District Judge 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, et al., Defendants.	No. 3:22cv5984 **DEFENDANTS' MOTION TO DISMISS CLASS ACTION COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND FED. R. CIV. P. 12(b)(6)** Oral Argument Requested

INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants U.S. Citizenship and Immigration Services ("USCIS"), et al. ("Defendants"), submit this motion to dismiss the putative class action complaint ("Complaint") filed by Plaintiff Linda Cabello Garcia ("Plaintiff") for lack of subject matter jurisdiction and for failure to state a claim. Pursuant to the Court's Standing Order for All Civil Cases §§ II(C), (F), undersigned counsel certifies that on February 13, 2023, the parties met and conferred telephonically to determine whether this motion could have been avoided but were unable to agree.

Plaintiff was granted U nonimmigrant status after she became a crime victim and helped the police investigate the crime. In 2020, she filed an application to adjust her status to that of a lawful permanent resident. Although the instructions on her adjustment application directed her to obtain a medical examination, she did not do so and now argues that an anxiety and panic disorder prevent her from attending "anything medical." Plaintiff claims, as the sole count of her

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Washington, D.C. 20044
(202) 305-0190

Complaint, that USCIS erred by requiring her to obtain a medical examination and then by denying her adjustment application because of her refusal to submit to a medical examination.

This Court should dismiss Plaintiff's claim, which she brings under the Administrative Procedure Act ("APA"). First, 8 U.S.C. § 1252(a)(2)(B)(i) precludes this Court from exercising jurisdiction over USCIS's decision to deny Plaintiff's adjustment of status application, as well as any preliminary judgments relating to the adjudication of the application, including USCIS judgments about the evidence it required to decide on the application. The Supreme Court's recent decision in *Patel v. Garland*, 142 S. Ct. 1614 (2022), gives an expansive reading to section 1252(a)(2)(B)(i)'s jurisdiction-stripping provision that precludes such review. Although *Patel* involved an adjustment of status denial made in a removal proceeding, the plain language of section 1252(a)(2)(B)(i), the reasoning of *Patel*, and several Ninth Circuit cases predating *Patel* indicate that USCIS's adjustment of status adjudications outside of removal proceedings are similarly insulated from judicial review. Thus, this Court should dismiss the Complaint for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

Second, USCIS's denial of Plaintiff's adjustment application due to her admittedly incomplete submission of USCIS-required medical records represented an agency decision committed to agency discretion by law. In such a situation, the APA further precludes this Court's review. 5 U.S.C. § 701(a)(2).

Third, and finally, if this Court determines that it has jurisdiction to review the denial of Plaintiff's adjustment application, it should find that USCIS's decision comported with its regulations that reasonably interpreted the statute regarding adjustment of status applications filed by U nonimmigrants. Because USCIS's denial was reasonable, the Court should dismiss the Complaint for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6).

RELEVANT LAW

I. U nonimmigrant visa and adjustment of status provisions

In October 2000, Congress created a new nonimmigrant classification, "U nonimmigrant status," for victims of qualifying crimes who cooperate with law enforcement in the investigation or prosecution of those crimes. *See* Victims of Trafficking and Violence Protection Act, Pub. L.

106-386, 114 Stat. 1464 (2000), *codified at* 8 U.S.C. § 1101(a)(15)(U). An individual granted U nonimmigrant status may, after three years in the United States, seek to adjust status to that of a permanent resident under 8 U.S.C. § 1255(m). The decision to grant this status is in the discretion of the Department of Homeland Security Secretary, as delegated to USCIS:

> (1) The Secretary of Homeland Security ***may*** adjust the status of an alien admitted into the United States (or otherwise provided nonimmigrant status) under section 1101(a)(15)(U) of this title to that of an alien lawfully admitted for permanent residence if the alien is not described in section 1182(a)(3)(E) of this title, unless the Secretary determines based on affirmative evidence that the alien unreasonably refused to provide assistance in a criminal investigation or prosecution, if—
>
> . . .
>
> (B) in the ***opinion*** of the Secretary of Homeland Security, the alien's continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

8 U.S.C. § 1255(m) (emphases added). The regulations implementing, and cases interpreting, this statute echo this grant of discretion. *See* 8 C.F.R. § 245.24(f) ("The decision to approve or deny a Form I-485 filed under [8 U.S.C. § 1255(m)] is a discretionary determination that lies solely within USCIS's jurisdiction."); *Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865, 872 (N.D. Cal. 2008) ("Congress also empowered the [Secretary] with discretion to convert the status of such immigrants to that of permanent residents when doing so is justified on humanitarian grounds, for family unity, or is otherwise in the public interest.").

