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, the Honorable Barbara J. Rothstein, Presiding
No. 3:22-cv-05984

APPELLEES' BRIEF

BRIAN M. BOYNTON
Principal Deputy
Assistant Attorney General

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

KATHLEEN A. CONNOLLY
Chief
Enforcement Unit

ANTHONY D. BIANCO
Assistant Director

HANS H. CHEN
Senior Litigation Counsel
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
Enforcement Unit
P.O. Box 868
Washington, DC 20044
(202) 305-0190
(202) 305-7000 (facsimile)
Hans.h.chen@usdoj.gov

ATTORNEYS FOR
DEFENDANTS-APPELLEES

TABLE OF CONTENTS

INTRODUCTION 1

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF JURISDICTION 3

STATEMENT OF THE CASE AND RELEVANT LAW AND PROCEDURAL HISTORY 4

I. Relevant law 4

II. Statement of Facts 7

III. Procedural History 9

SUMMARY OF ARGUMENT 11

ARGUMENT 13

I. Standard of review 13

II. Section 1252(a)(2)(B)(i) precludes courts from reviewing USCIS's denial of Ms. Cabello's adjustment application 14

A. Standards for dismissal under Federal Rule of Civil Procedure 12(b)(1) ... 15

B. Section 1252(a)(2)(B)(i) precludes the Court from considering a challenge to USCIS's adjustment denial 16

1. Section 1252(a)(2)(B)(i) precludes courts from reviewing adjustment applications filed by individuals not in removal proceedings 17

2. Section 1252(a)(2)(B)(i) precludes courts from reviewing any aspect of adjustment adjudications, even those characterized as policies or practices 32

C. Broad application of the jurisdictional bar at section 1252(a)(2)(B)(i) raises no constitutional issues 34

1. Precluding judicial review of discretionary adjustment adjudications raises no colorable constitutional claims 35

2. Precluding judicial review of adjustment decisions made outside of removal proceedings does not offend separation of powers 38

3. Because this action does not seek release from custody, the Suspension Clause has no application to this case 43

D. Ms. Cabello cites inapposite precepts of statutory interpretation that fail to overcome the plain language of section 1252(a)(2)(B)(i) 44

1. The canon of constitutional avoidance has no application to this case 44

2. The doctrine of absurdity does not permit the Court to consider questions not before it 46

3. The plain language of section 1252(a)(2)(B)(i) overcomes the presumption favoring judicial review 49

III. USCIS's adjustment decisions are independently unreviewable because they are committed to agency discretion by law 50

IV. Ms. Cabello's challenge to USCIS's requirement that she submit a medical examination and vaccination record fails to state a legally cognizable claim .51

A. Standards for dismissal under Federal Rule of Civil Procedure 12(b)(6)...51

B. This challenge to USCIS's medical examination and vaccination record requirement fails to state a cognizable claim 52

CONCLUSION 57

TABLE OF AUTHORITIES

Page(s)

Cases

Abuzeid v. Mayorkas,
62 F.4th 578 (D.C. Cir. 2023) ..... 22, *passim*

Ahmed v. Mayorkas,
No. 22-cv-60141, 2022 WL 2032301 (S.D. Fla. Mar. 28, 2022).....51

ANA Int'l, Inc. v. Way,
393 F.3d 886 (9th Cir. 2004).....30

Ariz. Christian Sch. Tuition Org. v. Winn,
563 U.S. 125 (2011) 21

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 51, 52

Ayanian v. Garland,
64 F.4th 1074 (9th Cir. 2023)..... 5, 36, 50

Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship,
526 U.S. 434 (1999) 25

Bansal v. U.S. Citizenship & Immigr. Servs.,
No. 4:21-cv-3203, 2021 WL 4553017 (D. Neb. Oct. 5, 2021) 47

Batalla Vidal v. Nielsen,
No. 16-cv-4756, 2018 WL 333515 (E.D.N.Y. Jan. 8, 2018) 14

Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.,
331 U.S. 519 (1947) 24

Boumediene v. Bush,
553 U.S. 723 (2008) 43

Britkovyy v. Mayorkas,
60 F.4th 1024 (7th Cir. 2023)..... 25, 27, 28, 31, 42

Carlson v. Comm'r,
712 F.2d 1314 (9th Cir. 1983) 26

Chaudhari v. Mayorkas,
No. 22-cv-0047, 2023 WL 1822000 (D. Utah Feb. 8, 2023) 23

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984) 53, 54

City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs.,
408 F. Supp. 3d 1057 (N.D. Cal. 2019) 54

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 37

Clark v. Martinez,
543 U.S. 371 (2005) 45, 46

Couch v. Telescope Inc.,
611 F.3d 629 (9th Cir. 2010) 15

Crowell v. Benson,
285 U.S. 22 (1932) 41

Dalton v. Specter,
511 U.S. 462 (1994) 39

Department of Homeland Security v. Thuraissigiam,
140 S. Ct. 1959 (2020) 43, 44

Doe v. Sec'y, U.S. Dep't of Homeland Sec.,
No. 22-11818, 2023 WL 2564856 (11th Cir. Mar. 20, 2023) 23, 25, 27, 31, 51

Ekimian v. I.N.S.,
303 F.3d 1153 (9th Cir. 2002) 51

Estate of Cowart v. Nicklos Drilling Co.,
505 U.S. 469 (1992) 29, 31

Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.,
423 U.S. 326 (1976) 54

Fernandes v. Miller,
No. 22-cv-12335, 2023 WL 1424171 (E.D. Mich. Jan. 31, 2023) 24

Fernandez v. Brock,
840 F.2d 622 (9th Cir. 1988).....53

Flyers Rts. Educ. Fund, Inc. v. U.S. Dep't of Transp.,
957 F.3d 1359 (D.C. Cir. 2020).....57

Fort Vancouver Plywood Co. v. United States,
747 F.2d 547 (9th Cir. 1984).....14

Garcia v. U.S. Citizenship & Immigr. Servs.,
No. 3:22-cv-5984, 2023 WL 2969323 (W.D. Wash. Apr. 17, 2023) 10

Gebhardt v. Nielsen,
879 F.3d 980 (9th Cir. 2018)..... 20, *passim*

Golden Nugget, Inc. v. Am. Stock Exch., Inc.,
828 F.2d 586 (9th Cir. 1987)..... 13, 14

Gon v. Gonzales,
534 F. Supp. 2d 118 (D.D.C. 2008) 37

Greenwood v. F.A.A.,
28 F.3d 971 (9th Cir. 1994).....35

Guillory v. County of Orange,
731 F.2d 1379 (9th Cir.1984).....14

Hacienda Valley Mobile Ests. v. City of Morgan Hill,
353 F.3d 651 (9th Cir. 2003).....13

Hassan v. Chertoff,
593 F.3d 785 (9th Cir. 2010).....19

Herman Fam. Revocable Tr. v. Teddy Bear,
254 F.3d 802 (9th Cir. 2001).....15

Hernandez v. U.S. Citizenship & Immigration Services,
No. 22-cv-904, 2022 WL 17338961 (W.D. Wash. Nov. 30, 2022).....18

Herrera v. Garland,
No. 21-17052, 2022 WL 17101156 (9th Cir. Nov. 22, 2022)..... 5, 20

I.N.S. v. St. Cyr,
533 U.S. 289 (2001) 45

Iancu v. Brunetti,
139 S. Ct. 2294 (2019) 45

In re Cavanaugh,
306 F.3d 726 (9th Cir. 2002)..... 21, 45

In re Dynamic Random Access Memory Antitrust Litig.,
546 F.3d 981 (9th Cir. 2008).....15

In re Ford Motor Co./Citibank (S. Dakota), N.A.,
264 F.3d 952 (9th Cir. 2001).....15

J.M.O. v. United States,
3 F.4th 1061 (8th Cir. 2021)..... 5, 22, 36, 55

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 46

Jilin Pharm. USA, Inc. v. Chertoff,
447 F.3d 196 (3d Cir. 2006).....30

Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.,
346 F.3d 1190 (9th Cir. 2003).....22

Kucana v. Holder,
558 U.S. 233 (2010) 49, 50

Lee v. U.S. Citizenship & Immigr. Servs.,
592 F.3d 612 (4th Cir. 2010)..... 18, 19, 23, 27

Linares v. Garland,
No. 20-71582, 2023 WL 4341452 (9th Cir. July 5, 2023).....48

Marbury v. Madison,
5 U.S. 137 (1803) 38

Ex parte McCardle,
74 U.S. 506 (1869) 39, 46

McNary v. Haitian Refugee Center, Inc.,
498 U.S. 479 (1991) 41, 42

Mejia Rodriguez v. U.S. Dep't of Homeland Sec.,
562 F.3d 1137 (11th Cir. 2009) 26, 30

Mendoza-Linares v. Garland,
51 F.4th 1146 (9th Cir. 2022) 40

Molina Herrera v. Garland,
570 F. Supp. 3d 750 (N.D. Cal. 2021) 5

Morina v. Mayorkas,
No. 22-cv-02994, 2023 WL 22617 (S.D.N.Y. Jan. 3, 2023) 24

Munoz v. Ashcroft,
339 F.3d 950 (9th Cir. 2003) 36, 37

N.L.R.B. v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937) 40

Nat'l Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 48

New York v. Ferber,
458 U.S. 747 (1982) 47

Oloteo v. Immigr. & Naturalization Serv.,
643 F.2d 679 (9th Cir. 1981) 29

Owen Equip. & Erection Co. v. Kroger,
437 U.S. 365 (1978) 15

Patel v. Garland,
142 S. Ct. 1614 (2022) ..... 1, *passim*

Perez v. Wolf,
943 F.3d 853 (9th Cir. 2019) 49

Poursina v. U.S. Citizenship & Immigr. Servs.,
936 F.3d 868 (9th Cir. 2019) 19

Productos Varios v. U.S. Dep't of Treasury,
638 F.3d 794 (D.C. Cir. 2011) 45

Rabinovych v. Mayorkas,
624 F. Supp. 3d 19 (D. Mass. 2022) 23, 31

Rashtabadi v. I.N.S.,
23 F.3d 1562 (9th Cir. 1994) 55

Reconstruction Finance Corp. v. Bankers Trust Co.,
318 U.S. 163 (1943) 40

Reno v. Am.-Arab Anti-Discrimination Comm.,
525 U.S. 471 (1999) 41

Reno v. Flores,
507 U.S. 292 (1993) 40

Sanchez v. Mayorkas,
141 S. Ct. 1809 (2021) 20

Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) 37

Sheldon v. Sill,
49 U.S. 441 (1850) 39

Tang v. Reno,
77 F.3d 1194 (9th Cir. 1996) 18

Torres-Aguilar v. I.N.S.,
246 F.3d 1267 (9th Cir. 2001) 36

Tourus Records, Inc. v. D.E.A.,
259 F.3d 731 (D.C. Cir. 2001) 57

Town of Castle Rock v. Gonzales,
545 U.S. 748 (2005) 35

United States v. Fiorillo,
186 F.3d 1136 (9th Cir. 1999) 49

United States v. Osuna-Alvarez,
788 F.3d 1183 (9th Cir. 2015) 25

United States v. Schopp,
938 F.3d 1053 (9th Cir. 2019) 25

United States v. Texas,
143 S. Ct. 1964 (2023) 47

Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.,
435 U.S. 519 (1978) 54

Ye v. INS,
214 F.3d 1128 (9th Cir. 2000) 22

Zarrabian v. U.S. Citizenship & Immigr. Servs.,
No. 21-cv-1962, 2023 WL 2375248 (S.D. Cal. Mar. 6, 2023) 23

