The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Felix RUBIO HERNANDEZ,

Plaintiff,

v.

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

Defendants.

Case No. 2:22-cv-00904-MJP

RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Noting Date: September 30, 2022

Oral Argument Requested

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INTRODUCTION

Defendants advance a remarkable position in moving to dismiss this case, namely, that U.S. Citizenship and Immigration Services (USCIS) has unfettered power to deny Plaintiff Felix Rubio Hernandez's (Mr. Rubio) application for adjustment of status for *any* reason. *See* Dkt. 7 at 1 ("[D]istrict courts do not have jurisdiction to review *any decision* concerning whether to grant relief under 8 U.S.C. § 1255."); *id.* at 9 ("[N]o aspect of a USCIS decision to deny adjustment of status pursuant to § 1255(m)(1) is judicially reviewable."). According to Defendants, even where the agency applies the incorrect legal standard, blatantly misstates the law, or patently tramples on the applicant's constitutional rights, this Court—nor any other court—has authority to review its decision. This is contrary to the statute, contrary to the strong presumption of judicial review for administrative actions, and contrary to the rule of law that underpins our democracy.

Defendants rely on 8 U.S.C. § 1252(a)(2)(B) to advance this argument. But that subsection—which is part of a section in the Immigration and Nationality Act (INA) entitled "Judicial review of orders of removal"—governs only cases in removal proceedings. 8 U.S.C. § 1252. Nor does *Patel v. Garland* require this Court to foreclose *all* judicial review of USCIS decisions, as the Supreme Court expressly limited its holding to cases in removal proceedings. *See* 142 S. Ct. 1614, 1626 (2022). And even if § 1252(a)(2)(B)(i) is read to apply to cases outside of removal proceedings, the statute should be construed to allow judicial review of legal and constitutional questions. Any contrary reading would raise serious constitutional concerns. Indeed, § 1252 includes language that reflects Congress's intent to preserve courts' jurisdiction to address constitutional claims and questions of law. *See* 8 U.S.C. § 1252(a)(2)(D).

Defendants also plainly misstate the law when asserting that "courts in the Ninth Circuit have held that decisions to adjust status, including those under § 1255(m), are committed to

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agency discretion and beyond judicial review." Dkt. 7 at 1. To the contrary, the Ninth Circuit has confirmed time and again that courts retain jurisdiction to review constitutional claims and questions of law, including mixed questions of law, even in the context of discretionary relief. Indeed, the Ninth Circuit has made clear USCIS has no discretion to violate the law, *Hernandez v. Ashcroft*, 345 F.3d 824, 846 (9th Cir. 2003), and the Court of Appeals has repeatedly reaffirmed that an agency's reliance on improper evidence is the type of legal question that is always subject to review, *see, e.g.*, *Zamorano v. Garland*, 2 F.4th 1213, 1221 (9th Cir. 2021). In this case, the agency has violated the law and relied on improper evidence in denying Mr. Rubio's application.

Finally, Defendants misstate the relief requested. Mr. Rubio does not ask this Court to "replace USCIS's judgment with its own and grant his application." Dkt. 7 at 1. Rather, Mr. Rubio asks this Court to set aside the unlawful action, and to instruct the agency to re-adjudicate his application without the glaring legal errors that undermine the initial determination. As the victim of a violent crime who suffered substantial harm, Mr. Rubio has already been granted a U visa based on his assistance to authorities in the investigation and prosecution of that crime. This Court should now order the agency to re-adjudicate his application for adjustment of status in accordance with the law—the next step in his path to obtaining lawful permanent residence—instead of reneging on the ameliorative protection Congress provided to encourage such victims of violent crimes to come forward and work with law enforcement officials.

ARGUMENT

I. 8 U.S.C. § 1252(a)(2)(B)(i) Does Not Bar Review of Cases Outside of Removal Proceedings.

Defendants first argue that 8 U.S.C. § 1252(a)(2)(B)(i) deprives this Court of jurisdiction to review any USCIS decision concerning the "granting of relief" under 8 U.S.C. § 1255. Dkt. 7

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at 6–9. But § 1252 only concerns judicial review of removal orders and agency determinations made on cases in removal proceedings, a fact made clear not only by the section's title but also by its content and context. The clause in (a)(2)(B)(i) must thus be read in that context.

Defendants' argument that § 1252(a)(2)(B)(i) strips this Court of jurisdiction to review Mr. Rubio's claims requires the Court to ignore "a fundamental canon of statutory construction": "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also Patel*, 142 S. Ct. at 1622 (looking to "§ 1252(a)(2)(B)(i)'s text and context" to ascertain the meaning of "judgment" in that subsection). A court should not "examine[] [the text] in isolation," as "statutory language cannot be construed in a vacuum." *Davis*, 489 U.S. at 809.

