516 (5th Cir. 2000) (holding the prohibition in 8 U.S.C. § 1252(g) cannot be evaded by characterizing the claim as a challenge to a different administrative action if the relief sought would preclude the execution of a removal order); *Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012) (holding 8 U.S.C. § 1252(a)(5) prohibits APA claims that indirectly challenge a removal order); *Delgado v.*

[6] The district courts in this case did not specify which of the three 8 U.S.C. § 1252 provisions barred the claims, and it appears that they ruled that the three operated in concert.

Quarantillo, 643 F.3d 52, 55 (2d Cir. 2011) (same); *Estrada v. Holder*, 604 F.3d 402, 408 (7th Cir. 2010) (same).

The district courts here reasoned that USCIS's decisions to close the appellants' status-adjustment applications for adjustment of status were based on the deportation orders against them, and thus the challenges to those decisions were inextricably linked to the validity of their deportation orders. The courts therefore determined that 8 U.S.C. § 1252(a)(5), (b)(9), and (g) operated to deprive the district courts of jurisdiction over the Appellants' challenges to USCIS's decisions.

The Appellants argue that the district courts erred in holding that the jurisdictional bars of 8 U.S.C. § 1252 apply to their claims for two reasons. First, they contend that any outstanding deportation orders against them were already fully executed when they departed the United States, and thus any relief the district court would grant could not prevent the orders from being executed. In other words, the Appellants argue that their claims could not possibly be indirect challenges to their outstanding deportation orders because no deportation orders remained outstanding against them. Second, they contend that even if the orders were not fully executed, their complaints are not indirect challenges to their outstanding deportation orders because granting the relief they seek would not prevent their orders from being executed in the future or require a determination as to their validity. We will consider each argument in turn.

1.

In support of their contention that their outstanding deportation orders were executed when they traveled abroad, the Appellants point to 8 U.S.C. § 1101(g), which provides in relevant part that "any alien ordered deported or removed . . . who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the

source from which the expenses of his transportation were defrayed or of the place to which he departed." They further point to 8 C.F.R. § 1241.7, which similarly states that "[a]ny alien who has departed from the United States while an order of deportation or removal is outstanding shall be considered to have been deported, excluded and deported, or removed[.]" These provisions, the Appellants argue, mean that when they left the United States voluntarily, they were legally considered deported therefrom. The Government counters that, while leaving the country normally executes a pending deportation order, MTINA's requirement that TPS beneficiaries return with the same immigration status as when they departed overrides this general functionality with respect to TPS beneficiaries.[7]

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[7] The Government points out that there are generally significant legal consequences when an alien is deported, including the alien being inadmissible for the following 10 years under 8 U.S.C. § 1182(a)(9)(A)(ii), which would preclude the Appellants from obtaining any adjustment of status under 8 U.S.C. § 1255(a)(2). We note that the Government is likely incorrect regarding the negative consequences the Appellants would suffer if this court were to determine that their deportation orders were executed when they left the United States. Although 8 U.S.C. § 1182(a)(9)(A)(ii) does generally provide that any alien who "departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal . . . is inadmissible," 8 U.S.C. § 1182(a)(9)(A)(iii) states that the prohibition "shall not apply . . . if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission." Other statutory provisions attaching negative consequences to removal or deportation similarly contain exceptions for when the alien has received permission to reapply for admission. *See, e.g.*, 8 U.S.C. § 1326(a)(2)(A) (exempting such aliens from the criminal offense of reentry after removal). As discussed in more detail below, "admission" refers to a procedurally proper entry into the United States other than parole, *see Tula Rubio v. Lynch*, 787 F.3d 288, 292–93 (5th Cir. 2015), and even aliens who are paroled into the United States are considered to be applicants for admission, *see* 8 U.S.C. § 1182(d)(5)(A). The grant of "advance parole" to the Appellants would thus likely be tantamount to advance consent to apply for admission, allowing Appellants to evade the consequences of 8 U.S.C. § 1182(a)(9)(A)(ii) and similar statutes.

The structure of TPS indicates that Congress intended that outstanding removal and deportation orders against TPS beneficiaries remain intact when they temporarily leave the country. In numerous decisions, courts have stressed that TPS is intended to be a "temporary refuge" that ceases to shield an applicant from removal once it is withdrawn. *United States v. Orellana*, 405 F.3d 360, 363 (5th Cir. 2005); *accord, e.g., id.* at 363–64 ("[T]he alien may not be removed from the United States so long as the registration is in effect."); *Melendez v. McAleenan*, 928 F.3d 425, 429 (5th Cir. 2019) ("Section 1254a(f) identifies a finite period in which the benefits of TPS will operate[.]"); *Dhakal v. Sessions*, 895 F.3d 532, 538 (7th Cir. 2018) ("TPS protects its recipients from removal only while the designation is valid[.]"). Indeed, 8 U.S.C. § 1254a(b)(3)(A) requires that all countries designated for TPS be reviewed periodically to ensure the conditions that prevent safe return continue to exist.

TPS essentially freezes an alien's position within the immigration system; although it grants the beneficiary present lawful status for its duration, it is not itself a "pathway to family reunification, permanent residency, or citizenship," *Dhakal*, 895 F.3d at 538, and it does not erase the effects of an alien's previous unlawful entry or presence in the country. *Melendez*, 928 F.3d at 428; *Serrano v. United States Attorney General*, 655 F.3d 1260 (11th Cir. 2011). An alien may even be ordered removed while under TPS, though the order remains inexecutable so long as the alien remains a TPS beneficiary. *Dhakal*, 895 F.3d at 538 n.8 (citing *Matter of Sosa Ventura*, 25 I. & N. Dec. 391, 393 (BIA 2010)). Unless the alien obtains a more permanent right to remain in the United States in the interim, the alien reverts to the status he or she previously held when TPS is withdrawn. *Orellana*, 405 F.3d at 365. This means that any outstanding removal orders may then be executed. *Dhakal*, 895 F.3d at 538 (citing *Sosa Ventura*, 25 I. & N. Dec. at 393).