Constitution and Statutes

U.S. Const. art. III, § 1 39

U.S. Const. art. III, § 2, cl. 2 39

5 U.S.C. § 701(a)(2) 11, 50, 51

5 U.S.C. § 706(2)(A) 9

5 U.S.C. § 706(2)(C) 52

8 U.S.C. § 1101(a)(15)(U) 4, 9

8 U.S.C. § 1182(a)(1) 6

8 U.S.C. § 1182(a)(1)(A) 53, 54

8 U.S.C. § 1182(a)(3)(E) 4

8 U.S.C. § 1229b(d)(1) 28

8 U.S.C. § 1252(a)(2)(A) 40

8 U.S.C. § 1252(a)(2)(B) 17, 21, 45

8 U.S.C. § 1252(a)(2)(B)(i)..... 1, *passim*

8 U.S.C. § 1252(a)(2)(D) 18

8 U.S.C. § 1252(a)(5)..... 28, 37

8 U.S.C. § 1255 ..... 16, 20

8 U.S.C. § 1255(a) 7

8 U.S.C. § 1255(l)(2) 56

8 U.S.C. § 1255(m) ..... 4, *passim*

8 U.S.C. § 1255(m)(1) 4, 5, 7

8 U.S.C. § 1255(m)(1)(A).....4

8 U.S.C. § 1255(m)(1)(B) 5, 13, 52, 54, 56

8 U.S.C. § 1259 56

8 U.S.C. § 1503(a)(2).....28

28 U.S.C. § 1291 3

Illegal Immigration Reform and Immigration Responsibility Act of 1996
Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).....26

Victims of Trafficking and Violence Protection Act,
Pub. L. 106-386, 114 Stat. 1464 (2000) 4

REAL ID Act of 2005,
Pub. L. No. 109-13, 119 Stat. 302 (2005) 26, 29

Rules

Federal Rule of Civil Procedure 12(b)(1) 11, 15

Federal Rule of Civil Procedure 12(b)(6) 3, 51, 52

Regulations

8 C.F.R. §§ 2.1 ..... 5, 30

8 C.F.R. § 245.1 7

8 C.F.R. § 245.2(a)(1) 28

8 C.F.R. § 245.24(d) 6

8 C.F.R. § 245.24(d)(1) 6, 53

8 C.F.R. § 245.24(d)(10) 6, 53

8 C.F.R. § 245.24(d)(11) 6, 53, 54, 56

8 C.F.R § 245.24(f) 50

8 C.F.R. § 245.24(k) 7

8 C.F.R. § 1003.10(b) 30

Other Authorities

2A *Sutherland Statutory Construction* § 47:14 (7th ed. 2007).....25

The Federalist No. 80 (Alexander Hamilton) (Lawrence Goldman ed., 2008).....38

INTRODUCTION

The Court should affirm the district court's judgment dismissing Appellant's putative class action complaint. Eleven months before the district court dismissed this action, the Supreme Court, in *Patel v. Garland*, 142 S. Ct. 1614 (2022), delivered an expansive interpretation of 8 U.S.C. § 1252(a)(2)(B)(i) and its bar on judicial review of "any judgment regarding the granting of" certain forms of immigration relief. Since then, every circuit court of appeals that has examined the issue and district courts nationwide (including the court below) have applied *Patel* to preclude judicial review of USCIS's denials of adjustment of status applications regardless of whether or not they were filed by an individual in removal proceedings.

Against this array of authority, Appellant-Plaintiff Linda Cabello Garcia ("Ms. Cabello") asks this Court to adopt an unnatural reading of section 1252(a)(2)(B) that finds no support in the statute's text. Ms. Cabello argues that section 1252(a)(2)(B)'s jurisdictional bar applies to USCIS adjustment decisions only if they occur simultaneously with removal proceedings. The Court should join the vast majority of courts that have examined this issue, reject Ms. Cabello's untenable interpretation of section 1252(a)(2)(B), and find lack of subject matter jurisdiction to review USCIS's adjustment denial in this case. In the alternative to dismissal for lack of jurisdiction on that basis, the Court should dismiss this action

because Ms. Cabello's adjustment application is committed to USCIS's discretion by law and is thus precluded from judicial review by the Administrative Procedure Act ("APA").

If the Court were to find jurisdiction to consider Ms. Cabello's claim, it should dismiss it for failure to allege a cognizable claim. USCIS lawfully denied Ms. Cabello's adjustment claim based on its statutory and regulatory authority to determine whether Ms. Cabello's adjustment was in the public interest. That public interest encompasses considerations of public health, and USCIS was justified in denying Ms. Cabello's adjustment application after she refused to submit the medical examination and vaccination records that USCIS relies upon to ensure that the adjustment of noncitizens is in the public interest.

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court properly dismiss Ms. Cabello's putative class action for lack of subject matter jurisdiction by finding that the jurisdictional bar at 8 U.S.C. § 1252(a)(2)(B)(i), which applies "regardless of whether the judgment, decision, or action is made in removal proceedings," precluded judicial review of the denial of Ms. Cabello's adjustment of status application and of the decisions underlying that denial, all of which USCIS made outside of a removal proceeding?

2. In the alternative to affirming the district court's dismissal of the complaint due to the jurisdictional bar at 8 U.S.C. § 1252(a)(2)(B)(i), is dismissal

of Ms. Cabello's putative class action required for lack of subject matter jurisdiction because USCIS's decisions relating to adjustment of status applications are unreviewable under the APA as decisions committed to agency discretion by law?

3. In the alternative to affirming the district court's dismissal of the complaint for lack of jurisdiction, is dismissal of Ms. Cabello's putative class action required by Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim because USCIS exercised its lawful statutory and regulatory authority in requiring U nonimmigrant adjustment applicants to submit proof of medical examinations and vaccinations to satisfy an adjustment requirement that, "in the opinion of the Secretary of Homeland Security, the alien's continued presence in the United States . . . is otherwise in the public interest"?

STATEMENT OF JURISDICTION

This Court possesses jurisdiction over this matter pursuant to 28 U.S.C. § 1291, which grants this Court jurisdiction to consider Ms. Cabello's appeal from the district court's order of April 17, 2023, dismissing Ms. Cabello's putative class action complaint. ER-4-9. On April 17, 2023, Ms. Cabello timely filed a Notice of Appeal from that district court order. ER-182-83.

STATEMENT OF THE CASE AND RELEVANT LAW AND PROCEDURAL HISTORY

I. Relevant law

In October 2000, Congress created a nonimmigrant classification of noncitizens, "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, seek to adjust to permanent resident status. *See* 8 U.S.C. § 1255(m). The statutory subsection providing for that adjustment begins with a delegation of authority to the government: "The Secretary of Homeland Security may adjust the status" of a U nonimmigrant. Section 1255(m) then lists two disqualifying factors for adjustment of status: noncitizens described in 8 U.S.C. § 1182(a)(3)(E), defining participants in Nazi persecution, genocide, torture, or extrajudicial killing; and, in the Secretary's determination, the applicant's unreasonable refusal to assist in a criminal investigation or prosecution. *See* 8 U.S.C. § 1255(m)(1). Then, in two inset sub-paragraphs, the statute further conditions adjustment on: (A) the U nonimmigrant completing three years of continuous physical presence in the United States, 8 U.S.C. § 1255(m)(1)(A); and (B) whether "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)(1)(B).

By ultimately conditioning adjustment on the judgment of the Secretary of Homeland Security, the statute places the decision to adjust the status of U nonimmigrants in the Secretary's discretion. 8 U.S.C. § 1255(m)(1), (m)(1)(B); *Ayanian v. Garland*, 64 F.4th 1074, 1082 (9th Cir. 2023) ("USCIS's decision to grant an adjustment of status is purely discretionary") (internal quotations omitted); *J.M.O. v. United States*, 3 F.4th 1061, 1064 (8th Cir. 2021) (finding adjustment of U nonimmigrants under section 1255(m) a form of "discretionary relief under the Immigration and Nationality Act"); *see also Molina Herrera v. Garland*, 570 F. Supp. 3d 750, 756 (N.D. Cal. 2021) (finding that USCIS's grant or denial of U nonimmigrant's adjustment application under section 1255(m) a discretionary determination), *aff'd sub nom. Herrera v. Garland*, No. 21-17052, 2022 WL 17101156 (9th Cir. Nov. 22, 2022). The Secretary has delegated that discretion to USCIS. 8 C.F.R. §§ 2.1, 103.2, 103.3.

USCIS has promulgated a number of regulations that set forth the considerations relevant to USCIS's exercise of discretion in deciding whether the adjustment of a U nonimmigrant is in the public interest. The first acknowledges that "[a]lthough 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." 8 C.F.R. § 245.24(d)(11).[1] Those factors thus include the public health grounds of inadmissibility. *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). Another regulation ensures that USCIS has sufficient information to make its discretionary determination by requiring U nonimmigrant adjustment applicants to each file a Form I-485, Application to Register Permanent Residence or Adjust Status ("I-485"), in accordance with that form's instructions. 8 C.F.R. § 245.24(d)(1). A third regulation requires U nonimmigrant adjustment applicants 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). The instructions for the Form I-485 require adjustment applicants, with no exception for U nonimmigrants, to submit a completed USCIS Form I-693 Medical Form, Report of Medical Examination and Vaccination Record ("I-693 Medical Form"), with their adjustment application. ER-46.

[1] The statutory appendix at the conclusion of this brief sets forth the full text of 8 U.S.C. § 1255(m) and 8 C.F.R. § 245.24(d).

If USCIS, after applying its discretion facilitated by those regulations, denies a U nonimmigrant adjustment application and the individual is placed in removal proceedings, the immigration judge may not review USCIS's denial or otherwise consider a U nonimmigrant adjustment application. That is because section 1255(m) gives the Secretary of Homeland Security the sole authority to adjudicate U nonimmigrant adjustment applications. *See* 8 U.S.C. §§ 1255(m)(1), (m)(1)(B); 8 C.F.R. § 245.24(k) ("USCIS shall have exclusive jurisdiction over adjustment applications filed under section 245(m) of the Act."). But such individuals remain free to pursue other forms of relief prior to or during removal proceedings, including adjustment of status based on other qualifications, such as marriage to a lawful permanent resident or U.S. citizen, and a waiver of inadmissibility that might be required for adjustment on those alternative grounds. *See* 8 U.S.C. § 1255(a); 8 C.F.R. §§ 245.1, 245.2.

