No. 23-35267

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
No. 3:22-cv-05984 – Honorable Barbara J. Rothstein

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Plaintiff-Appellant Linda Cabello Garcia has been stripped of her lawful immigration status, her right to work, and even her right to remain in this country with her family based on a federal agency's policy that blatantly violates Congress' statutory scheme. Defendants-Appellees assert that regardless of whether the agency decision violated the law, *no* court may ever review that decision or the underlying policy. Their argument dramatically expands the ruling in *Patel v. Garland*, 596 U.S. 328 (2022), which held that 8 U.S.C. § 1252(a)(2)(B)(i) bars judicial review of an immigration judge's decision denying adjustment of status in removal proceedings, except with respect to constitutional claims and questions of law, which remain reviewable on a petition for review pursuant to § 1252(a)(2)(D). However, the Court expressly refrained from deciding whether that same statute bars judicial review of adjustment applications where the applicant is not in removal proceedings. Moreover, the Court did not address the separate question of whether § 1252(a)(2)(B)(i) may be read to apply where the applicant would *never* be able to raise constitutional claims and questions of law on a petition for review.

Defendants nonetheless exhort this Court to adopt an interpretation that is breathtaking in its scope, as it would completely insulate the U.S. Citizenship and Immigration Services' (USCIS) actions from any form of judicial review. That would allow the agency to trample on Ms. Cabello and others' statutory and

constitutional rights without any recourse. To reach this result, Defendants isolate one clause of § 1252(a)(2)(B) from all context, ignoring the overall text and structure of the statute, which clarify the section focuses on judicial review of removal orders. Similarly, Defendants disregard legislative history explaining that Congress did not intend to preclude judicial review of constitutional claims and legal questions.

Defendants' position further ignores fundamental canons of statutory construction. Those canons instruct courts not to interpret statutes in a manner eliminating judicial review of agency actions absent the clearest terms. As this Court has explained,

> Even where the ultimate result [of a statute] is to limit judicial review, the Court cautions that as a matter of the interpretive enterprise itself, the narrower construction of a jurisdiction-stripping provision is favored over the broader one. Our Circuit has applied this admonition to conclude that a "jurisdictional bar is not to be expanded beyond its precise language."

ANA Int'l, Inc. v. Way, 393 F.3d 886, 891 (9th Cir. 2004) (citations omitted).

While other circuits have adopted broad readings of the statute, they have not addressed the issues presented here. Nor have they confronted the question in a case where there would *never* be judicial review of the agency denial. If the statute is read to bar all judicial review of such USCIS decisions eliminating lawful status, it is unconstitutional as applied to Ms. Cabello and others who are similarly situated. Defendants ignore controlling caselaw confirming that Ms. Cabello has

strong liberty interests and that she cannot be deprived of those interests without due process of law, including judicial review of constitutional claims and legal questions.

ARGUMENT

I. Section 1252(a)(2)(B) is directed at cases in removal proceedings.

The text and structure of 8 U.S.C. § 1252(a)(2)(B), its legislative and statutory history, and key canons of statutory interpretation all demonstrate the statute affords district courts authority to review the denial of a U-based adjustment application. Beginning with the title of § 1252, and in each subsection, Congress repeatedly addressed one issue: judicial review of orders of removal. Defendants argue that the "plain" meaning of § 1252(a)(2)(B)'s "regardless" clause extends the scope of Subparagraph (B) to *all* USCIS decisions, even where the person is not in removal proceedings. But that assertion suffers from the same failures plaguing the courts of appeals decisions that the district court below relied upon: it looks to the "regardless" clause in isolation, contrary to the Supreme Court's instructions that the "plainness" of language must analyze language in its context.

A. Context informs the "plain" meaning of the "regardless" clause.

Defendants do not address the Supreme Court caselaw declaring that 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 v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also* Dkt. 11-1 at 15, 17–18 (citing cases); *id.* at 22 (same); *Dubin v. United States*, 599 U.S. 110, 118 (2023) (adopting "narrower reading" of "uses" and "in relation to" after analyzing them in their "statutory context, taken as a whole"); *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 275–76 (2023) (declining to consider statutory text "[i]n complete isolation" and "consider[ing]" it instead "alongside its neighboring [statutory] provisions" to conclude that its meaning "becomes overwhelmingly evident" in that light). In fact, "[t]he 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*." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (emphasis added); *accord Keene-Stevens v. Comm'r of Internal Revenue*, 72 F.4th 1015, 1026 (9th Cir. 2023) (plainness is determined "by looking to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" (internal quotation marks omitted)).

