FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U VISA APPELLANTS, *Plaintiffs - Appellants*, v. DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Defendant - Appellee*.	No. 24-6824 D.C. No. 3:23-cv-04657-RFL OPINION

Appeal from the United States District Court
for the Northern District of California
Rita F. Lin, District Judge, Presiding

Argued and Submitted October 23, 2025
San Francisco, California

Filed September 14, 2026

Before: Richard A. Paez, Carlos T. Bea, and Danielle J. Forrest, Circuit Judges.

Opinion by Judge Forrest;
Partial Concurrence and Partial Dissent by Judge Bea

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SUMMARY*

Immigration/Administrative Procedure Act

In a case in which Plaintiffs sued the Director of the United States Citizenship and Immigration Services (USCIS) regarding their pending U-visa petitions, the panel affirmed in part and reversed in part the district court's rulings, and remanded.

Plaintiffs are domestic U-visa petitioners who had not received a decision on their petitions due to the yearly cap on issuing U visas. Plaintiffs either had been placed on the U-visa waiting list or received a determination that their visa petition is "bona fide," but had not received advance parole, which would allow them to leave the United States with permission to return.

Plaintiffs brought claims under the Administrative Procedure Act (APA). In Claim 1, Plaintiffs whose petitions had been deemed bona fide (BFD Plaintiffs) asserted that USCIS had unlawfully delayed or withheld considering them for the waiting list. In Claim 2, all Plaintiffs asserted that USCIS had unlawfully delayed or withheld considering them for advance parole. In Claim 3, Plaintiffs on the waiting list (WLD Plaintiffs) asserted that they had been arbitrarily and capriciously denied advance parole.

The panel held that granting parole to waitlisted U-visa petitioners is discretionary, not mandatory. Under 8 C.F.R. § 214.14(d)(2), "USCIS will grant deferred action or parole"

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

to U-visa petitioners "while" they "are on the waiting list." Focusing on the word, "while," Plaintiffs first contended that if someone on the waiting list travels abroad, USCIS must consider them for parole to enter (or reenter) the United States. The panel concluded that, even though Plaintiffs had not claimed that they planned to travel abroad, this claim was ripe because the panel could make a firm prediction based on undisputed evidence that any WLD Plaintiff who leaves the United States will not be considered for parole based on their waitlist status. Contrary to Plaintiffs' assertion, evidence that USCIS treats "or" in the phrase "deferred action or parole" as meaning "and/or" for petitioners who receive favorable waitlist determinations while abroad and are granted advance parole does not mean that "or" mandates a grant of both deferred action "and" parole.

Plaintiffs' second argument was based on 8 C.F.R. § 214.14(d)(3), which provides that a petitioner does not accrue unlawful presence while on the waiting list. Although this subsection indicates that USCIS has the authority to grant advance parole to domestic members on the waiting list, that does not mean that USCIS is required to do so. Finally, Plaintiffs argued that because § 214.14(d)(2) "authorizes" parole for waitlisted petitioners, § 212.5(f) requires USCIS to issue them advance-parole documents. The panel rejected this argument as circular.

The panel held that WLD Plaintiffs had standing to claim that USCIS unlawfully withheld or unreasonably delayed granting them advance parole (Claim 2) and arbitrarily and capriciously denied them parole (Claim 3).

However, the panel concluded that the court lacked statutory jurisdiction over those claims. Claim 2 was based

on a delayed- or non-action theory and was asserted under § 706(1) of the APA, which permits a court to "compel agency action unlawfully withheld or unreasonably delayed." However, the APA does not permit courts to order an agency to take discretionary action. The panel also concluded that, to the extent that Claim 3 was still pending, it did not challenge final agency action because there was no evidence of parole denials. The panel thus affirmed the district court's dismissal of the WLD Plaintiffs' claims.

Finally, the panel addressed the BFD Plaintiffs' challenge to the rejection of Claim 1, which asserted that USCIS unlawfully withheld, or unreasonably delayed, considering them for inclusion on the waitlist. The district court concluded that the BFD Plaintiffs had not shown an injury-in-fact because being waitlisted would not independently entitle them to be considered for parole. The panel agreed, reasoning that the BFD Plaintiffs failed to present facts indicating that waitlisted petitioners have more opportunities to seek parole than non-waitlisted petitioners.

However, the panel concluded that the district court erred by not considering the BFD Plaintiffs' alternative injury-in-fact arguments and remanded for further proceedings on these issues and, if necessary, the merits of Claim 1.

Concurring in part and dissenting in part, Judge Bea joined the part of the opinion affirming the dismissal of the Plaintiffs' claim that sought to compel USCIS to grant them advance parole. However, Judge Bea dissented from the decision to remand the BFD Plaintiffs' § 706(1) claim. In Judge Bea's view, regardless whether the BFD Plaintiffs had standing, their claim should be dismissed for lack of statutory jurisdiction. Their claim, which asserted that

USCIS had "unlawfully withheld" an adjudication of their eligibility for the waiting list, rested on the assertion that USCIS was required to conduct waiting-list adjudications for every pending U-Visa petition. However, there is no statutory provision or regulation requiring such adjudications. Judge Bea wrote that the district court should consider this issue on remand and determine whether jurisdiction is lacking.

COUNSEL

Brad Banias (argued), Banias Law LLC, Charleston, South Carolina, for Plaintiff-Appellant.

Aneesa Ahmed (argued) and Marie H. Feyche, Trial Attorney; Office of Immigration Litigation; Cara E. Alsterberg, Senior Litigation Counsel; William C. Silvis, Assistant Director; Yaakov M. Roth, Acting Assistant Attorney General; United States Department of Justice, Washington, D.C.; for Defendant-Appellee.

OPINION

FORREST, Circuit Judge:

U visas are issued to crime victims who have suffered "substantial physical or mental abuse" and "ha[ve] been helpful, [are] being helpful, or [are] likely to be helpful" to law enforcement. 8 U.S.C. § 1101(a)(15)(U)(i)–(ii). There is a significant backlog in the issuance of U visas because

Congress capped the number that may be issued in any given year. Plaintiffs are a group of over 150 U-visa petitioners living in the United States who have not received a decision on their visa petitions because of the statutory cap. Instead, they have been funneled down one of two interim paths: they either have been placed on the waiting list for receiving a U visa or they have received a determination that their U visa petition is "bona fide." Both paths have afforded Plaintiffs some interim benefit, notably deferral of removal and work authorization. But Plaintiffs have not received advance parole, which would allow them to leave the United States with guaranteed permission to return. As a result, Plaintiffs allege that they have spent years unable to visit family and friends abroad.

Plaintiffs sued the Director of the United States Citizenship and Immigration Services (USCIS) under the Administrative Procedure Act (APA). The Plaintiffs on the waiting list (WLD Plaintiffs) assert that they have been arbitrarily and capriciously denied advance parole. The Plaintiffs whose visa petitions have been deemed bona fide (BFD Plaintiffs) assert that USCIS has unlawfully delayed or withheld considering them for the waiting list. And all Plaintiffs assert that USCIS has unlawfully delayed or withheld considering them for advance parole. The district court rejected Plaintiffs' claims either on the pleadings or at summary judgment.

We affirm in part, reverse in part, and remand for further proceedings on the BFD Plaintiffs' single separate claim. There is an antecedent question relevant to Plaintiffs' claims: whether granting parole to waitlisted U-visa petitioners is discretionary or mandatory. Because we conclude that parole is discretionary, we lack jurisdiction under the APA to order USCIS to consider Plaintiffs for this relief. We also lack

statutory jurisdiction over the WLD Plaintiffs' separate claim challenging the denial of parole because they have not shown that USCIS took final action. As to the BFD Plaintiffs' separate claim, the district court correctly held that their alleged parole-related injuries do not constitute a sufficient injury-in-fact to confer standing, but the district court erred by failing to address the BFD Plaintiffs' other injury theories, and we remand for it to do so.

U-VISA FRAMEWORK

The U visa was established under the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, § 1513, 114 Stat. 1464 (2000) (codified at 8 U.S.C. § 1101(a)(15)(U)). U visas are available for crime victims (principal petitioners) who have "suffered substantial physical or mental abuse" from the criminal activity, "possess[] information concerning" such activity, and "ha[ve] been helpful, [are] being helpful, or [are] likely to be helpful" to the authorities, as well as select qualifying family members (derivatives). 8 U.S.C. § 1101(a)(15)(U)(i)–(ii). U-visa holders receive lawful nonimmigrant status and work authorization for up to four years. 8 U.S.C. § 1184(p)(3)(B), (p)(6); 8 C.F.R. § 274a.12(a)(19).