Congress has authorized TPS beneficiaries to "travel abroad with the prior consent of the Attorney General." 8 U.S.C. § 1254a(f)(3). However, in keeping with TPS's functionality as a hold on a beneficiary's immigration condition, Congress provided that such travelers "shall be inspected and admitted in the same immigration status [they] had at the time of departure." Pub. L. 102-232, § 304(c)(1)(A). Notwithstanding the Appellants' contention that having an outstanding deportation order is not an "immigration status," Congress likely intended this provision to prevent TPS beneficiaries from discharging outstanding removal and deportation orders simply by engaging in the brief travel abroad that 8 U.S.C. § 1254a(f)(3) authorizes. Indeed, were this not the case, it is unlikely that immigration authorities would ever grant such aliens permission to travel abroad.

Under long-settled canons of statutory interpretation, MTINA's specific provision mandating that TPS beneficiaries who travel abroad be admitted in the same immigration status they held at the time of their departure controls over 8 U.S.C. § 1101(g)'s more general statement regarding the effects of departing the United States on "any alien ordered deported or removed." *See Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) ("[I]t is familiar law that a specific statute controls over a general one 'without regard to priority of enactment.'" (quoting *Townsend v. Little*, 109 U.S. 504, 512 (1883)). We therefore conclude that the Appellants' outstanding deportation orders were not executed when they briefly left the country.

2.

The Appellants next contend that, even if their deportation orders remain outstanding, the district courts erred by construing their complaint as indirect challenges to those orders. The Government responds that the three

provisions of 8 U.S.C. § 1252 apply because, if USCIS is compelled to adjudicate the Appellants' applications and then chooses to grant those applications, the Appellants' outstanding deportation orders will be nullified.

The Government is correct that several district courts have held that 8 U.S.C. § 1252 bars jurisdiction over claims seeking to compel USCIS to adjudicate applications for adjustment of status, and this court has agreed in an unpublished decision that the parties do not cite. *See Akinmulero v. Holder*, 347 F. App'x 58, 61 (5th Cir. 2009) (unpublished); *Chen v. Johnson*, No. 15-CV-3422 (RRM), 2016 WL 4544034, at *5 & n.3 (E.D.N.Y. Aug. 30, 2016) (citing *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011)); *Chen v. Rodriguez*, 200 F. Supp. 3d 174, 181–82 (D.D.C. 2016); *Nolasco v. Nielsen*, No. 1:18-cv-00051-TC, 2018 WL 6441037 (D. Utah Dec. 7, 2018). The reasoning of these decisions is unconvincing, however.

Under 8 U.S.C. § 1252, "[w]hen a claim by an alien, however it is framed, challenges the procedure and substance of an agency determination that is inextricably linked to the order of removal," the federal district court lacks subject-matter jurisdiction. *Martinez*, 704 F.3d at 623. The distinction between an independent claim and one that is "inextricably linked" to a removal or deportation order "will turn on the substance of the relief that a plaintiff is seeking." *Id.* It is true that an order compelling USCIS to *grant* the Appellants' applications for adjustment of status would effectively nullify their outstanding deportation orders, and this court has held that a claim seeking such relief is barred under 8 U.S.C. § 1252. *Cardoso v. Reno*, 216 F.3d 512, 516 (5th Cir. 2000). However, this is not the relief that the Appellants seek.

The Appellants essentially ask for a determination as to what agency is the proper body to file their application with—USCIS within the Department of Homeland Security or the Immigration Court within the

Department of Justice. If the district court were to determine that USCIS was the correct body and order it to adjudicate the Appellants' applications, it would have no effect on their deportation orders because USCIS would maintain discretion to deny the applications on the merits. The courts that have held that no jurisdiction exists over this type of claim have not meaningfully analyzed this significant distinction between an order requiring adjudication and order requiring a certain result, instead simply stating that it is "of no moment" when it is addressed at all. *Chen*, 2016 WL 4544034, at *5 n.3 (quoting *Delgado*, 643 F.3d at 55).

Put another way, the Appellants do not seek review of a decision that could invalidate their removal orders, but rather USCIS's determination that it lacked discretion to make such a decision in the first place. This court recently considered a similar situation in *Melendez v. McAleenan*, 928 F.3d 425, 426 (5th Cir. 2019), *cert. denied*, No. 19-415, 2019 WL 6257434 (U.S. Nov. 25, 2019). In *Melendez*, a TPS beneficiary without an outstanding removal order applied for adjustment of status, and USCIS denied his application, determining that he was not eligible for adjustment due to a previous period of unlawful presence in the country. *Id.* at 426. The TPS beneficiary filed suit under the APA, and the district court dismissed for lack of jurisdiction, finding that 8 U.S.C. § 1252(a)(2)(B)(i) deprived it of jurisdiction to review "denials of discretionary relief," including "any judgment regarding the granting of relief under," *inter alia*, the adjustment of status statute. *Id.* On review, this court reversed, holding that 8 U.S.C. § 1252(a)(2)(B)(i) "applies only to discretionary decisions." *Id.* The court held that USCIS's determination that it *lacked* discretion to adjust the TPS beneficiaries' status was not discretionary because it was based on the objective legal determination that he was not eligible, and thus the jurisdictional bar did not apply. *Id.* at 426-27; *see also Zheng v. Gonzales*, 422 F.3d 98, 111 (3d Cir. 2005) (reaching the same conclusion).

The same principle applies here. Although the provisions of 8 U.S.C. § 1252 that the Government argues bar the present suit do not expressly reference "discretionary" decisions in the manner of 8 U.S.C. § 1252(a)(2)(B), this court has long recognized that 8 U.S.C. § 152(g) is designed to protect the discretionary decisions of immigration authorities in matters related to removal and deportation. *See Alvidres-Reyes v. Reno*, 180 F.3d 199, 201 (5th Cir. 1999) ("The Congressional aim of § 1252(g) is to protect from judicial intervention the Attorney General's long-established discretion to decide whether and when to prosecute or adjudicate removal proceedings or to execute removal orders."). This discretion is not implicated here, where the Appellants seek review of USCIS's determination that no discretion existed as a matter of law. *Cf. Ayanbadejo v. Chertoff*, 517 F.3d 273, 277 (5th Cir. 2008) (holding judicial review of the discretionary decision of whether to *grant* an application or adjustment of status is statutorily precluded).

