Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Linda CABELLO GARCIA, on behalf of herself and others similarly situated,

Plaintiff,

v.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES; Alejandro MAYORKAS, Secretary of Homeland Security; Ur M. JADDOU, Director, U.S. Citizenship and Immigration Services,

Defendants.

Case No. 3:22-cv-5984

RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Oral Argument Requested

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INTRODUCTION

Defendants advance a remarkable position in moving to dismiss this case, namely, that U.S. Citizenship and Immigration Services (USCIS) has unfettered authority to deny Plaintiff Cabello and the putative class members' applications for adjustment of status for *any* reason. *See* Dkt. 26 at 6 ("Section 1252(a)(2)(B)(i) precludes courts from considering judgments relating to *any* aspect of adjustment of status adjudications . . ." (emphasis added)). According to Defendants, even where the agency blatantly disregards the controlling statute and patently tramples on the applicant's legal rights, no court has authority to review its decision. This is contrary to the statute, contrary to the strong presumption of judicial review for administrative actions, and contrary to the rule of law that underpins our democracy.

Defendants rely on 8 U.S.C. § 1252(a)(2)(B), but by its plain language this statute—which is part of a section in the Immigration and Nationality Act (INA) entitled "Judicial review of orders of removal"—governs only cases in removal proceedings. 8 U.S.C. § 1252. In contrast, Ms. Cabello is not in removal proceedings. In fact, immigration judges (IJs) have no authority to adjudicate U-based adjustment applications, and so the judicial review scheme laid out in § 1252(a) does not apply. Nor does *Patel v. Garland* require this Court to foreclose *all* judicial review of USCIS decisions, as the Supreme Court expressly limited its holding to cases in removal proceedings. *See* 142 S. Ct. 1614, 1626 (2022). And for those cases in removal proceedings, § 1252 reflects Congress's intent to preserve courts' jurisdiction of constitutional claims and questions of law. *See* 8 U.S.C. § 1252(a)(2)(D). Any contrary reading would raise serious constitutional concerns. Hence, as the court held in *Rubio Hernandez v. USCIS*, Defendants' proposed interpretation to eliminate *any* judicial review should be rejected. *See* No. C22-904 MJP, ---F.Supp.3d---, 2022 WL 17338961, at *3-7 (W.D. Wash. Nov. 30, 2022).

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Defendants' argument that Ms. Cabello has failed to state a claim is meritless. Defendants have no discretion to violate the INA. Ms. Cabello and the putative class members were granted U nonimmigrant status. After three years with U status, they are entitled to apply for adjustment of status to lawful permanent residence. However, Defendants have put up an extra-statutory, unlawful barrier to obtaining that status: they require U-based adjustment applicants to submit a medical exam demonstrating they are not inadmissible under 8 U.S.C. § 1182(a)(1). But Congress explicitly chose *not* to subject U-based adjustment applicants to this ground of inadmissibility, instead decreeing that the only ground of inadmissibility that applies to them is the one found at § 1182(a)(3)(E) for certain serious human rights violations. *See id.* § 1255(m)(1). Defendants' medical exam requirement thus applies an additional inadmissibility ground—the health-related grounds under § 1182(a)(1)—to U-based adjustment applicants, contrary to the statute. Accordingly, Ms. Cabello has pled an appropriate cause of action.

ARGUMENT

I. Section 1252(a)(2)(B)(i) does not apply to cases outside of removal proceedings.

Defendants argue that 8 U.S.C. § 1252(a)(2)(B)(i) deprives this Court of jurisdiction to review any USCIS decision concerning the "granting of relief" under 8 U.S.C. § 1255. Dkt. 26 at 6–11. But § 1252 only concerns judicial review of removal orders and agency determinations made in cases in removal proceedings, a fact made clear not only by the section's title but also by its content and context. Neither *Patel* nor Ninth Circuit caselaw compels a contrary holding.

a. The plain language of § 1252(a) is limited to cases in removal proceedings.

Defendants' argument that § 1252(a)(2)(B)(i) strips this Court of jurisdiction to review Ms. Cabello's claims requires the Court to ignore "a fundamental canon of statutory construction": "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809

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(1989); *see also Patel*, 142 S. Ct. at 1622 (looking to "§ 1252(a)(2)(B)(i)'s text and context" to ascertain the meaning of "judgment" in that subsection). A court should not "examine[] [the text] in isolation," as "statutory language cannot be construed in a vacuum." *Davis*, 489 U.S. at 809.

