IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-1640

NORMA CISNEROS ZAVALA, individually;
ALVARO PEREZ GONZALEZ, individually;
MARIA SALAZAR MANZO, individually,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, Secretary of Homeland Security, in his official capacity;
TRACY RENAUD, Acting Director of United States Citizenship and Immigration Services, in her official capacity;
KRISTI BARROWS, District Director, United States Citizenship and Immigration Services, in her official capacity;
ANDREW LAMBRECHT, Field Office Director, United States Citizenship and Immigration Services, in his official capacity;
UNITED STATES OF AMERICA;
DEPARTMENT OF HOMELAND SECURITY; and
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Norma Cisneros Zavala, Alvaro Perez Gonzalez, and Maria Salazar Manzo, by and through undersigned counsel Olivia Kohrs, Luis Cortes Romero, Aaron Elinoff and Bryce Downer, of NOVO LEGAL GROUP, LLC, hereby allege for their Complaint as follows:

I. INTRODUCTION

Plaintiffs Norma Cisneros Zavala ("Ms. Cisneros Zavala"), Alvaro Perez Gonzalez ("Mr. Perez Gonzalez"), and Maria Salazar Manzo ("Ms. Salazar Manzo") are mothers and wives, and a father and husband. After spending years building their lives in the United States, they became

eligible to apply for adjustment of status so that they could live in the United States with security as lawful permanent residents. Plaintiffs began the long and arduous process of gathering the necessary documents, hiring legal counsel, getting fingerprints done, going through medical checks, completing applications, and paying large amounts of money to apply for this adjustment.

They all shared the expectation that, after many years building a life in the U.S., contributing to the country's growth and development through their hard work, following the procedures set out for them, and meeting the necessary requirements, that they would be granted this status. They went through the costly, time-consuming, and often emotional process of applying to become lawful permanent residents. The government nonetheless denied their applications when the agency tasked with processing those applications chose to unlawfully interpret and misapply a statute and found each of them "inadmissible" based on previous "unlawful presence" in the United States. With this finding, the government denied Plaintiffs the opportunity to become lawful permanent residents.

Immigration law, and the process by which an individual can seek status and citizenship in the United States is largely statutory. Until 1996, the concept of "unlawful presence" had not previously existed in U.S. immigration law. With the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress introduced both the concept of "unlawful presence" and sanctions for the same. Under 8 U.S.C. § 1182(a)(9)(B)(ii), "an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled."

Congress time-circumscribed sanctions under 8 U.S.C. § 1182(a)(9)(B), while making other sanctions permanent under 8 U.S.C. § 1182(a)(9)(C). The time-circumscribed sanctions of 8 U.S.C. § 1182(a)(9)(B) are at issue here, and USCIS's unlawful interpretation and improper application of this statute—specifically 8 U.S.C. § 1182(a)(9)(B)(i)(II)—caused Plaintiffs' denial of lawful permanent residence.

Section 1182(a)(9)(B) sets out time that an individual, subject to certain exceptions, is inadmissible, based on how long that person was "unlawfully present" in the United States. These restrictions are known by many different names, but they all refer to the length of time during which these sanctions are applicable to an individual. They are often referred to as the "three-year bar" and the "ten-year bar," or the "three-year waiting period" and the "ten-year waiting period," and will be referred to as such here. Most generally, "the provisions of § 1182(a)(9), including the ten-year bar, were intended to deter non-citizens who had accrued unlawful presence and then left the United States from later seeking admission." *Cheruku v. Att'y Gen. U.S.*, 662 F.3d 198, 207 (3d Cir. 2011). "It is recidivism, and not mere unlawful presence, that section [(a)(9)] is designed to prevent." *Matter of Rodarte-Roman*, 23 I.&N. Dec. 905, 909 (BIA 2006).

Under the three-year bar, if an individual 1) has been unlawfully present in the United States for more than 180 consecutive days, but less than a year, and 2) voluntarily leaves the United States before expedited removal or removal proceedings are begun, then that individual is inadmissible and barred from seeking admission under any status for a period of three years. 8 U.S.C. § 1182(a)(9)(B)(i)(I). Under the ten-year bar, relevant to Plaintiffs here, if an individual 1) has been unlawfully present in the United States for a year or more, and 2) departs or is removed

from the United States, then that individual is barred from seeking admission under any status for a period of ten years. 8 U.S.C. § 1182(a)(9)(B)(i)(II).

To interpret and apply these time-constrained sanctions, it is helpful to compare Section 1182(a)(9)(B) with Congress's permanent sanctions in Section 1182(a)(9)(C). The relevant portions of subparagraphs Section 1182(a)(9)(B) and Section 1182(a)(9)(C) are phrased similarly. The chief distinction lies in the applicability of the ten-year waiting period (or ten-year bar) to persons unlawfully present within the United States for more than one year. Section 1182(a)(9)(B) provides that a person who seeks readmission *within* ten years after departure or removal "is inadmissible." Section 1182(a)(9)(C) provides that such a person "who enters or attempts to reenter the United States without being admitted is inadmissible," without specifying a waiting period. Because no time limit or waiting period is specified in Section 1182(a)(9)(C), a person is inadmissible *whenever* he or she enters or attempts to enter the United States. There is a narrow exception in Section 1182(a)(9)(C) for an alien seeking readmission more than ten years after departure. 8 U.S.C. § 1182(a)(9)(C)(ii). This exception is available only to an alien applying for admission, *after* ten years, with the Secretary of Homeland Security's consent and advance permission, otherwise the person remains indefinitely inadmissible.

In this action, Plaintiffs are noncitizens who have applied for adjustment of status to lawful permanent residents. Plaintiffs had previously departed the United States after being unlawfully present in the United States, triggering the ten-year waiting period under 8 U.S.C. § 1182(a)(9)(B). Before this ten-year waiting period ended, each Plaintiff applied for, and the Government granted, admission to enter the United States with a visitor's visa. After the expiration of the ten-year waiting period, each Plaintiff filed for adjustment of status to lawful permanent residence.

Defendants—Alejandro Mayorkas, Secretary of Homeland Security, in his official capacity; Tracy Renaud, Acting Director of USCIS, in her official capacity; Kristi Barrows, District Director, USCIS, in her official capacity; Andrew Lambrecht, Field Office Director, USCIS, in his official capacity; the United States of America; the Department of Homeland Security; and USCIS—denied Plaintiffs' applications. Plaintiffs all filed their applications for adjustment of status *after* their respective ten-year waiting periods had expired. Defendants, however, found that the ten-year waiting period under Section 1182(a)(9)(B) was tolled, and each Plaintiff's ten-year clock had effectively stopped, when each Plaintiff reentered the United States before the ten-year waiting period was over, despite the absence of such a requirement in the statute.

Plaintiffs seek declaratory and injunctive relief to enjoin USCIS from relying on an extra-statutory requirement for adjustment of status applications under 8 U.S.C. § 1182(a)(9)(B) that violates federal law. Plaintiffs respectfully request that this Court compel Defendants to declare this agency action as unlawful, and enjoin Defendants from applying their current interpretation of 8 U.S.C. § 1182(a)(9)(B) to both Plaintiffs and to other applicants for adjustment of status.

II. JURISDICTION AND VENUE

1. Plaintiffs bring their claims pursuant to the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1537; the regulations implementing the INA; the APA, 5 U.S.C. §§ 552, 701-706; 28 U.S.C. § 1331; and the Due Process Clause of the Fifth Amendment.

2. This Court has jurisdiction for these claims pursuant to 28 U.S.C. § 1331 because this action arises under federal law. The Court has remedial authority under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, and the APA, 5 U.S.C. §§ 701-706.

3. A district court may review a "final agency action for which there is no other adequate remedy in a court," under 28 U.S.C. § 1331. *See Bowen v. Massachusetts*, 487 U.S. 879, 891 (1988); *see also Gallo Cattle Co. v. U.S. Dep't of Agriculture*, 159 F.3d 1194, 1198 (9th Cir. 1998); *see also Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1170-1172 (9th Cir. 2017). "Agency action is 'final' if a minimum of two conditions are met: '[f]irst, the action must mark the consummation of the agency's decision making process … it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will follow.'" *Gallo*, 159 F.3d at 1198-1199 (quoting *Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1196 (9th Cir. 1997) (brackets and ellipsis in original).

