No. 23-35267

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

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INTRODUCTION

Plaintiff-Appellant Linda Cabello Garcia (Ms. Cabello) is a long-time resident of the United States who has lived here lawfully for many years pursuant to a U visa. Congress enacted the U-visa framework to provide protection and stability for survivors of violent crimes who assist law enforcement, first by creating a pathway to lawful temporary immigration status, *see* 8 U.S.C. § 1101(a)(15)(U), and then to adjustment of that status to lawful permanent residence, *see* 8 U.S.C. § 1255(m). In creating this generous scheme, Congress explicitly deviated from the standard adjustment process by exempting U-visa holders from most grounds of inadmissibility, including the health-related grounds of inadmissibility. *Id.*

Nonetheless, U.S. Citizenship and Immigration Services (USCIS) has adopted a policy that flatly counters this statutory scheme. Ignoring the law's plain text, USCIS requires U-visa holders to submit a medical exam demonstrating they are not inadmissible for health-related grounds. Accordingly, the agency denied Ms. Cabello's application because she failed to submit a conforming medical exam. By denying her adjustment application, USCIS stripped away Ms. Cabello's lawful status and placed her in jeopardy of permanent separation from her home and family.

Ms. Cabello filed the action below under the Administrative Procedure Act (APA), seeking relief for herself and other U-visa holders, who each year are collectively required to pay millions of dollars to overcome this extra-statutory hurdle. Critically, the APA provides the only avenue to obtain judicial review, as Ms. Cabello is not in removal proceedings, and even if she were later placed in proceedings, immigration courts cannot adjudicate adjustment applications for U-visa holders. Defendants-Appellants moved to dismiss the case, advancing a remarkable position: that USCIS has *unfettered* authority to deny Ms. Cabello and the putative class members' applications for adjustment of status for *any* reason and that no court can ever review that decision. According to Defendants, even if the agency applies the incorrect legal standard, blatantly misstates the law, or tramples on the applicant's constitutional rights, no court—including this Court—has authority to review its decision. This is contrary to the Immigration and Nationality Act (INA), contrary to the strong presumption of judicial review for administrative actions, and contrary to the rule of law that underpins our democracy.

The district court concluded that 8 U.S.C. § 1252(a)(2)(B)(i) stripped it of jurisdiction to review Ms. Cabello's claim, acquiescing to the "majority of courts that have addressed this issue" since *Patel v. Garland*, 142 S. Ct. 1614 (2022). ER-9. But in doing so, the court recognized that this case presents a grave and serious

constitutional concern, acknowledging that “[t]he structure of our legal system assumes that there will be judicial review of agency actions. To remove an agency action from judicial review represents a serious depart[ure] from our societal mores and from the principles on which our government is formed.” *Id.*

This Court should resolve the issue of first impression this case presents by clarifying that 8 U.S.C. § 1252(a)(2)(B)(i) does not preclude judicial review of agency actions taken in cases outside of removal proceedings. At a minimum, the Court should conclude that is the case for those applications that have no alternative forum for judicial review, like Ms. Cabello’s application for adjustment of status. Alternatively, if the Court reads the statute to bar all judicial review, then it should hold that § 1252(a)(2)(B)(i) is unconstitutional insofar as it applies to Ms. Cabello and the putative class members, who otherwise have no opportunity for judicial review.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and the Constitution. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court issued its decision dismissing this case and entered final judgment on April 17, 2023. Ms. Cabello timely filed her notice of appeal from the district court order dismissing the case on April 17, 2023.

STATEMENT OF ISSUES PRESENTED

I. Whether 8 U.S.C. § 1252(a)(2)(B)(i) applies to cases not in removal proceedings;

II. If 8 U.S.C. § 1252(a)(2)(B) does apply to such cases generally, whether it applies to those issues for which no judicial review is available through removal proceedings and the petition for review process; and

III. Whether 8 U.S.C. § 1252(a)(2)(B)(i) as applied to Plaintiff and putative class members violates the Constitution.[1]

STATEMENT OF THE CASE

I. Legal Background

A. U Nonimmigrant Status

U nonimmigrant status ("U visa" or "U status") is a humanitarian protection that Congress created for noncitizen crime victims who assist law enforcement agencies in the investigation of the crimes they suffered. *See* Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, § 1513(a), 114 Stat. 1464, 1533–34. To obtain a U visa, an applicant must have been the victim of qualifying criminal activity and have received a certification from an appropriate law enforcement official attesting to the applicant's helpfulness in investigating or prosecuting the crime. *See* 8 U.S.C. §§ 1101(a)(15)(U)(i), 1184(p)(1). In addition, the applicant must be admissible to

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[1] The Addendum to this Brief includes the text of the pertinent statutory provision, 8 U.S.C. § 1252.

the United States or be granted a waiver for any relevant ground of inadmissibility. *See* 8 U.S.C. § 1182(d)(14). Individuals seeking U status may also petition to include certain family members as derivatives. *Id*. § 1101(a)(15)(U)(ii). The INA limits the number of U visas to 10,000 individuals per fiscal year, excluding derivatives. *Id*. § 1184(p)(2).

Once granted, the U visa provides four years of lawful immigration status and work authorization. *Id*. § 1184(p)(3)(B), (p)(6). However, in general, applicants reside in the United States for an even lengthier period while waiting for USCIS to first adjudicate their applications for U status—even after USCIS determines that an applicant qualifies for U status, they are subject to the statutory cap and placed on a waiting list. *See* 8 C.F.R. § 214.14(d)(2). U visa applicants on the waiting list are eligible for work authorization and protection from deportation. *Id*. As of April 2023, the median processing time for U visa applications was 58 months. USCIS, Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year, https://egov.uscis.gov/processing-times/historic-pt (last accessed May 31, 2023).

B. U-Based Adjustment of Status under 8 U.S.C. § 1255(m) and USCIS's I-693 Policy

When Congress created the U visa, it also provided a pathway to permanent residence for the crime victims it sought to protect through the U visa. *See* VTVPA § 1513(a)(2)(C), 114 Stat. at 1534. After being continuously present in the United

States for three years in U status, an individual has a one-year window to apply to adjust status under 8 U.S.C. § 1255(m). *See* 8 U.S.C. § 1255(m)(1)(A); 8 C.F.R. § 245.24(b)(2)–(3). A U-visa holder's status is extended while their adjustment application is pending. 8 U.S.C. § 1184(p)(6).

As USCIS has recognized, U-based adjustment of status under § 1255(m) is distinct from the general adjustment process under § 1255(a). *See* Adjustment of Status to Lawful Permanent Resident for [Noncitizens] in T or U Nonimmigrant Status, 73 Fed. Reg. 75540-01, 75548 (Dec. 12, 2008) ("The adjustment provisions contained in . . . 8 U.S.C. 1255(m), are stand-alone provisions and not simply a variation of the general adjustment rules contained in . . . 8 U.S.C. 1255(a)."). Unlike individuals seeking to adjust status under § 1255(a), U-visa holders applying to adjust status are not required to demonstrate general admissibility. *Compare* 8 U.S.C. § 1255(a) (adjustment applicants must, inter alia, be "admissible to the United States"), *with id.* § 1255(m)(1). Instead, Congress identified 8 U.S.C. § 1182(a)(3)(E) as the only inadmissibility ground applicable to U-based adjustment applicants. *Id.* § 1255(m)(1); *see also* 73 Fed. Reg. at 75549 ("Otherwise, U adjustment applicants are not required to establish that they are admissible on any of the grounds set forth in [8 U.S.C. § 1182(a)].").

Nevertheless, USCIS subjects all U-based adjustment applicants to the health-related inadmissibility grounds under 8 U.S.C. § 1182(a)(1) by requiring

them to undergo a medical examination by a civil surgeon and to submit Form I-693, Report of Medical Examination and Vaccination Record. ER-46 (stating that adjustment applicants must submit Form I-693 and listing no exceptions); ER-79–80 (requiring Ms. Cabello to submit Form I-693). USCIS imposes this requirement even though the sole purpose of Form I-693 is to "report[] results of an immigration medical examination . . . to establish that applicants who are seeking immigration benefits are not inadmissible to the United States on public health grounds" under § 1181(a)(1)—grounds that are inapplicable to U-based adjustment applicants. ER-82; ER-46 ("[A]pplicants for adjustment of status are required to have a medical examination to show that they are free from health conditions that would make them inadmissible").

In contrast, USCIS does not require Form I-693 for certain other applicants who are also not subject to the inadmissibility ground under § 1182(a)(1), such as those applying for adjustment under registry pursuant to 8 U.S.C. § 1259. ER-46; *see also* USCIS Policy Manual, vol. 7, pt. O, ch. 4 (stating that applicants need not submit Form I-693 "because the medical . . . ground[] of inadmissibility [is] not applicable.").

Failure to submit Form I-693 results in the denial of U-based adjustment. ER -160; ER-21 ¶¶ 7–9; ER-18 ¶ 6. In requiring Form I-693 for all U-based adjustment applications, USCIS does not exercise its discretionary authority on a

case-by-case basis. *See* 8 U.S.C. § 1255(m); 8 C.F.R. § 245.24(d)(11). Instead, USCIS imposes a categorical requirement that all U-based adjustment applicants satisfy the health-related inadmissibility grounds, contrary to the INA's language exempting them from that requirement.