Only 10,000 U visas may be issued each fiscal year to principal petitioners. 8 U.S.C. § 1184(p)(2). This statutory cap has been reached every fiscal year since 2010. *I-918, Petition for U Nonimmigrant Status*, U.S. Citizenship & Immigr. Servs.[1] Currently, USCIS is reviewing petitions filed in or before April 2017, prioritizing the oldest petitions first. *Id.*

[1] Available at https://www.uscis.gov/I-918 [https://perma.cc/324F-PZUK] (current as of June 5, 2026).

A. Waiting List

To address the backlog of U-visa petitions, USCIS issued a regulation creating a waiting list and authorizing two forms of interim relief:

> All eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status must be placed on a waiting list and receive written notice of such placement. . . . USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list. USCIS, in its discretion, may authorize employment for such petitioners and qualifying family members.

8 C.F.R. § 214.14(d)(2).[2] The first form of interim relief—deferred action—"is an exercise of prosecutorial discretion that defers the removal of the alien based on the alien's case being made a lower priority for removal" and "does not confer any immigration status." New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014-01, 53015 n.3 (Sept. 17, 2007); 1 U.S. Citizenship & Immigr. Servs., *Policy Manual*, Pt. I, Ch. 1 [hereinafter *USCIS Policy Manual*].[3] The second form of interim relief—parole—"is

[2] The Sixth Circuit has concluded that the act of placing petitioners on the waitlist is "nondiscretionary per DHS regulations." *Barrios Garcia v. U.S. Dep't of Homeland Sec.,* 25 F.4th 430, 443 (6th Cir. 2022). We do not address that issue here.

[3] Available at https://www.uscis.gov/policy-manual/volume-1-part-i-chapter-1 [https://perma.cc/L9YJ-D7PL] (current as of May 8, 2026). Volume 1, Part I (Deferred Action) of the Policy Manual was added

permission given by [the Department of Homeland Security] that allows an alien to physically enter the United States temporarily" and "is not deemed to be an admission to the United States." 72 Fed. Reg. 53014-01, 53015 n.3; *see* 8 U.S.C. § 1182(d)(5)(A) ("[P]arole . . . shall not be regarded as an admission of the alien."). At issue here is "advance parole," which "is an administrative procedure" that "permit[s] aliens to leave the country and to reenter lawfully without jeopardizing pending applications for discretionary relief."[4] *Navarro-Aispura v. INS*, 53 F.3d 233, 235 (9th Cir. 1995).

B. Bona Fide Determination

Before U-visa petitioners can receive the interim relief available to those on the waiting list, they must be placed on the waiting list. But there is also a backlog for waitlist adjudications. *See, e.g.*, U.S. Citizenship & Immigr. Servs., *Humanitarian Petitions: U Visa Processing Times* 5 (2021).[5]

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during the pendency of this appeal. *See* U.S. Citizenship & Immigr. Servs., *Policy Alert: Bonafide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners* (2026), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20260508-DeferredAction.pdf [https://perma.cc/C4EW-5RMC] [hereinafter *Deferred Action Policy Alert*]; 1 *USCIS Policy Manual*, Pt. I, https://www.uscis.gov/policy-manual/volume-1-part-i [https://perma.cc/ZV57-SS3Z] (last visited May 22, 2026).

[4] The parties refer to advance parole as "advance parole," "advanced parole," and "waiting list parole." We use the term "advance parole." *See Hassan v. Chertoff*, 593 F.3d 785, 788 (9th Cir. 2010).

[5] Available at https://www.uscis.gov/sites/default/files/document/reports/USCIS-Humanitarian-Petitions.pdf [https://perma.cc/J4DQ-ZV38].

For example, in 2019, it took an average of 41.5 months for the agency to decide whether a U-visa petitioner should be placed on the waiting list. *See id.* In response to the increasing volume of petitions and the "growing backlog," USCIS created an alternative interim process in 2021: USCIS will "provide [Employment Authorization Documents (EAD)] and deferred action to noncitizens with pending, bona fide petitions who meet certain discretionary standards." U.S. Citizenship & Immigr. Servs., *Policy Alert: Bonafide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners* 2 (2021).[6]

The first step in this alternative interim process is for USCIS to decide whether a petition is bona fide. According to USCIS's Policy Manual, a principal petitioner's application (Form I-918) is bona fide if it is complete and the agency has received the petitioner's background and security results from biometric screening. 3 *USCIS Policy Manual*, Pt. C, Ch. 5.[7] USCIS then determines whether the petitioner poses a risk to national security or public safety and considers other relevant discretionary factors before granting any interim relief.[8] *Id.* Bona fide determinations are

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[6] Available at https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210614-VictimsOfCrimes.pdf [https://perma.cc/YM7K-PMJD].

[7] Available at https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5 [https://perma.cc/HQ9G-KKBA] (current as of May 8, 2026).

[8] The new Deferred Action Part I enumerates 15 discretionary considerations. 1 *USCIS Policy Manual*, Pt. I, Ch. 5, https://www.uscis.gov/policy-manual/volume-1-part-i-chapter-5

made for derivative petitioners as well. *Id.* If a petitioner receives relief under the bona-fide-determination path, "USCIS generally does not conduct waiting list adjudications." *Id.* But if USCIS declines to exercise its discretion to grant interim relief to a petitioner with an otherwise bona fide petition, the petitioner "is evaluated for waiting list eligibility and still has the opportunity to obtain employment authorization and a grant of deferred action if deemed eligible for waiting list placement." *Id.*

Although petitioners who receive a favorable bona fide determination may, like all noncitizens (including those on the waiting list), seek parole at a port of entry or by filing a USCIS Form I-131, there is no separate provision in USCIS's policies for petitioners who receive a favorable bona fide determination to apply for parole based on that determination. *See* 3 *USCIS Policy Manual*, Pt. C, Ch. 5. And only those who are waitlisted receive complete visa-eligibility determinations. 3 *USCIS Policy Manual* Pt. C, Ch. 6 ("While the BFD process does not include a full analysis of eligibility requirements, USCIS conducts a full adjudication necessary to determine eligibility for U nonimmigrant status as part of the waiting list process.").[9]

BACKGROUND

A. Plaintiffs' Claims

Plaintiffs are U-visa petitioners (principal and derivative) who reside in the United States. A few have

[https://perma.cc/U5LX-FG8Q] (last updated May 8, 2026); *see supra* n.3.

[9] Available at https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-6 [https://perma.cc/XTD8-AUBE] (current as of May 8, 2026).

received favorable waitlist determinations, but most have received only a favorable bona fide determination. Because all Plaintiffs received favorable interim determinations, they have all received deferred action and employment authorization.

Plaintiffs assert three claims against USCIS under the APA. First, the BFD Plaintiffs allege that the agency "unlawful[ly] withh[eld] or unreasonabl[y] delay[ed] waiting list decisions." Second, all Plaintiffs allege that the agency "unlawful[ly] withh[eld] or unreasonabl[y] delay[ed] . . . waiting list parole." And third, the WLD Plaintiffs assert that the agency "arbitrar[ily] and capricious[ly] deni[ed] advanced parole." Claims 1 and 2 are brought under § 706(1) of the APA, which permits courts to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), so long as the challenged action is nondiscretionary, *Norton v. S. Utah Wilderness All.* (*SUWA*), 542 U.S. 55, 64 (2004). Claim 3 was brought under § 706(2), which permits courts to "hold unlawful and set aside agency action, findings, and conclusions" for one of several enumerated reasons. 5 U.S.C. § 706(2).

B. Motion to Dismiss

USCIS moved to dismiss all three claims for lack of standing and subject-matter jurisdiction, and, alternatively, to dismiss Claims 2 and 3 for failure to state a claim. As to the BFD Plaintiffs, the district court rejected USCIS's standing challenge but dismissed the joint Claim 2 as to them, reasoning that their challenge to the withholding or delay of advance parole based on waiting list status was not ripe. As to the WLD Plaintiffs, the district court concluded that they have standing, but it dismissed their challenges to the withholding or denial of advance parole because courts

cannot compel an agency to take discretionary action and because the WLD Plaintiffs failed to plead that they sought and were denied parole. Thus, the district court allowed only Claim 1, brought by the BFD Plaintiffs, to proceed past the pleading stage.

C. Motions for Summary Judgment

The parties subsequently cross-moved for summary judgment on Claim 1. The BFD Plaintiffs divided the claim into two subparts: (a) unlawful withholding of waitlist determinations and (b) unreasonable delay in issuing waitlist determinations. They argued that USCIS violated its duty to consider them for the waiting list as a matter of law. Recognizing that whether USCIS has a duty to consider petitioners who have received a favorable bona fide determination for inclusion on the waiting list controls whether the agency unreasonably delayed making waitlist determinations (and that the unreasonable-delay question would require discovery), the BFD Plaintiffs did not move for summary judgment on that portion of the claim.