Here, the context of § 1252(a)(2)(B) confirms its scope. First, the section within which this subparagraph is found is entitled "Judicial review of *orders of removal*." 8 U.S.C. § 1252 (emphasis added). The section then outlines the availability and scope of judicial review for various types of removal orders. Paragraph (a)(1) concerns "[g]eneral orders of removal" in proceedings before immigration judges. 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, the language of § 1252(a)(2)(D) expressly authorizes judicial review of "constitutional claims or questions of law raised upon a petition for review," notwithstanding the limitations outlined in, inter alia, "subparagraph (B) or (C)." 8 U.S.C. § 1252(a)(2)(D). Paragraph (a)(5) clarifies that "a petition for review filed . . . in

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accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter." *Id.* § 1252(a)(5); *see also id.* §1252(a)(3)–(4) (further specifying the judicial review authority for specific claims raised in removal proceedings).

Subsection (b) of § 1252 only further underscores that the scope of the section is limited to the removal context. It is entitled "Requirements for review of orders of removal," and it outlines the procedure for appealing a final order of removal via a petition for review. *See, e.g.*, *id.* § 1252(b)(2) (explaining that the proper venue for a petition for review is "the court of appeals for the judicial 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) (noting that the court of appeals must "decide the petition only on the administrative record on which the order of removal is based"). And as the Ninth Circuit 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 "Review 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 orders for persons subject to detention and removal. *Id.* § 1252(f). And finally, subsection (g) is about jurisdiction over the Attorney General's decision "to commence [removal] proceedings, adjudicate [removal] cases, or execute removal orders . . . ." *Id.* § 1252(g).

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In sum, the language of § 1252 makes clear the section is directed to judicial review of removal orders and determinations underlying those removal orders. When "read in th[is] context and with a view to their place in the overall statutory scheme," § 1252(a)(2)(B)'s restrictions on judicial review, too, are clearly intended to be limited to the removal context. *Davis*, 489 U.S. at 809; *see also, e.g.*, *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)).

To assert that § 1252(a)(2)(B)(i) applies more broadly, Defendants point to 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 also* Dkt. 7 at 7. But Defendants take this language out of its context, ignoring that it is discussing cases *in removal proceedings*. This language refers to those decisions that are not made by an immigration judge, yet 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 laid out in § 1252 after a final order of removal is issued. 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-918 U visa petitions (for victims of violent crimes), I-914 T visa petitions (for victims of trafficking), and I-751 petitions to remove conditions of residence. If granted, any of these applications will result either in the termination of removal proceedings or an opportunity for the

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approved beneficiary to seek adjustment of status before the immigration court. *See, e.g.*, *Malilia v. Holder*, 632 F.3d 598, 605–07 (9th Cir. 2011) (noting how USCIS plays a role in I-130 adjustment applications for individuals in removal proceedings); *see also* USCIS, Policy Manual, vol. 1, pt. E, ch. 3 (last updated Sept. 8, 2022) (discussing "coordination" between ICE and USCIS "in cases involving removal proceedings" for individuals with pending applications or petitions with USCIS); *id.*, vol. 3, pt. B, ch. 9 ("DHS may agree to the request of a person who is in [removal] proceedings . . . to file with the immigration judge or the Board of Immigration Appeals (BIA) a joint motion to administratively close or terminate proceedings without prejudice . . . while USCIS adjudicates an application for T nonimmigrant status.").[1] Even though those USCIS decisions are not "made in removal proceedings," 8 U.S.C. § 1252(a)(2)(B), they directly affect the "granting of relief" from removal, *id.* § 1252(a)(2)(B)(i).[2]

Section 1252(a)(2)(B)(i) makes clear that applicants may not independently seek judicial review of *those* determinations outside of the petition for review process permitted by § 1252(a). Defendants' argument that the phrase "regardless of whether [the action in question] is made in removal proceedings" automatically and necessarily "foreclose[s] review" therefore rests on a fundamental misunderstanding of how removal proceedings work. Dkt. 7 at 7 (citation omitted). This interpretation also isolates the phrase from its context. When read in context, the statutory language confirms the bar to judicial review found in § 1252(a)(2)(B)(i) does not apply to the unlawful agency action Mr. Rubio challenges: USCIS's legal errors and arbitrary and capricious

[1] The USCIS policy manual is available at https://www.uscis.gov/policy-manual.

[2] In contrast, individuals who are not in removal proceedings are not seeking "relief" from removal; their affirmative applications to USCIS are for immigration *benefits* and therefore do not constitute 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) (last updated Aug. 25, 2022), https://www.justice.gov/eoir/reference-materials/ic/chapter-1/4 ("DHS . . . adjudicates visa petitions and applications for immigration benefits.") *and* 8 C.F.R. § 1.2 ("Application means benefit request. . . . Benefit request means any application, petition, motion, appeal, or other request relating to an immigration or naturalization benefit . . . .").

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reasoning in deciding his adjustment of status application *outside* of the removal context. Mr. Rubio has not been placed in removal proceedings, and the agency adjudication at issue here falls outside the statutory judicial review scheme for removal cases laid out in § 1252(a).