C. Adjudication of U-based Adjustment of Status

The INA grants the Secretary of Homeland Security exclusive authority over adjustment of status under 8 U.S.C. § 1255(m)(1). Accordingly, adjudication of U-based adjustment applications falls "solely within USCIS's jurisdiction," 8 C.F.R. § 245.24(f). Critically, such applications cannot be filed or renewed before an immigration judge (IJ) in removal proceedings. *See id.* § 245.24(k) ("USCIS shall have exclusive jurisdiction over adjustment applications filed under [8 U.S.C. § 1255(m)].").[2] By regulation, applicants may appeal a denial of U-based adjustment status only to USCIS's Administrative Appeals Office. *Id.* § 245.24(f)(2). Given this statutory and regulatory scheme, USCIS's denial of U-based adjustment is never included in a removal order—or in a petition for review of a removal order. *See Nasrallah v. Barr*, 140 S. Ct. 1683, 1691 (2020). ("[F]inal orders of removal

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[2] By contrast, the INA expressly grants the "Attorney General" authority over general adjustment of status under 8 U.S.C. § 1255(a), and such applications may be filed or renewed before an IJ in removal proceedings. *See* 8 C.F.R. §§ 1245.1; 1245.2; 245.2(a)(1), (a)(5).

encompass only the rulings made by the [IJ] or [BIA] that affect the validity of the final order of removal.”).

II. Factual Background

Plaintiff-Appellant Linda Cabello Garcia is a native and citizen of Mexico who has resided in the United States since 1999, when she was just six years old. ER-173 ¶ 32. In October 2013, Ms. Cabello applied for a U visa based on a law enforcement certification verifying that she was the victim of stalking and cooperated with the criminal investigation. *Id.* ¶¶ 33–35. As part of her U visa application, Ms. Cabello requested a waiver of any applicable grounds of inadmissibility. *Id.* ¶ 35. On October 2016, USCIS granted her U visa application, waiving the inadmissible grounds and thus finding her admission “to be in the public or national interest.” 8 U.S.C. § 1182(d)(14).

In August 2020, Ms. Cabello timely submitted her U-based adjustment application, along with evidence demonstrating her eligibility. ER-174 ¶¶ 38–39. She also submitted evidence to support a favorable exercise of discretion, including documents showing that she is married to a U.S. citizen, has a U.S.-citizen sister, and has no criminal history. *Id.* ¶ 39.

The following year, USCIS issued a Request for Evidence (RFE) requesting that she submit Form I-693. ER-78. In her response, Ms. Cabello requested that USCIS approve her application without the Form I-693, explaining that the form

was unnecessary because she was not subject to the health-related grounds of inadmissibility. ER-96; ER-133. She further noted that she could not complete the exam due to her diagnosed anxiety disorder and panic disorder. ER-133. On February 2022, USCIS issued a Notice of Intent to Deny (NOID) Ms. Cabello's adjustment application for failure to submit Form I-693. ER-163–64. Ms. Cabello reiterated her arguments in response to the NOID, and enclosed various supporting documents, including medical records affirming she had been diagnosed with ICD-10 Generalized Anxiety Disorder and Panic Disorder. ER-137–44.

In August 2022, USCIS denied Ms. Cabello's application for adjustment of status. ER-160. The sole reason provided for the denial was the failure to provide the Form I-693. *Id.* USCIS stated that Form I-693 was required by regulation, citing 8 C.F.R. § 103.2(a)(1) and 42 C.F.R. § 34.1(d), which contain general instructions that adjustment applicants must submit a qualifying medical exam on Form I-693. *Id.*

III. Procedural Background

On December 16, 2022, Ms. Cabello filed a complaint in the Western District of Washington, challenging USCIS's denial of her adjustment application. She alleged that USCIS unlawfully denied her application by requiring her to submit Form I-693 even though U-based adjustment applicants are not subject to the related inadmissibility ground. Ms. Cabello filed the lawsuit on behalf of

herself and similarly situated individuals, seeking certification of a class of applicants subject to this unlawful practice. ER-177.

Defendants-Appellees moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1), arguing that 8 U.S.C. § 1252(a)(2)(B)(i) precludes district courts from reviewing "any judgments related to the denial of adjustment of status," regardless of whether the judgment occurs as part of removal proceedings or concerns alleged policies or practices. *See* ER-5. On April 17, 2023, the district court dismissed the action. ER-4. The district court found that § 1252(a)(2)(B)(i), as interpreted in *Patel*, precludes judicial review of all agency decisions denying relief under § 1255, "whether they be discretionary or nondiscretionary, legal or factual." ER-7 (citation omitted).

STANDARD OF REVIEW

The sole issue in this appeal is whether the district court had jurisdiction to hear this case. "The existence of subject matter jurisdiction is a question of law reviewed de novo." *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995).

SUMMARY OF ARGUMENT

The text and structure of § 1252(a)(2)(B), the legislative and statutory history regarding that section, and key canons of statutory interpretation all support the commonsense conclusion in this case: that district courts can review the denial

of a U-based adjustment application. First, the context of § 1252 shows that the "regardless" language in subparagraph (a)(2)(B) applies only to USCIS decisions made regarding cases in removal proceedings. Indeed, beginning with the title of § 1252, and in each subsection, Congress repeatedly addressed one issue: judicial review of orders of removal. Thus, the most natural reading of § 1252(a)(2)(B) is to similarly limit it to the removal context.

The statutory and legislative history supports such a limitation. When Congress added the "regardless" language in 2005, it explained that it intended to preserve judicial review for all noncitizens, regardless of their past conduct. Notably, Congress acted in response to the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), which questioned the constitutionality of a scheme that would bar all review of legal and constitutional claims prior to an individual's removal. Here however, the district court ignored these concerns, and held that Congress intended to do precisely what Congress said it was *not* doing when amending the INA to streamline judicial review in 2005.

Relatedly, the district court failed to address three critical canons of statutory construction that bolster the textual analysis showing Congress did not intend to eliminate all judicial review for U-based adjustment applications. First, time and again, the Supreme Court has applied a presumption of judicial review when interpreting immigration statutes that purport to strip federal courts of jurisdiction

over agency decisions. Second, the Court has also expressed grave concern that a statute eliminating all such review would violate the Constitution. And finally, it would produce absurd results for Congress to say—as the district court believes Congress did—that an agency can blatantly disregard the law and that no court can ever stop it. Each of these canons strongly supports the reading of § 1252(a)(2)(B) that preserves review in this case.

Notably, the Supreme Court's decision in *Patel* does not dictate otherwise. Indeed, *Patel* repeatedly states that it was not addressing the jurisdictional question that a case like this one presents. The same is true of this Court's prior decisions: none of them addressed the precise issue raised here. Moreover, *Patel* concerned a case in removal proceedings, where § 1252(a)(2)(D) preserves review of legal and constitutional questions. Under the district court's interpretation, no such review exists for U-based adjustments, even of a straightforward legal question like the one Ms. Cabello presents.

While the district court pointed to appellate decisions from other circuits to support its decision, those cases provided only a cursory analysis of the statute. Critically, in each of those cases, the courts failed to address nearly *every* argument Ms. Cabello has raised here. Nor did they address the precise stakes in this case or contemplate that in situations like this one, no judicial review will ever be available.

Ultimately, Defendants' interpretation of § 1252(a)(2)(B) represents a grave challenge to the constitutional order. Should this Court hold that subparagraph (B) deprives any court of jurisdiction to hear this case, then it must find the subparagraph unconstitutional as applied in this case. A conclusion that no court may consider Ms. Cabello's claims violates the separation of powers, allowing the Executive unchecked power and bestowing on it the judicial power "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Moreover, it violates the Fifth Amendment's Due Process Clause, which guarantees judicial review to long-time residents of the United States who seek to challenge an agency decision that flagrantly violates the law. Finally, the district court's decision further runs afoul of the Suspension Clause by depriving Ms. Cabello and putative class members of any chance to raise their legal claims prior to their removal.

These constitutional concerns are of the highest order, as they concern the life and liberty of people who have lived, raised families, and worked here for decades. The Court should thus read § 1252(a)(2)(B) to preserve review, as the text and statutory canons command. But in the alternative, if the Court does not, it should strike down the statute as applied to Ms. Cabello under the Constitution.

ARGUMENT

I. Section 1252(a)(2)(B)(i) Does Not Apply to Cases Outside the Removal Context.

A. The Statute Addresses Judicial Review of Removal Orders and Is Inapplicable to Cases Outside Removal Proceedings.

Section 1252 only concerns judicial review of removal orders and agency determinations made in cases in removal proceedings. The statute's language, title, content, and context make this clear.

"A fundamental canon of statutory construction" is "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also Patel*, 142 S. Ct. at 1622 (looking to "§ 1252(a)(2)(B)(i)'s text and context" to ascertain the meaning of "judgment" in that subsection). Courts must not "examine[] [the text] in isolation," as "statutory language cannot be construed in a vacuum." *Davis*, 489 U.S. at 809. Here, the context of § 1252(a)(2)(B)(i) confirms its scope.

