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 **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR RECONSIDERATION**

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INTRODUCTION

In moving this Court to reconsider its decision, Defendants rely primarily on speculation about legislative intent, the Ninth Circuit's non-binding assumptions regarding whether 8 U.S.C. § 1252(a)(2)(B) applies outside removal proceedings, and an unpublished disposition. These arguments do not demonstrate any "manifest error" or present any "new . . . legal authority," L. Civ. R. 7(h)(1), warranting the "extraordinary remedy" of reconsideration, which is "to be used sparingly" and only in "highly unusual circumstances," *Kona Enterprises, Inc. v. Est. of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citations omitted). Ultimately, Defendants rely on the same arguments that this Court has already rejected for good reason. Defendants' position would undermine the rule of law by allowing USCIS to wield unrestrained authority to violate the law.

ARGUMENT

I. The Court Correctly Held the Statute's Plain Text and Context Demonstrate Subparagraph (B) Does Not Apply Outside of Removal Proceedings.

Defendants' motion repeats the argument this Court rejected: that the phrase "regardless of whether the judgment, decision, or action is made in removal proceedings," 8 U.S.C. § 1252(a)(2)(B), demonstrates the subparagraph applies to *all* cases outside the removal context. Yet in so arguing, Defendants fail to engage with this Court's analysis as to Subparagraph (B)'s text and context, asking the Court instead to base its decision on "a hunch about unexpressed legislative intentions." *Patel v. Garland*, 142 S. Ct. 1614, 1637 (2022) (Gorsuch, J., dissenting).

As the Court held, the "regardless" language refers to determinations made outside of immigration court but with respect to individuals in removal proceedings. *See* Dkt. 14 at 11–13; *see also* Dkt. 8 at 5–6. As this Court noted, there are many such ancillary decisions that directly impact the results of those proceedings. It was thus logical for Congress to direct that those decisions be addressed with all other decisions that occur in removal proceedings—first on appeal to the Board of Immigration Appeals (BIA), and then on a petition for review—thereby "consolidat[ing] judicial review and avoid[ing] piecemeal litigation over the entire removal process." Dkt. 14 at 12–13. "In the context of the overall statute," this is the most plausible

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reading of Subparagraph (B), and one that would not "lead to absurd results." *Id.* at 11, 15 n.1. Not only is Subparagraph (B) found within a statute entitled "Judicial review *of orders of removal*," 8 U.S.C. § 1252 (emphasis added), but it is placed in a section "focus[ed] on orders of removal," Dkt. 14 at 12; *see also* Dkt. 8 at 3–4. And "the remaining subsections of Section 1252 address judicial review of removal orders." Dkt. 14 at 12. Moreover, the legislative history further shows § 1252(a)(2)(B)(i) was directed at cases in removal proceedings. *See* S. Rep. 104-249, 14 (1996) (noting that newly added § 1252(a)(2)(B) was intended to "[s]treamlin[e] judicial review of *orders of exclusion or deportation*," and that it "[p]rohibits judicial review of the Attorney General's judgment regarding certain forms of discretionary *relief from exclusion or deportation*, voluntary departure, or adjustment of status." (emphases added)).

Contrary to Defendants' arguments, Dkt. 15 at 2, *Patel*'s pronouncement that the REAL ID Act "expressly extended the jurisdictional bar to judgments made outside of removal proceedings," is consistent with this Court's order. *Patel*, 142 S. Ct. at 1626. Moreover, reading Subparagraph (B) as limited to removal proceedings is harmonious with the "context" and the "overall statutory scheme," while Defendants' interpretation is untethered from statute. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). In response, Defendants posit that the "regardless" language was added "*presumably* to resolve a disagreement" concerning whether Subparagraph (B) "applied outside the context of removal proceedings." Dkt. 15 at 2 (emphasis added) (quoting *Jimenez Verastegui v. Wolf*, 468 F. Supp. 3d 94, 98 n.5 (D.D.C. 2020)). Yet that is hardly the type of "'clear and convincing evidence' of congressional intent" needed "to preclude judicial review," *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020), and to overcome the strong presumption in favor of review of agency action, *see* Dkt. 8 at 8–9, 11–12.

II. Contrary to Demonstrating Manifest Error in the Court's holding, Defendants' Interpretation Raises Serious Constitutional Concerns.

The Court's holding also avoids the "substantial constitutional questions" Defendants' interpretation raises. Dkt. 14 at 15 (quoting *INS v. St. Cyr*, 533 U.S. 289, 300 (2001)). Defendants admit their reading of Subparagraphs (B) and (D) "may" result in no judicial review

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of Mr. Rubio's claim. Dkt. 15 at 4. But that result is not theoretical. Instead, Defendants' position would guarantee that many USCIS adjustment decisions never receive judicial review.