USCIS moved for summary judgment on the entirety of Claim 1, again asserting that the BFD Plaintiffs lacked standing. USCIS presented a declaration from Sharon Orise, the Adjudications Division Chief for USCIS's Service Center Operations Directorate. Orise stated that "USCIS, as a matter of discretion, may issue an Advance Parole Document to a noncitizen who is currently inside the United States who seeks to travel abroad," but the agency "has not used this authority to provide advance parole to individuals inside the United States based on placement on the U visa waiting list." She further explained that "[p]lacement on the waiting list does not create a separate basis on which to apply for advance parole." Rather, "U visa petitioners inside the

United States will only be considered for deferred action," and "[o]nce deferred action has been granted to a noncitizen on the waiting list, no further mechanism exists for them to apply for[] or be considered for parole based on their placement on the waiting list."

The district court raised a concern, however, that Orise had "not squarely address[ed]" Plaintiffs' argument "that these rules only applied to applications for advance parole that were made while in the United States" because "U visa petitioners on the waiting list in the United States could travel abroad . . . [and] seek either parole at the border or advance parole at an embassy or consulate abroad, and then receive such parole to reenter the United States based on their waiting list status." But the district court also noted that Plaintiffs had not presented any evidence supporting their assertion that waitlisted petitioners in the United States could subsequently travel abroad and receive parole due to their waitlist status.

The district court gave the parties an opportunity to submit supplemental evidence on this issue. The Plaintiffs failed to do so, conceding that they have "no evidence of U visa petitioners living in the United States who received waiting list decisions and were able to obtain parole to travel abroad by virtue of their placement on the waiting list." Instead, they presented evidence of principal petitioners who had received bona fide determinations being waitlisted as a result of litigation so that their derivative petitioners located abroad could be considered for waitlist placement and parole to enter the United States and evidence of parole being

granted to a principal petitioner who received a waitlist determination while residing outside the United States.[10]

USCIS submitted a supplemental declaration from Orise explaining that if a U-visa petitioner with a waitlist determination or a bona fide determination were to leave and try to re-enter the United States, they would receive no benefit from either determination in applying for parole. Petitioners located in the United States when placed on the waiting list "are considered for deferred action *and are not subsequently considered for parole* even if they depart the United States" thereafter. Orise acknowledged that there have been instances when domestic petitioners with bona fide determinations have received waitlist determinations because of legal action pending against USCIS, but the purpose was to allow derivative family members located abroad to enter the United States while the primary applicant waited for a U visa. In these situations, the principal petitioner was not considered for parole if they were placed on the waiting list while in the United States and the derivative family members were converted to deferred action after they entered the United States because parole only permits an entry into the country.[11] *See* 72 Fed. Reg. 53014-01, 53015 n.3.

[10] These circumstances are not present here because all Plaintiffs reside in the United States and none of them have alleged that they have a derivative petitioner located abroad. We, therefore, have no occasion to consider the scope of USCIS's regulatory obligations towards principal or derivative petitioners who reside abroad.

[11] During the summary judgment proceedings, USCIS moved to dismiss BFD Plaintiff Haroon Ishtiaq's claim as moot because he received a waitlist determination due to litigation involving his overseas derivatives. Ishtiaq did not dispute that his waitlist determination mooted Claim 1 as to him, but he argued that he (like the WLD Plaintiffs) is

The district court granted USCIS's motion for summary judgment, concluding that the BFD Plaintiffs had not shown they suffered an injury-in-fact, as required for standing. The district court found that "the undisputed evidence" established that placement on the waiting list would have "no impact whatsoever on the ability of a U visa petitioner in the United States to seek advance parole" and would not give the BFD Plaintiffs "any advantage in the consideration for parole," and also concluded that being placed on the waiting list does not entitle petitioners to parole. The district court also denied the WLD Plaintiffs' motion for jurisdictional discovery.

Plaintiffs timely appealed the district court's rulings.

DISCUSSION

We have appellate jurisdiction over this appeal under 28 U.S.C. § 1291. We review de novo the district court's dismissal of Claims 2 and 3. *E.g.*, *Osheske v. Silver Cinemas Acquisition Co*., 132 F.4th 1110, 1113 (9th Cir. 2025); *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1173 (9th Cir. 2022). Likewise, we review de novo the district court's grant of summary judgment for USCIS on Claim 1 based on lack of standing. *Hajro v. U.S. Citizenship & Immigr. Servs*., 811 F.3d 1086, 1098 (9th Cir. 2016). But we review "[t]he district court's factual findings on jurisdictional issues" for clear error. *Id.*

Because the nature of parole for waitlisted U-visa petitioners—whether it is discretionary or mandatory—is

entitled to advance parole. Because the court had already dismissed the WLD Plaintiffs' claims, it granted USCIS's motion to dismiss Ishtiaq. While it is clear Ishtiaq may not proceed as a BFD Plaintiff, USCIS does not dispute that he may now proceed as a WLD Plaintiff.

foundational to Plaintiffs' claims, we start there. We then consider whether the district court erred in dismissing the WLD Plaintiffs' claims and granting summary judgment for USCIS on the BFD Plaintiffs' Claim 1.

A. Waitlist Determinations

The U-visa waitlist procedure is governed by regulation. Of particular relevance, the regulations provide: "USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list. USCIS, in its discretion, may authorize employment for such petitioners and qualifying family members." 8 C.F.R. § 214.14(d)(2). Plaintiffs make three arguments for why USCIS is legally mandated to grant parole to all waitlisted petitioners. We consider these arguments in turn.[12]

1. Ongoing-Duty Theory

Plaintiffs first advance an ongoing-duty theory that focuses on the phrase "*while* the U-1 petitioners are on the

[12] USCIS contends that whether to grant parole to waitlisted petitioners is a matter of discretion and, as such, we lack subject-matter jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(ii), which prohibits courts from reviewing discretionary "decision[s] or action[s] of the Attorney General or the Secretary of Homeland Security." However, "a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002); *see also Hassan*, 593 F.3d at 789–90 (addressing § 1152(a)(2)(B)(ii) only after determining the challenged action was discretionary). Because we ultimately conclude that we lack statutory jurisdiction over the WLD Plaintiffs' claims and remand for the district court to determine Article III jurisdiction over the BFD Plaintiffs' claims, we do not consider whether 8 U.S.C. § 1252(a)(2)(B)(ii)'s jurisdictional limitations apply to Plaintiffs' claims.

waiting list."[13] *Id.* (emphasis added). Plaintiffs assert that the word "while" means "throughout the time that" or "as long as" and, therefore, USCIS must "grant parole or consideration for parole for overseas members of the waiting [list] *for as long as the* principal U visa applicant is on the waiting list." In other words, Plaintiffs contend that if someone on the waiting list travels abroad, regardless of where they were when they were waitlisted, USCIS must consider them for parole to enter (or reenter) the United States.

USCIS summarily argues that Plaintiffs' ongoing-duty theory is not ripe because they all reside in the United States and have not alleged that they have plans to travel abroad. The ripeness doctrine, drawn from both Article III and prudential concerns, serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148–49 (1967)). For cases raising ripeness challenges to "benefit-conferring regulation[s]," we have adopted the "firm prediction" rule:

[13] The parties disagree on whether Plaintiffs' argument about the ongoing-duty theory was properly preserved for appeal. Even if this argument was forfeited, we exercise our discretion to address it because it is a pure question of law, the district court addressed it on the merits, and it was fully briefed by the parties. *See Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012) (quoting *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010)).

> If it is inevitable that the challenged rule will operate to the plaintiff's disadvantage—if the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the rule—then there may be a justiciable controversy that the court may find prudent to resolve.

Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1435–36 (9th Cir. 1996) (citation modified) (quoting *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 69 (1993) (O'Connor, J., concurring)). Here, we can make a "firm prediction" based on USCIS's undisputed evidence that any WLD Plaintiff who leaves the United States will not be considered for, or granted, parole *based on their waitlist status (or lack thereof)*. *Cf. Pakdel v. City & County of San Francisco*, 594 U.S. 474, 479 (2021) (per curiam) ("Once the government is committed to a position . . . , potential ambiguities evaporate and the dispute is ripe for judicial resolution."). Accordingly, the dispute about whether it is lawful to withhold parole from waitlisted U-visa petitioners is ripe.

"Regulations are interpreted according to the same rules as statutes, applying traditional rules of construction," and our "starting point is the plain language." *United States v. Shih*, 73 F.4th 1077, 1092 (9th Cir. 2023) (citation modified). The waitlist regulation provides that "USCIS will grant deferred action *or* parole." 8 C.F.R. § 214.14(d)(2) (emphasis added). "The ordinary and contemporary meaning of the term ['or'] is sometimes 'either . . . or . . . but not both' and other times 'and/or,'" which could permit both. *United States v. Gallegos*, 613 F.3d 1211, 1215 (9th Cir. 2010). But

"[w]e have consistently defined 'or' as indicating separate alternatives." *Id.*; *see U.S. Commodity Futures Trading Comm'n v. Monex Credit Co.*, 931 F.3d 966, 976 (9th Cir. 2019) ("When Congress places 'or' between two words, we assume that Congress intended the two terms as alternatives."); *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87 (2018) (explaining that "'or' is 'almost always disjunctive'" and is naturally read to connect alternatives (citation omitted)); *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975) ("As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately.").