II. Standards for dismissal under Federal Rule of Civil Procedure 12(b)

Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Federal courts have power to hear only those cases authorized by the Constitution and statutes enacted by Congress. *Couch v. Telescope Inc.*, 611 F.3d 629, 632 (9th Cir. 2010). Defendants may seek dismissal of a claim or action for a lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts on its face sufficient to establish subject matter jurisdiction. *In re Dynamic Random Access Memory Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008). The plaintiff, as the party invoking the court's jurisdiction, bears the

burden of proving subject matter jurisdiction. *In re Ford Motor Co./Citibank (S. Dakota), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001). Once a court has concluded that it has no subject matter jurisdiction, there is nothing left to do but to dismiss the case. *Herman Fam. Revocable Tr. v. Teddy Bear*, 254 F.3d 802, 807 (9th Cir. 2001).

A complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). But the complaint must contain a plausible, not just possible, claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). The court is not required to accept as true legal conclusions set forth in a pleading. *Id.* at 678. Accordingly, a court should disregard "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* at 663. After eliminating unsupported legal conclusions, a court should identify "well-pleaded factual allegations," that the court should assume to be true, "and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. Dismissal is required under Federal Rule of Civil Procedure 12(b)(6) if the facts pleaded fail to describe a facially plausible claim. *Id.* at 679-80.

STATEMENT OF FACTS[1]

In this putative class action, Plaintiff also serves as the sole putative class representative. Compl. ¶¶ 8, 65. Plaintiff alleges that she is a citizen of Mexico but has lived in the United States since 1999. *Id.* ¶¶ 8, 32. She alleges that beginning in 2011, she became the victim of stalking and that the next year, she reported the stalking to a local police department. *Id.* ¶ 33. The police subsequently certified that she had been helpful with the investigation of the stalking crime. *Id.* ¶ 34. In October 2013, Plaintiff submitted her application for a U visa. *Id.* ¶ 35. On October 28, 2016, USCIS granted Plaintiff's application and granted her U nonimmigrant status for a term of four years. *Id.* ¶¶ 36-37.

On August 10, 2020, Plaintiff, as an individual in U nonimmigrant status, submitted to USCIS an application for adjustment of status on USCIS Form I-485, Application to Register

[1] The facts below come directly from the Complaint or from documents Plaintiff references in the Complaint. Defendants do not concede that those facts are true or accurate. Nonetheless, when evaluating a motion to dismiss, courts accept as true, as they must, the factual allegations of the Complaint. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

Permanent Residence or Adjust Status ("I-485"), pursuant to 8 U.S.C. § 1255(m). *Id.* ¶¶ 38, 61. Despite the I-485 instructions directing her do to so, Plaintiff did not submit with her I-485 a USCIS Form I-693, Report of Medical Examination and Vaccination Record ("I-693"). *Id.* ¶¶ 40, 53-54, 61 (citing USCIS, *Instructions for Application to Register Permanent Residence or Adjust Status* at 14 (Jul. 15, 2022), https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf). On August 23, 2021, USCIS sent Plaintiff a request for evidence ("RFE") requesting, among other things, a completed I-693. *Id.* ¶ 40. In her response to the RFE, Plaintiff did not submit an I-693. *Id.* ¶¶ 41-47. Plaintiff instead asked USCIS to approve her adjustment application without an I-693 and claimed that she had severe anxiety and panic attacks related to seeking medical services. *Id.* ¶¶ 41-42, 45.