II. *Patel* Did Not Hold § 1252(a)(2)(B)(i) Applies Outside the Removal Context.

Defendants' reliance on *Patel* is misguided. *See* Dkt. 7 at 6–7. As Defendants themselves acknowledge, *see id.* at 7, *Patel* addressed a challenge to an order of removal, not to USCIS's denial of an affirmative application, *see* 142 S. Ct. at 1620. The Supreme Court, moreover, expressly *declined* to hold that § 1252(a)(2)(B)(i) extends to USCIS decisions concerning individuals who are not in removal proceedings. *See id.* at 1626 ("The reviewability of [USCIS] decisions is not before us, and we do not decide it."). If anything, the Court's decision explicitly noted that "[s]ubparagraph (B) [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 USCIS's unlawful denial of Mr. Rubio's affirmative adjustment of status application was by no means a "facet of the removal process," § 1252(a)(2)(B) does not bar this Court's review thereof.

What is more, part of the Court's analysis of § 1252(a)(2)(B) in *Patel* turned on the authorization of judicial review found in § 1252(a)(2)(D), which preserves review of legal and constitutional questions. *See Patel*, 142 S. Ct. at 1623 ("[I]f Congress made such questions [as those in § 1252(a)(2)(D)] an exception, it must have left something within the rule [of § 1252(a)(2)(B)]. The major remaining category is questions of fact."). Moreover, since paragraph (a)(2)(D) is an exception to the jurisdictional bar in § 1252(a)(2)(B), its specification that review of legal and constitutional claims is available via the petition for review process laid out in that same section reaffirms that § 1252(a)(2)(B) is limited to removal cases.

However, to the extent § 1252(a)(2)(B) is read to apply to persons not in removal proceedings, § 1252(a)(2)(D) must similarly be read to permit judicial review of constitutional

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claims and questions of law for cases outside of removal proceedings. As the Supreme Court recognized in *Patel*, "Congress added [§ 1252(a)(2)(D)] after [the Court] suggested in [*INS v. St. Cyr*, 533 U.S. 289 (2001)] that barring review of all legal questions in removal cases could raise a constitutional concern." 142 S. Ct. at 1623. Should § 1252(a)(2)(B) be found to apply outside the removal context, the same constitutional concerns would be implicated here, as that subparagraph would otherwise bar review of all legal and constitutional questions relating to USCIS's adjudications of affirmative applications for discretionary immigration benefits. That would leave thousands of individuals—including Mr. Rubio—without *any* avenue for challenging plainly unlawful agency action. *See* Part IV, *infra* (discussing these concerns).

Defendants assert that the *Patel* majority "indicat[ed] Congress intended to foreclose judicial review beyond removal proceedings." Dkt. 7 at 7. However, not only did the majority expressly decline to reach the issue, but the opinion also merely speculates that "it is possible that Congress did, in fact, intend to close that door." *Patel*, 142 S. Ct. at 1626; *see also id*. at 1637 (Gorsuch, J., dissenting) (referring to the majority's suppositions about congressional intent regarding this issue as "a hunch about unexpressed legislative intentions").[3]

Notably, accepting Defendants' position would fly in the face of "a familiar principle of statutory construction: the presumption favoring judicial review of administrative action." *Kucana*, 558 U.S. at 251. Under this presumption, "[w]hen a statute is 'reasonably susceptible to divergent interpretation, [courts must] adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to

[3] Because the issue was not before the Court, it was never fully briefed, and the Court did not have occasion to adequately consider the "serious constitutional problems" that would arise if judicial review of even legal and constitutional claims were entirely barred. *St. Cyr*, 533 U.S. at 299–300. Moreover, the Court affirmed the statutory phrase "judgment regarding the granting of relief" "constrain[s] the provision from sweeping in judgments that have nothing to do with that subject." *Patel*, 142 S. Ct. at 1625.

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judicial review.'" *Id.* (citation omitted). This principle has been "consistently applied[,] . . . particularly to questions concerning the preservation of federal-court jurisdiction." *Id.* The Supreme Court has made clear that courts should not read a statute to bar judicial review of agency action absent "'clear and convincing evidence' to dislodge the presumption." *Id.* at 252 (citation omitted). Defendants have failed to make such a showing. *See also* Part IV, *infra*.

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 challenges regarding constitutional claims or questions of law, such as Mr. Rubio's challenges here.

III. The Ninth Circuit Has Not Resolved Whether § 1252(a)(2)(B) Applies Outside the Removal Context.

The Ninth Circuit has never squarely addressed the threshold question of whether § 1252(a)(2)(B) applies outside of removal proceedings. Instead, it has merely assumed that it does.

The Ninth Circuit addressed this issue most directly in *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683 (9th Cir. 2003). Noting that "[t]here is a split in authority as to the applicability of § 1252(a)(2)(B)[] outside the context of removal proceedings," the court declared that it "need not decide whether § 1252(a)(2)(B)(ii) applies outside the context of removal proceedings" because, as the decision being challenged was non-discretionary, that provision "would not preclude jurisdiction in this case." *Spencer*, 345 F.3d at 692; *accord ANA Int'l, Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004).