The remaining provisions of 8 U.S.C. § 1252 at issue here, § 1252(a)(5) and (b)(9), are "zipper clause[s]" that aim to funnel judicial review of final deportation orders and questions of law or fact arising from deportation proceedings into a single mechanism—a petition for review of the BIA's decision filed in the appropriate court of appeals. *See Duron*, 898 F.3d at 647. These provisions do not apply here. As discussed in more detail below, 8 C.F.R. § 1245.2(a)(1) grants the Immigration Court exclusive jurisdiction over applications for adjustment of status of "any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien)." Thus, aside from the simple factual determination that the Appellants had been placed in deportation proceedings, USCIS's decision that it lacked jurisdiction was based only on its conclusion that the Appellants were not arriving aliens *at the time of their*

applications.[8] This is not an issue arising from Appellants' deportation proceedings many years before, and it has no bearing on the validity of the deportation orders that those proceedings resulted in. And where review of an agency determination involves neither a determination as to the validity of the Appellants' deportation orders or the review of any question of law or fact arising from their deportation proceedings, § 1252(a)(5) and (b)(9) should not operate as a bar to the district court's review.

Moreover, there is no way for the Appellants to obtain review of USCIS's decision by following the procedure prescribed in § 1252(a)(5) and (b)(9). The dissent does not view the distinction between the adjudication and the granting of an application for adjustment of status to be of any significance. But were this view correct, the provisions of 8 U.S.C. § 1252 would not merely channel challenges to deportation orders into "the preordained administrative process." *Duron*, 898 F.3d at 647 (citing *Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007)). Rather, they would preclude judicial review of the agency's non-discretionary determination altogether.

Take the present case. Under BIA precedent, USCIS has *exclusive* jurisdiction over the adjustment applications of "arriving aliens" who have been placed in removal or deportation proceedings. *See Matter of Yauri*, 25 I. & N. Dec. 103 (BIA 2009). Assuming *arguendo* that the Appellants are correct that they are "arriving aliens," their applications for adjustment of status would be dismissed for lack of jurisdiction if they were to file them with the Immigration Court. To be sure, the Appellants could file a petition for

[8] Thus, the rationale advanced by the district courts and the dissent for why the Appellants' challenges are "inextricably linked" to their deportation orders—that USCIS found "it lacked jurisdiction precisely because those removal [sic] orders remain in effect," Dissent at 33—is simply incorrect. USCIS's threshold determination turned only on the fact that the Appellants had been placed in deportation *proceedings*; not that those proceedings had resulted in a valid deportation order.

review of *that* determination with the appropriate court of appeals, but the circuit court's affirming the Immigration Court's decision would not compel USCIS—a different agency in a different department of the federal government that would not be a party to the case—to adjudicate the Appellants' applications. Short of perhaps the extraordinary relief of mandamus, an alien would be entirely without judicial recourse under the dissent's view if USCIS erroneously denied jurisdiction, even if that denial were indisputably arbitrary and capricious because it was based on an erroneous interpretation of the law, *see Gen. Land Office v. United States Dep't of the Interior*, 947 F.3d 309, 320 (5th Cir. 2020).

The provisions of 8 U.S.C. § 1252 are not meant to preclude review of non-discretionary decisions that "'cannot be raised efficaciously within the administrative proceedings' already available." *See Duron*, 898 F.3d at 647 (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999)). And the Supreme Court has long held that, because "[t]here is a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,'" courts should "find an intent to preclude such review only if presented with 'clear and convincing evidence.'" *Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993)). Here, because the relief the Appellants seek would not directly or indirectly invalidate their deportation orders and they have no other ready avenue of obtaining judicial review, this presumption weighs in favor of an interpretation of 8 U.S.C. § 1252 that does not bar jurisdiction over the Appellants' claims. We thus conclude that the district courts erred by determining that they lacked jurisdiction over the Appellants' claims.

B.

The Appellants next argue that the district court in *Duarte* erred by affirming USCIS's determination on the merits because Duarte was not an arriving alien within the meaning of 8 C.F.R. § 1245.2(a)(1).[9] "Arriving alien" is defined by regulation as follows.

> Arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after any such parole is terminated or revoked. However, an arriving alien who was paroled into the United States before April 1, 1997, or who was paroled into the United States on or after April 1, 1997, pursuant to a grant of advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, will not be treated, solely by reason of that grant of parole, as an arriving alien under section 235(b)(1)(A)(i) of the Act.

8 C.F.R. § 1.2.

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[9] Seemingly not recognizing that the district court in *Duarte* granted summary judgment on the merits rather than dismissing for a lack of subject matter jurisdiction, the Appellants did not raise this argument until their reply brief. Although this court would ordinarily deem the argument waived, *see Dixon v. Toyota Motor Credit Corp.*, 794 F.3d 507, 508 (5th Cir. 2015) (citing *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 976 n. 4 (5th Cir.1993)), we recognize that the same issue will arise on remand in the other cases, and we therefore address it in the interest of judicial economy. *See Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010) ("[W]e retain discretion to consider matters not briefed, especially when they implicate substantial public interests.").

The text of the regulation appears to contemplate that an alien who travels abroad and returns pursuant to a grant of advanced parole is an arriving alien for purposes other than the expedited removal proceedings authorized under 8 U.S.C. § 1225(b)(1)(A)(i), and this court and other circuit courts have held that such an alien is "by definition an 'arriving alien.'" *Diarra v. Gonzales,* 137 F. App'x 627, 630 (5th Cir. 2005) (unpublished); *accord Bouchikhi v. Holder*, 676 F.3d 173, 178 (5th Cir. 2012); *Momin v. Gonzales*, 447 F.3d 447, 453 (5th Cir.), *reh'g granted and opinion vacated as moot*, 462 F.3d 497 (5th Cir. 2006); *Ibragimov v. Gonzales*, 476 F.3d 125, 138 (2d Cir. 2007); *Bona v. Gonzales*, 425 F.3d 663, 668 (9th Cir. 2005). Indeed, the Government concedes that "[i]n many instances, an alien traveling with an advance parole document may be paroled into the country as an arriving alien."