On February 4, 2022, USCIS issued a notice of intent to deny ("NOID") Plaintiff's adjustment application. *Id.* ¶ 46. The NOID cited Plaintiff's failure to submit an I-693. *Id.* ¶¶ 46-47. In her response to the NOID, Plaintiff did not submit an I-693, but she did submit partial vaccination records and other documents. *Id.* ¶¶ 48-52. She explained that she experienced panic attacks anytime she faced "anything medical." *Id.* ¶ 50. She also submitted with her response a document from a behavioral health specialist stating that she had been diagnosed with generalized anxiety disorder and panic disorder. *Id.* ¶ 51. On August 1, 2022, USCIS denied Plaintiff's adjustment of status application, citing her failure to submit an I-693. *Id.* ¶¶ 53-54.

On December 16, 2022, Plaintiff initiated this action by filing the Complaint on behalf of herself and a putative class consisting of the following:

> All individuals with approved U status under 8 U.S.C. § 1101(a)(15)(U) who have submitted an application for adjustment of status that has not yet been approved or who will submit an application for adjustment of status, and whom USCIS has required, or will require, to submit a Form I-693, Report of Medical Examination and Vaccination Record.

Id. ¶ 65. The Complaint contains a single cause of action brought under the APA, 5 U.S.C. § 706(2)(A), alleging that USCIS is acting arbitrarily and capriciously by requiring U nonimmigrants applying for adjustment of status to obtain medical examinations and by denying their applications due to their failure to submit a medical examination report. *Id.* ¶¶ 73-77.

ARGUMENT

I. This Court lacks jurisdiction to review decisions involving the adjustment of status of U nonimmigrants, due to 8 U.S.C. § 1252(a)(2)(B)(i)

Section 1252(a)(2)(B)(i) precludes this Court from exercising jurisdiction over Plaintiff's claim and requires the Court to dismiss it under Federal Rule of Civil Procedure 12(b)(1). As the Supreme Court recently discussed in *Patel*, section 1252(a)(2)(B)(i) covers any judgments related to the denial of adjustment of status. The jurisdictional bar of section 1252(a)(2)(B)(i) applies to adjustment decisions regardless of whether they occur in removal proceedings or outside of removal proceedings. Section 1252(a)(2)(B)(i) precludes courts from considering judgments relating to any aspect of adjustment of status adjudications, even those that a plaintiff may characterize as a broad pattern or practice that generally affects how USCIS adjudicates adjustment applications.

A. The plain text of section 1252(a)(2)(B)(i) precludes the Court from considering Plaintiff's challenge to USCIS's adjustment denial

In enacting 8 U.S.C. § 1252(a)(2)(B)(i), Congress precluded this or any other court from exercising jurisdiction to review decisions related to, among other areas, adjustment of status decisions made under 8 U.S.C. § 1255. *See* 8 U.S.C. § 1252(a)(2)(B)(i); *Patel*, 142 S. Ct. at 1619. Section 1252(a)(2)(B)(i) provides, in relevant part, as follows:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, […], and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, *or 1255 of this title* . . .

8 U.S.C. § 1252(a)(2)(B)(i) (emphasis added). Accordingly, by the plain terms of section 1252(a)(2)(B)(i), a district court is without jurisdiction to review any decision regarding adjustment of status that is governed by 8 U.S.C. § 1255. The language specifically precludes courts from reviewing decisions regarding the granting of relief under 8 U.S.C. § 1255. That section sets forth various requirements for a noncitizen to adjust his status to that of a lawful permanent resident. This includes the provision at subsection 1255(m) that provides for the

adjustment of U nonimmigrants. Section 1255(m) is the basis by which Plaintiff sought her adjustment of status. Compl. ¶ 38. Accordingly, USCIS's decision to deny Plaintiff's adjustment of status application falls within bar to judicial review set forth at 8 U.S.C. § 1252(a)(2)(B)(i).