Here, the context of § 1252(a)(2)(B) confirms its scope. First, the section within which the subparagraph is found is entitled "Judicial review of *orders of removal*." 8 U.S.C. § 1252 (emphasis added). The section then outlines the availability and scope of judicial review for various types of removal orders. Paragraph (a)(1) concerns "[g]eneral orders of removal" in proceedings before IJs. The subparagraphs surrounding § 1252(a)(2)(B) similarly address removal orders: § 1252(a)(2)(A) concerns orders of expedited removal, and § 1252(a)(2)(C) concerns orders of removal against noncitizens who have committed certain criminal offenses. *Id.* § 1252(a)(2)(A), (C); *see also Patel*, 142 S. Ct. at 1625 (looking to subparagraph (C) in analyzing the "[c]ontext" of subparagraph (B)). Subparagraph (a)(2)(D) expressly authorizes judicial review of "constitutional claims or questions of law raised upon a *petition for review*," 8 U.S.C. § 1252(a)(2)(D) (emphasis added), which is the vehicle for "judicial review of an *order of removal* entered or issued under any provision of this chapter," *id.* § 1252(a)(5) (emphasis added); *see also id.* §1252(a)(3)–(4) (specifying the judicial review authority for certain claims raised in removal proceedings).[1] The language of § 1252 thus makes clear the section is directed only to judicial review of removal orders and determinations related to cases in removal proceedings. Notably, Defendants do not address this language.

Analyzing the title of the section and the accompanying text, Judge Pechman rejected a

[1] The other subsections further underscore the section's scope is limited to the removal context. *See* § 1252(b) ("Requirements for review of orders of removal"); § 1252(c) ("Requirement for petition. A petition for review or for habeas corpus of an order of removal"); § 1252(d) ("Review of final orders"); § 1252(e) (judicial review of expedited removal orders under § 1225); § 1252(f) (limits on injunctive relief and stays of removal orders for persons subject to detention and removal); § 1252(g) (exclusive jurisdiction over decision "to commence [removal] proceedings, adjudicate [removal] cases, or execute removal orders").

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similar motion to dismiss a complaint seeking review of a denied adjustment application:

> [A]ll of the other subparagraphs of Section 1252(a)(2)—where Subparagraph (B) resides—focus on orders of removal. Subparagraph (A) is entitled "Review relating to section 1225(b)(1)," which concerns a [*sic*] Department of Homeland Security removal orders for "[noncitizens] who have not been admitted or paroled," including asylum seekers. 8 U.S.C. § 1252(a)(2)(A); 8 U.S.C. § 1225(b)(1).

Rubio Hernandez, 2022 WL 17338961, at *5; *see also Kucana v. Holder*, 558 U.S. 233, 245–46 (2010) (instructing courts to "not look merely to a particular clause, but consider [it] in connection with . . . the whole statute" and analyzing subparagraph (B) in light of its "statutory placement" (citation and internal quotation marks omitted)).

In making their argument, Defendants point to the phrase stating that "regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review [certain actions]." 8 U.S.C. § 1252(a)(2)(B); Dkt. 26 at 8. But they take this language out of context, ignoring that it is discussing "[j]udicial review of orders of removal." 8 U.S.C. § 1252. They assert that in *Rubio Hernandez*, "another judge . . . ignored the 'regardless of whether . . . made in removal proceedings' language." Dkt. 26 at 8. This is flatly incorrect. Judge Pechman directly addressed this language, explaining that it pertains to decisions not made by an IJ but that bear directly on cases in removal proceedings:

> Persons in removal proceedings have various alternative administrative avenues that, if successful, could terminate the removal proceeding in their favor. Those include: (1) I-130 family visa petitions; (2) I-360 self-petitions (for victims of domestic violence); (3) I-360 Special Immigrant Juvenile Status petitions; (4) I-918 U visa petitions (for victims of violent crimes); (5) I-914 T visa petitions (for victims of trafficking); and (6) I-751 petitions to remove conditions of residence. Stripping jurisdiction of judicial review of these kinds of applications for someone in removal helps consolidate judicial review and avoid piecemeal litigation over the entire removal process.