A review of the statutory framework makes clear, however, that USCIS erred by characterizing the Appellants' travel and reentry as advance parole. Generally, the law requires that immigration authorities detain any alien applying for entry into the United States unless the alien is "clearly and beyond a doubt entitled to be admitted." *Zheng*, 422 F.3d at 117 (quoting 8 U.S.C. § 1225(b)(2)(A)). But when an alien is granted parole, immigration authorities temporarily allow the alien access to the country while his or her application for admission is pending, though the alien is explicitly not considered "admitted" while in this condition.[10] *See* 8 U.S.C. § 1101(a)(13)(B); 8 U.S.C. § 1182(d)(5)(A). Put another way, parole creates something of legal fiction; although a paroled alien is physically allowed to

[10] "'Advance parole' is a practice whereby the government decides in advance of an alien's arrival that the alien will be paroled into the United States when he arrives at a port-of-entry." *Ibragimov*, 476 F.3d at 132. It "is often granted to aliens residing in the United States who have a need to travel abroad, but whose immigration status would not afford them a right to legal admission upon their return." *Id.*

enter the country, the legal status of the alien is the same as if he or she were still being held at the border waiting for his or her application for admission to be granted or denied. *See Zheng*, 422 F.3d at 117 ("Parole is a form of relief from immigration detention; it is not a form of relief from removal proceedings, and when the purposes of parole have been served the parolee must be returned to custody and removal proceedings must continue.")*;* 8 U.S.C. § 1182(d)(5)(A) (stating that an alien whose parole is revoked "shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.").

Immigration authorities usually have the discretion to parole "any alien applying for admission to the United States" "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). However, as discussed, Congress enacted a special provision as part of MTINA that specifically governs the foreign travel of a TPS beneficiary who obtains permission to temporarily leave the country. MTINA provides that such an alien "shall be inspected and *admitted in the same immigration status the alien had at the time of departure.*" Pub. L. 102-232, § 304(c)(1)(A), 105 Stat. 1733 (emphasis added). This provision is inconsistent with the granting of parole to TPS beneficiaries for two reasons.

First, because an alien that is paroled into the country is explicitly not considered "admitted," paroling TPS beneficiaries into the country is contrary to MTINA's mandate that such travelers "shall be inspected and *admitted*."[11] Second, unless the TPS beneficiary was on parole prior to his or

[11] "Admission" is statutorily defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). Under BIA precedent that this court has adopted, "the terms 'admitted' and 'admission,'. . . denote procedural regularity . . . rather than compliance with

her departure, paroling a TPS beneficiary into the country is also contrary to MTINA's command that a traveling TPS beneficiary return "in the same immigration status the alien had at the time of departure."

Thus, a contradiction appears to exist between the general authority of immigration authorities to grant parole to "any alien applying for admission" under 8 U.S.C. § 1182(d)(5)(A) and MTINA's specific requirement that TPS beneficiaries who temporarily travel abroad "be inspected and admitted in the same immigration status [they] had at the time of departure." And, under standard principles of statutory construction, "[w]hen a general permission or prohibition is contradicted by a specific prohibition or permission . . . the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). The prohibition on paroling returning TPS beneficiaries that is inherent in MTINA's requirement that they be "admitted in the same immigration status" must therefore be construed as an exception to the general authority of immigration officials to grant parole to aliens applying for admission. In other words, MTINA specifically removes USCIS's discretion to grant parole with respect to TPS beneficiaries like the Appellants because paroling them into the country is by definition not "admitt[ing]" them "in the same immigration status" as MTINA requires.

The dissent argues that we are wrong to assign the term "admitted" its settled legal meaning when interpreting MTINA because the definition was not statutorily codified until 1996, and thus Congress could not have been contemplating this meaning when it enacted MTINA in 1991. Dissent

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substantive legal requirements." *Tula Rubio v. Lynch*, 787 F.3d 288, 292 n.2 (5th Cir. 2015) (quoting *In re Quilantan*, 25 I. & N. Dec. 285, 290 (B.I.A. 2010)). In short, any procedurally proper entry into the United States that is not parole is an "admission."

at 35–36. But the BIA has attributed the same legal definition to "admitted" since at least 1980, *see Tula Rubio v. Lynch*, 787 F.3d 288, 292 (5th Cir. 2015) (citing *In re Areguillin*, 17 I. & N. Dec. 308 (B.I.A.1980)), and the agency has explicitly affirmed that the 1996 legislation did not change the term's meaning, *see id.* (citing *In re Quilantan*, 25 I. & N. Dec. 285 (B.I.A.2010)). There is no reason to believe that Congress was unaware of the definition immigration authorities had long ascribed to "admitted" when it enacted MTINA. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (stating that Congress can be presumed to be aware of relevant administrative interpretations when reenacting or amending a statute).

Moreover, the dissent misapprehends the functioning of "parole." Parole, be it advance or otherwise, is only available to an "alien applying for admission to the United States," and the alien remains an applicant for admission while on parole.[12] 8 U.S.C. § 1182(d)(5)(A). As stated, a paroled alien is legally equivalent to an alien that is held in custody at the border while their application for admission is processed. *See id.* This is why a parolee normally fits the regulatory definition of an "arriving alien"—for legal purposes, the parolee is a "an applicant for admission coming or attempting to come into the United States at a port-of-entry" even if, in actuality, a paroled alien has already physically come into the United States. Parole is thus an inherently different immigration status than many TPS beneficiaries hold prior to their departure on authorized travel because TPS beneficiaries are not uniformly applicants for admission that have been temporarily allowed into the country while their applications are pending. *See Gomez v. Lynch*, 831 F.3d 652, 658 (5th Cir. 2016) ("Status, by contrast, usually describes the type of permission to be present in the United States that an

[12] There is no indication that the Appellants continue to have pending applications for admission to the United States.

individual has." (citing STEEL ON IMMIGRATION LAW §§ 2:23, 3:1 (2015 ed.))). This is because TPS is available to aliens regardless of whether they were paroled, admitted, or gained entrance unlawfully without being admitted or paroled. *See* 8 U.S.C. § 1254a. The latter two categories of aliens have a fundamentally different immigration status from paroled aliens because aliens in those categories were not granted temporary permission to be present in the country pending adjudication of their applications for admission. They either have some other sort of permission to be present in the country or no permission at all (save perhaps TPS itself), and MTINA does not permit immigration authorities to recategorize these TPS beneficiaries as parolees upon their return.