4. USCIS's decision to deny Plaintiffs' adjustment of status applications was a final agency action.

5. *First*, the decision was neither tentative nor interlocutory. Plaintiffs "[have] no means of seeking review" of USCIS's decisions except in federal court. *Mamigonian v. Biggs*, 710 F.3d 936, 938 (9th Cir. 2013) is instructive. In that case, the Ninth Circuit held "district courts have jurisdiction to hear cases challenging determinations made on non-discretionary grounds respecting eligibility for the immigration benefits enumerated in 8 U.S.C. § 1252(a)(2)(B)(i), provided there are no pending removal proceedings in which an alien could apply for such benefits." *Id*. Applications for adjustment of status under 8 U.S.C. § 1255, at issue here, are within those enumerated benefits.

6. Moreover, USCIS's denials of Plaintiffs' applications under 8 U.S.C. § 1182(a)(9)(B)(i)(II) were based on statutory eligibility and therefore appear to be non-

discretionary. Additionally, there are no removal proceedings pending against Plaintiffs at this time.

7. *Second*, there can be no dispute that USCIS's decisions were ones from which legal consequences flow. USCIS denied each Plaintiff's application for adjustment of status, determined Plaintiffs were "not authorized to remain in the United States," and provided them thirty-three (33) days from the issuance of the decision to depart.

8. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) and (e)(1). A substantial part of the events and omissions giving rise to the claims asserted in this action occurred within the District of Colorado, Plaintiffs reside in this district, and the United States government, agencies thereof, and officers of the United States, acting in their official capacities, are Defendants.

III. PARTIES

Plaintiffs

9. At all times relevant to the subject matter of this litigation, Plaintiff Norma Cisneros Zavala was, and continues to be, a resident of and domiciled in the State of Colorado.

10. At all times relevant to the subject matter of this litigation, Plaintiff Alvaro Perez Gonzalez was, and continues to be, a resident of and domiciled in the State of Colorado.

11. At all times relevant to the subject matter of this litigation, Plaintiff Maria Salazar Manzo was, and continues to be, a resident of and domiciled in the State of Colorado.

Defendants

12. Defendant Alejandro Mayorkas is the Secretary of the Department of Homeland Security. In this capacity, he oversees the adjudication of all immigration benefits requests. He is sued in his official capacity.

13. Defendant Tracy Renaud is the Acting Director of USCIS, an "agency" within the meaning of the APA. 5 U.S.C. § 551(1). In this capacity, she oversees the adjudication of immigration benefits and establishes and implements governing policies. 6 U.S.C. § 271(a)(3), (b). She has the ultimate responsibility for the adjudication of applications filed with USCIS. Defendant Renaud is sued in her official capacity.

14. Defendant Kristi Barrows is the District Director of the Denver District USCIS office and is responsible for the adjudication of the applications for adjustment of status filed by Plaintiffs. Defendant Barrows is sued in her official capacity.

15. Defendant Andrew Lambrecht is the Field Office Director of the Denver District USCIS office and is responsible for the adjudication of applications in this district. Defendant Lambrecht is sued in his official capacity.

16. Defendant United States is responsible for the adjudication of the applications for adjustment of status filed by Plaintiffs.

17. Defendant Department of Homeland Security ("DHS") is an executive agency of the United States and an "agency" within the meaning of the APA. 5 U.S.C. § 551(1). DHS is a cabinet department of the United States federal government with responsibility for, among other things, administering and enforcing the nation's immigration laws.

18. Defendant United States Citizenship and Immigration Services ("USCIS") is an executive agency of the United States and an "agency" within the meaning of the APA. 5 U.S.C. § 551(1). USCIS is a part of DHS and is the government agency that "administer[s] the nation's lawful immigration system."[1] According to its website, USCIS "efficiently and fairly adjudicat[es] requests for immigration benefits."[2] USCIS operates within this district, with headquarters in Washington, D.C.

IV. STATEMENT OF FACTS

A. USCIS is responsible for the adjudication of adjustment of status applications.

19. The Immigration and Nationality Act ("INA") establishes a complex and detailed framework for the admission and removal of noncitizens from the United States, as well as the requirements for obtaining United States citizenship. 8 U.S.C. § 1101, *et seq.*

20. Adjustment of status is a process by which a person can apply for lawful permanent resident status while in the United States.

21. Generally, USCIS maintains "jurisdiction to adjudicate an application for adjustment of status filed by any alien" unless the Executive Office for Immigration Review, through an immigration judge, has jurisdiction to adjudicate the application because the noncitizen is in removal proceedings. 8 C.F.R. § 245.2(a)(1).

22. The eligibility requirements for adjustment of status vary depending on the immigrant category under which an individual is applying for adjustment.

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[1] United States Citizenship & Immigration Servs., About Us, https://www.uscis.gov/aboutus (last visited June 10, 2021).

[2] United States Citizenship & Immigration Servs., About Us, https://www.uscis.gov/about-us/mission-and-core-values (last visited June 10, 2021).

23. Generally, however, to qualify for adjustment of status under 8 U.S.C. § 1255(a), and in the discretion of the Attorney General, an individual generally must: 1) have been inspected and admitted or paroled into the United States, 2) be admissible, or rather, not be inadmissible to the United States under 8 U.S.C. § 1182, and 3) have an immigrant visa immediately available to them.[3]

24. In this case, USCIS denied Plaintiffs' applications on the basis that they did not satisfy requirement two—that they were admissible, or not inadmissible—and thus, this Complaint will focus its attention on that requirement.

B. USCIS's unlawful interpretation of 8 U.S.C. § 1182(a)(9)(B)(i)(II) results in erroneous determinations of inadmissibility under the statute.

1.

25. Inadmissibility grounds, generally, are codified in 8 U.S.C. § 1182. These grounds include health, criminal, security, public charge, illegal entrants, fraud or misrepresentation, or unlawful presence grounds, as well as prior removal-related grounds of inadmissibility.

26. One ground of inadmissibility is for "unlawful presence." 8 U.S.C. § 1182(a)(9)(B)(i)(II).

27. Until 1996, the concept of "unlawful presence" had not previously existed in U.S. immigration law. With the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress introduced sanctions for non-U.S. citizen persons who are "unlawfully present" in the United States.

[3] This availability is determined by statute under 8 U.S.C. § 1151(b)(2)(A)(i); and § 1153(a)(1)-(4). Visas are always immediately available for immediate relative petitions while for non-immediate relative petitions (preference category petitions), visa availability is posted by the Department of State in the Visa Bulletin.

28. Under 8 U.S.C. § 1182(a)(9)(B)(ii) "an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled."

29. Within the unlawful presence ground of inadmissibility are two distinct time bars, known as the three year time bar and the ten year time bar respectively.

30. If an individual 1) has been unlawfully present in the United States for more than 180 consecutive days, but less than a year, and 2) voluntarily leaves the United States before expedited removal or removal proceedings are begun, then that individual is barred from seeking admission for a period of three years. 8 U.S.C. § 1182(a)(9)(B)(i)(I).

31. If an individual 1) has been unlawfully present in the United States for a year or more, and 2) departs or is removed from the United States, then that individual is barred from seeking admission for a period of ten years. 8 U.S.C. § 1182(a)(9)(B)(i)(II).

32. Regardless of whether a person was unlawfully present in the U.S. for less than a year or more than a year, calculating the time that person is inadmissible and barred from seeking admission to the United States is straightforward: the clock starts ticking once the time bar is triggered by the individual's departure from the United States *after* accruing unlawful presence.

33. USCIS, however, forgoes this straightforward interpretation and instead denies applications for adjustment based on its unlawful interpretation of 8 U.S.C. § 1182(a)(9)(B)(i)(II).

34. USCIS's actions directly contradict the statute's language, context, purpose, and interpretation by agencies.

C. USCIS's denial of Ms. Cisneros Zavala's application for adjustment of status was based on an unlawful interpretation of § 1182(a)(9)(B)(i)(II).

35. Ms. Cisneros Zavala is a 54-year-old grandmother, born in Chihuahua, Mexico.

36. In 2001, Ms. Cisneros Zavala and her husband, Mr. Perez Gonzalez, also a Plaintiff here, came to the United States with dreams of working hard to provide their children with a good education and a better future here.

37. For the last twenty years, Ms. Cisneros Zavala and her family have put down roots here in Colorado. Apart from a few brief trips to Mexico, from which they always returned with their visa, the family has lived in the United States.

38. Her children have grown up in the U.S., and now have families of their own here.

39. Ms. Cisneros Zavala's children are older now, but she has not stopped working just as hard as ever. Even during the COVID-19 pandemic, Ms. Cisneros Zavala continued to work as an essential worker.

40. Ms. Cisneros Zavala works this job during the evenings, so she can take care of her granddaughter during the day.

41. Ms. Cisneros Zavala is actively involved with her granddaughter's day to day life, which has continued to strengthen the bonds of this close-knit family.