Since then, the Ninth Circuit has "suggest[ed]" that subparagraph (a)(2)(B) may apply outside the removal context. *Mamigonian v. Biggs*, 710 F.3d 936, 943 (9th Cir. 2013), *overruled by Patel*, 142 S. Ct. 1614. Indeed, even where the Ninth Circuit has found that § 1252(a)(2)(B) barred review of the application or issue under review, it has *not* expressly addressed the

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threshold, fundamental question of whether § 1252(a)(2)(B) should even apply in the first instance—something *Mamigonian*, *ANA,* and *Spencer* recognized was an open question. *See, e.g.*, *Hassan v. Chertoff*, 593 F.3d 785, 788–89 (9th Cir. 2010); *see also Poursina v. United States Citizenship & Immigr. Servs.*, 936 F.3d 868, 871–72 (9th Cir. 2019). This Court is thus "free to address the issue" here. *Brecht v. Abrahamson*, 507 U.S. 619, 630–31 (1993) (clarifying that "since we have never squarely addressed the issue, and have at most assumed the applicability of the [standard in question], we are free to address the issue [of its applicability] on the merits"); *see also, e.g.*, *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *Amalgamated Transit Union Loc. 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 n.5 (9th Cir. 2006) (observing the court was not bound by earlier decision, which had "assumed without discussion" the answer to the matter at issue).

As the Ninth Circuit has not squarely addressed this issue, this Court should find that § 1252(a)(2)(B) does not apply outside the removal context.

IV. Even If § 1252(a)(2)(B) Were Applicable Outside Removal, Legal and Constitutional Claims Must Remain Reviewable to Avoid Serious Constitutional Problems.

Were the Court to apply § 1252(a)(2)(B)(i) to USCIS decisions regarding affirmative applications filed by individuals who are not in removal proceedings, the Court should hold that federal courts retain jurisdiction to review legal and constitutional questions.

This jurisdiction is compelled first and foremost by a principle that lies at the heart of our constitutional order—that "[t]he very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Under this fundamental principle, it has long been axiomatic that an "individual who considers

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himself injured[] has a right to resort to the laws of his country for a remedy." *Id.* at 166. And this principle applies with particular force to executive actions causing a legal or constitutional wrong. Indeed, *Marbury* itself was "a case . . . involving review of executive action." *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986) (discussing *Marbury*).[4]

Consistent with *Marbury*, the Supreme Court has held time and again that depriving individuals of any meaningful judicial review of a legal or constitutional error by an agency raises serious constitutional questions. *See, e.g.*, *St. Cyr*, 533 U.S. at 300 ("A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."); *Bowen*, 476 U.S. at 681 n.12 (emphasizing that a "serious constitutional question" would arise if the federal statute at issue were construed "to deny a judicial forum for constitutional claims" (citation omitted)); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (same); *Johnson v. Robison*, 415 U.S. 361, 366–67 (1974) (same).

Relatedly, the Supreme Court has also long recognized the "strong presumption that Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670; *accord Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020); *Kucana*, 558 U.S. at 251; *St. Cyr*, 533 U.S. at 298; *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *see also, e.g.*, *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 874 (9th Cir. 2009) ("[W]e have stressed the importance of meaningful judicial review of agency action."). This presumption has been "consistently applied" to immigration statutes, *Kucana*, 558 U.S. at 251, and "can only be

[4] *See also United States v. Nourse*, 34 U.S. 8, 28–29 (1835) ("It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.").

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overcome by 'clear and convincing evidence' of congressional intent to preclude judicial review," *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (citation omitted). Any exceptions made by Congress to the presumptive reviewability of agency action, moreover, are "[s]ubject to constitutional constraints." *Bowen*, 476 U.S. at 672–73.

Accordingly, when interpreting immigration statutes limiting federal-court jurisdiction, the Supreme Court has applied the constitutional-avoidance canon and the presumption of reviewability to avoid constructions that would foreclose meaningful judicial review of legal and constitutional claims. *See, e.g.*, *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"); *St. Cyr*, 533 U.S. at 314 (remarking that "the absence of . . . a forum" where the question of law at issue could be answered "strongly counsels against adopting a construction that would raise serious constitutional questions"); *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993) (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).

Likewise, the Ninth Circuit has long held that, even assuming § 1252(a)(2)(B) applies outside the removal context, legal and constitutional claims are still reviewable. *See, e.g.*, *Poursina*, 936 F.3d at 875–76 (explaining that "legal conclusions" and "constitutional claim[s]" are "not subject to" § 1252(a)(2)(B)(ii)'s "jurisdictional bar"); *Hassan*, 593 F.3d at 789 (noting

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that the court "retain[s] jurisdiction to review constitutional claims, even when those claims address a discretionary decision") (quoting *Ramirez–Perez v. Ashcroft*, 336 F.3d 1001, 1004 (9th Cir. 2003)); *Freeman v. Gonzales*, 444 F.3d 1031, 1037 (9th Cir. 2006) ("The § 1252(a)(2)(B) bar on review of discretionary decisions does not apply to cases 'rais[ing] only constitutional or purely legal . . . challenges to the decisions in question'") (quoting *Wong v. United States*, 373 F.3d 952, 963 (9th Cir. 2004)); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141–44 (9th Cir. 2002) (holding that § 1252(a)(2)(B)(i) did not bar its review of "the purely legal" question at issue); *see also Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir. 2018) ("[T]he Supreme Court has cautioned us to hesitate before interpreting a statutory scheme as taking the 'extraordinary step' of barring review of constitutional claims.") (quoting *Califano v. Sanders*, 430 U.S. 99, 109 (1977)).