The dissent is therefore mistaken in concluding that our interpretation of MTINA "radically alters" the application of immigration law, Dissent at 37, and any limit our holding places on immigration authorities' discretion is modest at most. Immigration authorities maintain the discretion to grant TPS beneficiaries permission to travel abroad, an authority that is explicitly contemplated by MTINA and 8 U.S.C. § 1254a(f)(3).[13] What immigration authorities may not do is parole a TPS

[13] The dissent points out that, under the regulations promulgated by immigration authorities, advance parole is currently the only mechanism available for TPS beneficiaries to apply for and receive permission to travel abroad. Dissent at 34-35 (citing 8 C.F.R. § 244.15). But, as the dissent acknowledges, "a valid statute always prevails over a conflicting regulation," *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 829 (D.C. Cir. 2006), and a regulation can never "trump the plain meaning of a statute," *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 11 (D.C. Cir. 2002). "Advance parole" is not simply a synonym for "permission to travel abroad." Parole has a specific meaning within the statutory framework governing immigration, *see* 8 U.S.C. § 1182(d)(5)(A), and applying that meaning in the context of TPS beneficiaries returning from travel abroad is squarely contrary to MTINA's requirement that such aliens be "admitted in the same immigration status" they held prior to departure. Thus, to the extent promulgated regulations call for or authorize paroling returning TPS beneficiaries into the country, those regulations are invalid.

beneficiary into the country upon their return, which would transform the alien's immigration status into that of an ongoing applicant for admission. There is nothing in the record to suggest that USCIS otherwise treats returning TPS beneficiaries as parolees, and our decision simply corrects what would seem to be a mistake of nomenclature that has led to much confusion, including the Appellants' present claim to be arriving aliens.

In this case, MTINA mandated that the Appellants be "admitted"—not paroled—upon their return from their travel abroad. Additionally, the Appellants were previously subject to deportation proceedings, indicating that they had already effected an "entry" into the country either by "being inspected by immigration officials or successfully evading inspection, and continuing on without restraint." *United States v. Ramirez-Carcamo*, 559 F.3d 384, 386 n.2 (5th Cir. 2009) (citing *Yang v. Maugans*, 68 F.3d 1540, 1547 (3d Cir.1995)). Thus, prior to being granted TPS and traveling abroad, they were not on parole, and paroling the Appellants into the country upon their return was not assigning them "the same immigration status the alien[s] had at the time of departure." USCIS was therefore not authorized to grant the Appellants the advance parole that the 512L form it issued them purported to allow.

Because the Appellants were admitted and not paroled into the country, they were no longer "applicant[s] for admission coming or attempting to come into the United States at a port-of-entry" at the time they filed their Form I-485 applications for adjustment of status, as would make them arriving aliens under 8 C.F.R. § 1.2. Nor do they meet any of 8 C.F.R. § 1.2's alternate criteria, including being "alien[s] seeking transit through the United States at a port-of-entry, or [aliens] interdicted in international or

United States waters" who are brought to the United States. They therefore are not arriving aliens within the meaning of 8 C.F.R. § 1.2. [14]

Because the Appellants were previously placed in deportation proceedings and are not arriving aliens, the Immigration Court has exclusive jurisdiction over their applications for adjustment of status under 8 C.F.R. § 1245.2(a)(1).[15] The district court in *Duarte* thus did not err in holding that USCIS was correct to administratively close the Appellants' applications for lack of jurisdiction.

IV.

In accordance with the foregoing, we REVERSE the district courts' dismissal of Isaula's, Jezek's, and Cruz's claims for lack of jurisdiction and AFFIRM the district court's grant of summary judgment to the government on Duarte's claim. We further REMAND Isaula's, Jezek's, and Cruz's cases to the respective district courts for further proceedings consistent with this opinion.

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[14] Notably, Congress has specifically provided that several other classes of aliens who were not actually paroled into the country "shall be deemed, for purposes of [adjustment of status], to have been paroled into the United States." *See* 8 U.S.C. § 1255(g)–(h). No similar provision exists for TPS beneficiaries.

[15] The Appellants argue that 8 C.F.R. § 1003.23(b)(1) bars them from filing motions for reopening with the Immigration Court in order to file their applications for adjustment because they have previously departed the country while their deportation orders were outstanding. However, as the Government argued below, the Appellants likely would not be considered to have "departed" the United States under the specific provisions of MTINA applicable to TPS travel. In fact, the Government asserts in their brief and the Appellants confirmed at oral argument that one of the Appellants has obtained reopening of his removal proceedings with the Immigration Court.

DON R. WILLETT, *Circuit Judge*, concurring in part and dissenting in part:

For decades and without protest, the Attorney General has exercised the power to grant parole to TPS recipients. Today the majority holds that MTINA, which passed in 1991, stripped the Attorney General of that power. And because the Attorney General did not have the power to grant parole to Duarte, the majority reasons that Duarte could not use his reentry to file for lawful permanent resident status with USCIS. What does the majority notice that litigants and jurists have overlooked all these years? The statutory definition of one word, "admitted." There's just one problem: that statutory definition was enacted in 1996. So it does not tell us what Congress meant by "admitted" when MTINA was passed five years earlier.

I agree with the result the majority reaches—no relief—for two reasons. First, I conclude that the district courts lacked jurisdiction over any of these claims, which are effectively collateral challenges to Appellants' removal orders. Second, even if jurisdiction were proper, interpreting § 304(c)(1)(A) according to its plain, everyday meaning would prevent TPS recipients returning from travel abroad from qualifying for Lawful Permanent Resident status. While I reach the same result as the majority today, I fear that the majority's interpretation will have lasting consequences for the Attorney General's authority to permit TPS recipients to travel abroad in the future.

I

First, the jurisdictional question. As the majority opinion explains, the statutory provisions at issue—8 U.S.C. § 1252(a)(5), (b)(9), and (g)(2)—"operate to strip district courts of jurisdiction over any action directly or

indirectly attacking a final order of deportation, exclusion, or removal."[1] Notably, every court to apply this statute to this circumstance—aliens seeking to compel USCIS to adjudicate their status-adjustment applications—has concluded "no jurisdiction."[2] We reached the same result in an unpublished decision, *Akinmulero v. Holder*.[3] The majority opinion brushes aside *Akinmulero*'s reasoning as "unpersuasive." *Akinmulero* may not be precedential, but it is certainly persuasive[4]—and in my view it was decided correctly.