42. Ms. Cisneros Zavala was ecstatic to be able to apply to adjust her status to that of lawful permanent resident.

43. On November 4, 2019, Ms. Cisneros Zavala applied to adjust her status to that of lawful permanent resident, through her U.S. citizen daughter, by filing the two requisite forms with USCIS. Included with this application Ms. Cisneros Zavala submitted the required costs and

filing fees—$535 for one of the forms, and $1225 for the other. This amounts to a total of $1760 for the filing fees alone. This was a substantial amount of money for Ms. Cisneros Zavala to pay, and did not include any additional attorney fees or medical exam costs.

44. On November 13, 2019, USCIS notified Ms. Cisneros Zavala that it had received her application to adjust status to that of a lawful permanent resident along with the necessary filing fees.

45. USCIS issued Ms. Cisneros Zavala "alien[4] registration number" A219 375 055. Ms. Cisneros Zavala appeared for her required biometrics appointment on December 12, 2019, during which USCIS collected her fingerprints and took her photograph. At this appointment, Ms. Cisneros Zavala received a Courtesy Letter reminding her that USCIS needed a Medical Exam to properly adjudicate her application.

46. On September 8, 2020, Ms. Cisneros Zavala received an Interview Notice. The USCIS scheduled her interview for October 15, 2020 at 9:15am at the Denver USCIS Field Office.

47. On October 15, 2020, Ms. Cisneros Zavala, and her husband, Mr. Perez Gonzalez, appeared at the Denver USCIS Field Office for their interview.

48. On November 10, 2020, shortly after her interview, USCIS denied Ms. Cisneros Zavala's application for adjustment of status.

49. In its denial, USCIS justified its decision by stating that "[a]n applicant for adjustment of status under INA 245(a) must establish that he or she is not subject to the INA

[4] The term "alien" is a dehumanizing term. The use of this term throughout this Complaint is not intended to indicate support of the INA's or the Department's continued use of this term to further dehumanize and marginalize noncitizen immigrants in the United States.

212(a)(9)(B)(i)(II) (8 U.S.C. § 1182(a)(9)(B)(i)(II)) inadmissibility ground relating to aliens unlawfully present for 1 year or more." Exh. 3.

50. USCIS determined that Ms. Cisneros Zavala previously accrued more than one year of unlawful presence, and then departed the United States. This departure triggered the ten-year waiting period for seeking admission to the United States under Section 1182(a)(9)(b)(i)(II). *See* Exh. 3.

51. After she accrued more than one year of unlawful presence, Ms. Cisneros Zavala departed the United States in 2008. Thus, under Section 1182(a)(9)(b)(i)(II), Ms. Cisneros Zavala's ten-year bar expired in 2018.

52. Therefore, when Ms. Cisneros Zavala filed her application for adjustment of status in 2019, she was no longer subject to the ten-year bar and thus was no longer inadmissible. *See* 8 U.S.C. § 1182(a)(9)(b)(i)(II).

53. USCIS, based on an unlawful interpretation of this statute, imposed an additional and unsupported location requirement on Ms. Cisneros Zavala when it determined that it wasn't enough that she had waited the requisite ten years, but decided that she *also* needed to have spent the ten-year waiting period outside of the United States.

54. This denial came as a shock to Ms. Cisneros Zavala after she had followed the proper process and complied with the requirements for an application for adjustment of status.

55. Despite this devastating result, Ms. Cisneros Zavala still has faith in the law. She continues to work hard, pay her taxes, and be an outstanding member of her community.

D. <u>USCIS's denial of Mr. Perez Gonzalez's application for adjustment of status was based on an unlawful interpretation of § 1182(a)(9)(B)(i)(II).</u>

56. Mr. Perez Gonzalez is Ms. Cisneros Zavala's husband.

57. On November 4, 2019, Mr. Perez Gonzalez applied to adjust his status to that of lawful permanent resident through his U.S. citizen daughter. His application included the required costs and filing fees—$535 for one of the forms, and $1225 for the other. This amounts to a total of $1760 for the filing fees, and did not include any additional attorney fees or medical exam costs.

58. On November 13, 2019, USCIS notified Mr. Perez Gonzalez that it had received his application to adjust status to that of a lawful permanent resident along with the necessary filing fees.

59. USCIS issued Mr. Perez Gonzalez "alien registration number" A219 373 242. Mr. Perez Gonzalez appeared for his biometrics appointment on December 12, 2019. Like his wife, Mr. Perez Gonzalez received a Courtesy Letter reminding him that USCIS needed a Medical Exam to properly adjudicate his application.

60. On September 8, 2020, Mr. Perez Gonzalez received an Interview Notice indicating that USCIS had scheduled his interview for October 15, 2020 at 9:15am at the Denver USCIS Field Office.

61. On October 15, 2020, Mr. Perez Gonzalez, with his wife, appeared at the Denver USCIS Field Office for his interview.

62. On October 15, 2020, USCIS issued Mr. Perez Gonzalez a Request for Evidence requesting a completed Medical Exam form. USCIS gave Mr. Perez Gonzalez until January 1, 2021, to complete this request.

63. However, on November 10, 2020, before that due date had arrived, USCIS denied Mr. Perez Gonzalez's application for adjustment of status.

64. In its denial, USCIS justified its decision by stating that "[a]n applicant for adjustment of status under INA 245(a) must establish that he or she is not subject to the INA 212(a)(9)(B)(i)(II) (8 U.S.C. § 1182(a)(9)(B)(i)(II)) inadmissibility ground relating to aliens unlawfully present for 1 year or more." Exh. 3.

65. USCIS determined that Mr. Perez Gonzalez accrued more than one year of unlawful presence, and then departed the United States. This departure triggered the ten-year waiting period for seeking admission to the United States under Section 1182(a)(9)(b)(i)(II). *See* Exh. 3.

66. After he accrued more than one year of unlawful presence, Mr. Perez Gonzalez departed the United States in 2008. Thus, under Section 1182(a)(9)(b)(i)(II), Mr. Perez Gonzalez's ten-year bar expired in 2018.

67. Therefore, when Mr. Perez Gonzalez filed his application for adjustment of status in 2019, he was no longer subject to the ten-year bar and thus was no longer inadmissible. *See* 8 U.S.C. § 1182(a)(9)(b)(i)(II).

68. USCIS, based on an unlawful interpretation of this statute, imposed an additional and unsupported location requirement on Mr. Perez Gonzalez when it determined that it wasn't enough that he had waited the requisite ten years, but decided that he *also* needed to have spent the ten-year waiting period outside of the United States.

69. USCIS's denial of his application caused Mr. Perez Gonzalez significant sadness and confusion. He didn't, and still doesn't, understand why USCIS denied his application when he pays his taxes, is not problematic, and provides stability for his wife and children.

E. USCIS's denial of Ms. Salazar Manzo's application for adjustment of status was based on an unlawful interpretation of § 1182(a)(9)(B)(i)(II).

70. Ms. Salazar Manzo is a wife and mother who wants to remain in the United States with her husband and children.

71. Like Ms. Cisneros Zavalas and Mr. Perez Gonzalez, Ms. Maria Salazar Manzo applied to adjust her status to that of lawful permanent resident with USCIS.

72. On September 4, 2018, Ms. Salazar Manzo applied to adjust her status to that of lawful permanent resident through her U.S. citizen spouse. She was excited to have the peace of mind that comes with being a permanent resident, and was eager to continue to live with the love of her life, her husband. Exh. 4.

73. Ms. Salazar Manzo included the required costs and filing fees with her application—$535 for one of the forms, and $1225 for the other. This amounted to a total of $1760 for the filing fees, and did not include any additional attorney fees or medical exam costs.

74. On September 11, 2018, USCIS notified Ms. Salazar Manzo that it had received her application to adjust status to that of a lawful permanent resident along with the necessary filing fees.

75. USCIS issued Ms. Salazar Manzo "alien registration number" A214 995 701. Ms. Salazar Manzo appeared for her biometrics appointment on October 4, 2018. Ms. Salazar Manzo received a Courtesy Letter reminding her that USCIS needed a Medical Exam to properly adjudicate her application.

76. On January 29, 2019, Ms. Salazar Manzo received an Interview Notice indicating that USCIS had scheduled her interview for March 5, 2019 at 10:45am at the Denver USCIS Field Office.

77. On March 5, 2019, Ms. Salazar Manzo appeared at the Denver USCIS Field Office for her interview.

78. On March 5, 2019, USCIS issued Ms. Salazar Manzo a Request for Evidence. The Request for Evidence asked Ms. Salazar Manzo to submit an I-601 waiver to adjudicate her application for adjustment of status.