Rubio Hernandez, 2022 WL 17338961, at *6.

Thus, Section § 1252(a)(2)(B) instructs that a respondent in removal proceedings cannot separately challenge such judgments, decisions, or actions, except through the petition for review

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process laid out in § 1252 after a final order of removal is issued. This is important because, as the court recognized in *Rubio Hernandez*, USCIS regularly makes decisions that directly determine the outcome of removal proceedings. *See, e.g.*, *Malilia v. Holder*, 632 F.3d 598, 606–07 (9th Cir. 2011) (noting how USCIS plays a role in I-130 adjustment applications for individuals in removal proceedings); *Benedicto v. Garland*, 12 F.4th 1049, 1060 (9th Cir. 2021) (recognizing an IJ may terminate proceedings where a respondent has a pending application to "adjust status under INA § 212(h) or through an I-130 petition"). While those USCIS decisions are not "made in removal proceedings," 8 U.S.C. § 1252(a)(2)(B), they "relat[e] to the granting of relief" from removal, *Patel*, 142 S. Ct. at 1622 (emphasis omitted). Section 1252(a)(2)(B)(i) clarifies that applicants in removal proceedings may not seek judicial review of those USCIS determinations, other than through a petition for review.

When read in context, the statutory language confirms the bar to judicial review at § 1252(a)(2)(B)(i) does not apply to Ms. Cabello's challenge of USCIS's policy and practice of applying an extra-statutory bar to adjustment of status applications *outside* of the removal context. Ms. Cabello has not been placed in removal proceedings, and the agency adjudication at issue here falls outside the judicial review scheme for removal cases laid out in § 1252(a).

b. *Patel* did not hold § 1252(a)(2)(B)(i) applies outside the removal context.

Defendants' reliance on *Patel* is misguided. *See* Dkt. 26 at 7–9. As they themselves acknowledge, *see id.* at 8, *Patel* addressed a challenge to an application for relief denied in removal proceedings, not to USCIS's denial of an affirmative application, *see* 142 S. Ct. at 1620. The Supreme Court expressly *declined* to hold that § 1252(a)(2)(B)(i) extends to USCIS decisions concerning individuals who are not in removal proceedings. *See id.* at 1626 ("The reviewability of [USCIS] decisions is not before us, and we do not decide it."). If anything, the Court's decision explicitly noted that "[s]ubparagraph (B) bars review of only one facet of *the*

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removal process (consideration of discretionary relief)." *Id.* at 1625–26 (emphasis added). USCIS's adjudication of Ms. Cabello's affirmative adjustment of status application was by no means a "facet of the removal process."

What is more, the Court's analysis of § 1252(a)(2)(B) in *Patel* turned in part on the authorization of judicial review found in § 1252(a)(2)(D), which preserves review of legal and constitutional questions. *Id.* at 1623 ("[I]f Congress made such questions [as those in § 1252(a)(2)(D)] an exception, it must have left *something* within the rule [of § 1252(a)(2)(B)]. The major remaining category is questions of fact."). In addition, since paragraph (D) is an exception to the jurisdictional bar in § 1252(a)(2)(B), its specification that review of legal and constitutional claims is available via the petition for review process laid out in that same section reaffirms that § 1252(a)(2)(B) is limited to removal cases.

Defendants nonetheless assert "the reasoning of *Patel* indicated that Congress intended to foreclose judicial review of adjustment decisions unless they occurred during" a petition for review. Dkt. 26 at 8. However, the majority merely "speculate[d] in *dicta* that 'it is possible that Congress did, in fact, intend to close that door.'" *Rubio Hernandez*, 2022 WL 17338961, at *4 (quoting *Patel*, 142 S. Ct. at 1626); *see also Patel*, 142 S. Ct. at 1637 (Gorsuch, J., dissenting) (referring to the majority's suppositions about congressional intent regarding this issue as "a hunch about unexpressed legislative intentions").