II. Statement of Facts

In this putative class action, Ms. Cabello serves as the sole putative class representative. ER-168, 177. Ms. Cabello alleges that she is a citizen of Mexico but has lived in the United States since 1999. ER-168, 173. 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. ER-173. The police subsequently certified that she had been helpful with the investigation of the stalking crime. ER-173. In

October 2013, Ms. Cabello submitted her application for a U visa. ER-173. On October 28, 2016, USCIS granted Ms. Cabello's U visa application and granted her U nonimmigrant status for a term of four years. ER-174.

On August 10, 2020, Ms. Cabello submitted to USCIS an application for adjustment of status on an I-485, pursuant to 8 U.S.C. § 1255(m). ER-174. Despite the I-485 instructions directing her do to so, Ms. Cabello did not submit an I-693 Medical Form with her I-485. ER-174, 176. On August 23, 2021, USCIS sent Ms. Cabello a request for evidence asking that she submit, among other things, a completed I-693 Medical Form. ER-174. In her response, Ms. Cabello did not submit an I-693 Medical Form but claimed that she has severe anxiety and panic attacks related to receiving medical services and asked USCIS to approve her adjustment application without an I-693 Medical Form. ER-174-75.

On February 4, 2022, USCIS issued a notice of intent to deny ("NOID") Ms. Cabello's adjustment application. ER-175. The NOID cited Ms. Cabello's failure to submit an I-693 Medical Form. ER-175. In her response to the NOID, Ms. Cabello did not submit an I-693 Medical Form, but she did submit partial vaccination records and other documents. ER-175-76. She explained that she experiences panic attacks anytime she faces "anything medical." ER-175. She also submitted a document from a behavioral health specialist stating that she had been diagnosed with generalized anxiety disorder and panic disorder. ER-175. On

August 1, 2022, USCIS denied Ms. Cabello's adjustment of status application, citing her failure to submit an I-693 Medical Form. ER-176.

III. Procedural History

On December 16, 2022, Ms. Cabello initiated this action by filing a complaint in the District Court for the Western District of Washington 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 Medical Form, Report of Medical Examination and Vaccination Record.

ER-177. 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 Ms. Cabello's adjustment of status application due to her failure to submit an I-693 Medical Form. ER-179-80.

In addition to filing her Complaint, Ms. Cabello filed a motion for class certification, Dkt. 8, and a motion for a preliminary injunction enjoining USCIS, during the pendency of this action, from requiring U-visa nonimmigrant adjustment applicants to submit I-693 Medical Forms, Dkt. 9. The government opposed both motions. Dkts. 27, 29.

On February 28, 2023, the government moved to dismiss Ms. Cabello's putative class action complaint. Dkt. 26. On April 5, 2023, the district court stayed Ms. Cabello's class certification and preliminary injunction motions pending its ruling on the government's motion to dismiss. Dkt. 36. Then, on April 17, 2023, the district court entered an order granting the government's motion to dismiss. ER-4-9; *see also Garcia v. U.S. Citizenship & Immigr. Servs.*, No. 3:22-cv-5984, 2023 WL 2969323 (W.D. Wash. Apr. 17, 2023) (Rothstein, J.). The district court held that the jurisdictional bar at section 1252(a)(2)(B)(i) precluded it from reviewing USCIS's denial of Ms. Cabello's adjustment application. ER-8. The district court cited the language of section 1252(a)(2)(B) extending its jurisdictional bar "regardless of whether the judgment, decision, or action is made in removal proceedings." ER-7-8. The district court rejected Ms. Cabello's argument that section 1252(a)(2)(B)(i) applied to USCIS's adjustment decisions only if the agency made them in conjunction with ongoing removal proceedings, noting that "Plaintiff's argument was expressly addressed in *Patel v. Garland* and rejected by all but one court that has faced the same issue in the eleven months since *Patel* was decided." ER-8. The court below noted that in *Patel*, the Supreme Court accepted the possibility that applying section 1252(a)(2)(B)(i) to preclude district court review of adjustment decisions that USCIS made outside of removal

proceedings would preclude all review of such adjudications. ER-8 (citing *Patel*, 142 S. Ct. at 1626-27).

In dismissing the action on the basis of the jurisdictional bar at section 1252(a)(2)(B)(i), ER-9, the district court did not address the government's arguments in its motion to dismiss seeking, in the alternative, dismissal under the APA, 5 U.S.C. § 701(a)(2), or dismissal for failure to state a claim. The government renews those arguments here as alternate bases to affirm the district court's dismissal of this action. *See infra* Argument III, IV.

On April 17, 2023, Ms. Cabello timely filed a notice of appeal from the district court's order, ER-182, and then the district court entered judgment dismissing this action for lack of subject matter jurisdiction. ER-10.

SUMMARY OF ARGUMENT

Section 1252(a)(2)(B)(i) precludes this Court from exercising jurisdiction over Ms. Cabello's claim and requires its dismissal under Federal Rule of Civil Procedure 12(b)(1). As the Supreme Court recently held in *Patel*, section 1252(a)(2)(B)(i) covers any judgments related to the denial of adjustment of status. Section 1252(a)(2)(B)'s clarification that it applies "regardless of whether the judgment, decision, or action is made in removal proceedings" leaves no genuine dispute: courts lack jurisdiction to review any decisions related to adjustment of status, regardless of whether or not the adjustment applicant is in removal

proceedings, and regardless if the decisions relate to an individual application or to adjudication procedures for multiple applications.

This plain text reading of section 1252(a)(2)(B) and (B)(i) raises no constitutional issues. Because Ms. Cabello has no cognizable liberty interest in the discretionary relief of adjustment or in remaining in the United States, section 1252(a)(2)(B)'s limitation on judicial review of her adjustment application raises no due process issues. And courts have long affirmed jurisdiction-stripping statutes such as section 1252(a)(2)(B) instead of declaring them a threat to the separation of powers. Ms. Cabello's reliance on the Suspension Clause is similarly misplaced because she is not pursuing release from custody through habeas but seeks to remain in the United States, an interest that the Suspension Clause does not protect.

The canons of statutory interpretation that Ms. Cabello cites have no application here. Because Ms. Cabello has raised no colorable constitutional claims, the canon of constitutional avoidance is irrelevant, and in any case, the statute's unambiguousness precludes application of the canon. Similarly, with no actual constitutional claims at issue here, the Court should affirm the plain reading of section 1252(a)(2)(B) and avoid ruling on hypothetical scenarios that Ms. Cabello, citing the doctrine of absurdity, raises but that are not before the Court. Finally, the clear jurisdiction-limiting language of section 1252(a)(2)(B) overcomes the presumption of reviewability that Ms. Cabello cites.

Even if this Court were to find the jurisdictional bar of section 1252(a)(2)(B) inapplicable to this dispute, the Administrative Procedure Act would still require dismissal of Ms. Cabello's claim because there are no meaningful standards to apply in reviewing USCIS's exercise of discretion to adjust U nonimmigrants based on a "public interest" determination as required by 8 U.S.C. § 1255(m)(1)(B).

Finally, if this Court were to find subject matter jurisdiction to review Ms. Cabello's claim, it should dismiss it for failure to state a claim. USCIS's authority under section 1255(m) to adjust status only if justified in the "public interest" supports the regulations that explain USCIS's denial of Ms. Cabello's adjustment application after she failed to submit the medical examination and vaccine records that USCIS relies upon to protect the public health and determine whether an adjustment is in the public interest.

ARGUMENT

I. Standard of review

This Court reviews district court decisions to dismiss for lack of subject matter jurisdiction *de novo*. *Hacienda Valley Mobile Ests. v. City of Morgan Hill*, 353 F.3d 651, 654 (9th Cir. 2003). In the interest of judicial economy, this Court may affirm on any ground, including those the district court did not reach. *See Golden Nugget, Inc. v. Am. Stock Exch., Inc.*, 828 F.2d 586, 590 (9th Cir. 1987)

(per curiam). As a prudential matter, this Court may affirm the district court's dismissal of this action on alternative grounds where the record is sufficiently developed to do so and where the issues are purely legal. *Id.* Whether a judgment is committed to agency discretion by law and whether a complaint has stated a claim are questions of law. *See Guillory v. County of Orange,* 731 F.2d 1379, 1381 (9th Cir.1984); *Batalla Vidal v. Nielsen*, No. 16-cv-4756, 2018 WL 333515, at *1 (E.D.N.Y. Jan. 8, 2018). This Court may thus consider those questions even though the district court did not reach them below. *See Golden Nugget,* 828 F.2d at 590; *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir. 1984), *abrogated on other grounds by DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117 (9th Cir. 2019). In such cases, this Court considers those alternative grounds *de novo*, relying on the same standards that a district court would apply. *See id*.

II. Section 1252(a)(2)(B)(i) precludes courts from reviewing USCIS's denial of Ms. Cabello's adjustment application

The district court properly dismissed Ms. Cabello's claims after finding that the jurisdictional bar at section 1252(a)(2)(B)(i) precluded it from exercising subject matter jurisdiction to review USCIS's denial of Ms. Cabello's application for adjustment of status. As the Supreme Court recently held 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 or not they involve applicants in removal proceedings, and it

applies to all decisions related to adjustment of status adjudications, even those that a plaintiff may characterize as a broad pattern or practice regarding USCIS adjudications.

A. Standards for dismissal under Federal Rule of Civil Procedure 12(b)(1)

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).

B. Section 1252(a)(2)(B)(i) precludes the Court from considering a challenge to USCIS's adjustment denial

The plain text of section 1252(a)(2)(B) and (B)(i), and in particular the clause of section 1252(a)(2)(B) that precludes judicial review of certain administrative actions "regardless of whether the judgment, decision, or action is made in removal proceedings," precludes this Court from reviewing USCIS's adjudication of U nonimmigrant adjustment applications and requires dismissal of this action for lack of subject matter jurisdiction. Section 1252(a)(2)(B) precludes the Court from reviewing adjustment decisions that USCIS makes regardless of whether or not they occur in the context of ongoing removal proceedings, and it precludes not just USCIS's ultimate adjudication of an adjustment application but also USCIS's predicate factual and procedural determinations.

In enacting 8 U.S.C. § 1252(a)(2)(B)(i), Congress precluded courts 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). The provisions for relief in section 1255 include a subsection providing for the adjustment of U nonimmigrants. 8 U.S.C. § 1255(m). Ms. Cabello sought her adjustment of status pursuant to section 1255(m). ER-174. Accordingly, USCIS's decision to deny Ms. Cabello's adjustment of status application falls within the bar to judicial review set forth at 8 U.S.C. § 1252(a)(2)(B)(i).