This is so even where the language at issue appears to be "plain" on its face. *See, e.g.*, *Maine Cmty. Health Options v. United States*, 140 S.Ct. 1308, 1320–21 (2020) (analyzing the word "shall" by looking at the statute's "express terms and context"); *Yates v. United States*, 574 U.S. 528, 535 (2015) (plurality) (assessing

meaning of "tangible object"); *Robinson*, 519 U.S. at 341 (examining "employees"). For example, in *Yates*, the Eleventh Circuit had found "tangible object" to be "plain" and encompassing anything "possessing physical form." 574 U.S. at 535 (citation omitted). The Supreme Court disagreed, concluding the phrase had a "narrower reading" than the broad one the words indicated when read in isolation. *Id.* at 539. Adopting instead a "contextual reading," *id.* at 536, the Court looked to, inter alia, the "caption" of the statute where the language was found, the title of the section where the statute was situated, the statute's placement in the broader statutory scheme, and the surrounding words in the statute that "cabin[ed] the contextual meaning" of the term, *id.* at 539–40, 543.[1]

Despite this clear guidance, Defendants seek to untether the "regardless" clause from its broader statutory context. As an initial matter, that language is not "plain" in foreclosing jurisdiction of USCIS decisions. Indeed, the Supreme Court did not raise the issue when deciding *Sanchez v. Mayorkas*, 141 S.Ct. 1809 (2021), even though the case concerned an adjustment of status application outside removal proceedings. Nor did the Court find the language so clear in *Patel*, when it refrained from deciding the issue. 596 U.S. at 345.

[1] The Court also noted that "we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress,'" even where the word at issue was preceded by the word "any." *Yates*, 574 U.S. at 543 (citation omitted).

More critically, Defendants' assertion that the statutory context introduces ambiguity and "cannot overcome the plain language," Dkt. 21 at 26, is directly at odds with the Supreme Court's instructions. As the Court has explained, "[w]hether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words" but *also* on "the specific context in which that language is used, and the broader context of the statute as a whole." *Yates*, 574 U.S. at 537 (quoting *Robinson*, 519 U.S. at 341). Here, the neighboring provisions and the statute's title naturally "cabin the contextual meaning" of the "regardless" clause. *Yates*, 574 U.S. at 543. This context "harmonizes the various provisions of § 1252," Dkt. 11-1 at 44, and makes clear its scope is limited to USCIS decisions issued in the context of removal proceedings.

Defendants' contrary caselaw misses the mark. In *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Company*, the meaning suggested by the statute's heading plainly *contradicted* the broader language at issue and the relevant legislative history supported the broader reading. 331 U.S. 519, 527–29 (1947). Here, any apparent contradiction is only superficial, and the legislative history supports Ms. Cabello's reading of the "regardless" clause. *See infra* p. 8; Dkt. 11-1 at 23–27. And in *United States v. Osuna-Alvarez*, the defendant attempted to narrow the meaning of the statutory language by relying *only* on the statute's title. 788 F.3d 1183, 1185–86 (9th Cir. 2015) (per curiam). By contrast,

Ms. Cabello finds support for her argument in the entire statutory scheme of § 1252.

By disregarding context, it is Defendants, not Plaintiffs, who ignore the statute's plain text. Indeed, the statute encompasses any judgment regarding the granting of relief under, inter alia, § 1255, "regardless of whether the judgment, decision, or action is made in removal proceedings." Yet Defendants ask this Court to effectively modify the language so that it also encompasses judgments "regardless of whether the person is currently in removal proceedings." But that expansive interpretation of the "regardless" clause is inconsistent with § 1252's focus on the removal process. And, when read in the context of U-based adjustment application decisions—where a finding of no jurisdiction would permit the agency to act with unfettered discretion vis-à-vis a group of especially vulnerable noncitizens—that interpretation leads to absurd results. *See* Dkt. 11-1 at 31–33. Notably, Defendants' own authorities posit that *even in* the case of unambiguous statutory language, a court may "look beyond the plain meaning" of the language "when the result is [] absurd," in order to ascertain its purpose. *Tang v. Reno*, 77 F.3d 1194, 1196–97 (9th Cir. 1996). Congress's generous intent in creating the U-visa statutory scheme, Dkt. 11-1 at 45–48, is thus important and germane.