Accordingly, even if § 1252(a)(2)(B)(i) were applicable to adjustment applicants who, like Mr. Rubio, are not in removal proceedings, it must be construed to allow district-court review of legal and constitutional issues arising from USCIS's adjudication of their applications. A contrary construction would "raise serious questions concerning the [statute's] constitutionality." *Johnson*, 415 U.S. at 366. Without the ability to pursue claims of legal or constitutional error in the district courts, applicants who are not in removal proceedings and whose applications are wrongfully denied by USCIS would be "likely left with no avenue for judicial relief *of any kind*"—let alone meaningful judicial review. *Patel*, 142 S. Ct. at 1636 (Gorsuch, J., dissenting). Unlike their counterparts in removal proceedings, applicants who are not facing removal would not be able to pursue legal or constitutional claims on a petition for review to the courts of appeals, precisely because they are not in removal proceedings or subject to a final order of removal. *See* 8 U.S.C. § 1252(a)(5), (b)(9).

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To the extent the *Patel* majority seemed to suggest in dicta that those individuals may be able to obtain judicial review once they are placed in removal proceedings, such a suggestion defies reality and reason. "[T]housands of individuals seek to obtain a green card every year outside the removal context—the student hoping to remain in the country, the foreigner who marries a U.S. citizen, the skilled worker sponsored by her employer." *Patel*, 142 S. Ct. at 1636 (Gorsuch, J., dissenting). Many of these applicants are noncitizens who are *lawfully* residing in the U.S. with non-immigrant visas. Thus, they would not even be subject to removal proceedings even if their applications were denied—the government could *not* place them in removal proceedings even if it so desired.[5] While many others would lose their status upon denial of their application for adjustment of status or other immigration benefits, the government may choose not to place them in removal proceedings, thereby stripping them of the opportunity to seek review of the agency's decision. *See Reno v. Am-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (DHS has discretion to commence removal proceedings).

Thus, without the possibility of district-court review of USCIS's legal and constitutional errors, many aggrieved individuals would be wholly deprived of the fundamental "right to resort to the laws of [their] country for a remedy." *Marbury*, 5 U.S. at 166; *see also McNary*, 498 U.S. at 497 (interpreting a jurisdiction-limiting statute and holding that "restricting judicial review to the courts of appeals as a component of the review of an individual deportation order is the

[5] Notably, immigration courts do *not* have jurisdiction to adjudicate adjustment of status applications for U visa holders: that decision "lies solely within USCIS's jurisdiction." 8 C.F.R. § 245.24(f). What is more, their U visa status expires after four years, and is generally only extended while an adjustment of status application is pending. *See* 8 U.S.C. § 1184(p)(6). Allowing USCIS to act with impunity would severely undercut Congress's generous intent when creating the U visa. *See, e.g.*, *Lopez-Birrueta v. Holder*, 633 F.3d 1211, 1215–16 (9th Cir. 2011) ("The statute was a generous enactment, intended to ameliorate the impact of harsh provisions of immigration law on abused women. Accordingly, when interpreting this statute, we have adhere[d] to the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion." (internal quotation marks and citations omitted)).

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practical equivalent of a total denial of judicial review of . . . constitutional and statutory claims" for applicants bringing "pattern and practice" challenges to agency actions outside of removal proceedings (citation omitted)). But the Court can avert such an outcome here. It is more than "fairly possible" to interpret 8 U.S.C. § 1252 in a way that would avoid "serious constitutional problems," and thus the Court is "obligated to construe the statute" that way. *St. Cyr*, 533 U.S. at 299–300 (citation omitted).

First, nothing in § 1252's text clearly indicates a specific congressional intent to shield USCIS's legal and constitutional errors from judicial review outside the removal context. *See* Part I, *supra*. Instead, as its title indicates, the section is concerned with "Judicial review of *orders of removal*." 8 U.S.C. § 1252 (emphasis added).

Second, the context and legislative history of the REAL ID Act of 2005 militates against a finding of congressional intent to preclude judicial review of constitutional and legal claims for adjustment applicants who are not in removal proceedings. Contrary to the dicta in *Patel*, § 1252(a)(2)(D)—which provides for circuit court review of legal and constitutional claims for individuals in removal proceedings—hardly evinces Congress's intent to preclude judicial review of such claims for individuals not facing removal. *See* 142 S. Ct. at 1626–27. The subparagraph was added in response to *St. Cyr*, which held that precluding judicial review of questions of law for noncitizens in removal proceedings would raise substantial constitutional concerns. *See id.* at 1623; H.R. Conf. Rep. 109-72, at 173–75 (2005); *see also St. Cyr*, 533 U.S. at 300. And as the Supreme Court has cautioned, "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Bowen*, 476 U.S. at 674 (alteration in original) (citation omitted). Indeed, in all but

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exceptional cases, it should be presumed that Congress does *not* intend to knowingly violate the Constitution. *See McNary*, 498 U.S. at 496 ("[I]t is most unlikely that Congress intended to foreclose all forms of meaningful judicial review").