First, the section is entitled "Judicial review of *orders of removal*." 8 U.S.C. § 1252 (emphasis added). The clause at issue here is then specifically located within subsection (a), which outlines the availability and scope of judicial review for various types of removal orders. Paragraph (a)(1) concerns "[g]eneral orders of removal" in proceedings before IJs. The subparagraphs preceding and following §

1252(a)(2)(B) similarly address removal orders: § 1252(a)(2)(A) concerns orders of expedited removal entered by Department of Homeland Security (DHS) officers, and § 1252(a)(2)(C) concerns orders of removal against noncitizens who have committed certain criminal offenses. *Id.* § 1252(a)(2)(A), (C); *see also Patel*, 142 S. Ct. at 1625 (looking to subparagraph (C) in analyzing the "context" of subparagraph (B)). In addition, subparagraph (a)(2)(D) expressly authorizes judicial review of "constitutional claims or questions of law raised upon a *petition for review*," 8 U.S.C. § 1252(a)(2)(D) (emphasis added), which is the vehicle for "judicial review of an *order of removal* entered or issued under any provision of this chapter," *id.* § 1252(a)(5) (emphasis added);[3] *see also id.* § 1252(a)(3)–(4) (further specifying the judicial review authority for specific claims raised in removal proceedings).

The remaining subsections of § 1252 further underscore that the section's scope is limited to removal proceedings. Subsection (b) is entitled "Requirements for review of orders of removal," and outlines the procedure for appealing a final order of removal via a petition for review. *See, e.g.*, *id.* § 1252(b)(2) (designating the proper venue for a petition for review as "the court of appeals for the judicial

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[3] Subparagraph (a)(2)(D) is particularly instructive in reaffirming that subparagraph (a)(2)(B) is limited to removal cases, as it is an exception to the jurisdictional bar in the latter. *Compare* 8 U.S.C. § 1252(a)(2)(B), *with id.* § 1252(a)(2)(D).

circuit in which the immigration judge completed the [removal] proceedings"); *id.* § 1252(b)(3)(A) (requiring service of the petition on the DHS office in charge of the district "in which the final order of removal . . . was entered"), *id.* § 1252(b)(4)(A) (requiring the court of appeals to "decide the petition only on the administrative record on which the order of removal is based"). And as this Court has explained, § 1252(b)(9), along with § 1252(a)(5), "channel[s] judicial review over final orders of removal to the courts of appeals." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016).

Similarly, subsection (c) concerns a "petition for review or for habeas corpus of an order of removal," while subsection (d) discusses "[r]eview of final orders [of removal]." 8 U.S.C. § 1252(c), (d). Subsection (e) deals with review of expedited orders of removal. *Id.* § 1252(e). Subsection (f) deals with injunctive relief and stays of removal for persons subject to detention and removal. *Id.* § 1252(f). And finally, subsection (g) addresses jurisdiction over the Attorney General's decision "to commence [removal] proceedings, adjudicate [removal] cases, or execute removal orders." *Id.* § 1252(g).

In sum, the language of § 1252 demonstrates the section is directed to judicial review of removal orders and determinations underlying those removal orders. When "read in their context and with a view to their place in the overall statutory scheme," § 1252(a)(2)(B)(i)'s restrictions on judicial review are naturally

limited to the removal context. *Davis*, 489 U.S. at 809; *see also, e.g.*, *Rubio Hernandez v. USCIS*, No. C22-904 MJP, --- F.Supp.3d ----, 2022 WL 17338961, at *5 (W.D. Wash. Nov. 30, 2022) (holding that § 1252(a)(2)(B)(i) did not eliminate jurisdiction over challenge to U-based adjustment application after "analyzing Subparagraph (B) in the context of the overall statute" and "find[ing] that it applies only to removal actions"); *Kucana v. Holder*, 558 U.S. 233, 245–46 (2010) (instructing courts to "not look merely to a particular clause, but consider [it] in connection with . . . the whole statute" and analyzing subparagraph (B)'s reach and scope in light of its "statutory placement" (citation omitted)).

Notably, neither the district court nor the appellate decisions it cited even address the surrounding statutory language. *See infra* Section I.F. They rely instead on *Patel* and the language in § 1252(a)(2)(B) stating that "regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review [certain specified actions]." 8 U.S.C. § 1252(a)(2)(B); *see* ER-7–9. Not only does *Patel* not compel this reading, *see infra* Section I.D., but reading the quoted language in this manner erases its entire context and ignores the more sensible conclusion that it refers to cases in removal proceedings.

Clause (a)(2)(B)(i) decrees that "except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—(i) 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). The most natural reading of the "regardless" language, consistent with the principles of statutory construction, is that it is also confined to cases in removal proceedings.

The "regardless" phrase refers to those decisions that are not made by an IJ, but which still bear directly on the removal process. Under § 1252(a)(2)(B), a respondent cannot separately challenge such judgments, decisions, or actions, except through the petition for review process for final removal orders laid out in § 1252. This is important because in many removal cases, USCIS regularly makes decisions that directly affect their outcome. For example, persons in removal proceedings often file applications for relief with USCIS, such as I-130 family visa petitions, I-360 self-petitions (for victims of domestic violence), I-360 Special Immigrant Juvenile Status petitions, I-485 adjustment applications, I-918 U visa petitions, I-914 T visa petitions (for victims of trafficking), and I-751 petitions to remove conditions of residence. If granted, any of these applications result in either the termination of removal proceedings or an opportunity for the approved beneficiary to seek adjustment of status before the immigration court. *See, e.g.*, *Malilia v. Holder*, 632 F.3d 598, 606–07 (9th Cir. 2011) (noting USCIS's role in the I-130-based adjustment process for individuals in removal proceedings); *Benedicto v. Garland*, 12 F.4th 1049, 1060–61 (9th Cir. 2021) (recognizing an IJ

may terminate proceedings where a respondent has a pending application to "adjust status under INA § 212(h) or through an I-130 petition"). While those USCIS decisions are not "made in removal proceedings," 8 U.S.C. § 1252(a)(2)(B), they "relat[e] to the granting of relief" from removal, *Patel*, 142 S. Ct. at 1622 (emphasis omitted).

Notably, both USCIS and IJs have authority to adjudicate certain applications referenced in § 1252(a)(2)(B)(i). Both USCIS and IJs have authority to adjudicate waivers of the grounds of inadmissibility at § 1182(h) and (i). *See* 8 C.F.R. § 212.7(a)(1); *id.* § 1212.7(a)(1)(ii). And critically, while standard adjustment applications under § 1255(a) and § 1255(i) are adjudicated by both USCIS and IJs, IJs have exclusive authority to adjudicate such applications for noncitizens (other than those who are "arriving") placed in removal proceedings. *See* 8 C.F.R. § 1245.2(a)(1).[4] In contrast, U-based adjustment applications may only be adjudicated by USCIS, regardless of whether the noncitizen is placed in proceedings. *See supra* p.8.

In addition, § 1252(a)(2)(B)(i) specifies that it is directed at "any judgment regarding the granting of relief" under the enumerated provisions—*all* of which are

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[4] For refugee adjustment, 8 C.F.R. § 1209.1(a)(1) requires *all* refugees, including those in removal proceedings, to apply for adjustment of status directly with USCIS. An IJ can only review an application if USCIS denies it. *See id.* § 1209.1(e).

applications that can be presented to obtain "relief" in removal proceedings. In contrast, individuals who present affirmative applications for immigration benefits to USCIS outside the removal context are not necessarily seeking "relief" from removal—indeed, many are seeking to adjust from one lawful status to another, and are not in need of any such "relief." *Compare* 8 U.S.C. § 1252(a)(2)(B)(i) (barring review over "any judgment regarding the granting of relief"), *with* EOIR, Imm. Ct. Pr. Manual, § 1.4(e), https://www.justice.gov/eoir/reference-materials/ic/chapter-1/4 (last updated Nov. 14, 2022) ("DHS . . . adjudicates visa petitions and applications for immigration benefits."), *and* 8 C.F.R. § 1.2 (defining "Application" as "benefit request" and "Benefit request" as "any application, petition, motion, appeal, or other request relating to an immigration or naturalization benefit"). In the statutory context of § 1252, (a)(2)(B)(i)'s use of "relief" thus further clarifies that the clause is directed only at applications made during removal proceedings that may affect the IJ's decision as to removal. *See Patel*, 142 S. Ct. at 1625 ("To be sure, the reference to 'the granting of relief' appears to constrain the provision from sweeping in judgments that have nothing to do with that subject.").

The "regardless" language in § 1252(a)(2)(B) thus makes clear that applicants in removal proceedings may not independently seek judicial review of the referenced agency actions outside of the petition for review process permitted

by § 1252(a). *See Rubio Hernandez*, 2022 WL 17338961, at *6 (recognizing "practical reasons why, for someone in removal proceedings, Congress would prevent judicial review of ancillary agency determinations," as such persons "have various alternative administrative avenues that, if successful, could terminate the removal proceeding in their favor"). The argument that the phrase instead automatically and necessarily forecloses review of *any* adjustment decision ignores that § 1252 is focused solely on the removal context. The district court's interpretation "isolate[s] [this language] from everything else," contrary to the principles of statutory interpretation: "statutory interpretation [is] a 'holistic endeavor'" that looks "to text in context." *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (plurality opinion) (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)). Notably, none of the appellate decisions the district court cited in its order analyze the argument that the "regardless" clause intends to ensure that USCIS decisions occurring *within* the removal context are included within the ambit of (a)(2)(B)(i). *See infra* Section I.F.

In sum, the statutory context confirms the bar to judicial review found in § 1252(a)(2)(B)(i) does not apply to Ms. Cabello's challenge of USCIS's denial of her adjustment application *outside* of the removal context.

B. The Relevant Legislative History Reinforces the Fact that Subparagraph (B) is Confined to Cases in Removal Proceedings.

The legislative and statutory history also militate against a finding of congressional intent to preclude judicial review of claims outside the removal context.