79. If an individual seeks adjustment of status but is inadmissible to the United States under certain grounds of inadmissibility, they must file for a waiver of that ground of inadmissibility.

80. USCIS gave Ms. Salazar Manzo until May 31, 2019 to complete the request.

81. On March 25, 2019, Ms. Salazar Manzo, through counsel, responded to the Request for Evidence with a letter indicating that she was not required to submit a waiver because she was no longer subject to the ten-year time bar that had made her inadmissible.

82. After she accrued more than one year of unlawful presence, Ms. Salazar Manzo departed the United States in 1999. Thus, under Section 1182(a)(9)(b)(i)(II), Ms. Salazar Manzo's ten-year bar expired in 2009.

83. Despite this, on May 29, 2019, USCIS denied Ms. Salazar Manzo's application stating that "[a]n applicant for adjustment of status under INA 245(a) must establish that he or she is not subject to the INA 212(a)(9)(B)(i)(II) (8 U.S.C. § 1182(a)(9)(B)(i)(II)) inadmissibility ground relating to aliens unlawfully present for 1 year or more." Exh. 3.

84. USCIS determined that Ms. Salazar Manzo accrued more than one year of unlawful presence, and then departed the United States. This triggered the ten-year waiting period for seeking admission to the United States. *See* Exh. 3.

85. As Ms. Salazar Manzo told USCIS, her ten-year bar expired in 2009—nearly ten years before Ms. Salazar Manzo applied for admission.

86. Therefore, when Ms. Salazar Manzo filed her application for adjustment of status in 2019, she was no longer subject to the ten-year time bar and thus was no longer inadmissible. *See* 8 U.S.C. § 1182(a)(9)(b)(i)(II).

87. USCIS, based on an unlawful interpretation of this statute, imposed an additional and unsupported location requirement on Ms. Salazar Manzo when it determined that it wasn't enough that she had waited the requisite ten years, but decided that she *also* needed to have spent that ten-year waiting period outside of the United States.

88. USCIS's denial was heartbreaking for Ms. Salazar Manzo. She had sought the security of knowing she would be able to remain in the United States where she has built a life and has begun raising a family. She wants to continue to raise her children, Jose and Reyna, in the United States alongside her adoring husband, Reynaldo. Exh. 4.

V. STATEMENT OF CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
Administrative Procedure Act - Unlawful Agency Action
By All Plaintiffs and Against All Defendants

89. Plaintiffs hereby incorporate all of the paragraphs of this Complaint as though fully set forth herein.

90. Plaintiffs bring this Count against all Defendants and seek declaratory and injunctive relief under the APA.

91. "The APA 'sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.'" *Dep't of Homeland Sec. v. Regents*

of Univ. of Cal., 140 S. Ct. 1891, 1905 (2020) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992)). The APA empowers courts to review agency actions for whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also* 5 U.S.C. § 706(2)(B) (dictating that courts "shall . . . hold unlawful and set aside agency action" that is "contrary to constitutional right, power, privilege, or immunity."). In doing so, courts only review the grounds invoked by the agency when it made its decision. *Regents*, 140 S. Ct. at 1907.

92. "In some [APA] cases, an agency is alleged to have acted contrary to a statutory command or prohibition … In other APA cases, by contrast, the agency is acknowledged to have discretion under the relevant statute, but is alleged to have exercised that discretion in an arbitrary and capricious (that is, unreasonable) manner." *Multicultural Media, Telecomm. & Internet Council v. FCC*, 873 F.3d 932, 934 (D.C. Cir. 2017) (Kavanaugh, J.) (internal citations omitted).

93. This case falls within the first category of APA cases, as Plaintiffs claim that USCIS's denial of their applications was contrary to, and based on an incorrect interpretation of, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

94. In APA cases, a court is often called upon to apply the "*Chevron* framework" and determine 1) whether the statute is ambiguous regarding the question at issue, and if so, 2) whether the agency's interpretation is reasonable. *Chevron, USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984). The Supreme Court has forgone *Chevron* analysis when a case presents a narrow question of statutory interpretation which the courts are equipped to decide, as opposed to cases in which the agency is filling a gap left by the statute. *See INS v. Cardoza-Fonesca*, 480 U.S. 421, 446–48 (1987). Likewise, the Tenth Circuit has forgone the *Chevron* framework when an

agency is not exercising rulemaking power delegated by Congress or employing its "expertise in the formulation of substantive policy." *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1148 (10th Cir. 1999) (quoting *Sandoval v. Reno*, 166 F.3d 225, 239 (3d Cir. 1999)); *see also Da Silva v. Att'y Gen. U.S.*, 948 F.3d 629, 634–65 (3d Cir. 2020).

95. This case presents "a pure question of statutory construction for the court[] to decide," so *Chevron* is inapplicable. *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 (1987).

96. Moreover, the Government's statutory interpretation comes in the form of a letter denying an application, so it is not the type of fully researched and reasoned decision that is entitled to any deference beyond its power to persuade. Exh. 3; *see, e.g.*, *Perez v. Cuccinelli*, 949 F.3d 865, 877 (4th Cir. 2020) (en banc) (Service decision in letter not entitled to deference); *Kaufman v. Nielsen*, 896 F.3d 475, 484–85 (D.C. Cir. 2018) (same); *Khalil v. Hazuda*, 833 F.3d 463, 469 (5th Cir. 2016) (same).

97. Accordingly, Plaintiffs aver that this Court must use the ordinary tools of statutory interpretation to determine whether Defendants' interpretation and application of 8 U.S.C. § 1182(a)(9)(B)(i)(II) is legally correct. *Da Silva v. Att'y Gen. U.S.*, 948 F.3d 629, 634–65 (3d Cir. 2020).

98. The statute at issue here, 8 U.S.C. § 1182(a)(9)(B)(i)(II), provides that any non-citizen who "has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible." 8 U.S.C. § 1182(a)(9)(B)(i)(II). Four pertinent scenarios suggest themselves. Each assumes a non-citizen who was unlawfully present in the United States for one year or more, and then departed or was removed.

99. The first, Scenario A, is straightforward. Non-citizen A seeks admission to the United States in year 5, i.e., 5 years after her departure. Because the ten-year waiting period has not elapsed, Non-citizen A is "inadmissible," and her application is denied under 8 U.S.C. § 1182(a)(9)(B)(i)(II). The second, Scenario B, is equally straightforward. Non-citizen B seeks admission to the United States in year 11, i.e., 11 years after his departure. Because the ten-year waiting period has elapsed, he is not "inadmissible" under 8 U.S.C. § 1182(a)(9)(B)(i)(II). His application is not barred by 8 U.S.C. § 1182(a)(9)(B)(i)(II) and may be granted if he meets all other requirements. These first two scenarios closely track the statutory classification.

100. Non-citizen C, like Non-citizen A, seeks admission to the United States in year 5. Because the ten-year waiting period has not elapsed, she is "inadmissible," and her application is denied. So, like Non-citizen B, she applies for admission to the United States in year 11. Her situation is like that of Non-citizen B in every respect except one: during the ten-year waiting period, she filed an unsuccessful application for admission. Therefore, she should be treated like Non-citizen B, unless the filing of the application within the ten-year period is a disqualification—i.e., unless the "inadmissible" status attached when she applied in year 5, and is permanent.

101. Non-citizen D, like Non-citizen A, seeks admission to the United States in year 5. The ten-year waiting period has not yet elapsed, so she is "inadmissible." Nevertheless, Non-citizen D is granted admission (perhaps by mistake, or because she failed to disclose the facts rendering her inadmissible). In year 11, she seeks an adjustment of status, which depends on her being currently "admissible." In this sense, it is the functional equivalent of seeking admission.[5]

[5] "Seeks admission" means both applying for admission at the border, and applying for adjustment of status from within the United States. *Matter of Rodarte-Roman*, 23 I&N Dec. 905, 908 (BIA 2006).

As in the case of Non-citizen C, the issue boils down to whether Non-citizen D's 8 U.S.C. § 1182(a)(9)(B)(i)(II) "inadmissible" status, though unrecognized in year 5, nevertheless attached and persists beyond year 10.

102. Plaintiffs stand in the shoes of Non-citizen D. They each accrued more than one year of unlawful presence when they overstayed their visitor's visa. Exh. 5. They then departed from the United States—but did not stay "departed." Within 10 years of their respective departure they sought admission. Exh. 5. Thus, under the plain terms of the statute, Plaintiffs were "inadmissible" when they sought admission to enter the United States, because the ten-year waiting period had not elapsed. What creates the interpretive issue in this case is that Plaintiffs *were* nevertheless admitted, and have been in the United States since that admission. Exh. 5. The question is whether plaintiffs are "inadmissible" now.