1. Section 1252(a)(2)(B)(i) precludes courts from reviewing adjustment applications filed by individuals not in removal proceedings

In broadly applying section 1252(a)(2)(B)(i) to adjustment decisions made in removal proceedings, *Patel* noted that the "reviewability of [USCIS] decisions is not before us, and we do not decide it," 142 S. Ct. at 1626. But the reasoning of *Patel* nevertheless applies to USCIS's denial of adjustment of status applications made outside of removal proceedings and compels a finding that section 1252(a)(2)(B)(i) bars review of all USCIS adjustment of status decisions, for at least four reasons. First, the introductory language in section 1252(a)(2)(B) extends the bar "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 Ms. Cabello'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.), a district court – the only one to do so after *Patel* – 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)). *Patel's* reliance on *Lee* – a case that, as here, involved a USCIS denial of an adjustment application of an individual who was not in removal proceedings, *see Lee*, 592 F.3d at 619 – further indicates that *Patel's* holding applies to situations encountered in *Lee* and in this case.

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 (Gorsuch, J., dissenting) ("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."). Accordingly, under the reasoning of *Patel*, USCIS decisions to deny adjustment of status under 8 U.S.C. § 1255(m) are not judicially reviewable, regardless of whether the decisions represent the exercise of discretion or whether they occur outside of removal proceedings.

Finally, even before *Patel*, this Court had applied section 1252(a)(2)(B) to USCIS decisions made outside of removal proceedings and involving individuals not in 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 position since *Hassan*. *See, e.g.*, *Poursina v. U.S. 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 section 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*, 2022 WL 17101156, at *1. These Ninth Circuit cases properly applied the jurisdiction-limiting provisions of section 1252(a)(2)(B) to decisions made by USCIS outside of removal proceedings and involving individuals not in removal proceedings. *Patel* subsequently clarified that this jurisdictional bar covers any decision regarding adjustment, such as requiring Ms. Cabello to submit a I-693 Medical Form.

Ms. Cabello's reliance on *Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021), Appellant's Br. at 35-36, is misplaced. It is true that in *Sanchez*, the Supreme Court ruled on the merits of a case in which a noncitizen challenged the denial of his application for adjustment of status by USCIS. *See Sanchez*, 141 S. Ct. 1809. But neither the parties nor the Supreme Court mentioned or discussed section 1252(a)(2)(B)(i) in *Sanchez*. Indeed, until the Supreme Court issued *Patel* nearly a year after *Sanchez*, the government had a much more limited view of

1252(a)(2)(B)(i)'s jurisdictional bar as applying to pre-final actions only if they required the exercise of discretion. *See Patel*, 142 S. Ct. at 1621-22. Thus, even though *Sanchez* appears to assume that courts had jurisdiction to consider an APA claim, "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011). Thus, *Sanchez* does not compel a finding that courts have jurisdiction to hear Ms. Cabello's claims.

Faced with the clause of section 1252(a)(2)(B) that applies its jurisdictional bar "regardless of whether the judgment, decision, or action is made in removal proceedings," Ms. Cabello resorts to arguing that the jurisdictional bar only applies to adjustment decisions that "still bear directly on the removal process" that has already commenced for the adjustment applicant. Appellant's Br. 19; *see generally id.* 19-20. The Court should reject that interpretation as entirely unmoored from the actual text of the provision. The plain text of the statute precludes courts from reviewing adjustment decisions "regardless of whether the judgment, decision, or action is made in removal proceedings." 8 U.S.C. § 1252(a)(2)(B). It does not proceed to state "but only if the judgment, decision, or action is made during ongoing removal proceedings." Despite what Ms. Cabello may wish, this Court "may not add to the statute terms that Congress omitted." *See In re Cavanaugh*,

306 F.3d 726, 738 (9th Cir. 2002). Similarly, the Court should reject Ms. Cabello's attempt to construe "relief" to mean only the outcome of a removal proceeding. Appellant's Br. 20-21. That reading cannot be squared with the "regardless" clause of section 1252(a)(2)(B)(i) that explicitly uses "relief" to mean the outcome of adjustment applications filed both in removal proceeding and outside of removal proceedings. *See Abuzeid v. Mayorkas*, 62 F.4th 578, 584 (D.C. Cir. 2023); *see also J.M.O.*, 3 F.4th at 1064 (characterizing USCIS's adjustment of U nonimmigrants under section 1255(m) as "discretionary *relief*") (emphasis added).

Every circuit court to examine this question has rejected Ms. Cabello's interpretation, and this Court should do the same to avoid a circuit split and fractured application of the Immigration and Nationality Act. *See Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003) ("we decline to create a circuit split unless there is a compelling reason to do so," particularly where rules at issue "are best applied uniformly"); *Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000) ("the immigration laws should be applied uniformly across the country"). Relying on the plain text of section 1252(a)(2)(B), these circuits have held that the jurisdictional bar of section 1252(a)(2)(B)(i) applies to USCIS adjustment decisions even when the applicant is not in removal proceedings. *See Abuzeid*, 62 F.4th at 584. ("Although *Patel* addressed a judgment made in a removal proceeding before an immigration judge, and reserved ruling on

whether § 1252(a)(2)(B)(i) bars review of analogous judgments by USCIS that are challenged under the APA in a federal court . . . we see no basis for the distinction that appellants attempt to draw."); *Doe v. Sec'y, U.S. Dep't of Homeland Sec.*, No. 22-11818, 2023 WL 2564856, at *2 (11th Cir. Mar. 20, 2023) ("Ahmed's application for adjustment was made [to USCIS] under § 1255(m), and § 1252(a)(2)(B)(i) expressly states that no court has jurisdiction to review any judgment regarding the granting of relief under section . . . 1255 of this title.") (internal citation and quotation omitted); *Lee*, 592 F.3d at 619 (fact that adjustment application "is not and has never been in removal proceedings does not render § 1252(a)(2)(B) inapplicable").

District courts within this circuit and across the country have joined these circuit courts in applying section 1252(a)(2)(B)(i) to USCIS's denial of adjustment applications filed by individuals not in removal proceedings. *See, e.g., Zarrabian v. U.S. Citizenship & Immigr. Servs.*, No. 21-cv-1962, 2023 WL 2375248, at *2 (S.D. Cal. Mar. 6, 2023) ("[T]he fact that the challenged decision was made by USCIS outside of removal proceedings doesn't meaningfully distinguish this case from *Patel*."); *Chaudhari v. Mayorkas*, No. 22-cv-0047, 2023 WL 1822000, at *7 (D. Utah Feb. 8, 2023) ("[T]he language of § 1252(a)(2)(B)(i) compels the court to conclude *Patel's* holding applies whether or not removal proceedings have commenced."); *Rabinovych v. Mayorkas*, 624 F. Supp. 3d 19, 24 (D. Mass. 2022)

(holding that section 1252(a)(2)(B)(i) prohibits review of adjustment decisions even "where the petitioner is not involved in removal proceedings"); *Fernandes v. Miller*, No. 22-cv-12335, 2023 WL 1424171, at *4 (E.D. Mich. Jan. 31, 2023) ("[T]he fact that Fernandes is not currently in removal proceedings does not meaningfully distinguish this case from *Patel*."); *Morina v. Mayorkas*, No. 22-cv-02994, 2023 WL 22617, at *9 (S.D.N.Y. Jan. 3, 2023) (applying section 1252(a)(2)(B)(ii) "to USCIS decisions regarding the adjustment of status outside the removal context" after finding that "although *Patel* was decided in the context of a removal proceeding, courts have construed the Supreme Court's broad language to preclude district court review of any non-discretionary adjustment-of-status eligibility determinations including those made by USCIS outside of the removal context.").

In support of her attempt to re-write section 1252(a)(2)(B) so it precludes judicial review of only applications filed by individuals already in removal proceedings, Ms. Cabello cites the title of section 1252, "Judicial review of orders of removal." Appellant's Br. 15. But "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947). Section 1252(a)(2)(B) contains no ambiguity that permits any reference to the title of section 1252. *See Abuzeid*, 62 F.4th at 584 ("Appellants point to no ambiguity in the 'regardless' clause, and we

discern none."); *Britkovyy v. Mayorkas*, 60 F.4th 1024, 1031 (7th Cir. 2023) ("the meaning of the statutory text is clear") (internal quotations and citations omitted); *Doe*, 2023 WL 2564856, at *2 ("the text is clear" at section 1252(a)(2)(B)(i)). Ms. Cabello cannot create an ambiguity by pointing to differences between the statutory text and the title. *See United States v. Osuna-Alvarez*, 788 F.3d 1183, 1185 (9th Cir. 2015) (finding statute unambiguous despite being contradicted by its title); *see also* 2A *Sutherland Statutory Construction* § 47:14 (7th ed. 2007) ("headings . . . may not be used to create an ambiguity"). Nor can Ms. Cabello create an ambiguity simply by fabricating statutory language that limits the scope of section 1252(a)(2)(B)(i)'s jurisdictional bar to her liking. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461 (1999) ("A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong.").

Even if the Court could refer to the title of section 1252, it holds little value as an interpretive tool because it was not enacted at the same time and by the same legislature that drafted the body of the current statute. *See United States v. Schopp*, 938 F.3d 1053, 1061 n.3 (9th Cir. 2019) ("When section headings are discounted, it is ordinarily because they are not part of the statute as originally enacted and therefore have no bearing on statutory meaning or congressional intent."). The title of section 1252 originated in the Illegal Immigration Reform and Immigration

Responsibility Act of 1996. *See* Pub. L. No. 104-208, div. C, § 306, 110 Stat. 3009-546, 3009-607 (1996). Congress added the "regardless" clause nine years later, in the REAL ID Act of 2005. *See* Pub. L. No. 109-13, div. B, § 101(f)(2), 119 Stat. 302, 305 (2005); *see also Mejia Rodriguez v. U.S. Dep't of Homeland Sec.*, 562 F.3d 1137, 1142 n.13 (11th Cir. 2009) (explaining that Congress added "regardless" clause "presumably to resolve a disagreement between some of [the] circuits and district courts as to whether § 1252(a)(2)(B) applied outside the context of removal proceedings"). As the D.C. Circuit concluded after examining this legislative history, "[i]t appears that Congress simply neglected to amend the title of the statute to account for the new provision that it added." *Abuzeid*, 62 F.4th at 584 n.5. The title of section 1252 provides no guidance on the proper reading of subsection 1252(a)(2)(B).

Ms. Cabello also attempts to overcome the plain language of section 1252(a)(2)(B)(i)'s jurisdictional bar by comparing it to several other provisions of section 1252 that are limited in scope to removal proceedings or that eliminate judicial review of decisions made in removal proceedings. Appellant's Br. 16-17. But the provisions of section 1252 that are not at issue here cannot overcome the plain language of the provision that is. *See Carlson v. Comm'r*, 712 F.2d 1314, 1315 (9th Cir. 1983) (when interpreting a statute, courts may not go beyond its plain language unless it is ambiguous or rendered so by other inconsistent statutory

language). As noted above, there is nothing ambiguous about section 1252(a)(2)(B)(i). *See Abuzeid*, 62 F.4th at 584; *Britkovyy*, 60 F.4th at 1031; *Doe*, 2023 WL 2564856, at *2; *see also Lee*, 592 F.3d at 619 ("[A]lthough § 1252 generally addresses judicial review with regard to final orders of removal, the language 'regardless of whether the judgment, decision, or action is made in removal proceedings' makes clear that the jurisdictional limitations imposed by § 1252(a)(2)(B) also apply to review of agency decisions made outside of the removal context."). And interpreting section 1252(a)(2)(B)(i) to preclude judicial review of adjustment decisions made outside of removal proceedings does not render the rest of section 1252 inconsistent, meaningless, or superfluous. Interpreting section 1252(a)(2)(B)(i) broadly to apply to all USCIS adjudications does nothing to prevent the operation of other provisions of section 1252 that do apply only in the removal context.