In *Patel*, the Supreme Court recently held that the scope of section 1252(a)(2)(B)(i) is expansive and encompasses all judgments, including factual findings, related to the denial of adjustment of status. *Patel*, 142 S. Ct. at 1622-23. *Patel* involved a non-citizen in removal proceedings who filed an adjustment of status application with the immigration court. *Id*. at 1620. After the immigration judge found the non-citizen inadmissible for having previously misrepresented having U.S. citizenship and thus ineligible to adjust status, the non-citizen filed a petition for review challenging the immigration judge's preliminary inadmissibility finding. *Id.* The Supreme Court rejected the non-citizen's claims after determining that the text of section 1252(a)(2)(B)(i) "prohibits review of *any* judgment *regarding* the granting of relief under § 1255. . . ." *Id.* at 1622 (emphases in original). Thus, the statutory text does not "restrict itself to certain kinds of decisions." *Id.* The Supreme Court focused on the language in section 1252(a)(2)(B), noting that "any" has an "expansive meaning" and that the use of the word "regarding" similarly "has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Id*. (internal quotation marks and citation omitted). "Thus, § 1252(a)(2)(B)(i) encompasses not just 'the granting of relief' but also any judgment *relating* to the granting of relief." *Id*. (emphasis in original); *see also De La Rosa-Rodriguez v. Garland*, 49 F.4th 1282, 1287 (9th Cir. 2022) (recognizing the *Patel* Court's departure from the Ninth Circuit's historical approach to § 1252(a)(2)(B)(i), "stressing instead that the statute bars not only review of 'discretionary' decisions, but also of 'any judgment *relating* to the granting of relief' under" the covered statutes) (quoting *Patel*, 142 S. Ct. at 1622-26) (emphasis in original)). *Patel's* interpretation of section 1252(a)(2)(B)(i) precludes a court from reviewing not just the final approved-or-denied decisions on an adjustment application, but also any judgments made in reaching that final agency action. *Id.* This Court should apply the same reasoning and determine that it may not review USCIS's denial of Plaintiff's application or USCIS's judgment in requiring certain evidence, such as medical and vaccination records. *Id.*

B. Section 1252(a)(2)(B)(i) applies to reviews of adjustment adjudications that occur outside of removal proceedings

Patel applied section 1252(a)(2)(B)(i) to decisions made in removal proceedings, but its reasoning applies to USCIS's denial of Plaintiff's adjustment of status application outside of removal proceedings. While the *Patel* Court noted this distinction, stating that the "reviewability of [USCIS] decisions is not before us, and we do not decide it," 142 S. Ct. at 1626, section 1252(a)(2)(B)(i) bars review of USCIS's adjustment of status decisions after *Patel* on at least four grounds. First, the introductory language in section 1252(a)(2)(B) extends the jurisdiction-stripping effect of subparagraph (B) "regardless of whether the judgment, decision, or action is made in removal proceedings." 8 U.S.C. § 1252(a)(2)(B). That settles the matter: courts lack jurisdiction to review adjustment decisions made in removal proceedings, and courts lack jurisdiction to review adjustment decisions, such as Plaintiff's, made outside of removal proceedings. In *Hernandez v. U.S. Citizenship & Immigration Services*, No. 22-cv-904, 2022 WL 17338961 (W.D. Wash. Nov. 30, 2022) (Pechman, J.), another judge in this district ignored the "regardless of whether . . . made in removal proceedings" language of section 1252(a)(2)(B) to find that its jurisdictional bar did not cover adjustment decisions made outside of removal proceedings. *Id.* at *5-6. But *Hernandez*'s refusal to acknowledge and follow the plain text of the statute was in error, and this Court should not follow it. *See Tang v. Reno*, 77 F.3d 1194, 1196 (9th Cir. 1996) ("In interpreting a statute we must examine its language. If the statute is clear and unambiguous, that is the end of the matter.") (internal quotations and citation omitted).

Second, the reasoning of *Patel* indicated that Congress intended to foreclose judicial review of adjustment decisions unless they occurred during the stage of removal proceedings described in 8 U.S.C. § 1252(a)(2)(D). Thus, section 1252(a)(2)(B)(i)'s effect of "foreclosing judicial review unless and until removal proceedings are initiated would be consistent with Congress' choice to reduce procedural protections in the context of discretionary relief." *Patel*, 142 S. Ct. at 1626-27 (citing *Lee v. U.S. Citizenship & Immigr. Servs.*, 592 F.3d 612, 620 (4th Cir. 2010) ("To the extent Congress decided to permit judicial review of a constitutional or legal issue bearing upon the denial of adjustment of status, it intended for the issue to be raised to the court of appeals *during removal proceedings*") (emphasis in original)). *Hernandez*, again, erred

when it ignored this congressional intent, expressed in the plain language of section 1252(a)(2)(B)(i), and anchored its jurisdiction on the fact that the individual would otherwise have no mechanism to challenge USCIS's denial of his application. *See Hernandez*, 2022 WL 17338961, at *7. This Court should not ignore the plain language of section 1252(a)(2)(B)(i) merely to open for Plaintiff, at this point when she does not face removal, an avenue for judicial review of her adjustment denial.