This history shows § 1252(a)(2)(B)(i), which was added to the INA in 1996 in its original form, was directed at cases in removal proceedings. The addition was part of a section entitled "Part 4—Exclusion and Deportation," and was intended to "[s]treamlin[e] judicial review of *orders of exclusion or deportation*" to "[p]rohibit[] judicial review of the Attorney General's judgment regarding certain forms of discretionary relief from exclusion or deportation, voluntary departure, or adjustment of status." S. Rep. No. 104-249, at 14 (1996) (emphasis added).[5] Notably, not *all* "judgment[s] regarding . . . adjustment of status" were subject to "judicial review of orders of exclusion or deportation," as a subset of adjustment-eligible individuals—primarily parolees—could not apply for adjustment in immigration court. *See* 71 Fed. Reg. 27585, 27586 (May 12, 2006).[6] Adjustment

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[5] Orders of "deportation" or "exclusion" refer to removal orders. *See, e.g.*, H.R. Rep. No. 109-72, at 173 (2005) (Conf. Rep.) (recognizing that "pre–1996 nomenclature" uses "deportation order or exclusion order" when referring to "a final removal order").

[6] Congress did not create the U visa scheme until 2000, and it was not until 2006 that Congress removed immigration court jurisdiction over U-based adjustment applications. *See infra* Section II.

determinations for those individuals were accordingly not part of an "order of exclusion or deportation" issued by an IJ, and wholly outside the judicial review scheme for them.[7] Thus, when Congress sought to streamline review of such "orders" in 1996, it understood it was not reaching the *entire* universe of adjustment applications, just those that could be raised in immigration court proceedings.

This state of affairs did not change in 2005, when Congress amended § 1252(a)(2)(B) by adding the "regardless" clause courts have relied on to find that § 1252(a)(2)(B)(i) reaches situations outside the removal context. *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 101(f), 119 Stat. 302, 305 (May 11, 2005). The added language was part of a section entitled "PREVENTING TERRORISTS FROM OBTAINING *RELIEF FROM REMOVAL*," again underscoring Congress's focus on the removal context. *Id.* § 101, 119 Stat. at 302 (emphasis added).

That the REAL ID Act was responsive to *St. Cyr* similarly supports the reading § 1252(a)(2)(B) as confined to removal proceedings. In addition to adding

[7] Parolees filed their adjustment applications with the Immigration and Naturalization Service (INS) District Director, 71 Fed. Reg. at 27586–87, and obtained judicial review of that decision directly in district court, *see, e.g.*, *Noori-Khajavi v. INS*, 548 F. Supp. 150, 152 (E.D. Mo. 1982). When it legislated in 1996, Congress did not alter the fact that parolees were not considered to have been "admitted" for purposes of adjusting status before an IJ. In 1997, the Attorney General passed regulations seeking to deprive parolees in removal proceedings of the opportunity to file for adjustment of status completely, but abandoned the effort following litigation. *See* 71 Fed. Reg. at 27587–58.

the "regardless" language, the Act also amended subparagraph (a)(2)(B) to cross-reference the newly-created subparagraph (a)(2)(D), which provided an exception to the former's limitations on jurisdiction. *See id.* § 106, 119 Stat. at 310. However, contrary to the assumption of courts that have pointed to the dicta in *Patel*, 142 S. Ct. at 1626–27, the interaction of subparagraphs (B) and (D) does not evince Congress's intent to preclude all judicial review of the applications referenced in (B) for individuals *not* facing removal.[8] As the Supreme Court recognized in *Patel*, "Congress added [§ 1252(a)(2)(D)] after [the Court] suggested in *St. Cyr* that barring review of all legal questions *in removal cases* could raise a constitutional concern." *Id.* at 1623 (emphasis added); *see also* H.R. Rep. No. 109-72, at 173–74. That concern is grounded in several constitutional principles. *See infra* Secs. I.C.2. and III.B–C. Subparagraph (D) was thus added to provide for circuit court review over constitutional claims and legal questions on a petition for review of a final *removal order*.

Notably, the conference report detailing these changes explains that the amendments to § 1252's judicial review provisions were animated by Congress's desire to "preclude all district court review of any issue *raised in a removal proceeding*." H.R. Rep. No. 109-72, at 173 (emphasis added). Indeed, the

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[8] In any event, the Court in *Patel* did not speak as broadly as most lower courts have interpreted it to have done. *See infra* Section I.D.

legislative history is replete with references to judicial review of removal orders. *See id.* at 172–76; *see also, e.g.*, *id.* at 175 (clarifying the amendments "would not preclude habeas review over challenges to detention *that are independent of challenges to removal orders.* Instead, the bill would eliminate habeas review *only* over challenges to removal orders." (emphasis added)).

Critically, the report declares that the changes "do[] not eliminate judicial review" altogether, "but simply restore[]" it to the courts of appeals, for "all [noncitizens] who are ordered removed by an immigration judge." *Id.* at 174. It further affirms that the section does not intend to deprive any such noncitizen, "not even criminal [noncitizens], . . . of judicial review," and clarifies that it "would give every [noncitizen] one day in the court of appeals, satisfying constitutional concerns." *Id.* at 174–75. All of this highlights yet again that Congress did not intend to eliminate judicial review in its entirety for any category of noncitizens.

Ignoring that it was enacted to *preserve* judicial review, the district court pointed to 8 U.S.C. § 1252(a)(2)(D) as a *limitation* on Ms. Cabello's claim. ER-7–8. It is true that the INA generally channels review of legal questions to federal appellate courts following a removal order. *See J.E.F.M.*, 837 F.3d at 1031 (discussing § 1252(a)(5) and (b)(9)). But such channeling applies only to "claims that are tied to removal proceedings." *Id.*; *see also id.* at 1035 (only claims that "arise from" removal proceedings are channeled to appellate courts for review in

the petition for review process). Accordingly, where that process is unavailable, as is the case here, district court remains the appropriate forum. Thus, in *J.E.F.M.*, this Court reaffirmed that district courts have jurisdiction to hear claims where a petitioner otherwise has "no legal avenue to obtain judicial review of [their] claim." *Id.* (citing *Singh v. Gonzales*, 499 F.3d 969, 979–80 (9th Cir. 2007)). Similarly, in *St. Cyr*, the Court held that district courts could review the legal claims of certain noncitizens challenging their removal orders in habeas petitions because otherwise no judicial review was available. 533 U.S at 314.[9]

In sum, when Congress passed the 1996 and 2005 amendments relevant here, its focus was on the removal context and on streamlining judicial review over matters decided within that context. Congress did not understand itself to be denying access to judicial review to any category of adjustment-eligible noncitizens.

C. Longstanding Rules of Statutory Construction Further Reinforce that § 1252(a)(2)(B)(i) Should Not Be Interpreted to Bar Judicial Review in This Case.

The statute's limitation to removal proceedings is strongly reinforced by several rules of statutory construction. These rules establish a presumption of

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[9] In amending the INA to address *St. Cyr*'s statutory holding regarding judicial review, Congress was mindful of the Court's constitutional concerns and so channeled judicial review of *all* removal orders to the courts of appeals. *See* H.R. Rep. No. 109-72, at 175.

judicial review and instruct that where there are separate plausible interpretations of the statute, a court should adopt the reading which does not raise constitutional concerns. They also counsel against absurd results, like granting an agency complete and unchecked power.

1. The lower court's interpretation fails to address the presumption of judicial review.

First, the district court erred when it failed to apply the "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986); *accord Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020); *St. Cyr*, 533 U.S. at 298; *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). Notably, the Supreme Court has "consistently applied th[is] interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana*, 558 U.S. at 251.

For example, in *St. Cyr*, the Court applied this presumption and another regarding the availability of habeas relief to preserve judicial review for "errors of law, including the erroneous application or interpretation of statutes" raised in removal proceedings. 533 U.S. at 302. And in *Kucana*, the Court "adopt[ed] the reading [of the statute at issue] that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." 558 U.S. at 251 (citation omitted). Most recently, the Court again applied

the same principles to hold that federal courts of appeals reviewing orders of removal may review questions of law that include "application of a legal standard to established facts." *Guerrero-Lasprilla*, 140 S. Ct. at 1072. In short, the Court's "well-settled" application of the presumption favoring judicial review in the immigration context supports reading the statute here to preserve Ms. Cabello's claim. *Kucana*, 558 U.S. at 252 (quoting *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993)). This presumption "can only be overcome by 'clear and convincing evidence' of congressional intent to preclude judicial review." *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (citation omitted).

Here, the district court failed to apply this longstanding and well-established principle. Instead of requiring "clear and convincing evidence" that Congress intended to eliminate judicial review for cases outside of removal proceedings, *id.* (citation omitted), the court relied on the cursory analysis of other courts, which failed to adequately analyze whether § 1252(a)(2)(B) applies outside of removal proceedings. Had the district court properly applied the presumption, it would have found what the statutory text and legislative history already confirm: § 1252(a)(2)(B)(i) does not bar judicial review of Ms. Cabello's claim.