Contrary to Plaintiffs' assertion, the evidence that USCIS treats "or" as meaning "and/or" for petitioners who receive favorable waitlist determinations while living abroad such that they are granted parole in order to enter the United States does not mean that "or" mandates "and." "And/or" (which *permits* "A or B *or both*") is not equivalent to "and" (which *requires* both A and B). *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, Ch. 12 (1st ed. 2012). Regardless of whether the waitlist regulation is best read to say either that "USCIS will grant deferred action or parole" or that "USCIS will grant deferred action or parole [or both]," neither reading leads to the conclusion that USCIS *must* grant parole to petitioners who have been granted deferred action while in the United States.[14]

[14] One of our sister circuits recently reached a similar conclusion in an unpublished decision. *See Arenales-Salgado-De-Oliveira v. Dir., U.S. Citizenship & Immigr. Servs.*, No. 24-12360, 2026 WL 2043163, at *7–8 (11th Cir. 2026) (per curiam). Several district courts have also reached similar conclusions. *See Argueta v. Jaddou*, No. 4:23-CV-3002, 2023

Additionally, we are unpersuaded by Plaintiffs' assertion that, because the regulation states that petitioners will be granted deferred action or parole "while" on the waiting list, USCIS must grant parole based on a petitioner's choice to leave the country after being placed on the waitlist and receiving deferred action. Accepting Plaintiff's definition that "while" means "throughout the time that; as long as," that meaning does not require USCIS, after granting functional interim relief pursuant to 8 C.F.R. § 214.14(d)(2), to change the relief granted based on a petitioner's chosen location.[15] There is no evidence that USCIS withdraws a petitioner's deferred-action status when she leaves the country—the petitioner simply does not benefit from this relief while abroad. *Cf. Arenales-Salgado-De-Oliveira v. Dir., U.S. Citizenship & Immigr. Servs.*, No. 24-12360, 2026 WL 2043163, at *8 (11th Cir. 2026) (per curiam) (explaining that the petitioners' argument that domestic WLD holders

WL 8082113, at *8 (D. Neb. Nov. 21, 2023) ("[I]ndividuals who have received favorable WLDs are entitled to 'deferred action or parole,' not both."); *Kothari v. Dir. of U.S. Citizenship & Immigr. Servs.*, No. 3:24-C-50101, 2025 WL 732075, at *7–8 (N.D. Ill. Jan. 24, 2025) (rejecting Plaintiff's reading of § 214.14(d)(2) that would have the court find "that USCIS must grant both deferred action *and* parole"). The court in *Kothari* specifically addressed the argument that Plaintiffs make here about petitioners who were granted parole when placed on the waiting list while located overseas and then later granted deferred action: "First, and most obviously, the fact that USCIS sometimes grants both parole and deferred action to members of the waiting list living abroad is not evidence that USCIS *must* grant both to *all* waitlisted petitioners: it is merely an example of USCIS's exercising its discretion." 2025 WL 732075, at *8.

[15] Again, because all Plaintiffs in this case reside in the United States, we have no occasion to decide the scope of 8 C.F.R. § 214.14(d)(2)'s requirements for petitioners or derivatives initially placed on the waitlist while overseas.

would travel abroad and "no longer have deferred action" was "a hypothetical" and irrelevant when all the petitioners were present in the United States). And where a waitlisted petitioner has been granted deferred action while residing in the United States, the waitlist regulation is satisfied because the petitioner has received one of the remedies while on the waiting list.

2. Section 214.14(d)(3)

Plaintiffs also argue that the next subsection of the waitlist regulation—§ 214.14(d)(3)—"only works if all members of the waiting list are entitled to parole." Section 214.14(d)(3) concerns a U-visa petitioner's accrual of unlawful presence in the United States. It provides that "[d]uring the time a petitioner . . . who was granted deferred action or parole is on the waiting list," she will not accrue unlawful presence. 8 C.F.R. § 214.14(d)(3).

Plaintiffs do not explain why this subsection must be read to reach their conclusion that parole is mandatory for domestic petitioners who have been placed on the waiting list. It is true that, because unlawful presence accrues only while a noncitizen is present in the United States, subdivision (d)(3) does not apply to waitlist members who are abroad. Thus, the inclusion of "parole" in a subdivision applicable only to waitlist members in the United States contemplates that USCIS *could* exercise its discretion and adopt a process to grant these individuals advance parole. But Plaintiffs overread the regulatory text. Specifically, they provide no reason why subsection (d)(3) should be construed as *requiring* parole for domestic members on the waiting list. That this subsection indicates USCIS has the legal authority to adopt such a process does not mean that USCIS is required

to do so. Without any development, Plaintiffs' argument on this point is unpersuasive.

3. Section 212.5(f)

Finally, Plaintiffs argue that because § 214.14(d)(2) "authorizes" parole for waitlisted petitioners, § 212.5(f) requires USCIS to issue them advance-parole documents. Section 212.5(f), titled "Advance Authorization," states: "When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued an appropriate document authorizing travel." According to Plaintiffs, because the waitlist regulation permits the agency to grant parole to petitioners on the waiting list, all waitlisted petitioners are "authorized" for parole, thereby triggering § 212.5(f).

This is a circular argument, presupposing that whenever USCIS is authorized to grant parole, it must do so. "Authorized" means to be "endowed with authority; sanctioned by authority; having or done with legal or official approval." *Authorized*, Merriam-Webster.[16] Just because an agency *can* do something, does not mean that it *must*. Section 212.5(f) cannot reasonably be interpreted as requiring USCIS to grant parole under § 214.14(d)(2) for waitlisted petitioners. Only when USCIS has decided to exercise its power to grant "legal or official approval" for parole is a petitioner "authorized" for parole and entitled to receive parole documents under § 212.5(f). This interpretation is consistent with our prior conclusion that Congress gave the Secretary of Homeland Security discretion to grant parole under 8 U.S.C. § 1182(d)(5). *See,*

[16] Available at https://www.merriam-webster.com/dictionary/authorized [https://perma.cc/FS5L-46S2] (last visited Feb. 3, 2026).

e.g., *Hassan v. Chertoff*, 593 F.3d 785, 789–90 (9th Cir. 2010); *see also Arenales-Salgado*, 2026 WL 2043163, at *8 ("Just because [deferred action and parole] are available for the [USCIS] to choose from does not mean that [it] has authorized one or the other for any particular U-visa petitioner.").

In sum, Plaintiffs' arguments that USCIS is required to grant parole to waitlisted U-visa petitioners fail to persuade. And we reach the contrary conclusion: the governing regulation grants USCIS discretion to grant parole; it does not mandate that USCIS grant this relief. With this foundational issue resolved, we now turn to the Plaintiffs' claims.

B. WLD Plaintiffs' Claims

The WLD Plaintiffs assert that USCIS unlawfully withheld or unreasonably delayed granting them advance parole (Claim 2) and arbitrarily and capriciously denied them advance parole (Claim 3). On appeal, the WLD Plaintiffs collapsed these claims, arguing only that they must be considered for advance parole.[17] USCIS re-raises its standing challenge, asserting that because the court cannot compel USCIS to grant advance parole, any claimed injury is not redressable.

[17] The phrase "arbitrary and capricious" does not appear anywhere in the Opening Brief and is used only in reference to the BFD Plaintiffs in the Reply Brief. Therefore, arguably the WLD Plaintiffs have abandoned Claim 3. *See Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1213 (9th Cir. 2017).

1. Standing

Article III of the Constitution limits the judicial power of courts to hearing "cases" and "controversies." U.S. Const. art. III, § 2; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). The standing doctrine is one means of "identify[ing] those disputes which are appropriately resolved through the judicial process." *Lujan*, 504 at 560 (citation omitted). The Supreme Court has held "that the irreducible constitutional minimum of standing contains three elements": (1) "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) causation—"a causal connection between the injury and the conduct complained of"; and (3) redressability—that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560–61 (citation modified).

"As a general rule, when the question of jurisdiction and the merits of the action are intertwined, dismissal for lack of subject matter jurisdiction is improper." *See Williston Basin Interstate Pipeline Co. v. Exclusive Gas Storage Leasehold & Easement in Cloverly Subterranean*, 524 F.3d 1090, 1094 (9th Cir. 2008) (internal quotation marks and alterations omitted) (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). As we explained in *Williston Basin*,

> "[I]f the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," then the court has

> jurisdiction over the dispute, and cannot dismiss on jurisdictional grounds.

Id. (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). The party invoking federal jurisdiction bears the burden of proving standing. *Lujan*, 504 U.S. at 561.