In addition, it is Ms. Cabello who ignores other provisions of section 1252 that contradict her preferred reading of section 1252(a)(2)(B)(i). Where other provisions of section 1252(a)(2)(B) are limited to individuals in removal proceedings, the statute so states specifically. Thus, section 1252(a)(5), which creates the jurisdiction for courts of appeals to hear petitions for review, limits its application to "judicial review of an order of removal." Section 1252(b)(9), which channels all legal and constitutional questions to petitions for review, applies only

to "any action taken or proceeding brought to remove" a noncitizen. By comparison, section 1252(a)(2)(B) lacks any reference to removal proceedings. This Court, therefore, has no basis to write in such a limitation that Congress left out. *See Britkovyy*, 60 F.4th at 1030 (holding that if the "regardless" clause of section 1252(a)(2)(B)(i) "were not clear enough to establish that we lack jurisdiction to review USCIS's decision, surrounding provisions would drive that conclusion home," citing 8 U.S.C. § 1252(a)(5)).

Other immigration statutes establish that if Congress had wanted to apply section 1252(a)(2)(B)'s jurisdictional bar only when an individual was already in removal proceedings, it knew how to include such a provision. *See, e.g.*, 8 U.S.C. § 1229b(d)(1) (creating the so-called "stop-time rule" for cancellation of removal so that "any period of continuous . . . presence in the United States shall be deemed to end . . . when the alien is served a notice to appear" that commences removal proceedings); 8 U.S.C. § 1503(a)(2) (precluding individuals from raising claims of U.S. citizenship if that person's citizenship "is in issue in any such removal proceeding"). But the jurisdictional bar at section 1252(a)(2)(B) contains no such language limiting its application to instances in which an individual is already in removal proceedings. Indeed, (B)(i) specifically bars judicial review of all adjustment adjudications under section 1255, decisions that USCIS, as here, often makes absent any associated removal proceedings, *see* 8 C.F.R. § 245.2(a)(1). This

further indicates that Congress did not intend to limit section 1252(a)(2)(B)(i) to cases where removal proceedings are ongoing.

Ms. Cabello argues that the legislative history of section 1252(a)(2)(B)(i), as revised in 2005 to add the "regardless" clause, suggests that its jurisdictional bar should be read as applying to only adjustment decisions made in the context of removal proceedings. Appellant's Br. 23-26. But "when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). Here, nothing in plain text of section 1252(a)(2)(B) justifies resort to its legislative history. *See Oloteo v. Immigr. & Naturalization Serv.*, 643 F.2d 679, 682 (9th Cir. 1981) (rejecting resort to legislative history because "[t]here is nothing in the language of the statute which gives rise to a 'legitimate doubt' as to what its true meaning is, . . . for the terms of the statute are clear and unambiguous") (internal citation omitted).

Even if the Court could consider the legislative history of section 1252(a)(2)(B), it does not justify Ms. Cabello's attempts to write in a provision that Congress left out. Ms. Cabello cites the fact that Congress added the "regardless" clause to section 1252(a)(2)(B)(i) in a section of the REAL ID Act of 2005 entitled "PREVENTING TERRORISTS FROM OBTAINING RELIEF FROM REMOVAL." Appellant's Br. at 24 (citing REAL ID Act of 2005, Pub. L. 109-13,

§ 101, 101(f), 119 Stat. 302, 305 (May 11, 2005)). But the same section of the REAL ID Act adding the "regardless" clause also amended section 1252(a)(2)(B)(ii) by adding the words "or the Secretary of Homeland Security" after Attorney General. *Id.* § 101(f)(1). This addition applies the jurisdictional bar to decisions made not just in removal proceedings by immigration judges, who are delegatees of the Attorney General, 8 C.F.R. § 1003.10(b), but also to decisions made outside of removal proceedings by USCIS, the delegatee of the Secretary of Homeland Security, 8 C.F.R. §§ 2.1, 103.2, 103.3. And several courts have suggested that Congress amended section 1252(a)(2)(B) to add the "regardless" clause "to resolve a disagreement between some of [the] circuits and district courts as to whether 1252(a)(2)(B) applied outside the context of removal proceedings." *Mejia Rodriguez*, 562 F.3d at 1142 n.13 (citing *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 891 n.3 (9th Cir. 2004) (noting disagreement prior to the REAL ID Act regarding the applicability of § 1252(a)(2)(B) outside of removal proceedings)); *see Abuzeid*, 62 F.4th at 584 n.5 (citing *Mejia Rodriguez*, 562 F.3d at 1142 n.13); *Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196, 200 n.5 (3d Cir. 2006) ("Since the enactment of the REAL ID Act, this jurisdiction-stripping provision applies 'regardless of whether the [administrative] judgment, decision, or action is made in removal proceedings.'"). In short, nothing in the legislative history creates the exceptional circumstance that justifies looking past the clear language of section

1252(a)(2)(B)(i). *See Estate of Cowart*, 505 U.S. at 475; *Doe*, 2023 WL 2564856, at *2 ("Even assuming that Congress did not intend the jurisdiction stripping provision to apply to § 1255(m), it provided no exception in the statute and because the text is clear, we cannot look beyond it.").

Similarly, Ms. Cabello argues that because Congress intended the U visa program to protect vulnerable crime victims, "even if § 1252(a)(2)(B)(i) applies outside of removal proceedings, the Court should conclude that judicial review over U-based adjustment denials remains available in district court, as Congress intended." Appellant's Br. 45; *see also generally id.* 45-48. The Court should reject this request to rewrite the statute on policy grounds. As the Supreme Court noted when confronted with the argument that its holding would insulate all USCIS decisions from judicial review, "policy concerns cannot trump the best interpretation of the statutory text." *Patel*, 142 S. Ct. at 1627. Moreover, the Supreme Court has indicated that the plain meaning of § 1252(a)(2)(B)(i) – removing court jurisdiction to review USCIS's adjustment denials – is "consistent with Congress' choice to reduce procedural protections in the context of discretionary relief." *Patel*, 142 S. Ct. at 1626-27 (citation omitted). If Congress wishes to provide U nonimmigrants with judicial review in this context, it may do so. But it is not this Court's place to elevate purported policy considerations above statutory text. *See Britkovyy*, 60 F.4th at 1031.

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

Because of *Patel's* broad holding, section 1252(a)(2)(B)(i) would preclude judicial review of USCIS's requirement for U nonimmigrant adjustment applicants to submit I-693 Medical Forms even if the Court were to characterize that requirement as a pattern or practice that applies across individual adjudications.

First, 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. Ms. Cabello thus cannot escape section 1252(a)(2)(B)(i)'s jurisdictional bar by challenging USCIS's adoption of a broad pattern or practice that, in a non-discretionary fashion, requires medical examinations 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") (internal citation and quotation omitted).

Second, if USCIS adopted such a pattern or practice, it did so as an unreviewable exercise of its judgment regarding the process by which it adjudicates U nonimmigrant adjustment of status applications. Section 1252(a)(2)(B)(i)'s bar applies not only to USCIS's ultimate denial, but also to any

"authoritative decision" relating to granting adjustment. *See Patel*, 142 S. Ct. at 1622. In *Patel*, 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). *Patel's* interpretation of section 1252(a)(2)(B)(i) thus precludes a court from reviewing not just the final approved-or-denied decision on an adjustment application, but also any judgments made in reaching that final agency action, such as USCIS's decision to require I-693 Medical Forms from U nonimmigrant adjustment applicants. *Patel*, 142 S. Ct. at 1622.

In other immigration contexts, this Court has applied the jurisdictional bar of section 1252(a)(2)(B) to similar USCIS categorical judgments that the agency applies when adjudicating applications for discretionary relief. For example, in *Gebhardt*, this Court considered a challenge to the USCIS standard operating procedure of applying a "beyond any reasonable doubt" standard to visa petitions filed by convicted sex offenders as part of its discretionary determination of whether the petitioner poses no risk to the beneficiary. 879 F.3d at 984. Because

that no-risk determination is reserved by statute to USCIS's discretion, this Court found that 8 U.S.C. § 1252(a)(2)(B)(ii), which applies to discretionary immigration decisions besides those listed in section 1252(a)(2)(B)(i), precluded judicial review of USCIS's "beyond any reasonable doubt" standard because "[t]he standards by which the Secretary reaches a decision within his or her 'sole and unreviewable discretion' – and the methods by which the Secretary adopts those standards – are just as unreviewable as the Secretary's ultimate decisions themselves." *Id.* at 987. Here, by requiring I-693 Medical Forms from U nonimmigrant adjustment applicants, USCIS has set the standards and methods by which it will, in its discretion, determine whether a U nonimmigrant's adjustment is in the public interest. Those standards and methods are as unreviewable as the ultimate decision itself. *Id.*

C. Broad application of the jurisdictional bar at section 1252(a)(2)(B)(i) raises no constitutional issues

The Court should reject the groundless constitutional claims that Ms. Cabello raises in an attempt to evade section 1252(a)(2)(B)(i)'s jurisdictional bar.[2]

[2] In any case, Ms. Cabello's constitutional concerns ring hollow when she complains about the lack of judicial review over adjustment adjudications involving U nonimmigrants not in removal proceedings but raises no concern about adjustment adjudications involving U nonimmigrants who are in removal proceedings. Ms. Cabello claims that second type of U nonimmigrant adjustment adjudication is unreviewable in both district court, because of section 1252(a)(2)(B)(i), *see* Appellant's Br. 15, 23, and in a circuit court petition for review because "USCIS's denial of U-based adjustment is never included in a

1. Precluding judicial review of discretionary adjustment adjudications raises no colorable constitutional claims

Ms. Cabello first argues that section 1252(a)(2)(B)(i) cannot preclude all review of USCIS adjustment decisions because doing so infringes on her due process rights that allegedly guarantee "noncitizens with significant ties to the United States, like Ms. Cabello and all class members . . . a judicial hearing and consideration of their legal claims when an agency takes action affecting their life and liberty." Appellant's Br. 53. But circuit law is clear: Ms. Cabello has no due process entitlement to judicial review of a discretionary determination, such as the adjustment denial at issue here. And she has no due process entitlement to remain in the country, as she also seeks.