That § 1252's title was enacted before the addition of the "regardless" clause, Dkt. 21 at 25–26, does little to diminish its interpretive value. The legislative history shows Congress remained focused on judicial review in the removal context when it added the clause. Dkt. 11-1 at 24–26 (noting that the relevant conference report explained that changes to judicial review provisions were not intended to deprive any noncitizen "of judicial review" but meant instead to "restore[]" such review to the courts of appeals for all noncitizens "who are ordered removed by an immigration judge" (citations omitted)). Defendants' reliance on caselaw to suggest an alternative explanation for Congress's addition of the clause, Dkt. 21 at 26, "points to nothing in the text or legislative history that corroborates th[at] proposition," whereas Ms. Cabello's "simpler explanation for Congress' addition of this language . . . is rooted in the text of the statute as a whole," *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S.Ct. 883, 895 (2018), *and* the legislative history.[2]

[2] Notably, when the "regardless" clause was added, USCIS did not have exclusive jurisdiction over U-based adjustment applications, Dkt. 11-1 at 45, and the small category of adjustment decisions within USCIS's exclusive jurisdiction were understood to be reviewable in district courts, *id.* at 23–24. All Congress sought to do in 2005 was "preclude *all district court review* of any issue [that could be] raised in a removal proceeding." H.R. Rep. No. 109-72, at 173 (2005) (Conf. Rep.) (emphasis added). Adjustment decisions that were in USCIS's exclusive jurisdiction could *not* be "raised in a removal proceeding," *id.*, and so Congress was not legislating as to them.

Plaintiff's interpretation is also rooted in an understanding of how removal proceedings work in practice—an understanding *Rubio Hernandez v. USCIS* recognized. *See* 643 F. Supp. 3d 1193, 1202 (W.D. Wash. 2022). As that court explained, persons in removal proceedings "have various [ancillary] alternative administrative avenues that, if successful, could terminate the removal proceeding in their favor," "explain[ing] why Subparagraph (B) refers to determinations made outside of the removal context but is nonetheless limited to those who are in removal proceedings."[3] *Id.* Contrary to Defendants' assertion, Dkt. 21 at 18, Judge Pechman fully addressed the "regardless" clause language as well as the entire statutory text before concluding that "Subparagraph (B)'s text and context confirm that it strips jurisdiction only where the plaintiff is in removal proceedings," 643 F. Supp. 3d at 1202.

B. *Patel* does not compel a finding that no jurisdiction exists.

Neither *Patel* nor any subsequent appellate decision compels Defendants' broad reading of Subparagraph (B).

Defendants' reliance on *Lee v. USCIS*, 592 F.3d 612 (4th Cir. 2010), Dkt. 21 at 18–19, to extend *Patel* outside the removal context is misplaced. Unlike Ms.

[3] For this reason, § 1252(a)(2)(B)(i)'s use of "relief" is entirely consistent with the prefatory language extending its reach to USCIS decisions—any decision by USCIS that "terminate[s] the removal proceeding" in favor of the noncitizen *is* relief from removal. *Rubio Hernandez*, 643 F. Supp. 3d at 1202.

Cabello, the petitioner in *Lee could* renew his adjustment application in removal proceedings, *Lee*, 592 F.3d at 620, and thus had a path to obtain judicial review in a court of appeals. Moreover, *Lee* fails to support Defendants' arguments because its holding as to the scope of the "regardless" clause relied on that language in isolation. Similarly, the case relies on the suppositions of the Eleventh and Third circuits as to congressional intent, which were not based on the text of § 1252 or its legislative history *Compare Lee*, 592 F.3d at 619, *with Mejia Rodriguez v. U.S. Dep't of Homeland Sec.*, 562 F.3d 1137, 1142 n.13 (11th Cir. 2009) (per curiam) (relying on caselaw to divine congress's intent), *and Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196, 199 n.5 (3d Cir. 2006) (same).

Defendants' final attempt to extend *Patel* to this context turns on the *Patel* dissent's concern as to how the majority opinion may impact cases in other contexts. Dkt. 21 at 19. But a dissent's characterization of a majority opinion is not law, and the majority expressly refrained from deciding the issue, *Patel*, 596 U.S. at 345.

Notably, since *Patel*, no precedential Ninth Circuit decision has held that § 1252(a)(2)(B) applies to cases exclusively outside the removal context. The pre-*Patel* decisions Defendants rely on, Dkt. 21 at 19–20, either assumed the availability of judicial review over non-discretionary agency decisions, Dkt. 11-1 at 38–39, or failed to discuss whether the provision applied outside the removal

proceeding as a threshold determination, *id.* at 39–40. The two-paragraph, unpublished disposition in *Molina Herrera v. Garland*, No. 21-17052, 2022 WL 17101156 (9th Cir. Nov. 22, 2022), does not alter this state of affairs. It not only lacks precedential value, *see* 9th Cir. Rule 36-3(a), but it also does not analyze whether § 1252(a)(2)(B)(i) applies outside of removal proceedings or whether constitutional-avoidance considerations warrant finding jurisdiction, *see* 2022 WL 17101156, at *1. Unlike here, the case also concerned a discretionary determination rather than a legal question. *Id.* The applicability of § 1252(a)(2)(B) to legal questions wholly outside the removal context thus continues to be an open question in this circuit, and the court "would risk error if it relied on assumptions that have gone unstated and unexamined." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145 (2011).