Third, the four-justice dissent in *Patel* interpreted the majority opinion as barring review of USCIS's adjustment of status decisions. *See Patel*, 142 S. Ct. at 1637 ("The majority's interpretation has the further consequence of denying *any* chance to correct agency errors in processing green-card applications outside the removal context.") (Gorsuch, J., dissenting). Accordingly, under the reasoning of *Patel*, no aspect of any USCIS decision to deny adjustment of status under 8 U.S.C. § 1255(m) is judicially reviewable, regardless of whether it represents an exercise of discretion or whether it occurs outside of removal proceedings.

Finally, even before *Patel*, the Ninth Circuit has applied section 1252(a)(2)(B)'s jurisdictional bar to decisions that USCIS made outside of removal proceedings. *See*, *e.g.*, *Hassan v. Chertoff*, 593 F.3d 785, 788-89 (9th Cir. 2010) (holding that "judicial review of the denial of an adjustment of status application—a decision governed by 8 U.S.C. § 1255—is expressly precluded by 8 U.S.C. § 1252(a)(2)(B)(i)."). The Ninth Circuit has not deviated from this holding since *Hassan*. *See, e.g.*, *Poursina v. United States Citizenship & Immigr. Servs.*, 936 F.3d 868, 875 (9th Cir. 2019) ("In sum, because USCIS's decision to deny a national-interest waiver is specified to be in its discretion, § 1252(a)(2)(B)(ii) strips the federal courts of jurisdiction to review USCIS's refusal."); *Gebhardt v. Nielsen*, 879 F.3d 980, 984 (9th Cir. 2018) (holding that § 1252(a)(2)(B)(ii) bars review of USCIS's immigrant visa petition adjudications under the Adam Walsh Act). As recently as November 22, 2022, the Ninth Circuit reaffirmed its holding that section 1252(a)(2)(B)(i) applies to USCIS adjudications under 8 U.S.C. § 1255. *See Herrera v. Garland*, No. 21-17052, 2022 WL 17101156, at *1 (9th Cir. Nov. 22, 2022). Nothing in *Patel* changes the holding of these Ninth Circuit cases that the jurisdiction-limiting provisions of section 1252(a)(2)(B) apply to adjustment decisions made by USCIS outside of removal

proceedings. The *Hernandez* court disregarded this line of pre-*Patel* Ninth Circuit decisions, stating they lacked in-depth analysis to support their application of section 1252(a)(2)(B)'s jurisdictional bar to USCIS adjustment decisions. *See Hernandez*, 2022 WL17338961, at *5. But post-*Patel*, district courts and one circuit court have applied extensive analysis and have reached the same conclusion as the Ninth Circuit. *See Britkovyy v. Mayorkas*, No. 21-3160, --- F. 4th ---, 2023 WL 2059090, at *2, *3 (7th Cir. Feb. 17, 2023) ("§ 1252(a)(2)(B)(i) operates to eliminate judicial review of the denial of an adjustment-of-status application by USCIS"); *Doe v. Mayorkas*, No. 22-cv-00752, 2022 WL 4450272 at *3, (D. Minn. Sep. 23, 2022) ("Although the denial was a decision made by USCIS outside a removal proceeding, it is firmly within the plain language of the statute."); *Chaudhari v. Mayorkas*, No. 22-cv-47, 2023 WL 1822000 (D. Utah Feb. 8, 2023); *Morina v. Mayorkas*, No. 22-cv-02994, 2023 WL 22617 (S.D.N.Y. Jan. 3, 2023).