In *Akinmulero*, we held that because Congress has eliminated district court jurisdiction over "all questions of law and fact" arising from removal proceedings, "[a]liens subject to orders of removal may only seek adjustment of status by filing a motion to reopen removal proceedings with an immigration judge, and any subsequent challenges may be brought via petition for review of the final order."[5] We reasoned that Akinmulero, by asking the district court to compel the adjudication of his status-adjustment application, was "in effect, appealing the decision to execute a removal order against him, a form of relief that we have previously held to be outside the

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[1] Majority Op. at 10–11.

[2] *Chen v. Johnson*, No. 15-CV-3422, 2016 WL 4544034, at *5 & n.3 (E.D.N.Y. Aug. 30, 2016) (citing *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011)); *Chen v. Rodriguez*, 200 F. Supp. 3d 174, 181–82 (D.D.C. 2016); *Nolasco v. Nielsen*, No. 1:18-cv-00051-TC, 2018 WL 6441037, at *2–3 (D. Utah Dec. 7, 2018).

[3] 347 F. App'x 58 (2009) (unpublished).

[4] *United States v. Gurrola*, 898 F.3d 524, 534 n.13 (5th Cir. 2018) ("Although unpublished opinions are not precedential, they are persuasive.").

[5] *Id.* at 61 (citing § 1252(a)(5), (b)(9) and *Willington v. INS*, 108 F.3d 631, 635 (5th Cir. 1997)).

bounds of district court jurisdiction."[6] The district court thus lacked jurisdiction.

Similarly, in *Cardoso v. Reno*—our most on-point, published decision—we held there was no jurisdiction when the aliens in that case asked us to compel the Attorney General to grant their status-adjustment applications.[7] The majority distinguishes *Cardoso* because the aliens asked us to *grant* their petitions, not order the USCIS to *adjudicate* them.[8] But our basis for concluding there was no jurisdiction is telling: "Regardless of how she describes her claim, [the appellant] undeniably *seeks* to prevent the Attorney General from executing a removal order."[9] *Cardoso*, like *Akinmulero*, instructs that in determining whether § 1252(g) denies jurisdiction, we should look to the plaintiff's goals—what she is trying to achieve. If a plaintiff is, at bottom, challenging a removal order, then regardless of how she technically pleads her claim, it's a challenge to a removal order.[10] And district courts lack jurisdiction over such claims.

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[6] *Id.* (citing *Li v. Agagan*, No. 04-40705, 2006 WL 637903, at *4 (5th Cir. Mar. 14, 2006) (unpublished)).

[7] 216 F.3d 512, 513 (5th Cir. 2000).

[8] However, *Akinmulero* did not find this grant/adjudicate distinction meaningful or even discuss it.

[9] *Cardoso*, 216 F.3d at 516 (emphasis added).

[10] This logic is equally applicable to § 1252(a)(5) and (b)(9). *Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012) (holding that, "[w]hen a claim by an alien, however it is framed, challenges the procedure and substance of an agency determination that is 'inextricably linked' to the order of removal, it is prohibited by section 1252(a)(5)"); *Duron v. Johnson*, 898 F.3d 644, 647 (5th Cir. 2018) ("Section 1252(b)(9) operates as an 'unmistakable "zipper" clause' designed to 'consolidate and channel review of *all* legal and factual questions that arise from the removal of an alien' through the preordained administrative process." (internal quotations and citations omitted) (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) and *Aguilar v. I.C.E.*, 510 F.3d 1, 9 (1st Cir. 2007))).

Cardoso made clear that aliens can't "make an end-run around the terms of [§ 1252(g)] by simply characterizing their complaint as a challenge to a denial of adjustment of status, rather than a challenge to the execution of a removal order."[11] We emphasized that "[t]o permit such challenges would 'lead to the deconstruction, fragmentation, and hence prolongation of removal proceedings at which the Supreme Court concluded that § 1252(g) is directed.' "[12] In *Cardoso*, "although their prayers might have been different, the plaintiffs' claims were, *in essence*, an attempt to compel the Attorney General to allow them to remain in the country."[13]

Cardoso relied heavily on another of our § 1252(g) cases, *Alvidres-Reyes v. Reno*.[14] In that case, we stressed that, "although the plaintiffs did 'not explicitly pray for the court to order the Attorney General to initiate proceedings or adjudicate their deportability,' *if successful*, plaintiffs' suit would nevertheless 'compel the Attorney General to do so in order to consider their applications for suspension of deportation.' "[15] We held that the aliens, "in effect," challenged the Attorney General's "refusal to initiate proceedings, adjudicate them deportable, and consider their applications for suspension of deportation."[16] The aliens in *Alvidres-Reyes* were asking the Attorney General to *adjudicate* their applications for suspension of

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[11] *Cardoso*, 216 F.3d at 516.

[12] *Id.* (quoting *Alvidres-Reyes v. Reno*, 180 F.3d 199, 205 (5th Cir. 1999)).

[13] *Li*, 2006 WL 637903, at *3 (emphasis added) (citing *Cardoso*, 216 F.3d at 516).

[14] 180 F.3d 199 (5th Cir. 1999).

[15] *Cardoso*, 216 F.3d at 516 (emphasis added) (quoting *Alvidres-Reyes*, 180 F.3d at 205).

[16] *Alvidres-Reyes*, 180 F.3d at 205.

deportation—just like the Appellants in this case.[17] The command of *Alvidres-Reyes* and *Cardoso* is unmistakable: We must look beyond the pleadings and focus on what relief is ultimately being sought to determine whether jurisdiction is proper.