2. Constitutional avoidance further supports a reading that § 1252(a)(2)(B) does not bar all judicial review.

A second canon that supports reading the statute to preserve review is that of constitutional avoidance. The Supreme Court has held time and again that

depriving individuals of any meaningful judicial review over legal or constitutional error in agency actions raises serious constitutional questions. *See, e.g.*, *St. Cyr*, 533 U.S. at 300 (remarking that "entirely preclud[ing] review of a pure question of law by any court would give rise to substantial constitutional questions"). Here, Ms. Cabello and other putative class members have *no* alternative forum to seek judicial review of U-visa adjustment denials. *See* p. 8. Interpreting § 1252(a)(2)(B)(i) to extend outside the removal context would thus violate the U.S. Constitution because it would completely preclude judicial review of constitutional claims or questions of law for U-visa adjustment applicants. *See infra* Section III.

Where "an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [courts] are obligated to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 299–300 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Accordingly, the Supreme Court has repeatedly invoked constitutional and judicial review concerns in immigration cases to hold that the INA does not foreclose all meaningful judicial review of legal and constitutional claims in various contexts. *See, e.g.*, *id.* at 314 ("If it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept the INS'[s] reading of § 1252. But the absence of such a forum . . . strongly counsels

against adopting a construction that would raise serious constitutional questions."); *Guerrero-Lasprilla*, 140 S. Ct. at 1070 (holding that the phrase "questions of law" in 8 U.S.C. § 1252(a)(2)(D) includes mixed questions of law and fact, because a contrary reading "would effectively foreclose judicial review of the [agency's] determinations so long as it announced the correct legal standard"); *Reno*, 509 U.S. at 64 (avoiding "an interpretation of § 1255a(f)(1) that would bar [certain] applicants from ever obtaining judicial review of the regulations that rendered them ineligible for legalization"); *McNary*, 498 U.S. at 483–84 (holding that the district court had "jurisdiction to hear respondents' constitutional and statutory challenges to INS procedures," and repeatedly stressing the importance of avoiding a construction that would preclude "meaningful judicial review" of such claims). The Court should do the same here.

3. The rule of absurdity also undermines the lower court's interpretation.

The district court's order is further contrary to the rule that courts should read statutes so as to not produce absurd and irrational results that Congress could not have intended. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *United States v. Lopez*, 998 F.3d 431, 438 (9th Cir. 2021). The ruling below produces exactly that: it empowers federal agencies to disregard the law and the Constitution. In many cases, including this one, the holding below would actually allow the agency to do *whatever it wants without any consequences.*

Indeed, the agency could simply decide to require ten years of continuous presence to adjust a U-visa holder, even though the INA explicitly requires only three. *See* 8 U.S.C. § 1255(m)(1)(A). Yet under the district court's interpretation, no court could ever review that flagrantly unlawful requirement. This case is no different, where USCIS has similarly imposed a requirement that is contrary to the U adjustment statute.

Such a holding has enormous ramifications. Absent the possibility of district court review, applicants who have lived in the United States for years with lawful status—during which time many have married, had children, established careers, and purchased homes—would be wholly deprived of any judicial forum to review their claims. It would be absurd and irrational to conclude that Congress intended USCIS to have free rein to commit legal errors and constitutional violations against such individuals. *See United States v. Nourse*, 34 U.S. 8, 28–29 (1835). Indeed, the district recognized this, remarking that its interpretation results in "a serious depart[ure] from our societal mores and from the principles on which our government is formed." ER-9-n.3.

The availability of judicial review for USCIS's U visa denials further underscores the absurdity of the district court's interpretation. *See Medina Tovar v. Zuchowski*, 982 F.3d 631, 637 (9th Cir. 2020) (en banc) (holding a U visa regulation unlawful and inconsistent with the INA in APA case); *Perez Perez v.*

Wolf, 943 F.3d 853, 858, 866–68 (9th Cir. 2019) (affirming jurisdiction under APA to review USCIS decision denying U visa). If applicants who are denied U visas may seek judicial review, it defies reason that Congress would have sought to deny Ms. Cabello and other putative class members access to judicial review when they later apply for permanent legal status, once they have lived here lawfully for years and established deep ties to this country. Accordingly, this canon too favors a construction that does not bar judicial review of Ms. Cabello's claim.

D. *Patel* Expressly Declined to Extend its Holding to Cases Outside of Removal Proceedings.

In its decision, the district court relied heavily on the Supreme Court's decision in *Patel.* ER-7–9. But *Patel* addressed a challenge to an order of removal, not to USCIS's denial of an affirmative application. 142 S. Ct. at 1620. This is an essential fact, as the Supreme Court explicitly *declined* to decide whether § 1252(a)(2)(B)(i) precludes judicial review of USCIS decisions. *Id.* at 1626. Accordingly, the lower court's reliance on *Patel* is misguided.[10]

Patel involved a husband and wife who were ordered removed after an IJ denied their applications for adjustment of status. They had entered the United

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[10] The court further erred in assuming that the appellate courts to weigh in on § 1252(a)(2)(B) post-*Patel* were in fact addressing the same issue presented in this case. The referenced decisions addressed different contexts where the courts assumed that judicial review remains available once a final order of removal is issued. *See infra* Section I.F.

States unlawfully but subsequently applied for adjustment of status to lawful permanent residence under 8 U.S.C. § 1255(i). *Id.* at 1619. USCIS denied the applications after determining that the husband, who was the primary applicant, was inadmissible for having previously made a false claim to U.S. citizenship. *Id.* at 1620. In removal proceedings the couple had the opportunity to renew their adjustment applications before the IJ. There, Mr. Patel argued he had not made a knowing misrepresentation. *Id.* The IJ concluded that Mr. Patel's testimony was not credible, and accordingly denied the couple's application for adjustment of status and ordered them removed. *Id.* The BIA upheld that decision. *Id.*

The Patels then filed a petition for review seeking judicial review of the final removal orders and arguing that the IJ made a factual error in concluding that Mr. Patel had made a false claim to U.S. citizenship. However, the Eleventh Circuit concluded that it lacked jurisdiction to consider the petitioner's claim because § 1252(a)(2)(B)(i) bars judicial review of "any judgment regarding the granting of relief" under § 1255—the adjustment of status provision. *Id.* at 1620–21.

The Supreme Court granted certification to address a circuit split, but ultimately affirmed the Eleventh Circuit's position that § 1252(a)(2)(B)(i) stripped the court of jurisdiction to review all determinations made by an IJ denying an adjustment application in removal proceedings, unless the issues presented triggered the savings clause at § 1252(a)(2)(D) (preserving judicial review only for

constitutional claims and legal questions). *Id.* at 1622–23. However, *Patel* did not address the applicability of § 1252(a)(2)(B)(i) to affirmative applications filed with USCIS for adjustment of status where the person is not in removal proceedings. Nor did it address adjustment of status under § 1255(m), which is at issue in this case. Unlike the adjustment provisions found at § 1255(a) & (i), applications under § 1255(m) may not be adjudicated in removal proceedings, as the INA allows only DHS—not the Attorney General—to adjudicate such applications. 8 U.S.C. § 1255(m)(1).

Critically, the *Patel* court expressly stated the limits of its decision. The petitioners argued that the Eleventh Circuit's opinion may "have the unintended consequence of precluding all review of USCIS denials of discretionary relief." 142 S. Ct. at 1626. In response, the Court stated that "[t]he reviewability of such decisions is not before us, and we do not decide it." *Id*. Notably, the Court's decision explained that "[s]ubparagraph (B) [of § 1252(a)(2)] bars review of only one facet of *the removal process* (consideration of discretionary relief)." *Id.* at 1625–26 (emphasis added). As explained above, Ms. Cabello's claim does not involve a "facet of the removal process," and thus *Patel* is not controlling.

In fact, the Supreme Court recently exercised jurisdiction over precisely such a case. Like here, in *Sanchez v. Mayorkas*, the Court considered a challenge to a denied adjustment application to address whether individuals with

Temporary Protected Status were "admitted" for purposes of adjustment under § 1255(a) outside the removal context. 141 S. Ct. 1809 (2021). This is important, as "courts, including [the Supreme Court], have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Thus, prior cases where the Supreme Court exercised jurisdiction are instructive. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962) (explaining that while the Court was not bound by prior cases exercising jurisdiction, "neither should [the Court] disregard the implications of an exercise of judicial authority assumed to be proper for [many] years").

What is more*, Patel*'s analysis of § 1252(a)(2)(B)(i) turned in part on § 1252(a)(2)(D), which preserves judicial review of legal and constitutional questions. *See id.* at 1623. This is important, too, because § 1252(a)(2)(D) specifies review of constitutional claims and legal questions is available via the "petition for review" process. 8 U.S.C. § 1252(a)(2)(D). That language further reaffirms that § 1252(a)(2)(B) is limited to removal cases, where judicial review is available through petitions for review to a court of appeals.

Even in speculating that "it is possible that Congress did, in fact, intend to close [the] door" to all judicial review of USCIS decisions, the Court assumed that removal proceedings would provide an avenue for eventual judicial review of

constitutional and legal claims implicated by those decisions. *See* 142 S. Ct. at 1626–27 (surmising that "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" (emphasis added)). In addition, the Court noted that the "parties [did] not address the independent question whether a USCIS denial of adjustment of status made before the initiation of removal proceedings satisfies threshold finality and exhaustion requirements for review." *Id.* at 1626 n.3. That point further reinforces the view that the Court was concerned only with cases where later removal proceedings would allow an individual to raise any legal or constitutional errors from the agency proceedings.[11]

In sum, *Patel* does not compel reading § 1252(a)(2)(B) to apply outside the context of removal proceedings. This is particularly true as to those cases where challenges regarding constitutional claims or questions of law will never have the opportunity to be presented on a petition for review, such as Ms. Cabello's challenge.