C. Section 1252(a)(2)(B)(i) precludes courts from reviewing any aspect of adjustment adjudications, even those Plaintiff characterizes as policies or practices

Because of *Patel's* broad holding, even if Plaintiff characterizes her claim not as a challenge to USCIS's final judgment but as a challenge to the alleged pattern or practice in which USCIS requires medical examinations and vaccine records from U nonimmigrant adjustment applicants, *see* Compl. ¶ 28 (alleging that USCIS has a "policy or practice" of requiring U visa adjustment applicants to submit a medical examination report), that pattern or practice remains outside the Court's jurisdiction to review. First, if USCIS adopted such a pattern or practice, it did so as an exercise of its judgment regarding the process by which it adjudicates U nonimmigrant adjustment of status applications. And, as noted above, the jurisdiction-limiting provision of section 1252(a)(2)(B)(i) "prohibits review of *any* judgment *regarding* the granting of relief under § 1255 . . . ." *Patel* 142 S. Ct. at 1622 (emphasis added).

Second, in *Patel*, the Supreme Court rejected the government's pre-*Patel* position that section 1252(a)(2)(B)(i) insulates from judicial review only adjustment-related decisions that are purely discretionary, or "subjective or evaluative." *Id.* at 1623-24; *see also De La Rosa-Rodriguez*, 49 F.4th at 1287 (recognizing this change in interpretation). Here, Plaintiff cannot escape section 1252(a)(2)(B)(i)'s jurisdictional bar by claiming she challenges USCIS's adoption

of a broad pattern or practice that, in a non-discretionary fashion, requires medical and vaccination reports from U nonimmigrant adjustment applicants. *See Gebhardt*, 879 F.3d at 987 ("as we have explained before, 'the phrase "pattern and practice" is not an automatic shortcut to federal court jurisdiction.'"). In *Patel*, the Supreme Court rejected the argument that there was a jurisdictional-saving distinction between a discretionary, "subjective or evaluative" judgment regarding adjustment of status and any other type of decision underlying that discretionary denial, including objective factual findings. *Id.* The Court found, instead, that if USCIS has made *any* judgment *regarding* adjustment of status, regardless of whether it is objective or subjective, that judgment stands outside judicial review. *Id.* at 1624-25 ("A 'judgment' does not necessarily involve discretion, nor does context indicate that only discretionary judgments are covered by § 1252(a)(2)(B)(i)."). That ruling requires dismissal here.

II. The decision of whether to adjust status is independently unreviewable because it is committed to agency discretion by law

In addition to the jurisdiction-limiting provision of 8 U.S.C. § 1252(a)(2)(B)(i), another statute precludes this Court from reviewing the sole claim in the Complaint that Plaintiff alleges under the APA: the APA itself. USCIS's adjustment of status denial was "committed to agency discretion by law" and thus falls outside the scope of decisions subject to APA review. *See* 5 U.S.C. § 701(a)(2). This is because, as discussed above, *see* Relevant Law § I, the statute governing the decision, 8 U.S.C. § 1255(m), commits the matter entirely to USCIS's discretion, and any exercise of that discretion amounts to an unreviewable "matter of grace." *Kucana v. Holder*, 558 U.S. 233, 247 (2010). There is no meaningful standard by which to judge the agency's exercise of discretion under Section 1255(m). Under Section 1255(m), the Secretary "may" adjust status if, in his or her "opinion," it would be "justified" by "humanitarian grounds," "family unity," or the "public interest." There is no meaningful standard by which to judge an agency's exercise of discretion when no statute, regulation, or controlling case law defines the key terms applicable to the discretionary decision at issue. *See Ekimian v. I.N.S.*, 303 F.3d 1153, 1159–60 (9th Cir. 2002). The decision is thus unreviewable under the APA because it is "committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2). In addition to the

jurisdiction-limiting provision of 8 U.S.C. § 1252(a)(2)(B)(i), this bar to APA review provides a second, independent basis to dismiss the Complaint for lack of jurisdiction. *See* 5 U.S.C. § 701(a)(2); *Ekimian*, 303 F.3d at 1159-60.

III. If the Court has jurisdiction, it should dismiss the case for failure to state a claim

Even if the Court determines it has jurisdiction in this matter, Plaintiff's claim that USCIS acted arbitrarily and capriciously would still fail to state a legally cognizable claim, thereby requiring its dismissal under Federal Rule of Civil Procedure 12(b)(6). In her Complaint, Plaintiff claims that USCIS acted arbitrarily and capriciously by denying her application for adjustment of status "by requiring her to submit to a medical exam that the [Immigration and Nationality Act ("INA")] does not require." Compl. ¶ 76. Plaintiff's claim is meritless.