Defendants' interpretation is particularly striking because immigration courts lack jurisdiction to adjudicate U-based adjustment applications, as that decision "lies solely within USCIS's jurisdiction." 8 C.F.R. § 245.24(f); *see also* 8 U.S.C. § 1255(m). And so USCIS's denial of U-based adjustment would never be included in a removal order—or in a petition for review of a removal order. *See Nasrallah v. Barr*, 140 S. Ct. 1683, 1691 (2020)

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("[F]inal orders of removal encompass only the rulings made by the [IJ] or [BIA] that affect the validity of the final order of removal."). Ms. Cabello and other U-based adjustment applicants would thus *never* be able to obtain judicial review of USCIS's decision, no matter how arbitrary, capricious, or illegal. Accepting Defendants' position would fly in the face of "a familiar principle of statutory construction: the presumption favoring judicial review of administrative action." *Kucana*, 558 U.S. at 251; *see also infra* Part I.d. Further, as U status expires after four years, and is generally extended only while an adjustment application is pending, *see* 8 U.S.C. § 1184(p)(6), U-visa holders like Ms. Cabello would not only face denial of their applications for lawful residency without judicial review, but would also lose their lawful status altogether. Allowing USCIS such unfettered authority would severely undercut Congress's generous intent when creating the U visa. *See* Dkt. 1 ¶¶ 29-31.

c. The Ninth Circuit has not resolved the question.

Defendants also err in asserting the Ninth Circuit has already decided this issue. Dkt. 26 at 9–10. Prior to *Patel*, this Circuit had long held that § 1252(a)(2)(B) did not bar review of non-discretionary agency determinations. *See, e.g.*, *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002); *Poursina v. USCIS*, 936 F.3d 868, 875 (9th Cir. 2019). Thus, in cases like *Spencer Enterprises, Inc. v. United States*, the court explained it had no need to decide whether § 1252(a)(2)(B) applied outside the removal context, as the challenged determination was non-discretionary. *See* 345 F.3d 683, 692 (9th Cir. 2003); *accord ANA Int'l, Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004). Since then, the Ninth Circuit has simply assumed that Subparagraph (B) applies outside of removal proceedings for discretionary determinations, and then analyzed whether the case involved a discretionary determination. *See, e.g.*, *Poursina*, 936 F.3d at 871–75; *Gebhardt v. Nielsen*, 879 F.3d 980, 984–85 (9th Cir. 2018); *Hassan v. Chertoff*, 593 F.3d 785, 788–89 (9th Cir. 2010) (per curiam).

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Accordingly, this Court is "free to address the issue" here. *Brecht v. Abrahamson*, 507 U.S. 619, 630–31 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed the applicability of the [standard in question], we are free to address the issue [of its applicability] on the merits."); *see also, e.g.*, *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *Amalgamated Transit Union Loc. 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 n.5 (9th Cir. 2006) (observing the court was not bound by earlier decision, which had "assumed without discussion" the answer to the matter at issue). For these reasons, *Rubio Hernandez* held "the issue presented here to be one of first impression without controlling authority." 2022 WL 17338961, at *5.

Notably, even where it assumed that § 1252(a)(2)(B) applies outside the removal context, the Ninth Circuit's jurisdictional analysis was based on the now-overruled premise that the subparagraph did not bar review of non-discretionary determinations. Hence, prior to *Patel*, the court was not confronted with the serious constitutional concerns that would arise if judicial review of legal and constitutional claims were foreclosed. *See infra* Part I.d. It thus did not strictly examine the statute and its statutory context to ensure its interpretation did not present such concerns. Therefore, Defendants' authorities do not control on this point in light of *Patel*.

Defendants also cite to a Seventh Circuit case which held § 1252(a)(2)(B) barred judicial review of USCIS adjustment denials. Dkt. 26 at 10 (citing *Britkovyy v. Mayorkas*, 60 F.4th 1024 (7th Cir. 2023)). But that case involved a person in removal proceedings, and simply assumed without analysis that § 1252(a) applies to both cases in and outside of removal proceedings. *See Britkovyy*, 60 F.4th at 1027–28. Moreover, the court noted that "[r]ecognizing that we lack

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jurisdiction over this case will not preclude [the plaintiff] from receiving judicial review of the IJ's decision." *Id.* at 1032. As such it provides no meaningful guidance.