Finally, the Court should avoid Defendants' construction of § 1252 because such a construction would 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). First, Defendants' interpretation simply empowers the agency to disregard the law and the Constitution. In many cases, including this one, it would actually allow the agency to do *whatever it wants without any consequences.* Absent the possibility of district court review, many applicants—including those who have lived in the United States for years or even decades with lawful status—would be wholly deprived of any judicial forum that could hear their legal or constitutional claims. As noted above, this would raise serious constitutional problems, as the Supreme Court has repeatedly warned, and as Congress is well aware. It would be absurd and irrational to conclude that Congress intended USCIS to have free rein to commit legal errors and constitutional violations without facing judicial scrutiny, as long as such errors and violations occurred outside the removal context. *See Nourse*, 34 U.S. at 28–29.

Moreover, as Justice Gorsuch has rightly pointed out, "Congress [could not have] intentionally designed a scheme that encourages individuals who receive erroneous rulings on their green-card applications" to violate the immigration laws (e.g., by "overstay[ing] their visas and remain[ing] in this country unlawfully") in order to induce immigration authorities to place them in removal proceedings with the hope that they may obtain judicial review. *Patel*, 142 S. Ct. at 1637 (Gorsuch, J., dissenting). Nor would it make sense to conclude that "Congress replaced a presumptive promise of judicial review with a scheme in which judicial review

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depends on the happenstance of a governmental decision to seek removal." *Id.*; *cf. McNary*, 498 U.S. at 486–97 (refusing to read a similar jurisdiction-limiting statute as barring all judicial review of applicants' statutory and constitutional claims "unless . . . they voluntarily surrender themselves for deportation").

In light of the serious constitutional concerns at hand, the strong presumption in favor of judicial review over executive agency decisions (especially in the immigration context), and the text and scope of § 1252, this Court should find, at a minimum, that § 1252(a)(2)(B) does not bar review of constitutional and legal questions arising from cases challenging agency action outside of the removal context.

V. Mr. Rubio Raises Legal Issues that This Court Has Jurisdiction to Review.

In his complaint, Mr. Rubio alleged several distinct legal errors. First, the complaint explains that USCIS relied on evidence that he was arrested in 2004 for fourth-degree assault, *even though he was later found not guilty* for this alleged offense. Dkt. 1 ¶¶ 35–36, 42, 49. Second, the agency relied on another police report from 2001, even though the charge was dismissed. *Id.* ¶¶ 33, 41–42, 50. Third, USCIS weighed against Mr. Rubio his failure to produce police reports regarding his arrests in 2001 and 2004, even though he demonstrated that the precise documents USCIS requested were unavailable. *Id.* ¶¶ 33, 35, 42, 48. And finally, USCIS weighed against Mr. Rubio some of the exact same offenses it had already considered and waived when granting his U visa in 2014. *Id.* ¶¶ 24–25, 51.

These are legal errors over which this Court has jurisdiction. *See* Part IV, *supra*. While courts cannot "reweigh [the] evidence" when USCIS makes a discretionary decision, *Anaya-Ortiz v. Holder*, 594 F.3d 673, 676 (9th Cir. 2010) (citation omitted), they still retain jurisdiction to review "questions of law," including "whether [the agency] failed to consider the appropriate

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factors or *relied on improper evidence*," *Zamorano v. Garland*, 2 F.4th 1213, 1221 (9th Cir. 2021) (emphasis added) (citations omitted); *see also Avila-Ramirez v. Holder*, 764 F.3d 717, 722 (7th Cir. 2014) (noting that an argument challenging the Board of Immigration Appeals's "reliance on only uncorroborated arrest reports" raised a "question of law that [the Court] ha[d] jurisdiction to review").

Defendants fault Mr. Rubio for not "point[ing] to any authority concluding that the government was legally prohibited from relying on the evidence (or lack of evidence) here or otherwise suggesting that it was impermissible for USCIS to ask him to provide information about his prior involvement with law enforcement." Dkt. 7 at 12. As an initial matter, their argument places an obligation on Mr. Rubio where none exists. Their motion comes in response to his complaint, which required only a "short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). A complaint does not "need . . . any sort of detailed legal analysis," and it is "far more important to clearly state a factual claim than it is to cite a host of legal authorities." *Estrada v. Washington State Dep't of Soc. & Health Servs., Div. of Child Protective Servs.*, No. C18-5530RBL, 2019 WL 2995140, at *2 (W.D. Wash. July 9, 2019).