To be entitled to procedural due process, a party must show a liberty or property interest in the benefit for which protection is sought. *Greenwood v. F.A.A.*, 28 F.3d 971, 975 (9th Cir. 1994). But a petitioner has no liberty or property interest in obtaining purely discretionary relief. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (holding that benefits are not protected entitlements "if government officials may grant or deny [them] in their discretion")

---

removal order—or in a petition for review of a removal order." Appellant's Br. 8-9. Ms. Cabello's indifference to this total lack of judicial review for U nonimmigrants adjustment applicants in removal proceedings also contradicts her arguments elsewhere that the treatment of U nonimmigrants should be uniform and generous. Appellant's Br. 45-48.

(citation omitted). Because adjustment of status is a form of discretionary relief, *see Ayanian*, 64 F.4th at 1082, Ms. Cabello cannot raise a due process challenge to the denial of her application for adjustment. *See Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003) ("Since discretionary relief is a privilege created by Congress, denial of such relief cannot violate a substantive interest protected by the Due Process clause."); *Torres-Aguilar v. I.N.S.*, 246 F.3d 1267, 1271 (9th Cir. 2001) (holding that abuse of discretion challenges to discretionary decisions, even if recast as due process claims, do not constitute colorable constitutional claims); *J.M.O.*, 3 F.4th at 1064 (holding that the lack of judicial review for U nonimmigrant adjustment denials raises no colorable due process or equal protection issues "because there is no constitutionally protected liberty interest in discretionary relief"). For that reason, the lack of judicial review of Ms. Cabello's adjustment denial does not violate any cognizable due process rights.

To the extent that Ms. Cabello claims the lack of judicial review of her adjustment denial violates her due process rights by threatening her and the putative class members with "permanent loss of immigration status, [and] removal from their homes, families, and entire lives," Appellant's Br. 54, she overstates the facts and the law. First, USCIS's denial of her adjustment application does not result in her removal from the United States. And if Ms. Cabello is placed in removal proceedings, she not only may seek judicial review of any removal order

the immigration judge may enter, 8 U.S.C. § 1252(a)(5), but she may be able to pursue other avenues for relief while in removal proceedings, *see Abuzeid*, 62 F.4th at 586 n.7 (noting that plaintiff may seek a waiver of residency requirement if placed in removal proceedings). Ms. Cabello's speculative harm of removal and separation from her family is thus insufficient to constitute a due process claim. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *see also Gon v. Gonzales*, 534 F. Supp. 2d 118, 120 (D.D.C. 2008) (plaintiff "presents no legal support for the proposition that a prediction of future confinement, extradition, or deportation presents a concrete claim ripe for adjudication.").

Second, Ms. Cabello does not have a due process right to remain in the country. In the immigration context, courts have "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Thus, even if USCIS's adjustment denial were to create a concrete, non-speculative risk of her removal and separation from her family, that denial would still create no constitutional issue. *See Gebhardt*, 879 F.3d at 988 ("Plaintiff's theory is that he has a fundamental right to reside in the United States with his non-citizen relatives . . . . But that interest cannot be so fundamental that it overrides Congress' plenary power in this domain."); *Munoz*, 339 F.3d at 954 (rejecting claim that

noncitizen had acquired a substantive due process right to stay in the United States due to length of presence in the United States among his friends and family).

2. Precluding judicial review of adjustment decisions made outside of removal proceedings does not offend separation of powers

Ms. Cabello claims reading section 1252(a)(2)(B)(i) to preclude judicial review of all USCIS's adjustment decisions "upsets the basic structure of the constitutional order" by robbing the judiciary of its Article III power "'to say what the law is.'" Appellant's Br. 49 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). Ms. Cabello is incorrect, as is her discussion of this country's political and constitutional history. Ms. Cabello, for example, cites The Federalist No. 47 to argue that the government's interpretation of the legislative limitation on judicial review "threatens the rule of law." Appellant's Br. 49. But the Founders saw jurisdiction-limiting statutes as a key to maintaining the rule of law. Alexander Hamilton, after arguing the need for a federal judiciary in The Federalist No. 80, acknowledged the occasional necessity of legislation limiting federal court jurisdiction:

> From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, *it ought to be recollected that the national legislature will have ample*

> *authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.*

The Federalist No. 80, at 393 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (emphasis added). The Founders thus ratified Article III's Exceptions Clause to allow Congress to remove classes of cases from federal jurisdiction. U.S. Const. art. III, § 2, cl. 2. And because Article III grants Congress the power to establish inferior federal courts, U.S. Const. art. III, § 1, those inferior courts have only the jurisdiction that Congress affirmatively grants by statute. *See Sheldon v. Sill*, 49 U.S. 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

The Supreme Court has consistently held that these legislative limitations on judicial review are as important to the constitutional order as judicial review itself. *See Dalton v. Specter*, 511 U.S. 462, 477 (1994) ("The judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute."); *Ex parte McCardle*, 74 U.S. 506, 514 (1869) ("[J]udicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."). Ms. Cabello is thus violating, not honoring, the

separation of powers doctrine by demanding judicial review of her adjustment denial despite Congress's clear jurisdictional bar at section 1252(a)(2)(B)(i).

The legitimacy of jurisdiction-limiting legislation in the immigration context is particularly settled. The legislative and executive branches possess plenary power over immigration and naturalization that is largely immune from court control. *See Reno v. Flores*, 507 U.S. 292, 305-06 (1993). The power of the political branches over immigration further justifies Congressional limitations on judicial review of immigration provisions. *See, e.g., Mendoza-Linares v. Garland*, 51 F.4th 1146, 1162 (9th Cir. 2022) (giving full effect to jurisdictional bars at 8 U.S.C. § 1252(a)(2)(A) and (e) "in accordance with their broad plain language, even if that precludes review of constitutional claims or questions of law").

Ms. Cabello cites New Deal era cases to support her separation of powers argument, Appellant's Br. 50-51, but those cases actually support the government's position. Those cases required Article III review of agency action because those actions implicated "private rights." *See Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U.S. 163, 168 (1943) (addressing argument that "matters of private right may not be relegated to administrative bodies for trial" by citing availability of federal court review); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 78 (1937) (McReynolds, J., dissenting) ("what is determined as to these concerns may gravely affect a multitude of employers who engage in a great variety of private

enterprises"). But a third Supreme Court case from that period, *Crowell v. Benson*, 285 U.S. 22 (1932), described immigration as a "public right" that "Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.* at 51. That finding, in conjunction with the plenary power doctrine, supports Congress's delegation of immigration adjudications to administrative agencies free from judicial interference, a process the Supreme Court has largely supported without raising separation of powers concerns. *See, e.g., Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) ("Of course, *many* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts – indeed, that can fairly be said to be the theme of the legislation.").

Nor does *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), aid Ms. Cabello's separation of powers argument. While that case may provide an example of "the modern presumptions against reading statutes to deprive federal courts of jurisdiction to review agency action," Appellant's Br. 51, Ms. Cabello admits that "a clear statement to eliminate judicial review in immigration cases" can rebut that presumption. *Id. McNary* itself acknowledged that "broader statutory language" would have precluded jurisdiction. *See McNary*, 498 U.S. at 494. Unlike the statute in *McNary*, section 1252(a)(2)(B)(i) provides that broad language. The jurisdictional provision in *McNary* prohibited judicial review of only "a single act"

– the final agency adjudication – but not of the "group of decisions or a practice or procedure employed in making decisions." *McNary*, 498 U.S. at 491-92. But section 1252(a)(2)(B) precludes review of not just the ultimate adjudication but also of the policies and decisions leading to that final judgment. *See Patel*, 142 S. Ct. at 1622. Because this case turns on the interpretation of a statute, Ms. Cabello's reliance on a case involving a different statute is misplaced. *See J.E.F.M. v. Lynch*, 837 1026, 1036 n.9 (9th Cir. 2016); *Britkovyy*, 60 F.4th at 1030 ("In contrast to *McNary* . . . Britkovyy falls squarely within the scope of the jurisdictional bar because he challenges a 'judgment regarding the granting of relief under section . . . 1255.'").

The district court below did remark that the scope of the jurisdictional bar of section 1252(a)(2)(B)(i) represents a "serious depart[ure] from our societal mores and from the principles on which our government is formed." ER-9 n.3. But the district court made that comment after giving effect to that jurisdictional bar. The comment thus makes sense only as the district court's acknowledgment that Congress alone, not the courts, can reform the scope of the jurisdictional bar that it enacted at section 1252(a)(2)(B)(i). By yielding to Congress's ability to limit federal court jurisdiction, the district court affirmed, rather than repudiated, that power. This Court should now affirm that holding.

3. Because this action does not seek release from custody, the Suspension Clause has no application to this case

Finally, Ms. Cabello argues that a broad reading of section 1252(a)(2)(B), by leaving no avenue for judicial review of USCIS's U nonimmigrant adjustment decisions, violates the Constitution's Suspension Clause. Appellant's Br. 58. But because Ms. Cabello does not seek release from custody via the writ of habeas corpus, the Suspension Clause has no application to this case. In *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), the Supreme Court held the "core" of habeas relief, and thus the proper application for the Suspension Clause, involves a petition for release from unlawful executive detention. *Id.* at 1970-71. Ms. Cabello relies on *Boumediene v. Bush*, 553 U.S. 723 (2008), in support of her argument that the Suspension Clause entitles a detained person to challenge their detention before an Article III court. Appellant's Brief 56. But the petitioners in *Boumediene* were noncitizens detained at Guantanamo Bay. *Boumediene*, 553 U.S. at 732. Ms. Cabello is not detained and is not seeking release from unlawful detention. Like the petitioner in *Thuraissigiam*, she is, instead, challenging the denial of her application to remain permanently in the United States. *Thuraissigiam*, 140 S. Ct. at 1969. Because Ms. Cabello is seeking relief "outside the scope of the common-law habeas writ," the statute limiting judicial review of her application for relief does not violate the Suspension Clause. *Id.* at 1969-70, 1983.

Ms. Cabello argues that *Thuraissigiam* does not apply to her and the putative class because they have lived in the United States "for many years – Ms. Cabello for over thirty years." Appellant's Br. 59. But those assertions merely establish the applicability of *Thuraissigiam*'s central holding: because Ms. Cabello does not seek habeas relief of release from custody, she cannot rely on the Suspension Clause to secure judicial review of her application to reside permanently in the United States. *See Thuraissigiam*, 140 S. Ct. at 1983.

D. Ms. Cabello cites inapposite precepts of statutory interpretation that fail to overcome the plain language of section 1252(a)(2)(B)(i)

As established above at Argument II.C.1, precluding judicial review of USCIS U nonimmigrant adjustment denials raises no constitutional issues. Thus, constitutional avoidance and the doctrine of absurd results, two precepts of statutory interpretation that depend on the existence of constitutional claims, have no relevance here. And the plain language of the jurisdictional bar at section 1252(a)(2)(B) and (B)(i) easily overcomes the presumption of judicial review, the third precept of statutory interpretation that Ms. Cabello cites.