Similarly, the D.C. Circuit recently decided that § 1252(a)(2)(B)(i) bars review of a denied adjustment application. In *Abuzeid v. Mayorkas*, the court found that the statute's "regardless' clause" overcame the section's title limiting the provision to removal proceedings. No. 21-5003, ---F.4th---, 2023 WL 2543024, at *5 (D.C. Cir. Mar. 17, 2023). But the court failed to address 1) the fact that cases in removal proceedings often depend on USCIS actions occurring outside of those proceedings, and 2) that neighboring provisions reinforce that the section is focused on removal proceedings. *Id.* at *5–6. The decision thus grounds its holding on the text of § 1252(a)(2)(B) "isolated from everything else," but "statutory interpretation [is] a 'holistic endeavor'" that looks "to text in context." *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (citation omitted); *see also, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").[2] And just yesterday, an unpublished per curiam opinion from the Eleventh Circuit held that § 1252(a)(2)(B) bars review of a denied U-based adjustment application. *See Doe v. Sec'y, U.S. Dep't of Homeland Sec.*, No. 22-11818, 2023 WL 2564856 (11th Cir. Mar. 20, 2023). But again, it simply assumed § 1252(a)(2)(B)(i) applied to cases outside of removal proceedings based on an isolated reading of the text. *See id.* at *1–2. Moreover, the opinion implies that judicial review remains available for legal and constitutional questions. *Id.* at *3 ("What he seeks, however, is not the resolution of a constitutional or legal question, but a reweighing of the evidence.").

[2] The court's summary analysis may be due to the plaintiffs' failure to address this issue in their opening brief. *See Abuzeid*, 2023 WL 2543024, at *5.

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d. Legal and constitutional claims must remain reviewable to avoid serious constitutional problems.

Should the Court read § 1252(a)(2)(B) to apply to cases outside of removal proceedings, § 1252(a)(2)(D) must similarly be read to permit judicial review of constitutional claims and questions of law for cases outside of removal proceedings. *See Rubio Hernandez*, 2022 WL 17338961, at *6–7. This jurisdiction is compelled by a principle that lies at the heart of our constitutional order—that "[t]he very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

Consistent with *Marbury*, the Supreme Court has held time and again that depriving individuals of any meaningful judicial review over agency actions where there is an allegation of a legal or constitutional error raises serious constitutional questions. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (remarking that "entirely preclud[ing] review of a pure question of law by any court would give rise to substantial constitutional questions"). Relatedly, the Supreme Court has also long recognized the "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986); *accord Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020); *Kucana*, 558 U.S. at 251; *St. Cyr*, 533 U.S. at 298; *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). This presumption "can only be overcome by 'clear and convincing evidence' of congressional intent to preclude judicial review." *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (citation omitted).

Thus if § 1252(a)(2)(B)(i) were applicable to adjustment applicants who, like Ms. Cabello, are not in removal proceedings, it must be construed to allow district-court review of legal and constitutional issues arising from USCIS's adjudication of their applications. A contrary construction would "raise serious questions concerning the [statute's] constitutionality," *Johnson v. Robison*, 415 U.S. 361, 366 (1974), as U-based adjustment applicants have *no* other

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opportunity to obtain judicial review. Without the possibility of district-court review, aggrieved individuals like Ms. Cabello would be wholly deprived of the fundamental "right to resort to the laws of [their] country for a remedy." *Marbury*, 5 U.S. at 166; *see also McNary*, 498 U.S. at 497.

But the Court can readily avert such an outcome here. It is more than "fairly possible" to interpret 8 U.S.C. § 1252 in a way that would avoid "serious constitutional problems," and thus the Court is "obligated to construe the statute" that way. *St. Cyr*, 533 U.S. at 299–300 (citation omitted).[3] Nothing in § 1252's text indicates congressional intent to shield USCIS's legal and constitutional errors from judicial review outside the removal context. *See supra* Part I.a.

II. The APA does not bar review of Ms. Cabello's claim.

Defendants argue Ms. Cabello's claim is also barred because the denial of adjustment of status applications is "'committed to [USCIS] discretion by law,'" and there is allegedly "no meaningful standard by which to judge" USCIS's actions when making determinations pursuant to that discretion. Dkt. 26 at 11 (quoting 5 U.S.C. § 701(a)(2)). This argument ignores that Ms. Cabello's claim raises a pure *legal* question as to the legality of USCIS's rule requiring U-based adjustment applicants to satisfy the public-health inadmissibility grounds, even though Congress chose not to apply this ground of inadmissibility to them. There is clearly "law to apply" in analyzing that question. *See infra* Part III.