What is more, courts have regularly addressed these points and held that agency actions like those at issue in this case are legal errors. Here, Mr. Rubio's claim is precisely that the agency "relied on improper evidence." *Zamorano*, 2 F.4th at 1221. The Ninth Circuit has previously noted that it would be "troubl[ing]" if immigration officers were to rely on "the *mere fact* of arrest" to determine that an individual "had engaged in [the alleged,] underlying conduct," and then to weigh that against the individual. *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 805 (9th Cir. 1994). Yet here the agency has acted in an even more egregious manner—relying on a criminal charge of which Mr. Rubio was acquitted. Dkt. 1 ¶¶ 28, 33. In similar circumstances,

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courts have held that a "police report[] [was] not probative of anything and should not have been considered as [an] 'adverse factor[].'" *Sierra-Reyes v. INS*, 585 F.2d 762, 764 n.3 (5th Cir. 1978) (citation omitted); *see also Igwebuike v. Caterisano*, 230 F. App'x 278, 283 (4th Cir. 2007) (agency could not rely on an "arrest or charge by itself" where the noncitizen was "acquitted" in order to "support a finding that [the noncitizen] was a drug trafficker"). Thus, USCIS's reliance on Mr. Rubio's acquitted charge was legal error.

Likewise, the Court has jurisdiction over Mr. Rubio's claim that the agency improperly relied on excerpts from the police report concerning his 2001 simple-assault arrest. As with the 2004 fourth-degree assault acquittal, the agency held this arrest against Mr. Rubio even though (1) the case was dismissed, (2) the agency lacked a full police report (because such records were no longer available), and (3) Mr. Rubio supplied a statement to explain what happened. Whether such reliance on an "uncorroborated arrest report[]" was improper is a "question of law," *Avila-Ramirez*, 764 F.3d at 722, as Mr. Rubio is asserting the agency has "relied on improper evidence," *Zamorano*, 2 F.4th at 1221.

Notably, both the courts and also the BIA have refused to weigh against an individual the accounts police officers provide in uncorroborated police reports. For instance, the Ninth Circuit has held that arrest reports, such as a Form I-213, "merit[] little (if any) weight" where the information is not corroborated, not subject to cross-examination, and reliant only on hearsay. *Murphy v. INS*, 54 F.3d 605, 610–11 (9th Cir. 1995); *see also Olivas-Motta v. Holder*, 746 F.3d 907, 918–19 (9th Cir. 2013) (Kleinfeld, J., concurring) ("It has long been clear that police reports are not generally 'reasonable, substantial, and probative evidence' of what someone did. . . . [P]olice reports are not especially useful instruments for finding out what persons charged actually did. All the defects of hearsay, double hearsay, and triple hearsay apply, since people

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may speak to the police despite lack of personal knowledge and lack of adequate observation, may be misunderstood, and what they say may be misreported."). The BIA has similarly concluded it is error to give an arrest report significant weight where an individual denies wrongdoing, "prosecution was declined," and the government fails to present any corroborating evidence. *Matter of Arreguin de Rodriguez*, 21 I. & N. Dec. 38, 42 (BIA 1995). Other courts, including ones in this circuit, have similarly rejected immigration agencies' use of uncorroborated police reports. *See, e.g.*, *Prudencio v. Holder*, 669 F.3d 472, 483–84 (4th Cir. 2012) ("[P]olice reports . . . often contain little more than unsworn witness statements and initial impressions. Indeed, these materials are designed only to permit a determination of probable cause. Further, because the[y] are generated early in an investigation, they do not account for later events, such as witness recantations, amendments, or corrections. To confer upon such materials the imprimatur of fact[] . . . accords these documents unwarranted validity."); *Avila-Ramirez*, 764 F.3d at 722–25; *Sierra-Reyes*, 585 F.2d at 764 n.3; *Chuil Chulin v. Zuchowski*, No. 21-CV-00016-LB, 2021 WL 3847825, at *7 (N.D. Cal. Aug. 27, 2021) ("[I]t is a ground for remand when an agency gives significant weight to uncorroborated arrest reports.").

But here the errors were even more egregious. The agency relied on a charged offense even though Mr. Rubio was acquitted. Similarly, the agency relied on a charge that was later dismissed. Accordingly, under the applicable case law, the agency's actions here constituted legal errors and were the type of non-discretionary actions that courts not only regularly review, but also find "troubl[ing]" and subject to vacatur. *Paredes-Urrestarazu*, 36 F.3d at 805; *cf. Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 241 (1957) ("The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in

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any misconduct."); *id.* at 241 n.6 ("Arrest, by itself, is not considered competent evidence at either a criminal or civil trial to prove that a person did certain prohibited acts.").

Third, the agency also legally erred when it faulted Mr. Rubio for his inability to produce police reports that *no longer exist*. USCIS asked Mr. Rubio for full police reports of his 2001 and 2004 arrests. Yet as to both matters, Mr. Rubio supplied the partially available records that he did obtain, and also provided evidence demonstrating that any additional records had been destroyed. These claims are reviewable under the APA, as an agency cannot hold an applicant accountable for failing to do something that is factually or legally impossible for the applicant to do. Indeed, by demanding unavailable evidence, "USCIS placed [Mr. Rubio] in an impossible situation," "bas[ing] its decision on the absence of evidence" that Mr. Rubio "could not procure." *Rahman v. Napolitano*, 814 F. Supp. 2d 1098, 1107–08 (W.D. Wash. 2011). In fact, the agency was effectively asking him "to prove a negative"—that no other records existed—something that the Ninth Circuit has recognized is "improper" for an agency to do. *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1244 (9th Cir. 2001). Other courts too have held USCIS decisions to be arbitrary and capricious where the agency demanded something impossible from applicants—an unfortunately all-too-common occurrence. *See, e.g.*, *Smith v. USCIS.*, No. 5:19-CV-01913-CLS, 2021 WL 148741, at *8 (N.D. Ala. Jan. 15, 2021) (agency acted arbitrarily and capriciously where it demanded the original of a form that had to be submitted elsewhere); *Diamond Miami Corp. v. USCIS*, No. 18-24411-CIV, 2019 WL 4954807, at *5 (S.D. Fla. Oct. 8, 2019) (agency decision was not rational where it demanded employment records that did not exist); *Betancur v. Roark*, No. 10-11131-RWZ, 2012 WL 4862774, at *7 (D. Mass. Oct. 15, 2012) (similar). Accordingly, these claims also have a well-