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[11] In speculating that "it is possible that Congress did, in fact, intend to close [the] door [to all judicial review]," *Patel*, 142 S. Ct. at 1626, the majority further demonstrated that statute does not speak clearly or unequivocally about the matter, as required to overcome the strong presumption of judicial review of agency decisions, *Kucana*, 558 U.S. at 251–52; *see also Patel*, 142 S. Ct. at 1637 (Gorsuch, J., dissenting) (referring to the majority's suppositions about congressional intent regarding this issue as "a hunch about unexpressed legislative intentions").

E. Ninth Circuit Caselaw Has Not Addressed This Issue in light of *Patel.*

The Ninth Circuit has never squarely addressed the question this case presents. Instead, Ninth Circuit decisions analyzing the reach of § 1252(a)(2)(B) have centered on whether the agency action being challenged is discretionary. Indeed, prior to *Patel*, this Court had long held that § 1252(a)(2)(B) precludes only discretionary agency decisions. *See, e.g.*, *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002) (holding that § 1252(a)(2)(B)(i) "eliminates jurisdiction only over decisions by the BIA that involve the exercise of discretion"). In 2003, the Court applied this general rule in *Spencer Enterprises, Inc. v. United States*, a case involving the denial of an immigrant investor visa. 345 F.3d 683, 687–92 (9th Cir. 2003). The Court found that § 1252(a)(2)(B)(ii) does not preclude review because the authority to issue an immigrant investor visa was not committed to the agency's discretion. *Id.* at 691.

The *Spencer* court did acknowledge the appellants' alternate argument "that [§ 1252(a)(2)(B)] only applies to decisions made in the context of removal proceedings," and briefly examined the split among various courts on this issue. *Id.* at 692. The court expressly declined to address that question, however. *Id.* (noting that limiting the applicability of § 1252(a)(2)(B) to the removal context would be "consistent with our caselaw holding that, in interpreting IIRIRA, 'we should construe narrowly restrictions on jurisdiction'" (citation omitted)). Subsequent

circuit cases noted that the issue remained unresolved, but like in *Spencer*, decided the jurisdictional issue by applying the principle that § 1252(a)(2)(B) does not preclude review of nondiscretionary decisions. *See ANA Int'l, Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004) (noting that "[t]he Ninth Circuit has never squarely decided whether § 1252(a)(2)(B)(ii) in fact applies outside the context of removal proceedings" and declining to resolve the issue); *see also Mamigonian v. Biggs*, 710 F.3d 936, 943–46 (9th Cir. 2013) (suggesting that § 1252(a)(2)(B)(i) may apply outside of the removal context "[u]pon initial examination" but finding it did not reach the particular case at hand after considering, inter alia, precedent, legislative history, and finality of agency decision); *cf. Rubio Hernandez*, 2022 WL 17338961, at *5 (explaining that the issue is "one of first impression without controlling authority").

In other decisions following *Spencer*, the Ninth Circuit has examined whether § 1252(a)(2)(B) precludes review over certain USCIS decisions of immigration benefits, but without any discussion of whether the provision even applies outside of removal proceedings. *See, e.g.*, *Hassan v. Chertoff*, 593 F.3d 785, 788–89 (9th Cir. 2010) (per curiam) (subparagraph (B) precluded USCIS's discretionary determination that applicant poses a threat to national security, but not of his due process claim); *Gebhardt v. Nielsen*, 879 F.3d 980, 984–85 (9th Cir. 2018) (claims challenging USCIS's denial of family visa petitions under the Adam

Walsh Act were reviewable "only insofar as they challenge action beyond the scope of the [DHS] Secretary's 'sole and unreviewable discretion'"); *Poursina v. USCIS*, 936 F.3d 868, 871–72 (9th Cir. 2019) (subparagraph (B) precluded review of USCIS's discretionary denial of national interest waiver for employment visa applicant); *Perez Perez*, 943 F.3d at 867 (challenge to U visa denial was reviewable notwithstanding § 1252(a)(2)(B)(ii) because the determination was not wholly discretionary and the statute established meaningful standards for review); *Mejia Vega v. USCIS*, 65 F.4th 469, 471–72 (9th Cir. 2023) (subparagraph (B)(ii) precluded judicial review of USCIS's discretionary denial of U visa inadmissibility waiver).

In each of the above cases, the Ninth Circuit's jurisdictional analysis was based on the premise that the subparagraph did not bar review of non-discretionary determinations. But that holding has been overturned, at least insofar as it applies to § 1252(a)(2)(B)(i). *See De La Rosa-Rodriguez v. Garland*, 49 F. 4th 1282, 1287 (9th Cir. 2022) (explaining that *Patel* rejected this circuit's "historic approach" by holding that § 1252(a)(2)(B) precludes review of "any judgment *relating to* the granting of relief" under the statute), *vacated and reh'g en banc granted*, 62 F.4th 1232 (9th Cir. 2023) (Mem.). Hence, prior to *Patel*, this Court never confronted the serious constitutional concerns that would arise if all judicial review of constitutional claims and legal questions were foreclosed. *See infra* Section III. To

the contrary, the cases assumed that § 1252(a)(2)(B)(i) did not bar review of constitutional claims or legal questions, regardless of whether the challenged agency action occurred within or outside of the removal context.

Accordingly, this Court is "free to address the issue." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); *see also id.* ("[S]ince we have never squarely addressed the issue, and have at most assumed the applicability of the [standard in question], we are free to address the issue [of its applicability] on the merits."); *see also, e.g.*, *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *Amalgamated Transit Union Loc. 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 n.5 (9th Cir. 2006) (observing the court was not bound by earlier decision, which had "assumed without discussion" the answer to the matter at issue).

F. The Appellate Cases the District Court Relied On Are Distinguishable.

In concluding it lacked jurisdiction over Ms. Cabello's suit, the district court relied on the fact that panels in the D.C., Seventh, and Eleventh Circuits had found that § 1252(a)(2)(B)(i) deprives district courts of jurisdiction over challenges to USCIS decisions denying adjustment of status applications. ER-8. However, the analysis in all three of those cases is unpersuasive. Each case fails to follow basic principles of statutory construction by (1) reading the statutory language in

isolation, (2) assuming the availability of some form of judicial review, and (3) failing to consider that the "regardless" clause refers to USCIS decisions occurring within the context of removal proceedings.

First, contrary to the Supreme Court's admonition that "statutory language cannot be construed in a vacuum," all three decisions looked to the text of subparagraph (B) "in isolation" when they determined it applied to USCIS decisions occurring completely outside the removal context. *Davis*, 489 U.S. at 809. In all three cases, the courts simply assumed without *any* analysis of § 1252(a)(2)(B)'s neighboring provisions that the subparagraph applied to both cases in and outside of the removal context, purporting to rely on a reading of its "plain" text alone. *See Britkovyy v. Mayorkas*, 60 F.4th 1024, 1027–28 (7th Cir. 2023) (so holding based on the "plain text of § 1252(a)(2)(B)(i)"); *see also id.* at 1029–31 (similar); *Abuzeid v. Mayorkas*, 62 F.4th 578, 583 (D.C. Cir. 2023) (discussing "straightforward application of § 1252(a)(2)(B)(i)"); *id.* at 584 (referring to the "plain meaning of the 'regardless' clause"); *id.* at 585 (characterizing as "plain and unequivocal [the] language in § 1252(a)(2)(B)(i)"); *Doe v. Sec'y, U.S. Dep't of Homeland Sec.*, No. 22-11818, 2023 WL 2564856, at *2 (11th Cir. Mar. 20, 2023) (grounding decision in the "plain language" of the provision). But as the Supreme Court has observed, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific

context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also Gundy*, 139 S. Ct. at 2123 (explaining that the text of any particular provision must be "considered alongside its context, purpose, and history"). The courts' failure to analyze subparagraph (B)'s statutory context is a fundamental error that severely undermines their holdings.

Second, all three cases either explicitly or implicitly suggested some judicial review remained available for the adjustment applicant's claims. In *Britkovyy*, the court noted that judicial review was not entirely foreclosed, declaring that "this case will not preclude [the plaintiff] from receiving judicial review of the IJ's decision," even though immigration courts lack jurisdiction over adjustment applications filed by "arriving" noncitizens. 60 F.4th at 1032.[12] For its part, the D.C. Circuit incorrectly assumed that judicial review would eventually be available via a petition for review under subparagraph (D). *See Abuzeid*, 62 F.4th at 586 (relying on language from *Patel* that judicial review was foreclosed by subparagraph (B) "unless and until removal proceedings are initiated" (citation omitted)).[13] The Eleventh Circuit similarly implied that judicial review remains

[12] *Britkovyy* is also readily distinguishable from the instant case because it involved a person in the midst of removal proceedings. 60 F.4th at 1026, 1032.

[13] The court also noted that Mr. Abuzeid "still has options that might allow him to receive permanent-resident status." 62 F.4th at 586 n.7.

available for legal and constitutional questions. *See Doe*, 2023 WL 2564856, at *3. These courts therefore did not examine the constitutional concerns presented by their interpretation in the context of an individual such as Ms. Cabello and the class she seeks to represent—individuals who can *never* obtain judicial review of their U-based adjustment applications in any forum.