Nor do the dispositions by panels of the D.C., Seventh, and Eleventh circuits address or analyze the specific issues raised here. Dkt. 11-1 at 41–45. The unpublished, nonprecedential, *see* 5th Cir. R. 47.5.4, Fifth Circuit decision *Mendoza v. Mayorkas*, No. 23-20043, 2023 WL 6518152 (5th Cir. Oct. 5, 2023), also does not engage with the issues Ms. Cabello raised. Instead, it affirmed that Subparagraph (B) applies regardless of whether the decision at issue is discretionary, *id.* at *1, and found that Subparagraph (D) did not provide jurisdiction because the case did "not involve a petition for review," *id.* at *2. In

addition, that case concerned an adjustment application that *could* be renewed before an IJ, *see id.* at *1 (noting that the adjustment application was filed under § 1255(a)), and so did not implicate the same grave constitutional concerns raised here. "When there is a 'compelling reason to do so' [this Court] do[es] not hesitate to create a circuit split, even when several circuits have addressed the question and all reached a [contrary] result." *Woods v. Carey*, 722 F.3d 1177, 1183 n.8 (9th Cir. 2013). This is particularly true here, as the other circuits have not addressed the issues raised here, and those cases did not involve persons who faced loss of legal status without any recourse.

C. Canons of statutory construction support a finding of jurisdiction.

1. The strong presumption of judicial review of agency action applies.

Defendants largely ignore a cardinal rule of statutory construction that there is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986). Indeed, their response is limited to a single paragraph with the conclusory statement that Congress's intent was clear. Dkt. 21 at 49–50.

But Congress has not clearly expressed an intent to foreclose judicial review over *all* USCIS decisions outlined at § 1252(a)(2)(B)(i). The Supreme Court's tepid observation that "it is *possible*" that Congress could have so intended is evidence enough of that. *Patel*, 142 S.Ct. at 1626 (emphasis added). Read in

context, the "regardless" clause demonstrates Congress's intent to foreclose only review of USCIS decisions that occur within the removal context. *See supra* pp. 3–9; Dkt. 11-1 at 15–22. This reading of the statute also comports with the relevant legislative history. *See supra* p. 8; Dkt. 11-1 at 23–27. Accordingly, the "well settled" and "strong presumption" of judicial review of agency decisions applies in this case. *Guerrero-Lasprilla v. Barr*, 140 S.Ct. 1062, 1069 (2020) (citation omitted).

2. Constitutional avoidance similarly applies.

Ms. Cabello has demonstrated that traditional tools of statutory construction support her interpretation of Subparagraph (B). *See* Dkt. 11-1 at 15–33; *see supra* pp. 3–9. She has also demonstrated that Defendants' construction raises serious constitutional concerns. *See* Dkt. 11-1 at 29–31, 48–60; *see also infra* pp. 16–23. Indeed, when Congress added the "regardless" language in 2005, it explained that it intended to preserve judicial review for all noncitizens, regardless of their past conduct. Notably, Congress acted in response to the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), which questioned the constitutionality of a scheme that would bar all review of legal and constitutional claims prior to an individual's removal. As a result, here, the Court must simply "choos[e] between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious

constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). With respect to § 1252(a)(2)(B), the canon thus strongly supports reading the statute as limited to cases in removal proceedings, like the other subparagraphs.

3. The canon against absurdity also applies.

Finally, Ms. Cabello's argument as to the canon against absurdity is not based on an "imaginary situation[]." Dkt. 21 at 47. She is alleging that, in *this* case, adopting Defendants' interpretation would yield absurd results: eliminating *all* judicial review of an agency decision that would strip her of her lawful status that she has held for years and threaten to separate her from her family and her home based on a policy that blatantly violates the statute. Moreover, this would eliminate any judicial review for an agency interpretation that forces U visa holders to pay millions of dollars each year to obtain civil surgeon exams, despite statutory language to the contrary. This frustrates a statutory framework enacted by Congress to *favor* U-based adjustment applicants by denying U visa holders any recourse to correct unlawful agency action, even though they have lived in this country lawfully for years. Defendants respond that U.S. voters may seek recourse through future elections if the Executive Branch runs amuck. Dkt. 21 at 47. Their

answer simply reinforces that Ms. Cabello and others similarly situated are left with no meaningful way to defend themselves from unlawful agency action.[4]

Defendants further fail to explain how it is not absurd and irrational to allow initially for judicial review for U-visa applicants—before they ever are granted lawful status and when they have fewer ties to the United States—but then to subsequently deny judicial review to those who have been granted U visas years later. This is especially so because the U-visa statutory scheme is a cohesive one, Dkt. 11-1 at 4–5, 46, not "a different set of Congressional enactments," Dkt. 21 at 49.