Here, USCIS argues the WLD Plaintiffs cannot satisfy the first or third elements of standing. We disagree. The proper interpretation of the waitlist regulation dictates whether the WLD Plaintiffs have been injured by USCIS not considering them for advance parole and whether that injury is redressable. Neither USCIS nor the district court addressed causation, but "we have an independent obligation to consider" each element of standing. *See Bowen v. Energizer Holdings, Inc.*, 118 F.4th 1134, 1149 (9th Cir. 2024) (quoting *ACLU of Nev. v. Lomax*, 471 F.3d 1010, 1015 (9th Cir. 2006)). We conclude that the WLD Plaintiffs have demonstrated a "causal connection between the injury" (withholding of parole) "and the conduct complained of" (USCIS not affording waitlisted petitioners advance parole). *Lujan*, 504 U.S. at 560 (citation omitted). Thus, the WLD Plaintiffs have standing to bring their claims.

2. Statutory Jurisdiction

With Article III satisfied, we next consider whether we have statutory jurisdiction over the WLD Plaintiffs' claims. The APA permits judicial review only of final agency action. 5 U.S.C. § 704; *SUWA*, 542 U.S. at 62–63.[18] An agency's

[18] We have treated the finality requirement as both an issue of ripeness and "an independent jurisdictional requirement." *Ukiah Valley Med. Ctr. v. F.T.C.*, 911 F.2d 261, 264 n.1 (9th Cir. 1990). No matter how it is classified, "a finding of finality, or of an applicable exception, is

ongoing policy or program generally is not itself a final agency action under the APA. *See, e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890–91 (1990); *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001). An exception exists where "plaintiffs claim that a governmental action was unlawfully withheld or unreasonably delayed" because agencies cannot "effectively prevent judicial review of their policy determinations by simply refusing to take final action." *Cobell*, 240 F.3d at 1095.

Here, Claim 2 is based on a delayed- or non-action theory and is asserted under § 706(1) of the APA, which permits a court to "compel agency action unlawfully withheld or unreasonably delayed." Although a "failure to act" is treated as final action in this context, we have jurisdiction over a § 706(1) claim "only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64; *see San Luis Unit Food Producers v. United States*, 709 F.3d 798, 803–04 (9th Cir. 2013). Because USCIS is not required to grant parole to domestic waitlisted U-visa petitioners that were granted deferred action, we lack statutory jurisdiction over the WLD Plaintiffs' claim seeking to compel USCIS to take this action.

To the extent that Claim 3, which alleges USCIS arbitrarily and capriciously denied WLD Plaintiffs advance parole, is still pending, it likewise does not challenge final agency action. This claim was brought under § 706(2) of the APA, which allows courts to "hold unlawful or set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5

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essential when the court's reviewing authority depends on one of the many statutes permitting appeal only of 'final' agency action." *Id.*

U.S.C. § 706(2)(A). But the WLD Plaintiffs offer no evidence of any final "action, findings, [or] conclusions" by USCIS denying them parole. *See* 5 U.S.C. § 706(2). As the district court concluded, the WLD Plaintiffs do not allege or present any evidence that they requested advance parole or that USCIS denied them advance parole. And as previously discussed, USCIS's grant of deferred action to petitioners on the waitlist does not preclude it from also granting parole under either § 214.14(d)(2) or under the processes available to all noncitizens attempting to enter the United States. While Orise's declaration indicates that, as a matter of policy, waitlisted domestic petitioners are not given parole, the application of this policy alone is not enough to establish final agency action. *See Cobell*, 240 F.3d at 1095.

For these reasons, we affirm the district court's dismissal of the WLD Plaintiffs' claims.[19]

C. BFD Plaintiffs' Claim

Finally, the BFD Plaintiffs challenge the rejection of Claim 1, which asserts that USCIS unlawfully withheld, or unreasonably delayed, considering them for inclusion on the waitlist. On summary judgment, the district court concluded that the BFD Plaintiffs had not shown an injury-in-fact sufficient to establish standing because being waitlisted would not independently entitle them to be considered for parole under current USCIS policy. Plaintiffs counter that they have standing to challenge the bona-fide-determination policy because waitlisted petitioners are entitled to parole

[19] Because the APA's jurisdictional limits are dispositive, we do not address the parties' additional arguments about 8 U.S.C. § 1252(a)(2)(B)(ii)'s jurisdictional limitations.

and they have suffered other injuries by not receiving a waitlist determination.

The lost opportunity to pursue a benefit—even where the government retains discretion to ultimately deny the benefit—can be a constitutionally cognizable procedural injury. *See, e.g.*, *Serrato v. Clark*, 486 F.3d 560, 566–67 (9th Cir. 2007); *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998); *see generally* 13A Wright & Miller's Federal Practice and Procedure § 3531.4 (3d ed. 2025) (collecting cases). To constitute a sufficient injury to establish standing, the deprivation of a procedural right must "affect the plaintiff in a personal and individual way" and "actually exist." *Chennette v. Porch.com, Inc.*, 50 F.4th 1217, 1221 (9th Cir. 2022) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016)). The Supreme Court has made clear that "without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *see Spokeo*, 578 U.S. at 340–42. Therefore, here the BFD Plaintiffs must demonstrate that their "concrete interest" was adversely affected by being deprived of a waitlist determination.[20] *See Summers*, 555 U.S. at 496.

[20] Some courts have concluded that there can be no standing "when there is no plausible prospect that any benefit would have resulted from the foreclosed opportunity." Wright & Miller, *supra.* (collecting cases). We have not explicitly adopted this rationale in relation to the injury-in-fact requirement, but we have discussed a similar concept in the redressability context: "Redressability is satisfied so long as the requested remedy would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Matsumoto v. Labrador*, 122 F.4th 787, 801 (9th Cir. 2024) (citation modified). Other courts have discussed the lack of plausible relief if the alleged lost opportunity were provided in both

1. Ability to Obtain Parole

The BFD Plaintiffs first assert that receiving a favorable bona-fide determination but not a waitlist determination undermines their ability to obtain advance parole. This claimed injury does not meet Article III's injury-in-fact requirement. The district court found that the undisputed facts established that U-visa petitioners with waitlist determinations who have received deferred action and U-visa petitioners with bona-fide determinations who have received deferred action are in the same position with respect to parole—neither determination impacts whether advance parole will be granted. The Orise declarations provide uncontroverted evidence that domestic U-visa petitioners are not considered for parole and that being waitlisted does not provide petitioners who have received deferred action a separate pathway to obtain parole, regardless of whether parole is requested before or after departing the United States.

Because the BFD Plaintiffs failed to present facts indicating that waitlisted petitioners have more opportunities to seek parole than non-waitlisted petitioners or that

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injury and redressability analyses. *See, e.g.*, *Ranger Cellular v. F.C.C.*, 348 F.3d 1044, 1050 (D.C. Cir. 2003) (injury and redressability); *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 324–25 (4th Cir. 2002) (injury); *Carroll v. Hill*, 37 F.4th 1119, 1122 (6th Cir. 2022) (injury); *see also Kothari*, 2025 WL 732075, at *11 (finding that the lost opportunity to be considered for parole is an injury, but that it is not redressable); *Argueta*, 2023 WL 8082113, at *8 (finding no injury-in-fact because plaintiffs with BFDs would not gain anything by receiving WLDs, so it is a bare procedural injury). We need not decide whether the plausibility of relief is properly considered in assessing whether there is an injury-in-fact because here the undisputed evidence definitively establishes that the BFD Plaintiffs did not lose additional opportunities to obtain parole.

placement on the waitlist creates "any opportunity to be considered for parole that was previously unavailable" to domestic BFD Plaintiffs, their lost-parole-opportunity theory of injury necessarily fails.

2. Other Injury Theories

Although the district court addressed only the BFD Plaintiffs' alleged parole-related injury, Plaintiffs have advanced various other alleged harms resulting from the deprivation of a WLD. They assert that (1) the bona-fide-determination interim path delays adjudication of their eligibility for a U visa, risking loss of evidence, unlike petitioners placed on the waitlist, who receive full eligibility determinations at the time of adjudication and are subsequently reviewed for "continuing eligibility," 3 *USCIS Policy Manual* Pt. C, Ch. 7[21]; (2) unlawful presence is accrued following a bona fide determination but not a waitlist determination; and (3) the bona-fide-determination path is a creature of *policy*, and therefore subject to rescission and change, while the waiting-list path is governed by *regulation*.[22] Relevant to the last point,

[21] Available at https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-7 [https://perma.cc/C8SJ-ZMN6] (current as of Aug. 12, 2026).