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[17] One caveat: *Alvidres-Reyes* dealt specifically with *discretionary* decisions of the Attorney General. And the majority opinion, citing *Melendez v. McAleenan*, claims that this distinction is important because the statutes at issue here don't bar jurisdiction over non-discretionary choices of the Attorney General. But *Melendez* did not analyze any of the statutory provisions at issue in our case. *Melendez* was concerned with § 1252(a)(2)(B). And the text of § 1252(a)(2)(B) specifically cabins its application to "[d]enials of discretionary relief." As the majority opinion concedes, this discretionary distinction is *not in the text* of § 1252(a)(5), (b)(9), or (g). If the majority's interpretation is right, why didn't Congress include the same language it included in § 1252(a)(2)(B)? If anything, the absence of similar language in § 1252(a)(5), (b)(9), and (g) should lead to the opposite conclusion. Congress knew how to limit a statute to denials of discretionary relief. Its decision to omit that language from § 1252(a)(5), (b)(9), and (g) must have been a deliberate one.

But the majority contends that notwithstanding the absence of any textual support for its position, we have "long recognized that [§ 1252(a)(5), (b)(9), and (g)] are designed to protect the discretionary decisions of immigration authorities in matters related to removal and deportation." Majority Op. at 17. That's simply not an accurate summary of our precedents. The majority's only citation for this proposition is to *Alvidres-Reyes*, even though that case dealt only with § 1252(g)—not (a)(5) or (b)(9). Majority Op. at 17.

It's certainly true that *Alvidres-Reyes* repeatedly emphasized the Attorney General's "*discretion* not to commence proceedings or adjudicate cases . . . ." *Alvidres-Reyes*, 180 F.3d at 205 (emphasis added). But *Alvidres-Reyes* did not specifically hold that § 1252(g) *only* applies to discretionary decisions. And even assuming, for the sake of argument, that the best reading of *Alvidres-Reyes* does isolate the § 1252(g) jurisdictional bar to discretionary decisions, the majority opinion cites no authority for the proposition that the same is true for § 1252(a)(5) or (b)(9).

Here, Appellants' complaints are effectively collateral challenges to their deportation orders. Appellants asked the district court to compel USCIS to adjudicate their status adjustment. And the majority opinion concedes that if USCIS granted Appellants' applications for adjustment, their outstanding deportation orders would be nullified. In fact, Appellants' entire theory for why USCIS had jurisdiction is rooted in their belief that their travel pursuant to advance parole executed their removal orders. And USCIS disagreed. It found that it lacked jurisdiction precisely because those removal orders remain in effect.[18] Appellants' challenges are efforts to undo those removal orders. And § 1252(b)(9) "operates as an 'unmistakable "zipper" clause' "[19] designed as a channeling mechanism to move exactly these types of challenges away from federal district courts and into the congressionally "preordained administrative process."[20]

In sum, our precedent says our focus must be on the ultimate relief sought—not on the next technical step in the adjudicative process. And the relief Appellants ultimately seek is "inextricably linked" to their removal orders because, if successful, those removal orders would be nullified. The district courts correctly concluded that they lacked jurisdiction.

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[18] The majority opinion contends this "is simply incorrect," claiming instead USCIS disclaimed jurisdiction because "Appellants were not arriving aliens *at the time of their applications*." Majority Op. at 18 & n.8. But USCIS said in each of its administrative-closure letters that it was without jurisdiction precisely because "an Immigration Judge ordered you deported . . . [and i]t does not appear that the deportation proceedings . . . have been terminated." Even more, the plain language of § 1245.2(a)(1) addresses status at the time the alien's deportation or removal proceedings were initiated. *See, e.g.*, *Guevara v. Zanotti*, 399 F. Supp. 3d 494, 501–02 (E.D. Va. 2019). Appellant's putative status as "arriving aliens" at the time of their application is therefore irrelevant to the jurisdictional claim underlying the district court's dismissal.

[19] *Duron*, 898 F.3d at 647 (quoting *Reno*, 525 U.S. at 483).

[20] *Id.* (citing *Aguilar*, 510 F.3d at 9).

II

Putting aside the jurisdictional point, I agree with the majority's result: that the district court in Duarte's case correctly granted summary judgment in favor of the Government. But I disagree with the majority's reasoning: that MTINA removed the discretion of immigration authorities to grant TPS recipients advance parole.

While there is no case that directly refutes or affirms the majority's reading of § 304(c)(1)(A) of MTINA—because no party or court has ever considered it—its reading runs counter to regulations written by agencies who are familiar with this statutory framework. Under 8 C.F.R. § 244.15(a), "[t]he grant of Temporary Protected Status shall not constitute permission to travel abroad. Permission to travel may be granted by the director pursuant to the Service's advance parole provisions." Section 244.15 was promulgated in 1991[21] by the Immigration and Naturalization Service under the authority of § 1254a, the same provision of title 8 that the majority opinion says forbids immigration officials from authorizing advance parole.[22] Section 244.15 is titled "Travel Abroad," and advance parole is the only type of permission to travel it mentions. In fact, "[f]ailure to obtain advance parole prior to the alien's departure from the United States may result in the withdrawal of Temporary Protected Status and/or the institution or recalendering of deportation or exclusion proceedings against the alien."[23] Section 244.15(b)

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[21] Temporary Protected Status for Nationals of Designated States, 56 Fed. Reg. 619, 622 (Jan. 7, 1991) (to be codified at 8 C.F.R. pt. 240).

[22] Section 304(c)(1)(A) of MTINA is codified at 8 U.S.C. § 1254a note (Aliens Authorized to Travel Abroad Temporarily).

[23] 8 C.F.R. § 244.15(b).

indicates that for a TPS recipient to travel abroad, she must apply, *specifically*, for advance parole.

The majority opinion's interpretation of MTINA is irreconcilable with § 244.15. If the majority's reading of MTINA were the only permissible reading, then of course it must govern because "a valid statute always prevails over a conflicting regulation."[24] But no conflict exists here. The majority's reading hinges on a statutory definition of "admitted" found in 8 U.S.C. § 1101(a)(13)(A), a provision enacted five years after MTINA.[25] But § 304(c)(1)(A) can easily be read another way—a way that makes more sense in context. Here, we should give "admitted" its ordinary meaning at the time Congress enacted it, rather than a later-enacted statutory definition. When one examines MTINA's statutory history—not its *legislative* history, but its enacted lineage ("including prior laws, amendments, codifications, and repeals"[26])—this conclusion is inescapable.

MTINA was enacted in 1991. So, we must determine what the term "admitted" in § 304(c)(1)(A) would have meant in 1991.[27] The definition of "admitted" that the majority opinion relies on comes from the current version of § 1101(a)(13)(A) and was added in an Omnibus Consolidated

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[24] *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 829 (D.C. Cir. 2006). A regulation can never "trump the plain meaning of a statute." *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 11 (D.C. Cir. 2002).