1. The canon of constitutional avoidance has no application to this case

Ms. Cabello argues that the Court should disregard the plain language of section 1252(a)(2)(B) and (B)(i) by applying the canon of constitutional avoidance. Appellant's Br. 28-29. But the canon of constitutional avoidance applies only when

the construction of a statute raises serious constitutional problems and where any alternative interpretation of the statute is "fairly possible." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *see also Clark v. Martinez*, 543 U.S. 371, 381 (2005) (requiring "competing plausible interpretations of a statutory text" and "serious constitutional doubts" to apply the canon). Thus, "[a] clear statute and a weak constitutional claim are not a recipe for successful invocation of the constitutional avoidance canon." *See Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 638 F.3d 794, 801 (D.C. Cir. 2011).

Here, the statute is clear. It precludes judicial review of any judgment, decision, or action relating to adjustment of status, "regardless of whether the judgment, decision, or action is made in removal proceedings." 8 U.S.C. § 1252(a)(2)(B), (B)(i). Ms. Cabello proposes a reading of section 1252(a)(2)(B)'s "regardless" clause as "regardless of whether the judgment, decision, or action is made in removal proceedings, *but only if the judgment, decision, or action is made while the applicant is in removal proceedings*." Appellant's Br. 15, 23. But that reading requires an impermissible re-writing of the statute. *See In re Cavanaugh*, 306 F.3d at 738; *see also supra* Argument II.B.1. To adopt that reading under the guise of constitutional avoidance "is not to interpret the statute Congress enacted, but to fashion a new one." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019). "The

constitutional-avoidance canon does not countenance such textual alchemy." *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018).

And here, the constitutional claims are weak to nonexistent. Ms. Cabello has failed to raise any colorable constitutional claims related to the denial of her adjustment application or her wish to remain in the United States with her family and friends. *See supra* Argument II.C. With the plain reading of section 1252(a)(2)(B)(i) raising no colorable constitutional issues, the Court has no basis to exercise constitutional avoidance. *See Clark*, 543 U.S. at 381.

2. The doctrine of absurdity does not permit the Court to consider questions not before it

Ms. Cabello argues that precluding all USCIS adjustment adjudications from judicial review, regardless of whether they involve an individual in removal proceedings, would run contrary to the doctrine of absurdity because "[i]n many cases, including this one, the holding below would actually allow the agency to do whatever it wants without any consequences" and give USCIS "free rein to commit legal errors and constitutional violations" against U nonimmigrant adjustment applicants. Appellant's Br. 31, 32. But as discussed above, there is nothing absurd about the time-honored practice of Congress limiting federal court jurisdiction or about a court abiding by those limitations. *See Ex parte McCardle*, 74 U.S. at 514; *see also supra* Argument II.C.1. Nor does the district court's broad reading of section 1252(a)(2)(B)(i) result in absurd results by allegedly giving an agency

"complete and unchecked power" to do "*whatever it wants without any consequences*." Appellant's Br. 31. When Congress insulates agency action from judicial review, other methods remain to check the Executive Branch's policies and practices. For example, "Congress possesses an array of tools to analyze and influence those policies – oversight, appropriations, the legislative process, and Senate confirmations, to name a few. And through elections, American voters can both influence Executive Branch policies and hold elected officials to account for enforcement decisions" and other agency actions. *United States v. Texas*, 143 S. Ct. 1964, 1975 (2023) (internal citation omitted). Even though those may be "political checks for the political process," *id.*, they still curtail the "complete and unchecked power" of administrative agencies about which Ms. Cabello imagines. *See Bansal v. U.S. Citizenship & Immigr. Servs.*, No. 4:21-cv-3203, 2021 WL 4553017, at *6 (D. Neb. Oct. 5, 2021) ("adverse consequences ensue from discretionary decisions all the time, which is presumably *why* they are insulated from judicial review and committed to the branches of government which are accountable to voters").

Courts, furthermore, do not decide hypothetical cases, and imaginary situations do not control real ones. *See New York v. Ferber*, 458 U.S. 747, 767 (1982) ("[A] person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied

unconstitutionally to others in situations not before the Court."); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998) ("[W]e are reluctant . . . to invalidate legislation on the basis of its hypothetical application to situations not before the Court.") (internal quotation marks omitted). Ms. Cabello should not be able to frustrate a Congressionally mandated limit on judicial review merely by raising hypothetical or baseless constitutional claims. *See Linares v. Garland,* No. 20-71582, 2023 WL 4341452 (9th Cir. July 5, 2023) (Collins, J, concurring in denial of reh'g en banc) ("Where, as here, Congress has clearly and comprehensively sought to bar judicial review, its intent must be respected even if a difficult constitutional question is presented.") (internal citations and quotations omitted); *Gebhardt*, 879 F.3d at 988. In *Gebhardt*, the plaintiff alleged the denial of his visa petition violated his substantive and procedural due process rights. *Id.* at 984. Despite those constitutional claims, this Court held that the jurisdictional bar at section 1252(a)(2)(B)(ii) precluded review of the petitioner's statutory claims. It then assumed, without deciding, that the jurisdictional bar did not preclude it from reviewing colorable constitutional claims but found that the plaintiff had raised no colorable constitutional claims. *Gebhardt*, 879 F.3d at 988. As in *Gebhardt* – and in *Patel* – this Court need not decide whether section 1252(a)(2)(B)(i) precludes constitutional claims. It can, instead, apply the jurisdictional bar at section 1252(a)(2)(B)(i) to preclude consideration of Ms. Cabello's statutory claims and

then determine that Ms. Cabello has raised no colorable constitutional claims. *See Patel*, 142 S. Ct. at 1626 ("The reviewability of such decisions is not before us, and we do not decide it."); *Gebhardt*, 879 F.3d at 988; *supra* Argument II.C, II.D.1.

There is nothing absurd about permitting judicial review of U visa denials but not of U nonimmigrant adjustment denials. Appellant's Br. 32-33. U visa determinations lie outside the scope of section 1252(a)(2)(B)(i), and the statutory authority for agency adjudication of U visas lacks "the word 'discretion' or any synonym" required to trigger the adjacent jurisdiction bar at section 1252(a)(2)(B)(ii). *See Perez v. Wolf*, 943 F.3d 853, 867 (9th Cir. 2019). There is nothing absurd about analyzing a different set of Congressional enactments and reaching a different result. *See United States v. Fiorillo*, 186 F.3d 1136, 1148 (9th Cir. 1999) ("Congress does not use different language in different provisions to accomplish the same result").

3. The plain language of section 1252(a)(2)(B)(i) overcomes the presumption favoring judicial review

Ms. Cabello argues that the district court erred in applying section 1252(a)(2)(B)(i) to USCIS adjudications outside of removal proceedings by failing to apply the presumption favoring judicial review of administrative action discussed in *Kucana v. Holder*, 558 U.S. 233 (2010). Appellant's Br. 28-29. But *Kucana* held that Congress can overcome that presumption with "clear and convincing evidence" of its intent to limit judicial review. *Kucana*, 558 U.S. at

252. Section 1252(a)(2)(B) includes that clear and convincing language. *See Abuzeid*, 62 F.4th at 585 ("We think that the plain and unequivocal language in § 1252(a)(2)(B)(i) is clear and convincing evidence of Congress's intent to strictly circumscribe the jurisdiction of federal courts over cases involving the adjustment of immigration status").

III. USCIS's adjustment decisions are independently unreviewable because they are committed to agency discretion by law

If the Court does not affirm the district court's dismissal of this action for lack of jurisdiction resulting from the jurisdictional bar at section 1252(a)(2)(B)(i), it should dismiss this action on the alternative basis that 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).

The statute governing USCIS's adjustment adjudication, 8 U.S.C. § 1255(m), provides that the Secretary "may" adjust status if, in his or her "opinion," it would be "justified" by "humanitarian grounds," "family unity," or the "public interest." The statute, thus, commits the adjustment of U nonimmigrants entirely to USCIS's discretion, and any exercise of that discretion amounts to an unreviewable "matter of grace." *Kucana*, 558 U.S. at 247; *see also* 8 C.F.R § 245.24(f); *Ayanian*, 64 F.4th 1082. Under Section 1255(m), there is no meaningful standard by which to judge USCIS'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); *see also Ahmed v. Mayorkas*, No. 22-cv-60141, 2022 WL 2032301, at *4 n.1 (S.D. Fla. Mar. 28, 2022) (holding that adjustment decisions under section 1255(m) are inherently discretionary and therefore "committed to agency discretion by law," citing 5 U.S.C. § 701(a)), *aff'd in part, appeal dismissed in part sub nom. Doe v. Sec'y, U.S. Dep't of Homeland Sec.*, 2023 WL 2564856. 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.

IV. Ms. Cabello's challenge to USCIS's requirement that she submit a medical examination and vaccination record fails to state a legally cognizable claim

If the Court does not affirm the district court's dismissal of this action for lack of subject matter jurisdiction, it should affirm the district court's dismissal because Ms. Cabello's challenge to her adjustment denial fails to state a claim.

A. Standards for dismissal under Federal Rule of Civil Procedure 12(b)(6)

A complaint must contain a plausible, not just possible, claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). 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.

B. This challenge to USCIS's medical examination and vaccination record requirement fails to state a cognizable claim

Ms. Cabello's challenge to USCIS's denial of her adjustment application and to USCIS's requirement for U nonimmigrants to submit I-693 Medical Forms fails to state a cognizable claim under the APA. The I-693 Medical Form requirement is not arbitrary, capricious, or in excess of USCIS's statutory authority. *Cf.* 5 U.S.C. § 706(2)(C) (permitting reviewing courts to set aside agency action that is arbitrary and capricious or that exceeds agency's statutory authority). In requiring such records, USCIS is exercising its statutory authority to limit adjustment of status to only those U nonimmigrants whose continued presence in the United States, "in the opinion of the Secretary of Homeland Security," is "in the public interest," among other considerations. *See* 8 U.S.C. § 1255(m)(1)(B).

Section 1255(m) is silent on what USCIS should consider to be "in the public interest" when adjudicating U nonimmigrant adjustment applications. The statute is also silent on whether USCIS may consider traditional inadmissibility

grounds in doing so. USCIS permissibly filled that legislative silence with several regulations. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (affirming lawfulness of agency's regulation where statute is silent or ambiguous on an issue and agency's regulatory answer is based on a reasonable construction of the statute). The first regulation permits USCIS, when determining whether adjustment 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 I-693 Medical Form is intended to verify. *See* 8 U.S.C. § 1182(a)(1)(A). A second regulation 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 "in the public interest." 8 C.F.R. § 245.24(d)(10). The Form I-485 instructions require adjustment applicants to submit a completed I-693 Medical Form and contain no exception for U nonimmigrants applying for adjustment of status. ER-176-77. Those regulations represent USCIS's reasonable interpretation of statutory gaps in 8 U.S.C. § 1255(m), to which this Court should defer. *See Fernandez v. Brock*, 840 F.2d 622, 631 (9th Cir. 1988) (where Congress's intent is unclear, courts will defer to an agency's "permissible

construction of the statute" and "may not substitute [its] own construction of a statutory provision for a reasonable interpretation made by the . . . agency." (citing *Chevron*, 467 U.S. at 843-44)).