103. In 2018—almost twenty years after Ms. Salazar Manzo's departure, and eighteen years after her reentry—Ms. Salazar Manzo applied for an adjustment of status. Similarly, in 2019, Ms. Cisneros Zavala and Mr. Perez Gonzalez, eleven years after their reentry, applied for adjustment of status. An application for an adjustment of status requires an applicant to be "admissible."

104. A plain reading of 8 U.S.C. § 1182(a)(9)(B)(i)(II) establishes that its bar is inapplicable: Each Plaintiff departed the United States, when more than 10 years elapsed, each Plaintiff applied for adjustment of status. Ms. Cisneros Zavala, and Mr. Gonzalez Perez applied eleven years after the time bar elapsed. Ms. Salazar Manzo applied almost twenty years after the time bar elapsed.

105. The Government recognizes, as it must, that each Plaintiff's application was not filed "within 10 years of the date of [their] departure." Nonetheless, in denying the Plaintiff's application for adjustment of status, the Government reasoned that, although the ten year time bar had expired, Plaintiffs were "inadmissible" in 2019 and 2020, respectively, as a result of 8 U.S.C. § 1182(a)(9)(B)(i)(II), and that their inadmissible status never changed thereafter.

106. Of note, 8 U.S.C. § 1182(a)(9)(B)(i)(II) has a limited function. It is not a complete statement of grounds for grant or denial of admission. Rather, it permits the Government to dispose of certain cases in a summary manner. It imposes a ten-year categorical bar to admission, irrespective of the application's other merits, or lack thereof. So during the ten-year waiting period, the application will be denied. After the expiration of the ten-year period, however, the non-citizen may be, though will not necessarily be, admitted. The categorical bar of 8 U.S.C. § 1182(a)(9)(B)(i)(II) no longer applies, but any and all other grounds for exclusion may bar admission. Based on 8 U.S.C. § 1182(a)(9)(B)(i)(II)'s 1) words, 2) place in the statutory context, 3) purpose, and 4) interpretation by its implementing agency, a non-citizen is inadmissible only during the ten-year period following his or her departure.

A. Text of 8 U.S.C. § 1182(a)(9)(B)(i)(II)

107. Plaintiffs start with the plain language of 8 U.S.C. § 1182(a)(9)(B)(i)(II). *St. Charles Inv. Co. v. Comm'r*, 232 F.3d 773, 776 (10th Cir. 2000). The Government denied Plaintiffs' adjustment of status application under 8 U.S.C. § 1182(a)(9)(B)(i)(II). That section provides:

> Any alien (other than an alien lawfully admitted for permanent residence) who –

> (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254(a)(e)[] of this title) prior to the commencement of proceedings under section 1225(b)(1) of this title or section 1229a of this title, and again seeks admission within 3 years of the date of such alien's department or removal, or
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,
> is inadmissible.

8 U.S.C. § 1182(a)(9)(B)(i).

108. "An alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." 8 U.S.C. § 1182(a)(9)(B)(ii). "The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). The adjustment of status qualifies as an "admission." *Matter of Rodarte-Roman*, 23 I&N Dec. 905, 908 (BIA 2006).

109. Words derive meaning from surrounding words, and courts avoid giving words any broader meaning than their context can bear. *See In re McDaniel*, 973 F.3d 1083, 1094-95 (10th Cir. 2020); *see also Food and Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132 (2000) ("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning–or ambiguity–of certain words or phrases may only become evidence when placed in context.").

110. Here, the phrases "seeks admission" and "is inadmissible" are both expressed in the present tense. Because of this parallelism, the most natural reading of 8 U.S.C. § 1182(a)(9)(B)(i)(II) is that a non-citizen is inadmissible when the non-citizen seeks admission within the ten-year period—i.e., that an application for admission at that time should be denied. To understand inadmissibility under 8 U.S.C. § 1182(a)(9)(B)(i)(II) as stretching beyond the ten-year period would strain the context of the words, which address a specific, temporally limited situation.[6]

111. Time and tense are not the same thing. The phrase "is inadmissible" does not refer to the literal present, i.e., the moment that the reader is perusing the statute. Nor does it refer to the time that the drafter wrote it. It is the statutory "present," in the sense of the time at which the described event takes place and is permitted, prohibited, or otherwise affected by the statute.[7] While the thought might be more clearly expressed as "is inadmissible during that 10-year period," 8 U.S.C. § 1182(a)(9)(B)(i)(II) is clear enough. Because it is patently concerned with declaring certain persons inadmissible during that ten-year period, but not thereafter, it makes sense to read "is inadmissible" to require denial of application for admission within that ten-year period only.[8]

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[6] The alternative interpretation requires a reading of the statute to impose inadmissibility not temporarily, for a specified ten-year period, but permanently, for a certain class of people consisting of those who dared to apply for admission before that ten-year period had elapsed. The application before 10 years have elapsed would thus become, not just grounds for denial, but a brand of permanent disqualification. If that were the statute's drastic intent, we would expect a far clearer statement.

[7] In that sense, it has been written (we might say "it is written") that a statute is "always speaking." *See* Goldfarb, Neal. (2013). "Always speaking"? Interpreting the present tense in statutes. Canadian Journal of Linguistics/Revue canadienne de linguistique. 58. 63-83. 10.1017/S0008413100002528. Linguistically, this quickly gets the statute into deep water. What Plaintiffs are describing, however, is not highly specialized, but a matter of familiar usage.

[8] Consulting legislative history, the Conference Committee Report for the legislation that would become 8 U.S.C. § 1182(a)(9)(B)(i)(II) states that "[a]n alien unlawfully present for 1 year or more

112. The meaning of 8 U.S.C. § 1182(a)(9)(B)(i)(II) becomes clearer by comparison with related constructions in the statute. "[W]ord choice matters," and "Congress knows how to say such things when it wants to," *United States v. Hodge*, 948 F.3d 160, 163 (3d Cir. 2020), a comparative principle that applies a fortiori when applied within the same statute. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular language in a statute). Here, Congress used language of permanency in other parts of § 1182(a), language that easily could have been transplanted to 8 U.S.C. § 1182(a)(9)(B)(i)(II) to accomplish the same result, if that had been intended. For example, any non-citizen who "has engaged in terrorist activity," § 1182(a)(3)(B)(i)(I), or "has engaged in the recruitment or use of child soldiers," § 1182(a)(3)(G), is inadmissible—by implication, forever. By using the past tense, Congress has indicated that any former terrorist activity or use of child soldiers renders a non-citizen inadmissible thereafter. The present tense, used in 8 U.S.C. § 1182(a)(9)(B)(i)(II), does not carry the same connotation. The past always remains the past; not so, the present.

113. Relatedly, Congress demonstrated that it knows how to bar non-citizens comprehensively by the simple expedient of employing both the past and present tense. Elsewhere, the statute provides that any non-citizen who "is coming to the United States . . . to engage in prostitution, or has engaged in prostitution" is inadmissible. 8 U.S.C. § 1182(2)(D)(i). The upshot

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who voluntarily departs is barred from admission for 10 years." H.R. Rep. No. 104-828, at 207 (1996) (Conf. Rep.). Thus, this Report tends to confirm that the admission bar operates only for ten years.

of these provisions is that Congress knows how to impose inadmissibility on a perpetual basis, based on something the non-citizen has done.

114. Congress did not do that in 8 U.S.C. § 1182(a)(9)(B)(i)(II). Rather, Congress used the present tense ("seeks admission") when describing the act that renders a non-citizen inadmissible, and it specified a time frame. Differing verb tenses within one statute are significant. *See Carr v. United States*, 560 U.S. 438, 448-49 ("Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." (citing *United States v. Wilson*, 503 U.S. 329, 222 (1992) ("Congress' use of a verb tense is significant in construing statutes"))). The use of only the present tense, in contrast to tenses used elsewhere, reinforces the notion that a non-citizen is inadmissible under 8 U.S.C. § 1182(a)(9)(B)(i)(II) at that time—i.e., when seeking admission within the ten-year period. If Congress wanted to say that the past act of having sought admission within the ten-year period renders a non-citizen inadmissible forever after, as the Government would have it, Congress could have said "seeks admission or has sought admission." Because Congress did not do that, and because reading inadmissibility in conjunction with the present tense of "seeks admission" is more natural, the Government's reading of the statute is erroneous and must be rejected.[9]

115. The text of the statute, then, most naturally reads as a categorical bar to admissibility which applies for 10 years after the non-citizen departed, but not thereafter. As to comings, goings, or other events during that ten-year period, the statute is silent.