[25] Majority Op. at 18–19.

[26] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 440 (2012).

[27] *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (noting that, when interpreting statutory terms, "our job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.' " (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979))).

Appropriations Act in 1996, five years after MTINA was enacted.[28] Before 1996, § 1101 didn't include a definition of "admitted." Thus, Congress could not have been contemplating that definition when it drafted MTINA. Nor could a reader in 1991 employ the statutory definition when interpreting MTINA's text. Without a specific statutory definition, "admitted" would have borne its ordinary definition. The Oxford English Dictionary in print at that time defines "admit" this way: "To allow to enter, let in, receive (a person or thing)."[29] Absent indication to the contrary, that everyday meaning is the one it should carry in § 304(c)(1)(A). Bottom line: § 244.15(b) stays on the books, and the Attorney General maintains the discretion that everyone thought he had until today. Reading § 304(c)(1)(A) of MTINA contextually, as we must,[30] underscores this result. Here's the text again: "the alien shall be inspected and admitted in the same immigration status the alien had at the time of departure . . . ."[31] As noted above, the statutory definition of "admitted" is "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[32] But

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[28] PL 104–208, Sept. 30, 1996, 110 Stat 3009. The majority responds to this time-warp problem by saying that the BIA had adopted this interpretation even before MTINA was enacted, and the 1996 legislation did not change the term's meaning. But if knowledge of the legal meaning of this term was so widespread before 1996, then why did the Immigration and Naturalization Service see no problem with promulgating § 244.15 in 1991, and why did nobody else notice the majority's argument until now? The majority does not say.

[29] *Admit*, OXFORD ENGLISH DICTIONARY (2d ed. 1991). The edition of Black's Law Dictionary in print in 1991 doesn't have a listing for "admit" outside the evidence context.

[30] *Reed v. Taylor*, 923 F.3d 411, 415 (5th Cir. 2019) ("[J]udges, like all readers, must be attentive not to words standing alone but to surrounding structure and other contextual cues that illuminate meaning.").

[31] Pub. L. 102-232, § 304(c)(1)(A), 105 Stat. 1733.

[32] 8 U.S.C. § 1101(a)(13)(A).

many TPS recipients, like Appellants, didn't enter lawfully. So, if you plug the later-enacted statutory definition into our text, a contradiction emerges. Because an "admitted" person under the statutory definition is necessarily someone who entered lawfully, a TPS recipient who originally entered unlawfully can't be "admitted" in that same status—or any status.

This is obviously the majority's point. But remember, § 304(c)(1)(A) is about all TPS recipients. And a not-insignificant portion of TPS recipients enter unlawfully. The text specifically announces the class of people to whom it applies[33]—notably, aliens granted temporary protected status—and it doesn't distinguish between TPS recipients who entered lawfully and those who didn't. Not only does the majority's misreading radically alter the statute's application, it strips the Attorney General of his authority to grant parole under § 1182(d)(5)(A)—an authority that earlier this year another panel of this court acknowledged extends to TPS beneficiaries.[34] The majority's theory disregards the venerable rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary

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[33] The statute describes two primary classes of aliens to which it applies: "(A) Aliens provided benefits under section 301 of the Immigration Act of 1990 (relating to family unity)" and "(B) Aliens *provided temporary protected status* under section 244 of the Immigration and Nationality Act, including aliens provided such protection under section 303 of the Immigration Act of 1990." § 304(c)(2) (emphasis added).

[34] *See Solorzano v. Mayorkas*, 987 F.3d 392, 399 (5th Cir. 2021) ("TPS recipients have authorization to travel to any country and, with advanced notice to DHS and a proper application, they can obtain 'advance parole.'" (quoting 8 C.F.R. § 244.15(a) and citing 8 U.S.C. § 1254a(f)(3)). Admittedly, this language is dicta because the panel was not holding that TPS recipients can obtain parole—it was merely dismissing a "parade of horribles" argument advanced by the Appellee. But the fact that the *Solorzano* panel took it for granted—just like both parties in this case, the INS and the USCIS—that the Attorney General retained this power is further evidence of how small the majority's retroactive-application-of-a-statutory-definition-mousehole is.

provisions—it does not, one might say, hide elephants in mouseholes."[35] The no-elephants-in-mouseholes maxim counsels caution. Better to mind the elephant in the room: the majority's revision of federal immigration law.

A court's choice to advance a novel statutory interpretation *sua sponte* would be striking under any circumstances. But it is especially puzzling here because it is unnecessary. We need not hold that immigration authorities wrongly issued advance parole to come to the majority's correct conclusion that Appellants were not "arriving aliens" within the meaning of 8 C.F.R. § 1245.2(a)(1)(i). The majority opinion contends that Appellants were not arriving aliens because they were not actually paroled.

But the Government advances a more persuasive approach. While Appellants claim that their departure from the United States executed their deportation orders, the Government argues that deportation orders are not executed when an alien travels pursuant to a TPS-specific advance parole document. That's because, as we've seen, § 304(c)(1)(A) requires that the TPS recipient be "inspected and admitted *in the same immigration status* the alien had at the time of departure."[36] In the immigration context, we have defined "status" broadly as "a person's legal condition."[37] And Appellants' legal condition when they left the United States was as TPS recipients with unexecuted removal orders. They returned in the same condition. Here, § 304(c)(1)(A) works a kind of legal fiction for TPS recipients—it's *as if* the aliens never left. Thus, Appellants were not arriving aliens when they returned. And USCIS properly determined that it lacked jurisdiction because Appellants had outstanding removal orders.

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[35] *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001).

[36] § 304(c)(1)(A) (emphasis added).

[37] *Tula Rubio v. Lynch*, 787 F.3d 288 (5th Cir. 2015).

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Summing up: I believe the district courts lacked jurisdiction. But even if not, the majority's affirmance as to Duarte, while the right result, is wrongly reasoned. I agree that summary judgment would have been appropriate in Duarte's case (had there been jurisdiction). But I would let the Attorney General continue to exercise the discretion he has enjoyed from the time MTINA was enacted until today.