[22] Because we remand for further consideration of the BFD Plaintiffs' alternative injury-in-fact arguments, we need not decide whether to excuse Plaintiffs' forfeiture of their unlawful-presence argument, which was raised for the first time in their Reply brief, or whether USCIS waived a forfeiture defense by discussing this issue at oral argument and offering to submit supplemental briefing. *See, e.g.*, *Smith v. U.S. Customs & Border Prot.*, 741 F.3d 1016, 1020 n.2 (9th Cir. 2014) ("[W]e generally decline to consider new arguments raised for the first time on appeal, especially when they are raised for the first time in the reply brief." (citations omitted)); *United States v. Ngumezi*, 980 F.3d 1285, 1288 (9th Cir. 2020) ("But the government has not made a forfeiture

Plaintiffs highlighted the unstable nature of the BFD Policy in a recent letter alerting the Court of USCIS's Policy Alert about changes to deferred action and the accrual of unlawful presence for those with deferred action. *See Deferred Action Policy Alert*, *supra*, n.3.

Because the district court did not address the BFD Plaintiffs' alternative injury-in-fact arguments, USCIS has not meaningfully addressed these arguments, and the recent USCIS policy changes may necessitate additional factual development to evaluate these arguments, we remand for further proceedings on these issues and, if necessary, the merits of Claim 1.[23]

CONCLUSION

This appeal largely is resolved by our conclusion that 8 C.F.R. § 214.14(d)(2) gives USCIS discretion to grant parole to waitlisted U-visa petitioners in the United States who have received deferred action. Although the WLD Plaintiffs have standing to challenge the agency's withholding of advance parole, their claims were properly dismissed because there is no statutory jurisdiction as to Claim 2 because the APA does not permit courts to order an

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argument. Instead, it has addressed the issue on the merits and invited us to do so as well. We conclude that the government has forfeited any claim of forfeiture, so we proceed to consider the merits.").

[23] The dissent argues that a remand is unnecessary because "regardless whether the BFD Plaintiffs have standing, their claim must be dismissed for lack of statutory jurisdiction" under the APA, Dissent at 33–34. Although the dissent frames this approach as resolving statutory jurisdiction, it in fact addresses a significant merits question—and creates a split with our sister circuits—without first deciding whether constitutional jurisdiction exists. *See* Dissent at 42–49. We decline to follow that order of operations. *See Steel Co.*, 523 U.S. at 97 n.2.

agency to take discretionary action and because, to the extent it is still being advanced, Claim 3 does not concern final agency action. As to the BFD Plaintiffs, although the district court correctly rejected their parole-related injury in assessing whether they have standing to assert Claim 1, it erred by not considering their alternative injury theories.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.[24]

BEA, Circuit Judge, concurring in part and dissenting in part:

Our decision rightly affirms the dismissal of the Plaintiffs' claim under § 706(1) of the Administrative Procedure Act (APA) that seeks to compel U.S. Citizenship and Immigration Services (USCIS) to grant them advance parole. *See* Op. 24–27. USCIS is not "required" to make parole determinations, and we lack jurisdiction over a § 706(1) claim that seeks to compel an agency to take a discretionary action. I thus join that part of the opinion in full.[1] *See* Op. 24–27.

But I part ways regarding the majority's decision to remand the claim of the "BFD Plaintiffs" so that the district court may analyze whether they have Article III standing. Maj. Op. 31–32. As I see it, regardless whether the BFD Plaintiffs have standing, their claim must be dismissed for

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[24] The parties shall each bear their own costs on appeal.

[1] I also concur in the dismissal of the waiting-list Plaintiffs' claim under 5 U.S.C. § 706(2)(A) because it does not challenge "final agency action." *See* Op. 27–28.

lack of statutory jurisdiction. The BFD Plaintiffs seek relief under § 706(1) of the APA, which permits a court to "compel agency action unlawfully withheld or unreasonably delayed."

The BFD Plaintiffs' § 706(1) claim asserted that USCIS had "unlawfully withheld" an adjudication of their eligibility for the waiting list and sought an injunction that would order USCIS to adjudicate their waiting-list eligibility within fourteen days. Their claim rested on the assertion that USCIS was required to conduct waiting-list adjudications for every pending U-Visa petition. But "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*," and in this case, there is no statutory provision or regulation that requires USCIS to adjudicate every U-Visa petition to determine whether each petitioner is eligible for the waiting list. *Norton v. S. Utah Wilderness All.* (*SUWA*), 542 U.S. 55, 64 (2004) (emphasis in original). Therefore, the BFD Plaintiffs' claim under § 706(1) to "compel" USCIS to adjudicate their eligibility for the waiting list cannot proceed.

I would thus dismiss the BFD Plaintiffs' claim for lack of jurisdiction and affirm the district court's decision in full. Because a federal court must assure itself of its jurisdiction, the district court should consider this issue on remand and dismiss the BFD Plaintiffs' claim if it determines that jurisdiction is lacking.

I respectfully dissent in part.

I

A.

The majority opinion ably describes the complicated statutory and regulatory scheme that governs this case. *See* Maj. Op. 7–11. I provide a brief background to orient the reader.

The U-Visa Program, so-called because the legislation that created it is codified at 8 U.S.C. § 1101(a)(15)(U), was established as part of the Victims of Trafficking and Violence Protection Act of 2000. The Secretary of Homeland Security, who has delegated his authority to USCIS, may grant "U nonimmigrant status" (U Visa) to certain aliens who have been victims of serious crimes and have assisted law enforcement in investigating or prosecuting those crimes. 8 U.S.C. §§ 1101(a)(15)(U)(i)(I)–(IV); 8 C.F.R. § 214.14. U-Visa holders receive lawful status and work authorization for up to four years. 8 U.S.C. § 1184(p)(3)(B); 8 C.F.R. § 274a.12(a)(19).

To receive a U Visa, a victim of a qualifying criminal activity must file a petition known as Form I-918. The petitioner must also file a separate form, completed and signed by a law enforcement officer, which certifies that the petitioner was helpful in a law enforcement investigation or prosecution. 8 U.S.C. § 1184(p)(1); 8 C.F.R. § 214.14(c)(2)(i). USCIS has exclusive jurisdiction to adjudicate U-Visa petitions and determines U-Visa eligibility on a case-by-case basis. 8 C.F.R. § 214.14(c)(1). Because the analysis can involve credibility assessments and difficult issues of proof, especially for certain crimes like human trafficking or domestic violence, USCIS may ask the petitioner to supplement his petition with additional evidence. *Id.* § 214.14(c)(2)(ii).

By statute, only 10,000 U Visas may be issued per year. 8 U.S.C. § 1184(p)(2). The demand for U Visas is far greater than the supply. Each year, tens of thousands more petitions are filed than the number of U Visas that may be issued under the statutory cap. This creates an ever-growing backlog that currently exceeds 250,000 unreviewed petitions. *See* U.S. Citizenship & Immigr. Servs., *USCIS Application and Petition Form Types* (Form I-918) (Fiscal Year 2026, Quarter 2).

USCIS recognized that many petitioners who would otherwise be eligible to receive U Visas were not receiving them solely because of the statutory cap. So, in 2007, USCIS, through notice-and-comment rulemaking, created the waiting-list program (codified at 8 C.F.R. § 214.14(d)(2)). Through this program, U-Visa petitioners with meritorious petitions could receive interim benefits notwithstanding the statutory cap. USCIS uses the same procedures and substantive standards to determine eligibility for the waiting list and for a U Visa. *See* USCIS Policy Manual, Vol. 3, Pt. C, Ch. 6 ("USCIS conducts a full adjudication necessary to determine eligibility for U nonimmigrant status as part of the waiting list process.").[2] The only difference is that USCIS begins reviewing petitions for the waiting list and placing eligible petitioners on the waiting list only after USCIS issues its 10,000th U-Visa in a fiscal year. Once that statutory cap has been reached, USCIS continues to review pending U-Visa petitions using its "normal process to determine eligibility." Interim Rule,

[2] "The Policy Manual contains the official policies of USCIS and . . . is to be followed by all USCIS officers in the performance of their duties[.]" Policy Manual, *supra*, About the Policy Manual, https://www.uscis.gov/policy-manual [https://perma.cc/E4CV-CM83].

Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53027 (Sept. 17, 2007). If USCIS determines that a petitioner satisfies the requirements to receive a U Visa, and thus, that he would have received a U Visa if not for the statutory cap, USCIS "must" place him on the waiting list. 8 C.F.R. § 214.14(d)(2). Those on the waiting list receive certain benefits: deferred action, work authorization, and eligibility for parole; they also do not accrue unlawful status while they remain in the United States. *Id.* §§ 214.14(d)(2), (3).

After the waiting list was created, the number of U-Visa petitions filed each year grew rapidly, from 6,850 in 2009 to 37,287 in 2017. *See* U.S. Citizenship & Immigr. Servs., *Number of Form I-918, Petition for U Nonimmigrant Status Statistics by Fiscal Year, Quarter, and Case Status* (Fiscal Years 2009-2020). This increase overwhelmed USCIS. As discussed above, determining eligibility for either waiting-list placement or a U Visa required USCIS to conduct a full review of the petition. Unable to increase its operational capacity sixfold within eight years, USCIS accumulated a backlog of U-Visa petitions. At the beginning of 2016, the average interval between filing and a waiting-list determination was 12 months; by the end of 2020, it exceeded 50 months. *See* U.S. Citizenship & Immigr. Servs., *Humanitarian Petitions: U Visa Processing Times* 4–5 (2021).