Immigration courts lack jurisdiction to adjudicate adjustment-of-status applications for U-visa holders, as that decision "lies solely within USCIS's jurisdiction." 8 C.F.R. § 245.24(f); *see also* 8 U.S.C. § 1255(m). Therefore, USCIS's denial of U-based adjustment would never be included in a removal order. And for that reason, it could not be included in a petition for review of a removal order either. *See Nasrallah v. Barr*, 140 S. Ct. 1683, 1691 (2020) ("[F]inal orders of removal encompass only the rulings made by the immigration judge or [BIA] that affect the validity of the final order of removal."). Mr. Rubio and other U-based adjustment applicants would thus *never* be able to obtain judicial review of USCIS's decision, no matter how arbitrary, capricious, or illegal. Also, U status expires after four years, and is generally extended only while an adjustment application is pending. *See* 8 U.S.C. § 1184(p)(6). Thus, U-visa holders like Mr. Rubio would not only face denial of their applications for lawful residency without judicial review, but also risk losing their lawful status altogether. Allowing USCIS such unfettered authority would severely undercut Congress's generous intent when creating the U visa. *See* Dkt. 8 at 14 n.5 (citing *Lopez-Birrueta v. Holder*, 633 F.3d 1211, 1215–16 (9th Cir. 2011)).

Despite this harsh reality, Defendants take the extraordinary position that, outside the removal context, Congress intended to give USCIS free rein to commit legal and constitutional errors without facing any judicial scrutiny. *See* Dkt. 15 at 4. They go even further by suggesting that such a wholesale denial of judicial review "does not raise 'substantial constitutional questions.'" *Id.* Yet this argument runs afoul of decades of Supreme Court precedent. That precedent holds that depriving individuals of any meaningful judicial review of an agency's legal or constitutional error raises serious constitutional questions. *See* Dkt. 8 at 11–12 (citing cases).

Defendants also rely on a strawman in support of their troubling position, stating "[t]he Supreme Court has never held that a noncitizen is entitled to *more* judicial review of a denial of an adjustment of status application than is provided by statute." Dkt. 15 at 4. Yet Mr. Rubio has

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never argued he is entitled to more review than what the statute authorizes. Rather, he argues the statute is best read as providing for judicial review of his legal claims. *See* Dkt. 8 at 2–7, 10–17.

Equally unavailing is Defendants' assertion that "no judicial review is guaranteed by the Constitution" since "an immigration proceeding 'is not a criminal proceeding and has never been held to be punishment.'" Dkt. 15 at 4 (quoting *Carlson v. Landon*, 342 U.S. 524, 537 (1952)). Yet *Carlson* itself acknowledged that the political branches' power over immigration "is, of course, subject to judicial intervention under the 'paramount law of the [C]onstitution.'" *Id.* at 537 (citation omitted). The Supreme Court has repeatedly indicated that the Constitution imposes limits on restricting judicial review of an agency's legal or constitutional errors, including in the immigration context. *See* Dkt. 8 at 10–12 (citing cases). The Court was thus correct to hold that Congress did not intend to foreclose all judicial review here.

III. No Conflict Exists Between This Court's Decision and Ninth-Circuit Case Law.

Defendants err in asserting the Ninth Circuit has already decided this issue. Dkt. 15 at 1. As this Court noted, the Ninth Circuit has never "squarely addressed" whether § 1252(a)(2)(B)(i) "applies outside of removal proceedings." Dkt. 14 at 9. Prior to *Patel*, the court had long held that § 1252(a)(2)(B) did not bar review of non-discretionary determinations of the agency. *See, e.g.*, *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002); *Mamigonian v. Biggs*, 710 F.3d 936, 944–46 (9th Cir. 2013); *Poursina v. U.S. Citizenship & Immigr. Servs.*, 936 F.3d 868, 875 (9th Cir. 2019). Thus, in cases like *Spencer Enterprises, Inc. v. United States*, the court explained it had no need to decide whether § 1252(a)(2)(B) applied outside the removal context, since the challenged determination was non-discretionary. *See* 345 F.3d 683, 692 (9th Cir. 2003).