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recognized basis on which courts have jurisdiction to review USCIS's action, as they concern another way in which USCIS "relie[s] on improper evidence." *Zamorano*, 2 F.4th at 1221.

Finally, USCIS erred in relying on Mr. Rubio's 1991 petty-theft arrest, and 2001 and 2004 fourth-degree assault arrests, because the agency had previously granted Mr. Rubio a waiver *for these very offenses* when it approved his U-visa application. USCIS's decision, at the adjustment of status stage, to penalize Mr. Rubio for these three arrests—after it had *already* determined during the U visa adjudication that they were not bars to his admissibility to the country—offends fundamental notions of fairness and thus is arbitrary and capricious.

The cases Defendants cite to assert that other courts have refused to exercise jurisdiction over "identical issues" are unavailing. Dkt. 7 at 10. In *Molina Herrera*, the plaintiff similarly claimed that USCIS "ha[d] erected an impossible barrier by requiring Plaintiff to produce evidence from a 30-year-old investigation." *Molina Herrera v. Garland*, 570 F. Supp. 3d 750, 757 (N.D. Cal. 2021). Yet any similarities end there. Unlike here, "USCIS found that the record was devoid of even an attempt by Plaintiff to locate evidence supporting his assertion that he was exonerated," and the district court agreed. *Id.* (emphasis omitted). By contrast, Mr. Rubio (1) contacted the appropriate law enforcement and judicial authorities, (2) provided the non-destroyed portions of the arrest and court records USCIS requested as well as evidence that the rest of the records *no longer existed*, and, most importantly, (3) submitted documents showing either that he was found not guilty or that his case was dismissed. Dkt. 1 ¶¶ 28, 33, 35, 42. Whereas *Molina Herrera* presented only the question of whether the agency could weigh against the plaintiff the failure to *even try* to produce records and the other factors that cast doubt on his credibility, this case presents an entirely different issue. Here, the legal question is whether the agency can rely on the failure to produce further records where there is no dispute that all

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available records were produced and no further records are available. As the Supreme Court made clear in *Guerrero-Lasprilla*, 140 S. Ct. at 1067, questions of law include the application of a legal standard to undisputed or established facts.

The other case Defendants cited, *Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865 (N.D. Cal. 2008), is similarly distinguishable. There, the court held that the plaintiffs "lack[ed] standing," as the adjudication of U visa petitions and adjustment applications "are committed to USCIS'[s] discretion by law." 622 F. Supp. 2d at 880. This does nothing to help Defendants. *Catholic Charities CYO* simply stands for the unremarkable proposition that courts lack "jurisdiction to review the discretionary aspect of a decision to deny an application for adjustment of status." *Hernandez*, 345 F.3d at 845. The same is true for the other cases Defendants cite, such as *Bazua-Cota v. Gonzales*, 466 F.3d 747 (9th Cir. 2006), and *Torres-Valdivias v. Lynch*, 786 F.3d 1147 (9th Cir. 2015). Each of these cases simply involved a challenge to how the agency "weigh[ed] the equities" when making the ultimate discretionary decision. *Bazua-Cota*, 466 F.3d at 749; *see also Torres-Valdivias*, 786 F.3d at 1153 (noting that the petitioner challenged "[a] fact-intensive determination in which the equities must be weighed"). But as the Ninth Circuit has repeatedly held, that does not prevent review of other legal questions, such as whether the agency "relied on improper evidence." *Zamorano*, 2 F.4th at 1221. It is that latter type of claim that Mr. Rubio has raised here.

Mr. Rubio is not challenging the manner in which USCIS weighed different factors in his case; he is challenging the fact that they were weighed *at all*. That USCIS considered these factors—not how much weight it afforded each one—is a legal error that renders its decision arbitrary, capricious, and unlawful. As federal agencies have "no discretion to make a decision that is contrary to law," USCIS cannot simply "affix[] the adjective 'discretionary' to [a]

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determination" to make it non-reviewable. *Hernandez*, 345 F.3d at 846. Contrary to Defendants' arguments, *see, e.g.*, Dkt. 7 at 9, there *is* a "meaningful standard" against which to judge USCIS's actions. As outlined above, the propriety of considering particular evidence—not how it was weighed once the decision to consider it was made—is something courts may and often do review. The Court should thus hold that it has jurisdiction to decide these legal questions.

DATED this 26th day of September, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 26th day of September, 2022.

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