[9] Other courts have read the statute as Plaintiffs do here. *See Kanai v. U.S. Dep't of Homeland Sec.*, No. 2:20-cv-05345-CBM-(KSx), 2020 WL 6162805, at *2 (C.D. Cal. Aug. 20, 2020),

B. Context of 8 U.S.C. § 1182(a)(9)(B)(i)(II)

116. This Court should also consider the broader statutory context in which 8 U.S.C. § 1182(a)(9)(B)(i)(II) appears, as "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." *United States v. Burkholder*, 816 F.3d 607, 614 (10th Cir. 2016) (internal quotations and citations omitted); *see also Food and Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132 (2000) ("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evidence when placed in context.").

117. The section containing subparagraph 8 U.S.C. § 1182(a)(9)(B)(i)(II) comprises a graduated scheme, in which (B)(i)(II) occupies an intermediate position, short of the lifetime ban for more serious violators of the immigration laws which is contained in the following subparagraph (C).

118. The subparagraph at issue, (B)(i)(II), is part of 8 U.S.C. § 1182(a). The numbered subsections of Section 1182(a) describe classes of non-citizens who are "inadmissible" and thus "ineligible to receive visas and ineligible to be admitted." One such class, described in subsection (a)(9), consists of "aliens previously removed" from the United States.

119. Subsection (a)(9) in turn is divided into subparagraphs. One of those is subparagraph (B), the one at issue here, titled "Aliens unlawfully present." Another, subparagraph (C), applies to "Aliens unlawfully present *after previous immigration violations*." (Emphasis added). It stands to reason that the subparagraph (C) class might merits harsher treatment than the

subparagraph (B) class, and a decision of the Board of Immigration Appeals ("BIA") lends support to that view. *Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006). As described in *Rodarte-Roman*, subsection (a)(9)'s subparagraphs proceed stepwise in order of severity; they "seek to compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing such violations to be lawfully readmitted thereafter." *Id*.

120. Accordingly, Subparagraph (B) "provides for the temporary inadmissibility of aliens who have been unlawfully present in the United States for certain continuous periods and who are seeking admission after having departed," while subparagraph (C) "provides for the *permanent* inadmissibility of any alien who enters or attempts to reenter the United States without being admitted after a prior removal." *Id*. (emphasis added).

121. "[A]liens inadmissible under [subparagraph (C)] who attempt to enter or reenter without being admitted may be more culpable than those under [subparagraph (B)] who are seeking admission." *Cheruku v. Att'y Gen. U.S.*, 662 F.3d 198, 207 (3d Cir. 2011). Thus, it is subparagraph (C) which imposes the most severe consequence, permanent inadmissibility, on the most culpable violators. To read (B)(i)(II) as imposing the same punishment as subparagraph (C) would not be consistent with the expressed views of Congress that non-citizens qualifying for subparagraph (B) are a step below non-citizens qualifying for subparagraph (C) in culpability.

122. The Government's current interpretation is in considerable tension with that statutory scheme. Generally speaking, subparagraph (C) imposes permanent inadmissibility on past violators of the immigration laws; subparagraph (B) imposes the lesser sanction of inadmissibility for 10 years on less culpable persons. The Government's position—in effect, "once

inadmissible, always inadmissible"— would render Plaintiff's permanently inadmissible under the nominally more lenient subparagraph (B). In the context of subsection (a)(9)'s graduated scheme, a lifetime ban for those who fall under subparagraph (B) would be anomalous.

C. Purpose of 8 U.S.C. § 1182(a)(9)(B)(i)(II)

123. Plaintiffs' interpretation of 8 U.S.C. § 1182(a)(9)(B)(i)(II) is consistent with the statute's purpose, and would not produce absurd results. *Griffin v. Oceanic Contractors*, 458 U.S. § 564, 575 (1982). Most generally, "the provisions of 8 U.S.C. § 1182(a)(9), including the ten-year bar, were intended to deter non-citizens who had accrued unlawful presence and then left the United States from later seeking admission." *Cheruku*, 662 F.3d at 207. "It is recidivism, and not mere unlawful presence, that section [(a)(9)] is designed to prevent." *Rodarte-Roman*, 23 I&N Dec. at 909.

124. The Government's position does not very clearly further the statute's purpose. In more straightforward scenarios, (Scenarios A and B discussed above) bespeak a statutory purpose to withhold admissibility on a categorical basis for 10 years after departure, but permit it thereafter. What 8 U.S.C. § 1182(a)(9)(B)(i)(II) does not do, however, is impose a permanent ban on anybody.

125. The statute can be extended to Scenarios C and D only by distorting its text and attempting to implement some more general sense of its purpose. Such an approach exceeds the bounds of prudent statutory construction. Consider Non-citizen C, for example, who departed at the beginning of year 1, unsuccessfully sought admission in year 5, waited, and reapplied for admission in year 11. It does not advance the statute's purpose—understood as a ten-year bar or waiting period—to continue to bar Non-citizen C from admission in year 11. Non-citizen D differs from C in that her application for admission in year 5 was successful, before she went on to apply

to adjust her status in year 11. Her status-adjustment application still conforms to the words of the statute, however, in that it occurs more than 10 years after she departed. The issue the government conflates here is that she should not have been admitted in year 5—but that is a separate problem. The Government cannot fix that separate problem by grafting onto 8 U.S.C. § 1182(a)(9)(B)(i)(II) a judicially-created doctrine that, where the application for admission is wrongly granted, as opposed to denied, the non-citizen's inadmissible status should be deemed permanent. On that view, 8 U.S.C. § 1182(a)(9)(B)(i)(II) would operate as a punishment with permanent effects, rather than as a time-limited deterrent. That is inconsistent with both its wording and its evident purpose. *See Aguilar-Enriquez v. Holder*, 492 F. App'x 511, 517–18 (6th Cir. 2012) ("[8 U.S.C. § 1182(a)(9)(B)(i)(II)] only punishes a non-citizen by barring that non-citizen from applying for adjustment of status for 10 years."). Applying 8 U.S.C. § 1182(a)(9)(B)(i)(II)'s bar only during the ten- year period is consistent with the statute's purpose in most, if not all, instances, and the Government should not use a few awkward in-between cases should not be used as a basis to distort its interpretation.

126. Plaintiffs' reading of the statue would not produce absurd results. Plaintiffs sought re-entry during the ten-year period. Exh. 1. But instead of being deemed inadmissible, as the statute contemplates, the Government allowed Plaintiffs to be admitted with their visitor's visas. What should have happened was denial of admission. Still, some level of unlawful presence is a given; far from being an automatic or permanent disqualification, it is the very premise for application of 8 U.S.C. § 1182(a)(9) itself, and 8 U.S.C. § 1182(a)(9)(B)(i)(II) in particular. Plaintiffs waited for between eleven and almost twenty years after their departure to apply for adjustment of their status to lawful permanent residents. Although that period well exceeds the ten-year statutory waiting

period, Plaintiffs' spent most of that period inside, not outside, the United States, as a result of the erroneous grant of their re-entry.

127. While this specific situation may not have been addressed by the statute's drafters, and the Government may consider applying the statute literally to Plaintiffs' situation to be bad policy, the legislature, not the court, should fix it. "To depart from a statute's plain meaning today, the text must dictate a result so unreasonable that it amounts to an absurdity." *Riccio*, 954 F.3d at 588 n.2. That is a "high bar," as "[v]irtually all laws would be absurd if judged by whether they accomplish a perfect solution to an underlying legislative concern." *Id*. at 589 (citation omitted). The text, context, and purpose of 8 U.S.C. § 1182(a)(9)(B)(i)(II) all indicate that its bar on admission applies only to the ten-year period. Applying 8 U.S.C. § 1182(a)(9)(B)(i)(II)'s plain meaning to the facts here may reveal a statutory blind spot where a non-citizen is accidentally admitted. Yet a gap in the statute is not the same thing as an absurdity. *See Robbins v. Chronister*, 435 F.3d 1238, 1241 (10th Cir. 2006); *see also In re Visteon Corp.*, 612 F.3d 210, 234 (3d Cir. 2010) ("That [the statute] is a partial solution to congressional concerns in no way converts it into an absurdity."). Indeed, applying the Service's interpretation to avoid this blind spot would thwart the statute's text and purpose. At bottom, 8 U.S.C. § 1182(a)(9)(B)(i)(II) is a "*specific* bar[] to admissibility" under limited circumstances. *Cheruku*, 662 F.3d at 207 (emphasis added). That it does not capture the particular situation here does not evince any absurdity—only the reality that, like many statutes, its plain meaning is incapable of addressing every situation. *See Robbins v. Chronister*, 435 F.3d at 234; *see also Visteon*, 612 F.3d at 234.