First, USCIS properly promulgated the regulations that USCIS relies upon to require medical examinations from U nonimmigrants applying for adjustment of status. In reviewing the lawfulness of an agency's regulation, courts first determine whether Congress has directly spoken to the precise question at issue. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's regulatory answer is based on a permissible or reasonable construction of the statute. *See id.* at 843. If so, a court "may not substitute its own construction of [the] statutory provision . . . ." *Fernandez v. Brock*, 840 F.2d 622, 631 (9th Cir. 1988). Hence, even if the agency's interpretation is not the only possible one, or even if it is not one a court would have chosen, it should stand if reasonable. *See Chevron*, 467 U.S. at 843 n.11.

The regulations that require U nonimmigrant adjustment of status applicants to obtain a medical examination represent a proper exercise of USCIS's rulemaking authority. As noted above, *see* Relevant Law § I, the INA permits USCIS to adjust the status of U nonimmigrants only if "in the opinion of the Secretary of Homeland Security, the [U nonimmigrant's] continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest." 8 U.S.C. § 1255(m)(1)(B). The statute applies only one of the inadmissibility grounds at 8 U.S.C. § 1182 to U nonimmigrant adjustment applications. *See* 8 U.S.C. § 1255(m)(1) (statutorily barring as inadmissible only applicants described in 8 U.S.C.

§ 1182(a)(3)(E) (participants in Nazi persecution, genocide, torture, or extrajudicial killing)). Plaintiff's claim that USCIS's medical exam requirement is unlawful, Compl. ¶ 76, relies on reading section's 1255(m)'s enumeration of the 1182(a)(3)(E) statutory bar as thus excluding any other inadmissibility ground from USCIS's consideration. The Complaint implicitly – and Plaintiff's motion for preliminary injunction explicitly – relies on the canon of construction known as "*expressio unius est exclusio alterius*." *Id.* ¶¶ 26, 28; Pl.'s Mot. for Prelim. Injunction at 8, Dkt. 9. That canon involves "a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions." *United States v. Fuller*, 531 F.3d 1020, 1027 (9th Cir. 2008) (internal citation omitted). But it "is a rule of interpretation, not a rule of law . . . properly applied only when it makes sense as a matter of legislative purpose." *Id.* Here, the maxim is not controlling because Congress did not stop after enumerating section 1182(a)(3)(E) as an inadmissibility bar applicable to U nonimmigrant adjustment applicants. Congress, instead, also required USCIS to exercise its discretion over every U nonimmigrant adjustment application. 8 U.S.C. § 1255(m)(1) (providing the "Secretary . . . may adjust the status" of a U visa nonimmigrant as the only authority to adjust status of U nonimmigrants). This includes determining whether approval is "in the public interest." *Id*. So while Congress did not specify that other grounds of inadmissibility would render an applicant ineligible for U nonimmigrant adjustment of status, it also did not preclude USCIS from considering such factors in its exercise of discretion. *See Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("Sometimes there is no negative pregnant: 'get milk, bread, peanut butter and eggs at the grocery' probably does not mean 'do not get ice cream.'").

Section 1255(m) is thus silent on two critical issues: (1) whether USCIS may consider traditional inadmissibility grounds in adjudicating adjustment applications filed by U nonimmigrants and (2) how USCIS should define "in the public interest" in adjudicating adjustment applications filed by U nonimmigrants in the exercise of its discretion. USCIS's regulations permissibly interpreted both of those issues.

The first regulation that fills the statutory silence by permitting USCIS, in the exercise of its discretion to decide whether the adjustment of a U nonimmigrant is in the public interest, to

"take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application." 8 C.F.R. § 245.24(d)(11). This includes the public health grounds of inadmissibility for which the medical examination is intended to verify, *see* 8 U.S.C. § 1182(a)(1) (barring admission to noncitizens, *inter alia*, determined "to have a communicable disease of public health significance" or who fail to present documentation of vaccination), and which Plaintiff failed to obtain. Compl. ¶¶ 53-54.