In short, an analysis of the plain meaning of the statute properly incorporates its context and demonstrates Subparagraph (B)'s jurisdictional bar extends only to USCIS decisions occurring within the removal context. This reading is bolstered by longstanding rules of statutory construction and is not contradicted by *Patel*.

[4] Moreover, "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies" "is exclusively a judicial function." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 544 (1940). Stripping courts of such a crucial function is an affront to the separation of powers upon which this country was founded. *See* Dkt. 11-1 at 49–53; *infra* pp. 19–22.

II. Interpreting § 1252(a)(2)(B)(i) to bar review violates the Constitution as applied in this case.[5]

A. Ms. Cabello is entitled to due process rights that guarantee, at a minimum, judicial review of her legal claims.

Defendants offer no meaningful response to Ms. Cabello's discussion of long-established caselaw affirming that she and putative class members have due process rights by virtue of their lawful immigration status, length of residence in the country, and community ties. *Compare* Dkt. 11-1 at 54–58, *with* Dkt. 21 at 35–38. Instead, Defendants minimize the interests at stake to argue that Ms. Cabello has "no due process entitlement to judicial review." Dkt. 21 at 35. But a denial of U-visa adjustment based on USCIS's unlawful I-693 policy permanently strips Ms. Cabello of her lawful immigration status, with its attendant employment authorization and the right to remain in this country with her family and community. Prior to even applying for a U visa, Ms. Cabello had resided in the United States since 1999. She applied for a U visa in 2013, and it was granted in 2016. She maintained lawful immigration status until the agency denied her

[5] Defendants contend that Ms. Cabello's "constitutional concerns ring hollow" because she is "indifferen[t]" to the lack of judicial review for the claims of "U nonimmigrants who are in removal proceedings." Dkt. 21 at 34 n.2. While Ms. Cabello's first statutory argument is that § 1252(a)(2)(B) is limited to cases in removal proceedings, she has also maintained that all U visa holders must have a path for judicial review, and to the extent the Court finds that § 1252(a)(2)(B)(i) precludes all judicial review of questions of law and constitutional claims with respect to denials of U-based adjustment, the statute is unconstitutional as applied.

adjustment in 2022. ER-160, 173; Dkt. 11-1 at 9. Given the specific nature of the U-visa statutory scheme, the losses that Ms. Cabello faces are not comparable to those faced by an individual applying for an initial discretionary benefit. Rather, she faces the loss of "all that makes life worth living." *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (citation omitted).

Defendants also misconstrue the claim here. Ms. Cabello does not claim the substantive "due process right to remain in the country." Dkt. 21 at 37. Instead, she claims a procedural right: the ability to challenge unlawful agency action that threatens to deprive her of her lawful status.[6] She has demonstrated that the loss of lawful status and employment authorization directly threatens her liberty and property interests, as that loss would result in her separation from family, home, and career. The Supreme Court has repeatedly recognized the significance of these interests for due process purposes in the immigration context in cases where individuals have developed deep ties to this country. *See* Dkt. 11-1 at 54–55 (citing cases). And once such important benefits are conferred, recipients have a protected interest entitling them to appropriate procedures before those benefits may be taken away. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (finding due

[6] Moreover, even as to discretionary benefits that have not yet been granted, "a legitimate claim of entitlement may exist where there are rules or mutually explicit understandings that support [a plaintiff's] claim of entitlement to the benefit . . . ." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 514 (9th Cir. 2018) (alterations in original) (internal quotation marks omitted).

process entitlement for parolees who "have been on parole for a number of years" and "relied on at least an implicit promise that parole will be revoked" only if they violate parole conditions); *cf. Bell v. Burson*, 402 U.S. 535, 539 (1971) (noting "the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege'").

Defendants fail to acknowledge the significance of these harms, much less the Supreme Court's recognition of them, and instead speculate that Ms. Cabello may be eligible to pursue some other form of relief from removal. *See* Dkt. 21 at 37 (citing *Abuzeid v. Mayorkas*, 62 F.4th 578, 586 n.7 (2023)). The reference to a "waiver of residency requirement" is wholly inapplicable, as it is only available to certain exchange visitors who are generally subject to a requirement that they return to their home country for two years before seeking a different status in the United States. 8 U.S.C. § 1182(e); 22 C.F.R. §§ 40.202, 41.63. Instead, as Defendants conceded, not even an immigration judge would be authorized to review USCIS's denial or otherwise consider a U nonimmigrant adjustment application, which serves as her only basis to remain in this country. Dkt. 21 at 7. Defendants' argument is utterly without merit, as any judgment from this court must be based on facts, not "rank speculation." *McSherry v. City of Long Beach*, 584 F.3d 1129, 1138 (9th Cir. 2009). Defendants' reliance on *City of Los Angeles*

v. Lyons, 461 U.S. 95 (1983), and *Gon v. Gonzales*, 534 F. Supp. 2d 118 (D.D.C. 2008), is also misplaced. Neither case addresses the issue whether an individual is entitled to due process. To the extent that Defendants cite them to argue that Ms. Cabello has suffered only "abstract injury," *Lyons*, 461 U.S. at 101, or that her due process claim is not a "concrete claim ripe for adjudication," *Gon*, 534 F. Supp. at 120, those arguments lack merit because Ms. Cabello has demonstrated that concrete liberty and property interests are at stake.[7]