128. To the extent Plaintiffs' cases are anomalous, the anomaly is not so much a product of some absurdity in the statute as it is a product of a mistaken decision to allow Plaintiffs to re-

enter the United States. Either because 1) Plaintiffs did not disclose their prior unlawful presence, or 2) the Government, at the time of his admission, did not catch their prior unlawful presence (or both), Plaintiffs were admitted for re-entry. 8 U.S.C. § 1182(a)(9)(B)(i)(II) does not contemplate this situation because it assumes that, when a non-citizen "seeks admission" in the ten-year period, they will be properly denied admission. The result of interpreting the statute in Plaintiffs' favor produces a result that may be unanticipated, but is not absurd, and it does not bespeak a legislative failure to guard against an obviously absurd result. A court cannot rewrite a statute merely because the legislative means are not a perfect fit for the legislative ends.

D. Interpretation by Other Tribunals

129. Other tribunals have agreed with Plaintiffs' reading of the statute.

130. To start, immigration courts, the BIA, and USCIS have previously read 8 U.S.C. § 1182(a)(9)(B)(i)(II) in the way that Plaintiffs assert. *See Cheruku v. Att'y Gen.*, 662 F.3d 198 (3d Cir. 2011); *see also County of Maui v. Haw. Wildlife Fund*, 140 S.Ct. 1462, 1474 (2020).

131. The U.S. Court of Appeals for the Third Circuit interpreted 8 U.S.C. § 1182(a)(9)(B)(i)(II) in *Cheruku v. Att'y Gen.* straightforwardly, as creating a ten-year period of inadmissibility running from the noncitizen's departure. *Id.* Construing 8 U.S.C. § 1182(a)(9)(B)(i)(II) in relation to a question not presented here, the Third Circuit explained that the statute creates a "ten- year bar" and provides that "an alien with a one-year period of unlawful presence in the U.S. would not be eligible for consular admission and inspection at all *during the applicable bar period* without a waiver of inadmissibility." *Cheruku*, 662 F.3d at 207 (emphasis added). Therefore, the Third Circuit indicated that 8 U.S.C. § 1182(a)(9)(B)(i)(II) bars admission only "during the applicable bar period," ten years from a date of departure.

132. The BIA's construction of 8 U.S.C. § 1182(a)(9)(B)(i)(II) also illuminates the statute and tips in favor of Plaintiffs' interpretation. *See County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. at 1474 (in interpreting a statute that an agency administers, courts consider the agency's views and prior application, even when *Chevron* is inapplicable). In *Matter of Rodarte-Roman*, the BIA, much like the Third Circuit, expressed a general sense that 8 U.S.C. § 1182(a)(9)(B)(i)(II) does no more than impose a ten-year ineligibility period. There, the BIA addressed whether, under (B)(i)(II), the entire one year of unlawful presence must precede the departure. 23 I&N Dec. at 908. The BIA held that it must: "an alien's departure from the United States triggers the 10-year inadmissibility period specified in [8 U.S.C. § 1182(a)(9)(B)(i)(II)] only if that departure was preceded by a period of unlawful presence of at least 1 year." *Id.* at 909. In construing (B)(i)(II), the BIA reasoned that 8 U.S.C. § 1182(a)(9)(B)(i)(II) is intended to create a "temporary" period of inadmissibility and so operates in a literal way: first, a non-citizen accrues one year of unlawful presence, then he departs, and then he seeks admission within 10 years. At the time he seeks admission, he is inadmissible. *Id.* The words of the statute are read literally, even if the tribunal thinks it would make just as much sense to apply the statute to non-citizens who left before accruing a year of unlawful presence: "Congress made departure . . . the event that triggers inadmissibility." *See id.* at 208, 210.

133. *Matter of Rodarte-Roman* thus evinces an understanding by the BIA that 8 U.S.C. § 1182(a)(9)(B)(i)(II) creates a temporary bar of inadmissibility running 10 years from the date of departure (preceded by one year of unlawful presence). *Id.* at 905. The BIA's approach in *Matter of Rodarte-Roman* stresses a literal reading of 8 U.S.C. § 1182(a)(9)(B)(i)(II): a straightforward timeline of unlawful presence, departure, and inadmissibility for 10 years. *Id.*

134. There are two tribunal to have faced facts like Plaintiffs', in the context of a very closely allied legal issue, and both read the statute much as Plaintiffs do here.

135. In *Kanai v. Dep't of Homeland Sec.*, the plaintiff entered the United States in 1996 on a visa, overstayed that visa, departed in 2003, entered the United States again in 2005 on a visa, overstayed that visa, and applied to adjust her status some 17 years after her departure, in 2020. No. 2:20-cv-05345-CBM-(KSx), 2020 WL 6162805, at *2 (C.D. Cal. Aug. 20, 2020). The Government denied her application, reasoning that, although her period of inadmissibility began to run from 2003 (her departure), that period was tolled by her "substantively unlawful" admission in 2005 and subsequent unlawful presence in the country. DE 24, at 2. The court rejected the government's argument that 8 U.S.C. § 1182(a)(9)(B)(i)(II) contemplates tolling of the ten-year period based on an intervening, unlawful readmission to the United States. 2020 WL 6162805, at *3. Rather, the court reasoned, the plain language of the statute entailed that the plaintiff was inadmissible for 10 years following 2003; because she applied for adjustment of status in 2020, well after that period expired, she was not subject to the (B)(i)(II) bar.

136. In *Neto v. Thompson*, the plaintiff was lawfully admitted into the United States in 1993 on a tourist visa. 2020 WL 7310636, at *1 (D.N.J. 2020). He overstayed his visa and was ordered deported in 1994. *Id*. However, he did not leave the United States until 2000. *Id*. In 2002, the plaintiff was again admitted to the United States on a tourist visa. In gaining admission, the plaintiff allegedly did not disclose that he previously had been unlawfully present in the United States from 1994 to 2000. He had remained in the United States since 2002. *Id*. In 2016, the plaintiff applied to USCIS for adjustment of his status to that of a lawful permanent resident. *Id*. The Court rejected the government's argument that 8 U.S.C. § 1182(a)(9)(B)(i)(II) contemplates

tolling of the ten-year period based on an intervening readmission to the United States and reasoned that the plain language of the statute entailed that the plaintiff was inadmissible for 10 years following 2002; because he applied for adjustment of status in 2016 he was not subject to the 8 U.S.C. § 1182(a)(9)(B)(i)(II) bar.

E. USCIS' APA Violation

137. Here, the Defendants acted unlawfully in denying Plaintiffs' application for lawful permanent residence because their interpretation of 8 U.S.C. § 1182(a)(9)(B)(i)(II) is legally erroneous.

138. Three actions in particular embody such unlawful action treatment:

a. The Defendants' denial of Norma Cisneros Zavala's application for lawful permanent residence on November 10, 2020 due to Defendants' erroneous interpretation of 8 U.S.C. § 1182(a)(9)(B)(i)(II).

b. The Defendants' denial of Alvaro Perez Gonzalez's application for lawful permanent residence on November 10, 2020 due to Defendants' erroneous interpretation of 8 U.S.C. § 1182(a)(9)(B)(i)(II).

c. The Defendants' denial of Maria Salazar Manzo's application for lawful permanent residence on May 29, 2019 due to Defendants' erroneous interpretation of 8 U.S.C. § 1182(a)(9)(B)(i)(II).

139. Moreover, the Plaintiffs have the right to review these agency decisions under 5 U.S.C. § 702.

140. For all of the foregoing reasons, the Defendants violated the APA when denying Plaintiffs' applications for lawful permanent residence.

SECOND CLAIM FOR RELIEF
FIFTH AMENDMENT - PROCEDURAL DUE PROCESS
By All Plaintiffs Against All Defendants

141. Plaintiffs hereby incorporate all of the paragraphs of this Complaint as though fully set forth herein.

142. Defendants denied Plaintiffs' applications for lawful permanent residence, despite the fact that Plaintiffs met all of the requirements for approval.

143. Defendants' actions in denying these applications constitute a deprivation of liberty without a meaningful review of the substantial evidence by the adjudicator in violation of Plaintiffs' rights to due process under the Fifth Amendment of the United States Constitution.