In 2021, USCIS circulated a policy memorandum that created the Bona Fide Determination Policy ("BFD Policy"). U.S. Citizenship & Immigr. Servs., *Policy Alert: Bona Fide Determination Process for Victims of Qualifying Crimes* ("*BFD Policy Alert*") (June 14, 2021). The BFD Policy created an alternative, streamlined procedure by which U-Visa petitioners could receive benefits, namely, work

authorization and deferred action, before USCIS had completed a full adjudication of their petition. *See id.* In 2008, Congress had authorized DHS to grant work authorization to aliens who have "pending, bona fide" applications for a U Visa, 8 U.S.C. § 1184(p)(6), and USCIS exercised its authority under § 1184(p)(6) to create the BFD Policy. *See* U.S. Citizenship & Immigr. Servs., *BFD Policy Alert*.

Under the BFD Policy, a petitioner could receive benefits once he established that his U-Visa petition was "bona fide," a far less demanding standard that involved only a threshold review of whether the petition was properly filed, complete, and supported by the required initial evidence. *Policy Manual*, Vol. 3, Pt. C, Ch. 5. Compared with the waiting-list program, which required a "full adjudication necessary to determine eligibility" for U-Visa status, the BFD process was a more streamlined means of administering interim benefits to U-Visa applicants whose petitions were in the backlog. *Policy Manual*, Vol. 3, Pt. C, Ch. 6.

The BFD process was created in response to the growing backlog of petitions and the agency's recognition that it needed a more efficient way to process petitions than the waiting-list program. A faster process like the BFD was necessary, USCIS stated, because the status quo (which forced USCIS to conduct a lengthy adjudication on every petition to determine eligibility) was forcing USCIS to divert resources from other programs toward the U-Visa program:

> "As of June 14, 2021, USCIS is unable to adjudicate the tens of thousands of petitions for the waiting list . . . in a single fiscal year without incurring a negative impact in other

> humanitarian programs and fee-based applications or petitions. . . . USCIS must allocate resources among the competing adjudicative priorities and balance the number of resources that can be assigned to the U visa program. . . . [T]he BFD process enables USCIS to review petitions more efficiently . . . than the waiting list process alone, which requires a full adjudicative review of eligibility for [U-1] nonimmigrant status." *Policy Manual*, Vol. 3, Pt. C, Ch. 5, Appendix.

Like waiting-list members, BFD recipients receive work authorization and deferred action. Unlike waiting-list members, BFD recipients continue to accrue unlawful status and are not considered for parole. *Policy Manual*, Vol. 3, Pt. C, Ch. 5. Notably, if a U-Visa petitioner is granted bona fide status, USCIS will "generally" not consider him for the waiting list. *Id.* Rather, USCIS next reviews a BFD recipient's petition during "final adjudication" of the U-Visa petition. *Id.*

B.

Let's turn to the present case. The BFD Plaintiffs sued USCIS under § 706(1) of the APA. That provision permits a court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The BFD Plaintiffs alleged that USCIS was unlawfully withholding their "waiting list decisions." The BFD Plaintiffs argued that the USCIS regulation that created the waiting-list program, 8 C.F.R. § 214.14(d)(2), imposed on USCIS a binding obligation to conduct waiting-list determinations for *every* U-Visa petitioner. The BFD Plaintiffs then pointed to

USCIS's guidance document establishing the BFD Policy, which stated that "USCIS will generally not conduct waiting list adjudications for [aliens] who have been granted BFD," as proof that the agency had disregarded its duty under 8 C.F.R. § 214.14(d)(2) to provide waiting list determinations to them. The BFD Plaintiffs brought their claim under 5 U.S.C. § 706(1) and asserted that USCIS was unlawfully withholding or unreasonably delaying a waiting-list determination. To remedy this allegedly unlawful failure to act, the BFD Plaintiffs sought an injunction that would "[o]rder USCIS to make WLDs for all Plaintiffs in 14 days."

The district court dismissed the BFD Plaintiffs' claim for lack of Article III standing. *De Sousa, et al. v. Director, U.S. Citizenship & Immigr. Servs.*, 755 F. Supp. 3d 1266, 1275 (N.D. Cal. 2024). But the court did not consider whether the BFD Plaintiffs' claim under § 706(1) of the APA had satisfied the "independent jurisdictional requirement" that it challenge "final agency action." *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 n.1 (9th Cir. 1990); 5 U.S.C. §§ 551(13), 702, 704. Nevertheless, we may do so on appeal.

II

The BFD Plaintiffs seek relief for USCIS's purported "failure" to issue waiting-list determinations. "Failures to act are sometimes remediable under the APA, but not always." *SUWA*, 542 U.S. at 61. "[W]e have jurisdiction over a § 706(1) claim 'only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.'" Maj. Op. 27 (quoting *SUWA*, 542 U.S. at 64). We do not have such a case here, and on remand, the district court may recognize the jurisdictional defect and dismiss the claim on that ground.

A.

The APA provides a cause of action for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Where, as here, no other statute authorizes judicial review, the APA permits judicial review only of challenges to "final agency action." *Id.* § 704. And the APA sets out the scope of review for an agency's failure to act in § 706(1): "The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed."

In *Norton v. Southern Utah Wilderness Alliance*, the seminal decision interpreting § 706(1), the Supreme Court held that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." 542 U.S. at 64 (emphases in original). "In this circuit, the final agency action requirement has been treated as jurisdictional." *San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 571 (9th Cir. 2019).

Consistent with *SUWA*, we have held that "the operation of § 706(1) is restricted to discrete actions that are unequivocally compelled by statute or regulation." *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1081 (9th Cir. 2016). The requirement must be "so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010) (citation omitted). The legal obligation must take the form of a "'specific, unequivocal command,'" *SUWA*, 542 U.S. at 64 (quoting *ICC v. New York, N.H. & H.R. Co.*, 287 U.S. 178, 204 (1932)), or an order to take a "'precise, definite act . . . about

which [the agency] ha[s] no discretion whatever.'" *Id.* (quoting *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 46 (1888)). "Specific, unequivocal commands" that a court may enforce under § 706(1) are rare, but a clear example is a date-certain statutory deadline. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11, 1178 (9th Cir. 2002) (recognizing a claim under § 706(1) to compel agency action when "Congress has specifically provided a deadline for performance" and the agency has not performed "within the mandated time frame").

B.

The BFD Plaintiffs' § 706(1) claim does not fall within these narrow limits and should have been dismissed.

1.

The BFD Plaintiffs identify the USCIS regulation establishing the waiting-list program as the source of the "unequivocal command" necessary to sustain their § 706(1) claim. To be sure, "an agency can create a non-discretionary duty by binding itself through a regulation carrying the force of law." *Elec. Priv. Info. Ctr. v. Internal Revenue Serv.*, 910 F.3d 1232, 1244 (D.C. Cir. 2018); *see also Vietnam Veterans*, 811 F.3d at 1081 (9th Cir. 2016). But the waiting-list regulation does not impose any legal obligation on USCIS to adjudicate the BFD Plaintiffs' petitions, let alone a "specific, unequivocal command" to do so.

The waiting-list regulation provides, in relevant part:

> "All eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status must be placed on a waiting list and

> receive written notice of such placement." 8 C.F.R. § 214.14(d)(2).

The BFD Plaintiffs rest their § 706(1) claim on the regulation's language that all eligible U-Visa petitioners "*must be placed on a waiting list*." 8 C.F.R. § 214.14(d)(2) (emphasis added). They contend that "USCIS has a duty to make WLDs under § 214.14(d)(2)" and that the court should "compel USCIS to make WLDs for Plaintiffs." But the text of the regulation cannot bear this weight.

The mandatory duty imposed by the regulation—that USCIS "must" place certain petitioners on the waiting list—extends only to "eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status." 8 C.F.R. § 214.14(d)(2). The term "eligible petitioner" does not encompass every U-Visa petitioner. Rather, an "eligible" petitioner is one whose application USCIS has reviewed under its "normal process" and whom USCIS has deemed eligible. Interim Rule, *Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53027 (Sept. 17, 2007).