Contrary to Defendants' assertion, *see* Dkt. 15 at 2–3, 5, the Ninth Circuit has yet to issue any ruling on this question. Instead, in the cases Defendants cite, the court has simply assumed that Subparagraph (B) applies outside of removal proceedings for discretionary determinations, and then addressed whether the question raised involves such a discretionary determination. *See, e.g.*, *Poursina*, 936 F.3d at 871–85; *Gebhardt v. Nielsen*, 879 F.3d 980, 984 (9th Cir. 2018);

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Mamigonian, 710 F.3d at 943–46; *Hassan v. Chertoff*, 593 F.3d 785, 788–89 (9th Cir. 2010). For instance, in *Mamigonian*—upon which Defendants rely—the court noted merely that the language of § 1252(a)(2)(B) "suggest[ed]" the jurisdictional bar also applied to determinations made outside the removal context, and thus "seem[ed] to" preclude judicial review. 710 F.3d at 943. This equivocal and noncommittal observation is not a binding holding that "clearly require[d] this Court to find § 1252(a)(2)(B) applies" outside the removal context. Dkt. 15 at 5.

Indeed, in the cases which assume § 1252(a)(2)(B) applies outside the removal context, the Ninth Circuit's jurisdictional analysis was based on the now-overruled premise that § 1252(a)(2)(B) did not bar review of non-discretionary determinations. Accordingly, prior to *Patel*, the court was not confronted with the serious constitutional concerns that would arise if judicial review of legal and constitutional claims were foreclosed. It thus did not strictly examine the statute and its context in the statutory scheme to ensure its interpretation did not present such concerns. Therefore, the cases cited by the government are no longer controlling in light of *Patel*.

Defendants also contend that, in cases like *Hassan* and *Mamigonian*, "the Ninth Circuit necessarily reached the determination that § 1252(a)(2)(B)(i) applies outside removal proceedings," since every court "has an independent obligation to assess its jurisdiction." Dkt. 15 at 5. As an initial matter, the Ninth Circuit *has* assumed jurisdiction in the past. *See Gebhardt*, 879 F.3d at 988 (assuming jurisdiction "to review colorable constitutional claims," given the strong presumption against finding that review of such claims was barred). More crucially, this argument all but undermines Defendants' position. As this Court noted, Dkt. 14 at 9, the Supreme Court recently reviewed the *merits* of a challenge to a USCIS denial of adjustment of status outside the removal context, *see Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021). Thus, the Supreme Court, too, must have "necessarily" held in *Sanchez* that § 1252(a)(2)(B)(i) does *not* apply outside the removal context, Dkt. 15 at 5, for the obligation to ensure jurisdiction applies equally to the high court, *see Trump v. Hawaii*, 138 S. Ct. 2392, 2415–16 (2018).

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Lastly, while Ninth-Circuit case law is unsettled as to § 1252(a)(2)(B)'s applicability outside the removal context, the court of appeals has consistently and unequivocally held that the jurisdictional bar does not preclude review of legal and constitutional claims. *See* Dkt. 8 at 12–13 (listing cases). Indeed, the very decisions upon which Defendants rely, such as *Hassan*, *Poursina*, and *Mamigonian*, reaffirm this well-established rule. *See id.* Thus, this Court's holding that Mr. Rubio's legal claims are reviewable regardless of whether § 1252(a)(2)(B) applies is also consistent with Ninth-Circuit precedent. *See* Dkt. 14 at 14–15.

IV. *Molina Herrera v. Garland* Does Not Support Reconsideration.

Finally, the Ninth Circuit's two-paragraph, unpublished order in *Molina Herrera v. Garland*, No. 21-17052, 2022 WL 17101156 (9th Cir. Nov. 22, 2022), does not warrant reconsideration. *Molina Herrera* lacks precedential weight, for it is an unpublished order with only a cursory analysis. *See* 9th Cir. Rule 36-3(a); *M2 Software, Inc. v. Madacy Ent.*, 421 F.3d 1073, 1086 (9th Cir. 2005) (finding district court did not abuse its discretion in denying motion for reconsideration in light of newly-issued "unpublished memorandum disposition" because it was "not binding precedent"); *Turner ex rel. Davis New York Venture Fund v. Davis Selected Advisers, LP*, 626 F. App'x 713, 719 (9th Cir. 2015) (declaring "it is plain that a memorandum disposition is not 'controlling law'" when assessing motion to amend).

The decision also lacks persuasive value. *Molina Herrera* does not address whether § 1252(a)(2)(B)(i) applies outside of removal proceedings, or Mr. Rubio's alternative claim that constitutional-avoidance considerations warrant finding jurisdiction. *See* 2022 WL 17101156, at *1. Moreover, unlike this case, *Molina Herrera* concerned a discretionary determination—rather than a legal question. *Compare id.*, *with* Dkt. 14 at 14–15. Accordingly, *Molina Herrera* does not constitute "new . . . legal authority." L. Civ. R. 7(h)(1).

CONCLUSION

The Court's decision was not manifestly erroneous, and there is no new legal authority that makes reconsideration appropriate. Accordingly, the Court should deny Defendants' motion.

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DATED this 23rd day of December, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 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 23rd day of December, 2022.

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