Third, none of the opinions address the obvious explanation as to the meaning of the "regardless" language: that it was designed to clarify the jurisdictional bar extended to USCIS determinations occurring within the context of removal proceedings that affect whether the noncitizen in those proceedings will receive a final removal order. *See generally Britkovyy*, 60 F.4th 1024; *Abuzeid*, 62 F.4th 578; *Doe*, 2023 WL 2564856. Notably, the D.C. Circuit found that the argument that subparagraph (B) was limited only to the removal context "create[d] an untenable contradiction" with the "regardless" language. *Abuzeid*, 62 F.4th at 585.[14] But that "contradiction" disappears had the court understood that the "regardless" language refers to USCIS decisions occurring within the removal context, a reading that harmonizes the various provisions of § 1252 instead of creating a conflict.

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[14] The court's failure to appreciate the merit of this argument may be due to the appellants' failure to adequately address it in their opening brief. *See* 62 F.4th at 584. This led the D.C. Circuit to consider the argument forfeited. *Id.*

The district court thus erred in relying on these cases, whose reasoning ignores Supreme Court guidance on how to conduct statutory analysis and also failed to address the bulk of Ms. Cabello's arguments on the topic.

II. The District Court's Interpretation Frustrates Congress's Intent to Protect Crime Survivors.

Not only does the statute's text permit district court review here, but any conclusion to the contrary would frustrate Congress's express intent to protect the crime survivors the U visa statute benefits. As a result, 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.

As noted above, the INA assigns the adjudication of U-based adjustment applications to DHS by statute (rather than to EOIR in the removal process). *See* 8 U.S.C. § 1255(m); *see also* 8 C.F.R. § 245.24(k). Originally, the INA assigned this duty to the Attorney General when the U visa was created in 2000. *See* VTVPA, Pub. L. No. 106-386, § 1513(f), 114 Stat at 1536. As a result, at the time, U visa-related adjustment claims could have been raised in the PFR process. But in 2006—after Congress enacted the REAL ID Act to preserve judicial review of legal claims that a noncitizen might raise to challenge their removal—Congress transferred the U adjustment functions to DHS. *See* Violence Against Women Act (VAWA) of 2005, Pub. L. No. 109-162, § 803(b), 119 Stat. 2960, 3055 (2006).

This history further underscores that § 1252(a)(2)(B)(i) cannot be read to eliminate judicial review here. Congress created a temporary immigration status that would provide a pathway to lawful permanent resident status for this favored, vulnerable class of noncitizens. But according to the district court's interpretation of § 1252, Congress's 2006 decision to task DHS with adjudicating U-based adjustment applications entirely eliminated judicial review of those applications. That argument runs counter to what Congress actually did and repeatedly said it was doing when it created the U visa framework and later amended the statute. Specifically, rather than *penalize* U visa holders—which is what Defendants claim Congress was doing—Congress explained that it intended to provide these crime survivors *preferential* treatment. This Court has recognized this point before, observing that the VAWA law—where the U visa scheme is embedded—is "a generous enactment, intended to ameliorate the impact of harsh provisions of immigration law on abused women." *Lopez-Birrueta v. Holder*, 633 F.3d 1211, 1215 (9th Cir. 2011) (citation omitted).

The 2006 legislation assigning DHS to adjudicate U-based adjustment applications reemphasized Congress's intent to both protect noncitizen crime victims and strengthen law enforcement agencies' ability to investigate and prosecute serious crimes. Congress, for example, expressed its "sense" that officials "should particularly consider exercising" authority to consent to

noncitizens' reapplication for admission after deportation in cases involving U visa applicants. VAWA 2005 § 813(b)(2), 119 Stat. at 3058. Likewise, Congress responded to the agency's previous failure to promulgate regulations to implement the 2000 legislation, including as to U-based adjustment of status applications, by requiring the agency to timely issue regulations. *Id.* § 828, 119 Stat. at 3066.

Notably, as part of the 2006 legislation, Congress also transferred to DHS the task of adjudicating the "T visa," an immigration benefit enacted alongside the U visa in 2000 for victims of human trafficking—"a contemporary manifestation of slavery whose victims are predominantly women and children." VTVPA § 102(a), 114 Stat. at 1466; *see also* VAWA 2005 § 803, 119 Stat. at 3054–55 (codified in part at 8 U.S.C. § 1255(*l*)). And similar to the U visa, Congress created the T visa to afford preferential treatment for qualifying noncitizens, observing that "[e]xisting laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves." VTVPA § 102(b)(17), 114 Stat. at 1468. But under the district court's interpretation, T visa holders applying for adjustment of status would face the same inexplicable dilemma of being deprived of all judicial review of agency decisions denying their applications.

The legislative history of the 2006 amendments further demonstrates that, in assigning their adjustment applications to USCIS, Congress was seeking to help

survivors of violent crimes. For example, the House committee report "recommend[ed] that [an existing,] specially trained unit [for VAWA, T, and U cases] . . . process the full range of adjudications, adjustments, and employment authorizations related to VAWA cases," including for T and U visa holders. H.R. Rep. No. 109-233, at 114 (2005) (quoting 62 Fed. Reg. 16607–08). As with the other protective provisions it enacted, Congress's choice to send both U- and T-based adjustment applications to USCIS rather than the immigration courts was an effort to help this particularly vulnerable population by providing for "sensitive and expeditious" processing of their adjustment applications. *Id.*

In sum, the 2006 amendments to the U visa statute reflect Congress's effort to protect persons eligible for U visas, like Ms. Cabello. To read § 1252(a)(2)(B)(i) as depriving these individuals of any judicial review over constitutional and legal challenges to USCIS's adjudication of their applications would be wholly contrary to Congress's stated intent.

III. Interpreting the Statute to Bar All Judicial Review Violates the Constitution.

The district court's interpretation reading § 1252 to bar all judicial review of Ms. Cabello's legal claim violates the separation of powers, the Due Process Clause of the Fifth Amendment, and the Suspension Clause in Article I, Section 9 of the Constitution. Defendants' brazen disregard for the U-based adjustment statute—and their assertion that no court may *ever* review Ms. Cabello's claim—

means that Ms. Cabello and others may be separated from their families, lose work authorization, and be deported from the life they have established for years without any court reviewing the clear question of law in this case. That position threatens basic rule of law principles and the very foundations of the constitutional order in this country. Thus, should the Court determine the INA bars judicial review here, it should declare § 1252(a)(2)(B) unconstitutional as applied to Ms. Cabello and putative class members.

A. Barring All Judicial Review of Questions of Law Violates the Separation of Powers.

First, barring all judicial review upsets the basic structure of the constitutional order. The "judicial power" in Article III, Section 1 of the Constitution includes, at a minimum, the power to "to say what the law is." *Marbury*, 5 U.S. at 177. But here, under the district court's interpretation, Congress handed to the Executive the power both to "execute[]" *and* "construe[] the law." *Wayman v. Southard*, 23 U.S. 1, 46 (1825). Doing so threatens the rule of law, as the Framers explained when urging the states to ratify the Constitution: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison). Thus, Article III guaranteed that federal courts would act as an "essential safeguard" by exercising "its proper and peculiar province": "[t]he

interpretation of the laws." The Federalist No. 78 (Alexander Hamilton); *cf. Patel*, 142 S. Ct. at 1637 (Gorsuch, J., dissenting) (criticizing the majority for interpretation that would "turn an agency once accountable to the rule of law into an authority unto itself").

Under the district court's interpretation of § 1252(a)(2)(B), Congress eliminated these fundamental constitutional safeguards. Yet when Congress greatly expanded the administrative state nearly a century ago in the New Deal, the Supreme Court repeatedly looked to the availability of judicial review over agency actions to uphold the administrative schemes Congress devised. For example, in *NLRB v. Jones & Laughlin Steel Corp.*, the Court explained that the National Labor Relations Act did "not offend against the constitutional requirements governing the creation and action of administrative bodies," largely because NLRB decisions are "subject to review by the designated court." 301 U.S. 1, 46–47 (1937). Notably, the Court observed that such review included "all questions of the jurisdiction of the Board and the regularity of its proceedings, [and] all questions of constitutional right or statutory authority." *Id.* at 47.

A few years later, the Court upheld the authority of the Interstate Commerce Commission (ICC) where it exercised its powers to reorganize a bankrupt railway company. *Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U.S. 163 (1943). A trustee of the company claimed that the ICC's structure violated the

Fifth Amendment and Article III "by depriving the courts of power to determine whether the Commission's decision was contrary to law." *Id.* at 168. But the Court rejected that argument because the governing Act "leaves the [federal district] court free to decide upon the basis of the Commission's report all *questions of law*." *Id.* at 170 (emphasis added).

Against this backdrop, and in light of Congress's efforts to ensure review of agency action through the APA, *see, e.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48–51 (1950), the Supreme Court constructed the modern presumptions against reading statutes to deprive federal courts of jurisdiction to review agency action, *see, e.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 136, 149 (1977); *Barlow v. Collins*, 397 U.S. 159, 166–67 (1970). Notably, cases like *Abbott*, *Barlow*, and others focus on statutory questions, as they construe the statute in question *not* to preclude judicial review. *See Abbott*, 387 U.S. at 139–41; *see also Barlow*, 397 U.S. at 165–67.