B. The availability of judicial review for questions of law safeguards the separation of powers.

Defendants argue that § 1252(a)(2)(B)(i) must be interpreted to preclude all judicial review, but do not refute that such an interpretation "represents a serious depart[ure] from our societal mores and the principles on which our government is formed." ER-9-n.3. Contrary to Defendants' interpretation, Alexander Hamilton discussed the Exceptions Clause only briefly in order to bolster the argument for the creation of a national judiciary, *see* The Federalist No. 80 (Hamilton), and the meaning of the clause has been a subject of academic and political debate, *see, e.g.*, Curtis A. Bradley & Neil S. Siegel, Historical Gloss, Constitutional Convention, and the Judicial Separation of Powers, 105 Georgetown L.J. 255, 287–311 (2017).

[7] Defendants assert only that Ms. Cabello lacks due process rights. Dkt. 21 at 35–38. They do not challenge that if she has due process rights, the Due Process Clause guarantees judicial review. *See* Dkt. 11 at 55–58.

Fundamentally, "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757 (1996).

Notably, nearly all of the cases that Defendants rely on uphold jurisdiction-limiting statutes but preserve some level of judicial review over questions of law. *See, e.g.*, *Ex Parte McCardle*, 74 U.S. 506 (1869) (maintaining general jurisdiction in habeas corpus cases). Even in *Dalton v. Specter*, where the Court upheld a complete preclusion of judicial review, it was in the context of an "unusual legislative scheme" affording the president "unfettered discretion" with respect to the closure of military bases—a context that is not present here (and one in which Congressional and Executive power is at its zenith). 511 U.S. 462, 479 (1994) (Souter, J., concurring).

Defendants also suggest that *Crowell v. Benson* upholds the preclusion of judicial review in matters involving "public right[s]," like immigration. Dkt. 21 at 41 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). But Defendants overlook a key point: the *Crowell* court limited that principle "to determinations of *fact*." 285 U.S. at 50 (emphasis added).[8] Moreover, while it acknowledged that in deportation cases involving a claim of citizenship, "the findings of fact of the

[8] The Supreme Court made a similar point in *Patel*, observing that for cases in removal proceedings, review of fact-finding was precluded, but review of legal and constitutional claims was not. 596 U.S. at 339.

executive department would be conclusive," the court noted that habeas corpus proceedings would be available to determine the individual's status because the claim of citizenship is "an essential jurisdictional fact both in the statutory and constitutional sense." *Id.* at 60 (internal quotation marks omitted); *cf. N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982) ("[E]ven with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts.").

Defendants also point to the broad interpretation of § 1252(a)(2)(A) and 1252(e) in *Mendoza-Linares v. Garland*, 51 F.4th 1146 (9th Cir. 2022), Dkt. 21 at 40, but that statutory scheme provides a specified avenue for judicial review, and does not purport to preclude *all* judicial review, *see* 8 U.S.C. § 1252(a)(2)(A)(i), (ii), (iv) (referring to § 1252(e) as an exception to the general jurisdictional bar over expedited removal orders); *id.* § 1252(e)(2)–(3) (providing for judicial review over limited set of issues). Professor Chemerinsky has observed that "[t]here simply never has been a Supreme Court decision construing a statute to preclude *all* federal court review." Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 20 Immigr. & Nat'y L. Rev. 295, 311 (1999) (emphasis added). Defendants imply that even if a clear statement existed to eliminate judicial review (which is not present here), no separation of powers concerns would arise. *Compare* Dkt. 11-

1 at 49–53, *with* Dkt. 21 at 38–42. But Congress cannot use jurisdiction-stripping statutes "to interfere with the Court's essential functions under the Constitution." Chemerinsky, *supra*, at 313 (citations omitted). The Supreme Court has explained that "[s]eparation of powers concerns are diminished when . . . the power of the federal judiciary to take jurisdiction remains in place." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 679 (2015) (internal quotation marks and citation omitted). Here, Defendants' interpretation of § 1252(a)(2)(B)(i) leaves no such power; thus, if the Court adopts that reading, it should declare the statute unconstitutional as applied to Ms. Cabello.

C. The Suspension Clause requires judicial review for Ms. Cabello.

Even though Ms. Cabello does not seek release from custody through the writ of habeas corpus, Suspension Clause caselaw is instructive. This is particularly true because she now faces the threat of removal—and the detention that inevitably accompanies it—because of Defendants' policy. Yet despite that, under Defendants' reading of Subparagraph B, and given that U visa issues do not form part of a removal order, she would never have the chance to raise her legal claims.

The Supreme Court recognized in *St. Cyr* that "a serious Suspension Clause issue would be presented" if the traditional scope of habeas jurisdiction over deportation cases was eliminated with "no adequate substitute for its exercise." 533

U.S. at 305. And in defining that traditional scope, the Court explained that the immigration statutory scheme "had the effect of precluding judicial intervention in deportation cases *except insofar as it was required by the Constitution*," thus "allow[ing] for review on habeas of questions of law concerning [a noncitizen's] eligibility for discretionary relief." *Id.* at 304 (citation omitted); *see also id.* at 307 ("[H]abeas courts . . . regularly answered questions of law that arose in the context of discretionary relief."). Accordingly, Ms. Cabello's inability to raise her claim at any time—including in removal proceedings via the petition for review process that substitutes for habeas—underscores that Defendants' reading of Subparagraph (B) violates the Constitution.

III. The Administrative Procedure Act (APA) provides for review of legal questions like the one presented here.

Relying on 5 U.S.C. § 701(a)(2), Defendants also aver—erroneously—that there is no review available under the APA because adjustment decisions are committed to agency discretion. Dkt. 21 at 50.

However, the APA explicitly provides that a court may "hold unlawful and set aside agency action . . . found to be . . . an abuse of discretion." 5 U.S.C. § 706(2)(A). And the Supreme Court has made clear that § 701(a)(2) is narrowly limited to "rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (citation omitted). Indeed, this Court has repeatedly affirmed judicial review

remains available as long as there are meaningful legal standards upon which to review the agency's action. *See, e.g.*, *Perez Perez v. Wolf*, 943 F.3d 853, 863–64 (9th Cir. 2019) (finding, inter alia, that the U visa statutes "provide[d] meaningful standards for reviewing" USCIS's denial, and noting that "an agency's sole discretionary authority is not inconsistent with judicial review of the agency's exercise of that discretion"); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003) (holding "[t]he APA does not preclude judicial review" over agency denial of immigrant visa petition after finding that "the statutory framework provides meaningful standards" for review).

Here, the statute provides a clear legal framework upon which to evaluate Ms. Cabello's claim that Defendants' I-693 policy is unlawful.[9]

IV. Ms. Cabello properly pled a cognizable claim for relief, as USCIS has no discretion to violate the law.

This case presents a straightforward challenge to the agency's failure to abide by 8 U.S.C. § 1255's plain text. Specifically, Ms. Cabello challenges USCIS's practice of categorically applying the health-related inadmissibility grounds to U-based adjustment applicants even though Congress chose *not* to apply that ground to them, unlike almost all other adjustment applicants.

[9] The district court dismissed Ms. Cabello's claim on jurisdictional grounds, not for failure to state a claim. *See* ER-9.

Section 1255 creates the framework for specified groups of noncitizens to adjust their status to lawful permanent residence. Under that section, some adjustment applicants face a much more rigorous process than others. Most adjustment applicants apply under subsection (a), which requires the applicant to demonstrate that they are admissible—i.e., that they do not fall under the inadmissibility grounds at § 1182(a). *See* 8 U.S.C. § 1255(a). These subsections include inadmissibility based on (1) health, (2) criminal offenses, (3) national security, (4) likelihood of becoming a public charge, (5) failure to comply with the employment visa labor certification process, (6) entry without proper documents or by fraud, (7) failure to maintain valid immigration status, (8) evading the draft, (9) prior removals or unlawful presence, and (10) other miscellaneous grounds including practicing polygamy or having unlawfully voted. *See id*. § 1182(a). Adjustment applicants must generally overcome *all* inadmissibility grounds or demonstrate that they qualify for a waiver of those grounds.

However, § 1255 provides alternative adjustment processes for certain visas. For example, Special Immigrant Juvenile Status (SIJS) holders apply for adjustment under § 1255(h), which exempts vulnerable youth from specific grounds of inadmissibility. *See id*. § 1255(h)(2)(A). In addition, the statute provides them with a more generous framework for waivers of specified inadmissibility grounds if the Attorney General determines it is appropriate for

"humanitarian purposes, family unity, or when it is otherwise in the public interest." *Id.* § 1255(h)(2)(B).

For U-visa holders, Congress chose to apply the most generous framework, enacting subsection (m). By its express terms, *only* the inadmissibility ground at § 1182(a)(3)(E)—which deals with participating in persecution, genocide, torture, or extrajudicial killings—applies to them. *Id.* § 1255(m).