The mandatory duty to place petitioners on the waiting list does not extend to any petitioner unless USCIS has deemed him "eligible" following a "full adjudication." *Policy Manual*, Vol. 3, Pt. C, Ch. 6. The BFD Plaintiffs, who have received only a bona fide determination, are not "eligible petitioner[s]" within the meaning of the regulation. *See* 8 C.F.R. § 214.14(d)(2). The Policy Manual (which binds USCIS officials) makes clear that a determination that a petition is "bona fide" is not equivalent to a determination that the petitioner is "eligible" for purposes of the waiting list: "The BFD process only provides a basic review of the principal petition for U nonimmigrant status and does not require the petitioner to establish eligibility for U

nonimmigrant status[.]" *Policy Manual*, Vol. 3, Pt. C, Ch. 5, Appendix. The BFD Plaintiffs admit that they have received only a BFD, not a full waiting-list determination. That fact is the basis of their claim, which seeks an order compelling USCIS to adjudicate their eligibility for the waiting list. Because the BFD Plaintiffs have not been deemed "eligible," USCIS's mandatory duty to place eligible petitioners on the waiting list does not apply to them. *See* 8 C.F.R. § 214.14(d)(2).

Because USCIS owes the BFD Plaintiffs no duty to place them on the waiting list, there is no "unequivocal command" that they may enforce under § 706(1). *SUWA*, 542 U.S. at 64 (citation omitted). Accordingly, the BFD Plaintiffs' claim should be dismissed for lack of jurisdiction. *See San Luis Unit Food Producers v. United States*, 709 F.3d 798, 803–04 (9th Cir. 2013).

2.

Alternatively, the BFD Plaintiffs contend that, although USCIS is not required to *place* them on the waiting list, USCIS must *adjudicate* whether they are eligible for waiting-list placement. Both the Fourth and Sixth Circuits have sided with the BFD Plaintiffs on this issue and held that 8 C.F.R. § 214.14(d)(2) imposes a binding obligation on USCIS to conduct waiting-list adjudications. *See Gonzalez v. Cuccinelli*, 985 F.3d 357, 374 n.10 (4th Cir. 2021); *Barrios Garcia v. U.S. Dep't of Homeland Sec.*, 25 F.4th 430, 443 (6th Cir. 2022) ("USCIS's regulations mandate the placement of U-visa-eligible petitioners on the waitlist. So the federal courts may determine whether USCIS unlawfully withheld or unreasonably delayed the placement of the principal petitioners on the U-visa waitlist under § 706(1)."). But this argument has several defects.

First, this theory relies on an erroneous construction of the waiting-list regulation. *See* 8 C.F.R. § 214.14(d)(2). That regulation, as discussed above, imposes a mandatory duty on USCIS to *place* an *eligible* U-Visa petitioner on the waiting list, but says nothing about a mandatory duty to *adjudicate* U-Visa petitions. *See id.* ("All eligible petitioners . . . must be placed on a waiting list[.]"). A requirement that eligible petitioners "must be placed" on the waiting list does not mandate that USCIS take the antecedent step of adjudicating every U-Visa petition to determine eligibility for the waiting list. The USCIS Policy Manual reflects the distinction between placement of eligible petitioners and the logically prior step of adjudication to determine eligibility. *Policy Manual*, Vol. 3, Pt. C, Ch. 6 ("USCIS *conducts a full adjudication* necessary to determine *eligibility* for U nonimmigrant status as part of the waiting list process . . . officers may . . . gather additional information necessary to *adjudicate* for *waiting list placement*.") (emphases added). The waiting-list regulation does not reference a duty to adjudicate claims at all, let alone impose this duty in "specific, unequivocal" terms. *SUWA*, 542 U.S. at 63.

Second, there is no other statutory provision or regulation that imposes an unequivocal duty on USCIS to *adjudicate* waiting-list eligibility for any petitioners.

The waiting list was created as an exercise of USCIS's discretionary authority to administer the U-Visa program; no statutory provision mandates it. Several courts have implied both that USCIS has a nondiscretionary duty to process and adjudicate applications and that a court may redress an unreasonable delay in doing so under § 706(1) of the APA. *See, e.g.*, *Calderon-Ramirez v. McCament*, 877 F.3d 272, 275 (7th Cir. 2017) ("[T]here is no dispute that Ramirez has

a right to adjudication for both the waiting list and a U-visa."). But there are no regulations that impose a mandatory duty to *adjudicate* these claims. The statute establishes eligibility criteria, specifies the immigration benefits that USCIS is authorized to grant, and mandates that USCIS issue no more than 10,000 U Visas per year, but nowhere does it impose a duty on USCIS to adjudicate claims. *See* 8 U.S.C. §§ 1101(a)(15)(U) (statutory eligibility criteria), 1184(p) (adjudicatory procedures, USCIS's duties and authority, and the statutory cap). By regulation, USCIS has committed to granting a U Visa to a petitioning alien when he satisfies the statutory criteria. 8 C.F.R. § 214.14(c)(5)(i).

USCIS has made a similar commitment to petitioners who meet the criteria for the waiting list, as discussed above. 8 C.F.R. § 214.14(d)(2). But nowhere does USCIS have a duty to adjudicate these claims. Any implied obligation is insufficient to sustain a claim under § 706(1), which requires an obligation to be "so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Vietnam Veterans*, 811 F.3d at 1081. Therefore, we (and the district court on remand) lack jurisdiction over this claim and should dismiss it. *Lovo v. Miller*, 107 F.4th 199, 216 (4th Cir. 2024) ("[B]ecause neither Congress nor USCIS itself has ever bound USCIS to adjudicate these applications, the federal courts lack jurisdiction to consider Plaintiffs' APA claim.").

Finally, a court's exercise of jurisdiction over USCIS's general practice of processing U-Visa petitions would violate general principles of administrative law, which teach that courts lack the authority to direct how an agency allocates its own resources. *In re Barr Lab'ys, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) ("[W]e have no basis for reordering agency priorities. The agency is in a unique—and

authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way.").

If a court were to exercise jurisdiction over whether USCIS "unlawfully withheld" or "unreasonably delayed" waiting-list adjudications, the court would inevitably substitute its own discretion for that of the agency. The pace of U-Visa adjudications depends on USCIS's decisions about training, hiring, and investing in the U-Visa program, all factors that are within the agency's discretion. With regard to the increase in waiting-list processing times around 2020, USCIS explained that it "attempted to keep up with this increase [in petitions and processing times] by shifting resources as well as hiring and training new officers; yet, despite these attempts, the burden quickly outpaced resources *given competing demands and priorities across the agency*." *Policy Manual*, Vol. 3, Pt. C, Ch. 5, Appendix (emphasis added). Processing times for immigration visas also depend on internal agency priorities, American foreign policy, global events, and national security concerns. The authority to adjust USCIS's allocation of resources and priorities in response to the various matters that affect U-Visa processing times (*e.g.*, how to respond to consular shortages or geopolitical exigencies) belongs to USCIS, not to a federal court. *See Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."); *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) (Wilkinson, J.) ("The agency operates in an environment of limited resources, and how it allocates those resources to address the burden of increasing claims is a calculation that courts should be loath to second guess.").

Moreover, a court would have no jurisdiction to grant the BFD Plaintiffs their requested injunction, which would order USCIS to make waiting-list determinations for all BFD Plaintiffs within fourteen days. As part of USCIS's discretion to allocate its resources and energies, USCIS has the discretion to decide whether to adjudicate the BFD Plaintiffs' petitions within two weeks or at a later date. *See SUWA*, 542 U.S. at 71 (explaining that "judicial decree compelling immediate [agency action] would divert [the agency's] energies from other projects throughout the country that are in fact more pressing."). The BFD Plaintiffs do not identify any statutory provision or regulation that requires USCIS to adjudicate *their* petitions immediately rather than any of the 250,000 other petitions in the backlog, so their § 706(1) claim fails for this additional reason.

Given the lack of a clear statutory or regulatory command to USCIS to adjudicate petitions for the waiting list, no court may exercise jurisdiction over APA claims that would require it to superintend USCIS's "day-to-day" administration of the U-Visa program. *See SUWA*, 542 U.S. at 66. Such "pervasive oversight by federal courts over the manner and pace of agency compliance . . . is not contemplated by the APA." *Id.* at 67. Thus, the BFD Plaintiffs' claim under § 706(1) to "compel" USCIS to adjudicate their eligibility for the waiting-list program cannot proceed. On remand, the district court should dismiss that claim for this reason.[3]

[3] Because USCIS has not "unlawfully withheld" waiting-list adjudications from the BFD Plaintiffs, it follows that the agency has not "unreasonably delayed" these adjudications, either. *SUWA*, 542 U.S. at 63 n.1 ("Of course § 706(1) also authorizes courts to 'compel agency action . . . unreasonably delayed'—but a delay cannot be unreasonable

* * *

The BFD Plaintiffs' claim under § 706(1) did not assert that USCIS had "failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64. We lack jurisdiction and should have dismissed the claim. On remand, the parties may raise this issue, and the district court could correct our oversight. I respectfully dissent in part.

with respect to action that is not required."); *In re A Cmty. Voice*, 878 F.3d 779, 784 (9th Cir. 2017) ("an agency cannot unreasonably delay that which it is not required to do").