The separation of powers concerns underlying those cases and the New Deal era cases apply with equal force in the immigration context. Evincing those concerns, the Supreme Court has repeatedly applied the canon that requires a clear statement to eliminate judicial review in immigration cases. For example, in *McNary*, the Court rejected the government's argument that no judicial review was

available of the noncitizens' claims that the INS "routinely and persistently violated the Constitution and statutes in processing [Special Agricultural Worker (SAW) program] applications." 498 U.S. at 491. The Court recognized that denying jurisdiction to those claims would result in "the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* at 497. And for that reason, it employed the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action" to ensure review of those claims was available. *Id.* at 496; *see also, e.g.*, *Reno*, 509 U.S. at 63–64 (employing canon to avoid interpretation that would bar certain immigrants whose claims had been "front-desked" from obtaining judicial review of lawfulness of INS regulation); *St. Cyr*, 533 U.S. at 298; *Guerrero-Lasprilla*, 140 S. Ct. at 1069 ("We have consistently applied the presumption of reviewability to immigration statutes." (internal quotation marks omitted)).

In sum, unless this Court concludes that § 1252(a)(2)(B)(i) preserves judicial review or declares it unconstitutional, this case will "ero[de] . . . the central powers of the judiciary" by depriving it *entirely* of the ability to interpret certain federal laws. *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc). Such deprivation constitutes "an improper interference with or delegation of the independent power of a branch" that "prevents or substantially impairs performance by the branch of its essential role in

the constitutional system." *Id.* (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)). This is especially so in light of the additional constitutional concerns outlined below.

B. Barring All Judicial Review Violates the Due Process Clause.

Second, the elimination of all judicial review in this context violates the Due Process Clause. The district court's interpretation would foreclose any judicial review at all for Ms. Cabello and the proposed class of their legal claim, regardless of any subsequent removal proceedings. Yet due process demands that noncitizens with significant ties to the United States, like Ms. Cabello and all class members, receive a judicial hearing and consideration of their legal claims when an agency takes action affecting their life and liberty.

"[T]he Due Process Clause, like its forebear in the Magna Carta . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)). "By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions." *Id.* As the Supreme Court has explained, what process is due an individual depends on the circumstances that a case or situation presents. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

As an initial matter, Ms. Cabello and members of the proposed class have due process rights. All of them are noncitizens lawfully present in the United States pursuant to U status. Indeed, the Constitution provides due process protections to "all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("The Fifth Amendment . . . protects every one of the [noncitizen] persons . . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."). That principle is particularly true here, where Ms. Cabello and members of the proposed class are among those who have "gain[ed] admission to [the United States]" and have begun "to develop the ties that go with permanent residence." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

These due process rights guarantee, at a minimum, judicial review of legal questions. In particular, the interests at stake in this case are those of the highest order. Ms. Cabello and other putative class members face permanent loss of immigration status, removal from their homes, families, and entire lives because Defendants refuse to adjust their status based on an erroneous interpretation of the INA. ER-25–26 ¶¶ 14–16 (describing potential separation from family members and loss of "whole life" in the United States); ER-12 ¶ 8 (facing similar losses, as

well as possibility of further victimization by former abuser); ER-21–22, ¶¶ 10–11 (anticipating inability to raise young U.S.-citizen children, including those with special needs); ER-15–16, ¶ 8 (similar). Such threatened removal "involves issues basic to human liberty and happiness and, in the present upheavals in lands to which [noncitizens] may be returned, perhaps to life itself." *Wong Yang Sung*, 339 U.S. at 50–51. Ms. Cabello "stands to lose the right 'to stay and live and work in this land of freedom,' [and] . . . . she may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual." *Plasencia*, 459 U.S. at 34. In such situations, where agency action threatens to cause a noncitizen to lose "all that makes life worth living," *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (citation omitted), due process demands "the essential standards of fairness," *id.* at 154.

In light of the significant interests here, those "essential standards of fairness," *Bridges*, 326 U.S. at 154, guarantee that Ms. Cabello must have the "opportunity to present her case effectively," *Plasencia*, 459 U.S. at 35. As the Supreme Court has explained, "[t]he theme that due process of law signifies a right to be heard in one's defense[] has continually recurred" in the Court's case law on due process. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (internal quotation marks omitted) (citing to *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876), *Baldwin v. Hale*, 1 Wall. 223 (1864), and *Hovey v. Elliott*, 167 U.S. 409 (1897)). "[T]here can

be no doubt that at a minimum the[] [words of the Due Process Clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

In the specific context of this case, those principles guarantee judicial review. For example, in *Boddie*, the Court held that similarly weighty interests—those regarding marriage and family—meant that due process required access to courts. 401 U.S. at 374. In the immigration context, these same principles have led the Supreme Court to interpret statutes not to foreclose judicial review. Thus, in *Heikkila v. Barber*, the Court held that while the Immigration Act of 1917 "preclude[ed] judicial intervention in deportation cases," federal courts could still review such cases "insofar as it was required by the Constitution." 345 U.S. 229, 234–35 (1953). At the time, that review was accomplished via habeas corpus, *see id.*, which, at a minimum, guarantees review of legal questions like the one Ms. Cabello presents in this case. *See Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (holding that the Suspension Clause entitles a detained person "to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law" before an Article III court (citation omitted)). The Supreme Court reiterated this point in *St. Cyr*, observing that "under the pre–1952 regime which provided only what *Heikkila* termed the constitutional

minimum of review. . . . habeas was also used to review legal questions . . . ." 533 U.S. at 307 n.30.

Since *Heikkila*, the Supreme Court has repeatedly reiterated that conclusion. In *St. Cyr*, the Court reaffirmed that "some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" 533 U.S. at 300 (quoting *Heikkila*, 345 U.S. at 235). With that principle in mind, the Court held that the INA's judicial review provisions at issue in that case did not foreclose review of legal questions raised in challenges to removal orders through petitions for writs of habeas corpus. *Id.* at 300–14. And as noted above, in *McNary*, the Court interpreted the INA not to foreclose review in a situation similar to this one, where the INS "routinely and persistently violated the Constitution and statutes in processing SAW applications." 498 U.S. at 491. In so holding, the Court noted that concluding otherwise would result in "the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* at 497; *see also Reno*, 509 U.S. at 64 (similar). And most recently, the Court looked to the principles underlying these cases to hold that judicial review includes so-called "mixed" questions of law and fact. *See Guerrero-Lasprilla*, 140 S. Ct. at 1068–70.

By contrast, no judicial review whatsoever remains for U-based adjustment applications under the district court's reading of § 1252(a)(2)(B)(i). Because USCIS has exclusive jurisdiction over such applications, and because a court of

appeals reviews only issues raised in a removal case, no court can ever review the legal question at issue here. Due process requires more. Ms. Cabello has lived in this country for decades, and her family, friends, and community live here. In light of these significant interests, due process requires an opportunity for her to present questions of law regarding her legal status in this country to an Article III court.

C. Barring All Judicial Review Violates the Suspension Clause.

Finally, for similar reasons, the district court's interpretation violates the Suspension Clause. No judicial review of a U-based adjustment application exists in removal proceedings. Yet the Constitution—and specifically, the Suspension Clause—requires otherwise. In *St. Cyr*, the Supreme Court held that district courts retained jurisdiction to consider challenges to removal orders for certain noncitizens because the INA did not explicitly reference 28 U.S.C. § 2241 in its section limiting judicial review. 533 U.S. at 300–14. In so holding, the Court explained that interpreting the INA to "entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions." *Id.* at 300. The Court so reasoned because the writ of habeas corpus—and by extension, the Suspension Clause—has since the Founding "encompassed [challenges to] detentions based on errors of law, including the erroneous application or interpretation of statutes." *Id.* at 302. The Supreme Court explained that at least for noncitizens like those in *St. Cyr* and *Heikkila*, such review was "required by the

Constitution." 533 U.S. at 304 (quoting *Heikkila*, 345 U.S. at 235). The Court also explained that depriving such review "would represent a departure from historical practice," as "[t]he writ of habeas corpus has always been available to review the legality of Executive detention." *Id.* at 305.

The Supreme Court's decision in *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), does not compel a different conclusion as Ms. Cabello and the putative class are readily distinguished from the petitioner in *Thuraissigiam*. All of them are people who have lived in the United States for many years—Ms. Cabello for over thirty years, with almost ten years in lawful status—developing significant ties to this country. *Compare* 533 U.S. at 293 (explaining that St. Cyr "was admitted to the United States as a lawful permanent resident in 1986"), *and supra* pp. 8–9 (summarizing Ms. Cabello's decades-long life in this country, her deep ties to family and community, and her U status), *with Thuraissigiam*, 140 S. Ct. at 1967. Accordingly, they are precisely the type of individuals to whom the Constitution affords minimum guarantees of judicial review prior to taking away their "life[] [and] liberty" in this country. U.S. Const. amend. V.

In sum, several provisions in the Constitution, including its separation of powers, the Fifth Amendment's Due Process Clause, and the Suspension Clause demonstrate that it requires judicial review in this case. Should the Court hold that

§ 1252(a)(2)(B) deprived the district court of jurisdiction, then it should conclude that the statute violates the Constitution as applied to Ms. Cabello and putative class members.

CONCLUSION

For the foregoing reasons, the Court should grant the appeal, reverse the district court, and hold that jurisdiction exists in this case to consider Ms. Cabello's claim.

Date: June 16, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Leila Kang, am an attorney for Appellant. I hereby certify that this brief contains 13,956 words according to the word count feature of Microsoft Word, excluding the items exempted by Federal Rule of Appellate Procedure 32(f), and thus complies with the word limit set forth by Ninth Circuit Rule 32-1. The brief's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

Signature: s/ Leila Kang ________________ Date: June 16, 2023
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