In proceedings below, Ms. Cabello argued that USCIS's I-693 Medical Form requirement is arbitrary and capricious because "nothing in § 1255 empowers Defendants to impose additional *categorical* requirements to establishing eligibility for adjustment. . . ." PI Mot. at 9, Dkt. 9. But the public interest includes ensuring that new residents of this country do not pose a threat to public health. 8 U.S.C. § 1255(m)(1)(B); *City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 408 F. Supp. 3d 1057, 1127 (N.D. Cal. 2019) ("The public certainly has an interest in decreasing the risk of preventable contagion."). By requiring U nonimmigrant adjustment applicants to submit I-693 Medical Forms, USCIS is merely gathering evidence it needs to execute its discretionary authority to protect the public's interest in public health and safety. 8 U.S.C. § 1255(m)(1)(B); 8 U.S.C. § 1182(a)(1)(A); 8 C.F.R. § 245.24(d)(11). Courts are to defer to an agency in such an instance when it must "exercise its administrative discretion in deciding how, in light of internal organizational considerations, it may best proceed to develop the needed evidence." *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976); *see also Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978)

("administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties") (internal quotations and citation omitted).

Ms. Cabello also argued below that treating the "public interest" provision of section 1255(m)(1)(B) as an independent requirement for adjustment by U nonimmigrants is "incongruous with Section 1255, which discusses the 'public interest' in a permissive and generous manner." Response to Defs.' Mot. to Dismiss 14-15, Dkt. 32. But that "public interest" clause at section 1255(m) does not call on USCIS to exercise discretion in the applicant's favor in every instance. Section 1255(m) requires the applicant to present "public interest" grounds that justify, in the agency's opinion, adjustment of status. *See Rashtabadi v. I.N.S.*, 23 F.3d 1562, 1568 (9th Cir. 1994) (noncitizen "has the burden of persuading [USCIS] to exercise [its] discretion favorably" in adjustment of status) (internal citation omitted); *see also J.M.O.*, 3 F.4th at 1064 ("failure to establish that adjustment of status is . . . in the public interest . . . is a discretionary determination") (internal quotations omitted). There is no incongruity in this framework.

Ms. Cabello also argued below that if Congress had intended USCIS to apply the inadmissibility grounds of section 1182 to U nonimmigrant adjustment applicants, it would have done so by explicitly mentioning those grounds, as it did

for T visa adjustment applicants. PI Mot. at 10 (citing 8 U.S.C. § 1255(l)(2)). But that argument ignores the different statutory language involved in the adjustment of T nonimmigrants versus U nonimmigrants. Congress imposed all the inadmissibility provisions of section 1182 on T nonimmigrant adjustment applicants but permitted the government to waive some of them. 8 U.S.C. § 1255(l)(2). But with U nonimmigrant adjustment applicants, Congress required the government to consider whether the adjustment of a U nonimmigrant is "in the public interest." 8 U.S.C. § 1255(m)(1)(B); 8 C.F.R. § 245.24(d)(11). Congress thus created different administrative mechanisms for USCIS to adjudicate adjustment applications of T and U nonimmigrants. But both permit USCIS to consider inadmissibility grounds.

Ms. Cabello makes an inapt comparison with another immigration statute when she points out that USCIS does not require individuals applying for adjustment under the separate provision of 8 U.S.C. § 1259 to submit I-693 Medical Forms because section 1259 does not apply the health-related inadmissibility ground to them. Appellant's Br. 7. She thus implies that USCIS is acting arbitrarily by requiring I-693 Medical Forms from U nonimmigrant adjustment applicants because section 1255(m), like section 1259, does not explicitly mention the health-related inadmissibility ground. But section 1259 lacks

the public interest provision found in section 1255(m) that supports the regulations requiring U nonimmigrants to submit I-693 Medical Forms.

Ms. Cabello also argued below that USCIS acted arbitrarily and capriciously because its denial notice cited two regulations that Ms. Cabello claims are too general to justify USCIS's denial. PI Mot. 11. But when USCIS denies an application, nothing more than a "brief statement" is necessary, as long as USCIS explains "why it chose to do what it did." *Tourus Records, Inc. v. D.E.A.*, 259 F.3d 731, 737 (D.C. Cir. 2001). Here, USCIS's denial notice for Ms. Cabello cited a regulation requiring applicants for immigration benefits to submit the documentation required by the form instructions, a regulation requiring medical examinations for adjustment applicants, and Ms. Cabello's failure to satisfy those requirements. ER-160-61. The notice thus contained the necessary "brief statement of the grounds for denial." *Flyers Rts. Educ. Fund, Inc. v. U.S. Dep't of Transp.*, 957 F.3d 1359, 1363 (D.C. Cir. 2020).

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's order dismissing Ms. Cabello's putative class action or, in the alternative, dismiss the action for lack of subject matter jurisdiction as an action committed to agency discretion by law, or, in the alternative, dismiss the action for failure to state a claim.

Dated: August 16, 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
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

ATTORNEYS FOR
DEFENDANTS-APPELLEES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number(s) 23-35267

The undersigned attorney or self-represented party states the following:

[ ] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[X] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

- *Patel v. Garland*, No. 21-17024 (9th Cir.) (argued May 18, 2023);
- *Nakka v. U.S. Citizenship and Immigration Services*, No. 22-35203 (9th Cir.) (argued February 7, 2023, supplemental post-argument briefing completed June 16, 2023);
- *Akinmulero v. U.S. Department of Homeland Security*, No. 23-35364 (9th Cir.) (appellant's brief due August 28, 2023).

The scope of the jurisdictional bar at 8 U.S.C. § 1252(a)(2)(B)(i) is an issue in those appeals pending in this Court.

Signature */s/ Hans H. Chen* **Date** August 16, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, I certify that this Brief:

(1) complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,340 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

(2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point Times New Roman font.

I also certify that the text of the electronic brief is identical to the text of the paper copies filed with the Court. The electronic brief has been scanned for viruses with Microsoft Forefront Endpoint Protection, and no virus was detected.

Dated: August 16, 2023

/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

ATTORNEYS FOR
DEFENDANTS-APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2023, I filed the foregoing Appellees' Brief with the Clerk of the Court through the Court's ECF system and that it will be served electronically upon registered participants identified on the Notice of Electronic Filing.

Dated: August 16, 2023

/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

ATTORNEYS FOR
DEFENDANTS-APPELLEES

STATUTORY ADDENDUM

STATUTORY ADDENDUM[1]

Table of Contents

U.S. Constitution article III, § 1 ..... A-1

U.S. Constitution article III, § 2, clause 2 ..... A-1

8 U.S.C. § 1255(m) A-2

8 C.F.R. § 245.24(d) A-5

[1] Except for the following, all applicable statutes, etc., are contained in the statutory addendum attached to Appellant's Brief.

U.S. Constitution article III, § 1

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

U.S. Constitution article III, § 2, clause 2

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

8 U.S.C. § 1255. Adjustment of status of nonimmigrant to that of person admitted for permanent residence

. . .

(m) Adjustment of status for victims of crimes against women

(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-

(A) the alien has been physically present in the United States for a continuous period of at least 3 years since the date of admission as a nonimmigrant under clause (i) or (ii) of section 1101(a)(15)(U) of this title; and

(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.

(2) An alien shall be considered to have failed to maintain continuous physical presence in the United States under paragraph (1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in

the aggregate exceeding 180 days unless the absence is in order to assist in the investigation or prosecution or unless an official involved in the investigation or prosecution certifies that the absence was otherwise justified.

(3) Upon approval of adjustment of status under paragraph (1) of an alien described in section 1101(a)(15)(U)(i) of this title the Secretary of Homeland Security may adjust the status of or issue an immigrant visa to a spouse, a child, or, in the case of an alien child, a parent who did not receive a nonimmigrant visa under section 1101(a)(15)(U)(ii) of this title if the Secretary considers the grant of such status or visa necessary to avoid extreme hardship.

(4) Upon the approval of adjustment of status under paragraph (1) or (3), the Secretary of Homeland Security shall record the alien's lawful admission for permanent residence as of the date of such approval.

(5)

(A) The Secretary of Homeland Security shall consult with the Attorney General, as appropriate, in making a determination under paragraph (1) whether affirmative evidence demonstrates that the alien unreasonably refused to provide assistance to a Federal law enforcement official, Federal prosecutor, Federal judge, or other Federal authority investigating or prosecuting criminal activity described in section 1101(a)(15)(U)(iii) of this title.

(B) Nothing in paragraph (1)(B) may be construed to prevent the Secretary from consulting with the Attorney General in making a determination whether affirmative evidence demonstrates that the alien unreasonably refused to provide assistance to a State or local law enforcement official, State or local prosecutor, State or local judge, or other State or local authority investigating or prosecuting criminal activity described in section 1101(a)(15)(U)(iii) of this title.

8 C.F.R. § 245.24 Adjustment of aliens in U nonimmigrant status

. . .

(d) Application Procedures for U nonimmigrants. Each U nonimmigrant who is requesting adjustment of status must submit:

(1) Form I–485, Application to Register Permanent Residence or Adjust Status, in accordance with the form instructions;

(2) The fee prescribed in 8 CFR 106.2 or an application for a fee waiver;

(3) [Reserved]

(4) A photocopy of the alien's Form I–797, Notice of Action, granting U nonimmigrant status;

(5) A photocopy of all pages of all of the applicant's passports valid during the required period (or equivalent travel document or a valid explanation of why the applicant does not have a passport) and documentation showing the following:

(i) The date of any departure from the United States during the period that the applicant was in U nonimmigrant status;

(ii) The date, manner, and place of each return to the United States during the period that the applicant was in U nonimmigrant status; and

(iii) If the applicant has been absent from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days or more, a

certification from the investigating or prosecuting agency that the absences were necessary to assist in the investigation or prosecution of the criminal activity or were otherwise justified;

(6) A copy of the alien's Form I–94 (see § 1.4), Arrival-Departure Record;

(7) Evidence that the applicant was lawfully admitted in U nonimmigrant status and continues to hold such status at the time of application;

(8) Evidence pertaining to any request made to the alien by an official or law enforcement agency for assistance in an investigation or prosecution of persons in connection with the qualifying criminal activity, and the alien's response to such request;

(9) Evidence, including an affidavit from the applicant, that he or she has continuous physical presence for at least 3 years as defined in paragraph (a)(1) of this section. Applicants should submit evidence described in 8 CFR 245.22. A signed statement from the applicant attesting to continuous physical presence alone will not be sufficient to establish this eligibility requirement. If additional documentation is not available, the applicant must explain why in an affidavit and provide additional affidavits from others with first-hand knowledge who can attest to the applicant's continuous physical presence by specific facts;

(10) Evidence establishing that approval is warranted. Any 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; and

(11) Evidence relating to discretion. An applicant has the burden of showing that discretion should be exercised in his or her favor. 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. Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate. Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns.