IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JANE DOE, Plaintiff, **v.** **UR M. JADDOU, et al.,** Defendants.	**Civ. Action No.** TDC-24-650

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff, Jane Doe, filed this action on March 6, 2024, and moved for a preliminary injunction—asking the Court to enjoin U.S. Citizenship and Immigration Services (USCIS) and Customs and Border Protection (CBP) from requiring Plaintiff to have valid refugee travel documents to be admitted to the United States. The statute of limitations for Plaintiff to challenge the travel document requirement promulgated in 8 C.F.R. § 223 has run under 28 U.S.C. § 2401(a), and she is barred from bringing this suit. Further, Plaintiff sues under the Administrative Procedure Act (APA), but the APA is not a basis for a cause of action where "statutes preclude judicial review," 5 U.S.C. § 701(a)(1), or the "agency action is committed to agency discretion by law," § 701(a)(2), and both apply here. Decisions on the required travel documents are subject to the Secretary of Homeland Security's sole discretion, and Congress unambiguously barred review of these decisions in the Immigration and Nationality Act (INA), which states that "no court shall have jurisdiction to review . . . any other decision or action of . . . the Secretary of Homeland Security in the authority for which is specified . . . to be in the discretion of the Secretary. . . ." 8 U.S.C. § 1252(a)(2)(B)(ii). Accordingly, the Court lacks subject matter jurisdiction over Plaintiff's claims.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Jane Doe is an Iraqi national who was granted a refugee status by the United States in 2016. Plaintiff's Exhibit A, ECF 25-2, ¶ 8. She and her two children entered the United States in June 2016. *Id.* at ¶ 9. Soon after, because Plaintiff's husband's refugee application was denied and there was some concern for his safety, she returned to Iraq with her children in July 2016. *Id.* at ¶¶ 12, 13. Before returning to Iraq, Plaintiff consulted an attorney and learned about the travel document requirements. *Id.* at ¶ 14. Plaintiff alleges that she filed for travel documents just shortly before the one-year deadline in July 2017. *Id.* at ¶ 17. On January 18, 2023, USCIS denied

Plaintiff's application for a travel document. Plaintiff's Exhibit B, Exhibit 1, ECF 25-3. She then brought this suit, and subsequently this motion for a preliminary injunction, alleging violations of the APA. Complaint and Plaintiff's Motion for a Preliminary Injunction, ECF 1 and 25.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). It is "one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). To gain the benefit of that extraordinary relief, Plaintiff must demonstrate that (1) she is likely to succeed on the merits; (2) she is likely to suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in her favor; and (4) an injunction is in the public interest. *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citing *Winter*, 555 U.S. at 20).

ARGUMENT

The Court should decline to grant the "extraordinary remedy" of a preliminary injunction in this case for three reasons: (1) the government is likely to prevail on the merits of the case because the statute of limitations has run for a facial-challenge to the relevant regulations; (2) Defendants' decision regarding travel documents is discretionary and is thus not subject to judicial review.

I. Plaintiff cannot show a likelihood of success on the merits because the statute of limitation has run under 28 U.S.C. § 2401(a).

The Court should deny Plaintiff's motion for a preliminary injunction because her claim is barred by the relevant statute of limitations under 28 U.S.C. § 2401(a), which bars civil suits brought against the United States after six years. 28 U.S.C. § 2401(a). Here, although Plaintiff first cites to USCIS's policies, particularly what is referred to as the "Cooper Memo," (Memo) the

Memo relies on the authority granted by 8 C.F.R. § 223 about refugees and travel documents. *See* Plaintiff's Exhibit D, ECF 25-5, pp. 6-9, 11. It is thus more appropriate to construe her claim as challenging the regulation itself because the Memo relied on the federal regulation, *i.e.*, 8 C.F.R. § 223.

Because an action against a federal agency is an action against the United States, "a complaint under the APA for review of an agency action is a 'civil action' within the meaning of section 2401(a)." *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999) (quoting *Sierra Club*, 120 F.3d at 631); *see also Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, 983 F.3d 671, 681-82 (4th Cir. 2020). Under 28 U.S.C. § 2401(a), there exists a six-year statute of limitations for civil suits brought against the United States. The relevant statute states as follows:

> Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

28 U.S.C.A. § 2401 (West). The right of action accrues when an agency publishes its regulation. *Outdoor Amusement Bus. Ass'n, Inc.*, 983 F.3d at 682 (quoting *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012)) ("The Fourth Circuit has held that when 'plaintiffs bring a facial challenge to an agency [action] . . . the limitations period begins to run when the agency publishes the regulation.'") Here, 8 C.F.R. § 223.2, the section requiring travel documents for refugees residing outside of the United States, became effective on April 1, 1997. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312 (Mar. 6, 1997) (to be codified at 8 C.F.R. § 223). Plaintiff's facial challenge to the regulation comes almost twenty-seven (27) years after the rule was published.

Therefore, the statute of limitations has run, and Plaintiff is barred from seeking a preliminary injunction.

The Supreme Court is currently considering the argument that the statute of limitations under 28 U.S.C. § 2401(a) does not start running until there is an injury, but even that position does not save Plaintiff's claims. *See N. Dakota Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634 (8th Cir. 2022), *cert. granted sub nom. Corner Post, Inc., v. Bd. of Governors of the Fed. Rsrv. Sys.,* 144 S. Ct. 478, 216 L. Ed. 2d 1312 (2023). Even if the Supreme Court decides that the statute of limitations runs on the day of an injury, the limitations period would have started running for Plaintiff on the day she learned of the travel document requirement in 2016. Plaintiff's Exhibit A, ECF 25-2, ¶ 14. At the latest, the statute of limitations would have started running when she applied for a travel document in July of 2017. *Id.* at ¶ 17. Plaintiff did not file this suit until March 6, 2024, well over six years after she suffered her claimed injury. Therefore, regardless of what the Supreme Court rules, Plaintiff's claim is barred by the statute of limitations.

II. Plaintiff's APA challenge is also barred from judicial review.

The Court should decline to grant a preliminary injunction because the sought-after review is precluded by statute. While statutes are presumed to favor judicial review, that "presumption can be overcome by 'clear and convincing evidence' of congressional intent to preclude judicial review." *Thigulla v. Jaddou*, 94 F.4th 770, 775 (8th Cir. 2024) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993)). As recognized by the Supreme Court, "Congress has sharply circumscribed judicial review of the discretionary-relief process" by § 1252(a)(2)(B). *Patel v. Garland*, 596 U.S. 328, 332 (2022). Where "the statute is clear," there is "no reason to resort to the presumption of reviewability." *Id.* at 347.

The presumption of judicial review of agency action "may be overcome by specific language in a provision or evidence drawn from the statutory scheme as a whole." *Patel*, 596 U.S. at 347 (internal quotations omitted). Here, § 1252(a)(2)(B)(ii) of the INA precludes review of whether, how, and when the Department of Homeland Security exercises its discretion on issuance of travel documents. A subparagraph titled "Matters Not Subject to Judicial Review," states:

> (B) Denials of discretionary relief
>
> Notwithstanding any other provision of law (statutory or nonstatutory) . . . and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> . . .
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B)(ii). As the Supreme Court has recognized, § 1252(a)(2)(B)(ii) is a "catchall provision" which, when read together with subclause (i), "convey[s] that Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General's discretionary authority in the statute." *Kucana v. Holder*, 558 U.S. 233, 247 (2010).

Section 1157(c)(1) of Title 8 of the United States Code unambiguously states that "the Attorney General[1] *may*, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter." 8 U.S.C. § 1157(c)(1) (emphasis added). USCIS was granted discretionary authority by the Attorney

[1]The Attorney General's discretion was delegated to the Secretary of Homeland Security under the Homeland Security Act of 2002. Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178 (2002).

General to approve or deny a request for a refugee travel document. 8 C.F.R. § 223.2(e) ("USCIS may approve or deny a request for a reentry permit or refugee travel documents as an exercise of discretion."). "The statute says 'may.' And 'may' does not just suggest discretion, it '*clearly* connotes' it." *Biden v. Texas*, 597 U.S. 785, 787 (2022).

Congress, in § 1252(a)(2)(B)(ii), enacted a jurisdictional bar on review of such discretionary decisions. "Two elements trigger § 1252(a)(2)(B)(ii)'s jurisdictional bar: (1) a decision or action by the Attorney General or the Secretary of Homeland Security and (2) statutorily specified discretion under Subchapter II of Chapter 12 of Title 8 (8 U.S.C. §§ 1151-1381) (Subchapter II)." *Thigulla*, 94 F.4th at 774 (citing *Kucana*, 558 U.S. § 253). Because the § 1157(c)(1) authority to admit refugees is in the discretion of the Attorney General or the Secretary of Homeland Security, there is no jurisdiction to review any decision or action of when or whether to exercise § 1157(c)(1) discretion.

While the INA prohibits judicial review of discretionary immigration decisions made by the Secretary of Homeland Security, the INA does allow plaintiffs to bring colorable constitutional claims or questions of law pursuant to § 1252(a)(2)(D). That exception, however, is inapplicable here because "no removal proceeding is pending" against Plaintiff. *Polfliet v. Cuccinelli*, 955 F.3d 377, 384 (4th Cir. 2020). Because Plaintiffs do not seek review of an order of removal, the exception to the statutory bar does not apply.

Additionally, Plaintiff's claims are independently barred under the APA itself. Section 702 of the APA confers a general cause of action upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. That cause of action is withdrawn where "statutes preclude judicial review," § 701(a)(1), or the "agency action is committed to agency discretion by law," § 701(a)(2). Here, both provisions apply to bar review

of Plaintiff's application for a travel document. As noted, § 1252(a)(2)(B)(ii) of the INA bars judicial review of Plaintiff's claims under § 701(a)(1). Section 223.2(e), which grants Defendants discretionary authority to grant or deny refugee travel documents, is an unambiguously discretionary grant of authority that further bars review of Plaintiff's claims under the APA. The relevant regulation contains the kind of discretion that the APA prevents courts from reviewing. Accordingly, Plaintiff's APA claims are barred by both the INA and the APA.

CONCLUSION

WHEREFORE, Defendants respectfully request that the Court deny Plaintiff's Motion for a Preliminary Injunction.

Respectfully submitted,

Erek L. Barron
United States Attorney

CATHY RICHARDSON (Affiliate)
Digitally signed by CATHY RICHARDSON (Affiliate)
Date: 2024.03.26 16:58:23 -04'00'

Cathy Richardson
Special Assistant U.S. Attorney
U.S. Attorney's Office
District of Maryland
36 S. Charles Street, 4th Floor
Baltimore, MD 21201
(410) 209-4800
Cathy.richardson@usdoj.gov
Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on March 26, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all counsel.

CATHY RICHARDSON (Affiliate)
Digitally signed by CATHY RICHARDSON (Affiliate)
Date: 2024.03.26 16:59:06 -04'00'

Cathy Richardson
Special Assistant United States Attorney