The Ninth Circuit has repeatedly affirmed judicial review remains available in such situations. For example, in *Perez Perez v. Wolf*, the court concluded judicial review existed for the plaintiff's allegations of legal errors in USCIS's denial of his U visa application, finding,

[3] Section § 1252(a)(2)(D) was added in response to *St. Cyr*, which held that precluding judicial review of questions of law for noncitizens in removal proceedings would raise substantial constitutional concerns. *Patel*, 142 S. Ct. at 1623. And as the Supreme Court has cautioned, "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Bowen*, 476 U.S. at 674 (alteration in original) (citation omitted).

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inter alia, the relevant statutes "provide[d] meaningful standards for reviewing" the claims, and noting that "an agency's sole discretionary authority is not inconsistent with judicial review of the agency's exercise of that discretion." 943 F.3d 853, 863–64 (9th Cir. 2019); *see also, e.g.*, *Spencer Enterprises*, 345 F.3d at 688 (concluding "[t]he APA does not preclude judicial review" over agency denial of immigrant visa petition after finding that "the statutory framework provides meaningful standards by which to review [the agency's] action"). Because there are "legal standards that apply and against which the Court may judge the agency's action," Ms. Cabello's claim is not barred by the APA. *Rubio Hernandez*, 2022 WL 17338961, at *7.

III. Ms. Cabello has pled a legally cognizable claim.

Defendants next assert their requirement that U-based adjustment applicants satisfy the health-related inadmissibility grounds is "a proper exercise of USCIS's rulemaking authority," Dkt. 26 at 12, because they contend 8 U.S.C. § 1255(m) is "silent" both as to whether USCIS can consider other inadmissibility grounds and as to how it should define "public interest" in adjudicating U-based adjustment applications, *id.* at 13. Defendants' argument ignores the plain text of § 1255(m) and its neighboring subsections, traditional canons of statutory construction, and Congress's generous purpose in enacting the U-visa statutory scheme.

Section 1255 deals generally with the adjustment process for nonimmigrants seeking lawful permanent residence. It establishes that most adjustment applicants must demonstrate "they are admissible to the United States for permanent residence." § 1255(a). Unlike adjustment under subsection (a), which subjects adjustment applicants to *all* inadmissibility grounds, subsection (m)—providing adjustment of status for U visa holders—by its express terms applies *only* the inadmissibility ground at § 1182(a)(3)(E). 8 U.S.C. § 1255(m) (providing for adjustment of status "if the [noncitizen] is not described in [8 U.S.C. §] 1182(a)(3)(E)"); *see also United*

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States v. Fuller, 531 F.3d 1020, 1025 (9th Cir. 2008) ("Statutory construction always starts with the language of the statute itself." (internal citation and quotation marks omitted)).

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis*, 489 U.S. at 809. Thus, the fact § 1255(a) applies all grounds of admissibility, while the other provisions in that same section provide instructions as to the applicable grounds of inadmissibility for every listed type of adjustment applicant, must be given effect. *See*, 8 U.S.C. § 1255(h)(2) (specifying applicant must demonstrate admissibility except for certain enumerated inadmissibility grounds that "shall not apply"); *id.* § 1255(i)(2)(A) (providing general admissibility grounds apply to those adjustment applicants); *id.* § 1255(j)(1), (2)(C) (noting S-visa holders seeking to adjust status may do so if they are "not described in section 1182(a)(3)(E)"); *id.* § 1255(*l*)(2) (outlining criteria for determining what inadmissibility grounds apply to T visa holders). The neighboring adjustment provision for T-visas, enacted at the same time as the adjustment provision for U visas, is particularly instructive because Congress specifically included the health-related grounds of inadmissibility for T-visa holders, but authorized the Attorney General to waive that ground. *Id.* § 1255(*l*)(2)(A). Tellingly, Congress did not require such a showing of admissibility or require such a waiver for U-based adjustment applicants. *Id.* § 1255(m). The text of § 1255(m), when "clarified by [the] statutory context," thus makes plain that only the specified inadmissibility ground at § 1182(a)(3)(E) applies to U-based adjustment applicants. *Washington v. Chu*, 558 F.3d 1036, 1043 (9th Cir. 2009).