144. Non-citizens who are physically present in the United States are guaranteed the protections of the Due Process Clause of the Fifth Amendment. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

145. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

146. One of the first inquiries in any case involving a violation of procedural due process "is whether the plaintiffs have a protected property or liberty interest and, if so, the extent or scope of that interest." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–70 (1972)).

147. Defendants have deprived Plaintiffs of protected property interests. The property interests protected by the Due Process Clause "extend beyond tangible property and include anything to which a plaintiff has a 'legitimate claim of entitlement.'" *Roth*, 408 U.S. at 576–77.

"A legitimate claim of entitlement is created [by] . . . 'rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Id.* Therefore, an individual has a protected property interest where they have a reasonable expectation of entitlement to that interest. *See Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.").

148. Here, Plaintiffs possess a protected property interest in their application for adjustment of status and the numerous benefits which accompany status as an applicant to lawful permanent residence. The Supreme Court recognizes that where an individual is receiving benefits, such as those recognized in the Immigration and Nationality Act ("INA") conveying immigration benefits, amounts to a "statutorily created 'property' interest protected by the Fifth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

149. Moreover, the Plaintiffs and Defendants mutually understood that as long as Plaintiffs paid the application fees, subjected themselves to a rigorous background check, and met all other eligibility requirements, they would have their applications for lawful permanent residence granted. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

150. Defendant's conduct in depriving Plaintiffs of their protected property interests will be evaluated under the three-part *Eldridge* test. *See id.* at 333-47. "[I]n *Mathews v. Eldridge*, the Supreme Court set forth a three-part inquiry to determine whether the procedures provided to protect a liberty or property interest are constitutionally sufficient. *Id.*

151. *First*, courts must look at the nature of the interest that will be affected by the official action, and in particular, to the degree of potential deprivation that may be created. *Id.* at 341-42.

152. *Second*, courts must consider the fairness and reliability of the existing procedures and the probable value, if any, of additional procedural safeguards. *Id.* at 343.

153. *Third*, courts must assess the public interest, which includes the "administrative burden and other societal costs that would be associated with" additional or substitute procedures. *Mathews v. Eldridge*, 424 U.S. at 343; *see also Nozzi v. Hous. Auth. of L.A.*, 806 F.3d 1178, 1192–93 (9th Cir. 2015). This test requires courts to balance the affected interests to see whether the procedures provided are constitutionally sufficient.

154. In this instance, Plaintiffs' protected property interests outweigh any cost or risk of harm to the Defendants for three reasons.

155. *First*, Plaintiffs protected property interests are in the immigration benefit of adjustment of status to that of lawful permanent residents and their lawful permanent resident card. This status conveys significant benefits as it authorizes noncitizens the right to live and work in the United States permanently.[10] Moreover, this allows noncitizens to apply for Social Security, a state issued driver's license, and permits travel abroad. *Id.* Particular to Plaintiffs' interest, this benefit will allow them, and their families, to have security and a sense of stability. The potential for deprivation that is created with the erroneous denial of these benefits is significant and would result in the separation of parents and children.

[10] United States Citizenship & Immigration Servs., After We Grant Your Green Card, https://www.uscis.gov/green-card/after-we-grant-your-green-card (last visited June 10, 2021).

156. *Second*, current agency procedures are insufficient, unfair, and contrary to the Plaintiffs reasonable reliance on the law. Plaintiffs in this matter took steps to ensure that they were able to comply with all steps necessary to successfully adjust status, including paying USCIS for the proper and fair service and adjudication of their applications. Plaintiffs hired counsel to ensure their applications were correct, they each paid USCIS $1,760 in application fees, they each attended interviews with the agency, and they each waited over two years in order to receive a decision, only to have USCIS unlawfully deny their applications. As noted above, USCIS did not take the time to receive one Plaintiff's Request for Evidence, let alone contemplate it, and did not take the time to address another Plaintiff's arguments as to why 8 U.S.C. § 1182(a)(9)(B)(i)(II) does not apply to her. In the totality of the circumstances, Defendants current agency procedures are insufficient, unfair, and contrary to the Plaintiffs' reasonable reliance on the law.

157. *Third*, there is a significant public interest, which outweighs the administrative burdens. Primarily, Plaintiffs' interests in the lawful adjudication of an application for immigration benefits substantially outweighs the administrative costs associated with an internal change in policy requiring the agency to act lawfully. Significantly, much of the administrative cost in changing policy would result in the proper adjudication of adjustment of status applications similar to Plaintiffs' here—the cost of which will primarily be on the applicants themselves.

158. For Plaintiffs, the process of working to obtain these benefits has been a long and arduous process. In each instance, Plaintiffs lived and built lives in the United States for decades before applying for adjustment of status. As a result of the lives they built they began to develop family, friends, and community ties within the United States. Exh. 4.

159. Eventually, when they became eligible to apply for adjustment of status, Plaintiffs then began to gather documents, hire legal counsel, get fingerprints done, go through medical checks, complete applications, and pay large amounts of money to request admission into the United States. Exh. 1-3.

160. After submitting the applications for admission as a lawful permanent resident, each Plaintiff continued to wait for a period of almost a year before receiving notice of an interview with the USCIS Denver Field Office. Exh. 2. Yet, after the interview process was concluded, USCIS denied the applications based on an unlawful interpretation of 8 U.S.C. § 1182(a)(9)(B)(ii).

161. This action violated Plaintiffs' due process rights as they were denied an opportunity to address any concerns USCIS had at the time of the interview.

162. Additionally, Plaintiffs' due process right to reasonable reliance on the law was violated. Plaintiffs had a reasonable expectation that, as they submitted their applications for adjustment of status to lawful permanent resident status, after the ten-year time bar clock had run out, this would not be a barrier to their admission through adjustment of status.

THIRD CLAIM FOR RELIEF
DECLARATORY RELIEF
By All Plaintiffs and Against All Defendants

163. Plaintiffs hereby incorporate all of the paragraphs of this Complaint as though fully set forth herein.

164. As explained above, Defendants' denial of Plaintiffs' application for lawful permanent residence violates the Administrative Procedure Act, and Due Process under the Fifth Amendment of the U.S. Constitution. Plaintiffs therefore seek a declaration that:

(a) Defendants' interpretation of 8 U.S.C. § 1182(a)(9)(B)(i)(II) is unlawful;

(b) Plaintiffs, and other applicants for adjustment of status, have a constitutionally protected interest in their legitimate expectation of lawful permanent residence where Fifth Amendment Due Process protections apply. *Akhtar v. Burzynski*, 384 F.3d 1193, 1202 (9th Cir. 2004); *Walters v. Reno*, 145 F.3d 1032, 1036, 1042–44 (9th Cir. 1998).; and

(c) USCIS's reasoning for denying the applications for adjustment of status filed by Plaintiffs is unlawful, a violation of the Immigration and Nationality Act and the relevant regulations.

165. Further, Plaintiffs seek a declaration that: the ten-year time bar no longer applies to Plaintiffs. For the same reasons, Plaintiffs are entitled to an order directing Defendants to approve their applications for lawful permanent residence. 5 U.S.C. § 706(1).

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Norma Cisneros Zavala, Alvaro Perez Gonzalez, and Maria Salazar Manzo respectfully request that this Court enter judgment in their favor and against Defendants, and award them all relief as allowed by law and equity, including, but not limited to the following relief:

1. Issue a declaratory judgment pursuant to 28 U.S.C. § 2201(a) that:

(a) Defendants' interpretation of 8 U.S.C. § 1182(a)(9)(B)(i)(II) is unlawful;

(b) Plaintiffs, and other applicants for adjustment of status, have a constitutionally protected interest in their legitimate expectation of lawful permanent residence where Fifth Amendment Due Process protections apply;

(c) USCIS's reasoning for denying the applications for adjustment of status filed by Plaintiffs is unlawful, a violation of the Immigration and Nationality Act and the relevant regulations, and a violation of the United States Constitution;

2. Enjoin Defendants from applying their current interpretation of 8 U.S.C. § 1182(a)(9)(B)(i)(II) to Plaintiffs and all other noncitizens applying for adjustment of status;
3. Set aside and vacate the invalid USCIS decision, under 5 U.S.C. § 706(2)(A), and remand the matter to the agency for further review and application of the correct legal test for Plaintiffs;
4. Grant reasonable attorneys' fees and costs, as provided in the Equal Access to Justice Act, 5 U.S.C. § 504;
5. Grant any other and further relief that this Court may deem fit and proper.

DATED this 15th day of June, 2021.

Respectfully submitted,

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