Notably, this charitable scheme for U-visa holders contrasts even with that of the simultaneously-created T-visa holders (victims of trafficking). Those individuals are still required to demonstrate they are not subject to all the grounds of inadmissibility under § 1182(a) unless they obtain a waiver. *Id*. § 1255(*l*)(2). Unlike U-visa holders, Congress explicitly applied the health-related ground of inadmissibility to T-visa holders, but authorized a special waiver for that ground. *Id.* § 1255(*l*)(2)(A).

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). The context here—the specifically delineated admissibility criteria for *every* type of adjustment application under § 1255—makes clear Congress made a deliberate choice to exempt U-visa holders from the other inadmissibility grounds not specified, *including* the health-related ones at § 1182(a)(1).

Traditional canons of statutory construction reinforce this reading of the statute. "When 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 unius est exclusio alterius*)." *Bittner v. United States*, 598 U.S. 85, 94 (2023); *see also, e.g.*, *Nken v. Holder*, 556 U.S. 418, 430–31 (2009) ("[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. This is particularly true here, where subsections . . . were enacted as part of a unified overhaul of judicial review procedures." (internal quotation marks and citation omitted)).

Notwithstanding this canon, Defendants argue that the agency is nonetheless authorized to apply the health-related inadmissibility ground because Congress left the decision whether to grant adjustment in USCIS's "opinion," including determining whether approval is "in the public interest." Dkt. 21 at 52. But providing discretion and setting rules are not mutually exclusive, as the rules provide boundaries within which USCIS exercises its discretion. For example, Congress chose to require T-visa holders to demonstrate a showing of "extreme hardship," but did not require the same of U-visa holders. *Compare* 8 U.S.C. § 1255(*l*)(1)(C)(ii), *with id.* § 1255(m). Defendants may not then override the statutory framework by deciding that as a matter of "public interest," U-visa holders must also demonstrate their removal would result in extreme hardship. The

agency, moreover, has no discretion to violate the law. *See Hernandez v. Ashcroft*, 345 F.3d 824, 846 (9th Cir. 2003).

Further, Defendants' use of the term "public interest" to impose additional categorical restrictions in the U-based adjustment process is incongruous with § 1255. The section uses "public interest" in a permissive and generous manner: the public interest may be used to "waive" inadmissibility grounds for SIJS-based adjustment applicants, or to grant a U-based adjustment application. *See* 8 U.S.C. § 1255(h)(2)(B), (m)(1)(B). Defendants' argument also ignores the context in which the term is provided, as one of multiple factors that the agency may rely on in determining that a U-based adjustment applicant merits adjustment as a discretionary matter. *See id.* § 1255(m)(1)(B) (specifying applicant may be granted adjustment if their "continued presence . . . is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest"). It is not a separate hurdle to overcome, allowing the agency to impose additional, categorical barriers (let alone barriers Congress chose to eliminate), but instead is an additional basis to justify the grant of permanent residence.

Defendants urge the Court to defer to their interpretation of subsection (m) because it is "reasonable," Dkt. 21 at 52–54, but such deference only applies where Congress has not directly spoken on the issue, *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Here, Congress *chose* not to apply

the health-related grounds of inadmissibility to U-visa holders. Thus, Defendants' contrary interpretation seeking to overcome the plain language of the statute is owed no deference as there is no statutory gap to fill.

But even had Congress not spoken clearly, Defendants' interpretation is not "a permissible construction of the statute," *id.* at 843, given the plain text of § 1255 as a whole and subsection (m) specifically. That interpretation's 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 statutorily subject to the health grounds of inadmissibility. *Compare* ER-46 (adjustment application instructions exempting registry applicants), *with* 8 U.S.C. § 1259 (omitting § 1182(a)(1) from inadmissibility grounds applicable to registry applicants). Defendants' argument that the "public interest includes ensuring that new residents of this country do not pose a threat to public health," Dkt. 21 at 54, rings hollow given that U-based adjustment applicants like Ms. Cabello have already been living lawfully in the country for years. Their policy is thus not aimed at screening "new residents."

Given the language and context of § 1255(m), Ms. Cabello has stated a claim that Defendants' I-693 policy is arbitrary and capricious under the APA.

CONCLUSION

Ms. Cabello respectfully requests the Court grant her appeal.

Date: October 20, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Aaron Korthuis, am an attorney for Appellant. I hereby certify that this brief contains 6,983 words according to the word count feature of Microsoft Word, excluding the items exempted by Federal Rule of Appellate Procedure 32(f), and thus complies with the word limit set forth by Ninth Circuit Rule 32-1. The brief's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

Signature: s/ Aaron Korthuis Date: October 20, 2023
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