Traditional canons of statutory construction reinforce this reading of the statute: "[w]hen Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio*

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unius est exclusio alterius)." *Bittner v. United States*, 143 S. Ct. 713, 720 (2023). And while the rule "is not absolute," "[c]ontext counts" in ascertaining the correct meaning. *Bartenwerfer v. Buckley*, 143 S. Ct. 665, 673 (2023) (looking to the context provided by neighboring subsections). The context here is a meticulous and detailed discussion of the applicable inadmissibility grounds to *every* type of adjustment application under Section 1255. That subsection (m) "does not say expressly that *only* the listed thing[] [is] included" does not diminish the force of the related, "basic canon of construction establishing that an explicit listing of some things should be understood as an *exclusion of others* not listed." *In re Clean Water Act Rulemaking*, 60 F.4th 583, 595 (9th Cir. 2023) (citation and internal quotation marks omitted). Indeed, the Ninth Circuit has found "silence" to be particularly telling where "Congress created contrasting provisions in neighboring [sub]sections of the same [section of the] statute." *Nat'l Lab. Rels. Bd. v. Aakash, Inc.*, 58 F.4th 1099, 1105 n. 3 (9th Cir. 2023).

Defendants argue that although the plain language does not apply the health-related inadmissibility ground, the agency is nonetheless entitled to apply it because Congress left the decision whether to grant adjustment in USCIS's "discretion," including "determining whether approval is 'in the public interest.'" Dkt. 26 at 13. Providing discretion and setting rules are not mutually exclusive, as the rules provide boundaries within which USCIS exercises its discretion. Moreover, in referencing consideration of the "public interest," Section 1255 distinguishes it from inadmissibility, demonstrating they are analytically distinct. *See* § 1255(h)(2); § 1255(m). In fact, Defendants' use of the term to impose additional categorical restrictions in the U-based adjustment process is incongruous with Section 1255, which discusses the "public interest" in a permissive and generous manner: the public interest can be used to "waive" inadmissibility grounds for Special Immigrant Juvenile Status-based adjustment applicants, or to grant a U-

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based adjustment application. *See* § 1255(h)(2)(B), (m)(1)(B); *cf.* § 1255(*l*)(2) (certain inadmissibility grounds can be waived "in the national interest").

Defendants argue the Court should defer to its interpretation of subsection (m) because it is "reasonable," Dkt. 26 at 12, but such deference only applies where Congress has not directly spoken on the issue, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Because here Congress has, Defendants' contrary interpretation is owed no deference. In seeking to overcome the plain language of the statute Defendants make much of Ms. Cabello's counsel's bluebooking error in quoting 8 C.F.R. § 245.24(d)(11). Dkt. 26 at 14. The phrase Defendants rely on purports to authorize USCIS to consider "acts that would otherwise render the applicant inadmissible." 8 C.F.R. § 245.24(d)(11). But the regulation cannot authorize USCIS to take an action that is contrary to the statute. Moreover, Defendants do not point to any "act" or condition that purportedly would otherwise render Ms. Cabello inadmissible. Instead, it is a policy to apply whole cloth an inadmissibility ground that Congress chose to omit.

Even had Congress not spoken clearly, Defendants' interpretation is not "a permissible construction of the statute," *Chevron*, 467 U.S. at 843, in light of the plain text of Section 1255 as a whole and subsection (m) specifically. Its arbitrary nature is underscored by the fact that USCIS has recognized in other contexts that it may not require medical exams for adjustment applicants who are not subject to the health grounds of inadmissibility. *See* Dkt. 9 at 3 (citing exemption in adjustment application instructions for registry applicants pursuant to 8 U.S.C. § 1259). Ms. Cabello has therefore stated a claim that Defendants have acted arbitrarily and capriciously under the APA.

CONCLUSION

Ms. Cabello thus respectfully requests the Court deny Defendants' motion to dismiss.

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Respectfully submitted,

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