To make her central argument that the government may not apply any inadmissibility grounds to U nonimmigrant except for those relating to Nazi persecution, genocide, extrajudicial killings, or torture, Plaintiff resorts to misquoting 8 C.F.R. § 245.24(d)(11):

> Federal regulations explicitly recognize this point [that U visa holders applying to adjust status and become LPRs are not required to demonstrate that they are admissible at the time of applying for adjustment of status]. *See* 8 C.F.R. § 245.24(d)(11) (*"U adjustment applicants are not required to establish that they are admissible."*).

Compl. ¶ 19 (emphasis added). By including a terminal period within quotation marks in her quotation of section 245.24(d)(11) at paragraph 19 of her Complaint, Plaintiff misleadingly indicates that she has quoted a complete sentence from section 245.24(d)(11). But Plaintiff cited only a portion of the regulation. As a result of Plaintiff's omissions and punctuation, her version of the regulation appears to render inadmissibility criteria, even those involving serious crimes or terrorism, wholly inapplicable to U nonimmigrant adjustment applications. But that is not what the regulation provides. As discussed in the previous paragraph, the regulation, as actually written, allows USCIS, as a matter of discretion, to consider any other traditional inadmissibility ground in adjudicating a U nonimmigrant adjustment of status application. *See* 8 C.F.R. § 245.24(d)(1) ("Although U adjustment applicants are not required to establish that they are admissible, USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application.").

The second regulation at issue in this case requires U nonimmigrant adjustment applicants to submit a Form I-485 "in accordance with the form instructions," 8 C.F.R. § 245.24(d)(1), and to submit "[a]ny other information required by the instructions to Form I-485, including whether adjustment of status is warranted as a matter of discretion on

humanitarian grounds, to ensure family unity, or *is otherwise in the public interest.*" 8 C.F.R. § 245.24(d)(10) (emphasis added). Plaintiff's Complaint admits that the instructions for the Form I-485 require adjustment applicants to submit a completed medical examination and vaccination form and contains no exception for U nonimmigrants applying for adjustment of status. Compl. ¶ 61; *see also* 8 C.F.R. § 245.24(d)(10). Those regulations represent the agency's reasonable interpretation of statutory gaps in 8 U.S.C. § 1255(m), to which this Court, applying *Chevron* step two, should defer. *See Fernandez*, 840 F.2d at 631.

This statutory and regulatory scheme permits USCIS to require U nonimmigrants to submit medical examinations with their adjustment applications. Because USCIS reasonably relied on statutory and regulatory authority to require U nonimmigrant adjustment applicants to submit evidence of medical examinations, Plaintiff has failed to state a claim that USCIS acted arbitrarily or capriciously when it allegedly "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." 5 U.S.C. § 706(2). In requiring that Plaintiff submit a medical examination and denying her adjustment application after she refused to do so, USCIS acted reasonably by relying on and considering the factors that Congress set forth, such as whether the adjustment of U nonimmigrants was in the public interest. *See* 5 U.S.C. § 706(2).

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint for lack of jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1), or, in the alternative that this Court determines it has jurisdiction to hear this matter, for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6).

DATED: February 28, 2023

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
United States Department of Justice
Civil Division

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section

KATHLEEN A. CONNOLLY
Acting Chief
Enforcement Unit

ANTHONY D. BIANCO
Assistant Director

/s/ Hans H. Chen
HANS H. CHEN
Senior Litigation Counsel
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
Enforcement Unit
P.O. Box 868
Washington, DC 20044
Telephone: (202) 305-0190
E-mail: hans.h.chen@usdoj.gov

M. SAMER BUDEIR
Trial Attorney

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing DEFENDANTS' MOTION TO DISMISS CLASS ACTION COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6) with the Clerk of Court using the CM/ECF system. The CM/ECF system will serve a copy of the foregoing to the following attorneys for Plaintiffs-Petitioners registered as CM/ECF filers:

Matt Adams
matt@nwirp.org

Glenda M. Aldana Madrid
glenda@nwirp.org

Aaron Korthuis
aaron@nwirp.org

Jason Baumetz
jason.Baumetz@akijp.org

Dated: February 28, 2023

Respectfully submitted.

/s/ Hans H. Chen
HANS H. CHEN
Senior Litigation Counsel
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
Enforcement Unit