IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
LINCOLN DIVISION

ANDRE BOULAY, et al., Plaintiffs, v. UR M. JADDOU, in her official Capacity as Director, United States Citizenship & Immigration Services (USCIS), Defendant.	)	4:23-cv-03052-CRZ

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs are before this Court because Defendant's failure to process and adjudicate their Form I-601 waiver applications has prevented them from completing their long journey to become lawful permanent residents. Defendant's failure is causing extended uncertainty, family separation, and financial and emotional devastation. Defendant, seeking to dismiss Plaintiffs' unreasonable delay claims under the Administrative Procedure Act (APA), argues that because the eventual final *decision to grant or deny* Plaintiffs' Form I-601 waiver cases is discretionary, delay by the agency—even if indefinite—is also within the agency's discretion and this Court is powerless to address Plaintiffs' claims. Defendant is wrong. Defendant's reading of the statutes misapprehends the plain text, precedent, and would lead to the absurd result where the agency can collect large fees for adjudicating waiver applications and then decline to adjudicate them forever without any consequence or recourse. That defeats both the letter and spirit of the INA, APA, and any rational understanding of fairness.

In a further attempt to quash jurisdiction, Defendant misapplies *Patel v. Garland* to this context. 142 S. Ct. 1614 (2022). *Patel* involved a jurisdiction-stripping provision that governs adjustment of status to permanent resident applications and a *denial* of immigration relief in removal proceedings, not a claim for unreasonable *delay* in the affirmative benefits context. The Supreme Court in *Patel* did not inoculate USCIS from claims of unreasonable delay nor did it even consider the specific delegation in the APA to Article III courts to compel agencies to act when they have unlawfully or unreasonably failed to do so. 5 U.S.C. §§ 555(b), 706(1). Defendant's application of *Patel* to normal statutory and regulatory adjudication has no basis in law and its application to this case is unfounded.

Defendant's Rule 12(b)(6) arguments likewise fail. Plaintiffs' well-pleaded complaint raises a plausible claim under the APA for unreasonable delay. By virtue of the APA, *see* 5 U.S.C. § 555(b), Congress has authorized judicial intervention if federal agencies fail to act "[w]ith due regard for the convenience and necessity of the parties or their representatives" and "within a reasonable time, . . . proceed to conclude a matter presented to it." Courts shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Plaintiffs' allegations, taken as true and with all inferences drawn in their favor, easily meet the threshold to show a plausible claim that USCIS has failed to reasonably act on their Form I-601 waiver applications. While Defendant contends that the factors set forth in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) ("*TRAC*") , 750 F.2d 70, 80 (D.C. Cir. 1984), weigh in their favor, numerous courts have held that a *TRAC* analysis, which is highly fact-dependent, is premature at the motion to dismiss stage.

Nevertheless, Plaintiffs factually demonstrate that USCIS's processing times have sharply increased over recent years for no rational reason, directly harming Plaintiffs and their

families. Moreover, a ruling in favor of Plaintiffs would align with the priorities of USCIS, rather than work against them. Accordingly, the Court should deny Defendant's motion and allow the parties to proceed to discovery to evaluate the factual claims made in Defendant's motion.

II. STANDARDS OF REVIEW

a. 12(b)(1) Standard

Plaintiffs have the burden of proving subject matter jurisdiction exists to defeat a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Defendant has asserted a "facial attack," as they claim this Court lacks jurisdiction because statutory provisions bar judicial review. ECF No. 12 at 8-21 (arguing jurisdiction barred by 8 U.S.C. §§ 1252(a)(2)(B)(i), 1252(a)(2)(B)(ii), 1182(a)(9)(B)(v), 1182(h), and 1182(i)). "A 'facial' attack accepts the truth of the plaintiff's allegations and views them in the light most favorable to the nonmoving party." *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914 (8th Cir. 2015). A plaintiff has no evidentiary burden in a "facial attack." Instead, the plaintiff meets the burden if, after the court accepts the allegations in the complaint as true and draws all reasonable inferences in plaintiff's favor, the court decides the plaintiff has sufficiently alleged a basis of subject matter jurisdiction. *Id*. (*citing Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)).

b. 12(b)(6) Standard

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47 (1957). A complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 570 (2007). A plaintiff need not provide specific facts in support of his allegations but must include sufficient information to provide "grounds" on which the claim rests, and to "raise a right to relief above a speculative level." *Twombly*, 550 U.S. at 555 & n.3; *Erikson v. Pardus*, 551 U.S. 89, 93 (2007) (*per curiam*).

In evaluating a motion to dismiss for failure to state a claim, the Court must first "tak[e] note of the elements a plaintiff must plead to state [the] claim" to relief, and then determine whether the plaintiff has pleaded those elements with adequate factual support to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 675, 678 (alterations in original). The complaint need not include "detailed factual allegations," and a plaintiff may survive a Rule 12(b)(6) motion even if "recovery is very remote and unlikely," so long as the facts alleged in the complaint are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56. In evaluating a 12(b)(6) motion, a court can consider matters of public and administrative record referenced in the complaint. *See Owen v. Gen. Motors Corp.*, 533 F.3d 913, 918 (8th Cir. 2008).

III. STATUTORY AND REGULATORY BACKGROUND

Where noncitizens do not qualify to adjust to lawful permanent resident status based on a family member's visa petition from within the United States under 8 U.S.C. § 1255(a), they must apply for an immigrant visa at a United States Embassy or Consulate abroad. 8 U.S.C. § 1202(a); 22 C.F.R. § 42.61(a). Those noncitizens deemed inadmissible to the U.S. under any ground in 8 U.S.C. § 1182(a) must apply for and be granted a waiver of inadmissibility, if available, before a consular officer can issue an immigrant visa. Applications for waivers of inadmissibility are filed with USCIS on Form I-601 in accordance with form instructions and must be submitted with a filing fee. *See* 8 C.F.R. § 212.7(a)(1); 8 C.F.R. § 106.2(a)(24). This form is filed in the United

States, even though, as here, Plaintiffs are "stuck" outside the United States, separated from their families. USCIS instructions provide that the current filing fee for Form I-601 is $930. USCIS, Form I-601 Waiver of Ground of Inadmissibility, available at https://www.uscis.gov/i-601, (last accessed July 19, 2023).

Once a waiver application has been properly filed with the required fee, regulations require USCIS to issue a decision and provide notice of an approval or denial. *See* 8 C.F.R. § 103.2(b)(19) (defining procedures for notification of approvals); 8 C.F.R. § 103.3 (defining notification procedures for denials). By regulation, USCIS "*will* provide a written decision and notify the applicant and his or her attorney or accredited representative…." 8 C.F.R. § 212.7(a)(3) (emphasis added).

IV. ARGUMENT

a. This Court has jurisdiction over Plaintiffs' claims for unreasonable delay under the Administrative Procedure Act

Defendant has not rebutted the strong presumption that this Court has jurisdiction to consider Plaintiffs' APA claims. There is a "strong presumption that Congress intends judicial review of administrative action," *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670, 106 S. Ct. 2133 (1986), and it is "familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628, 122 S. Ct. 2450 (2002). Under the APA, a person suffering a legal wrong because of an agency action is entitled to judicial review. 5 U.S.C. § 702. "Agency action," for purposes of the APA, is defined to include the failure to act. 5 U.S.C. § 551(13). Congress has commanded agencies to proceed to conclude matters presented to them "with due regard for the convenience and necessity of the parties or their representatives and within a reasonable time." 5 U.S.C. § 555(b). Where a reviewing court determines that an agency action has been unlawfully withheld or unreasonably delayed, the APA

requires that the court compel agency action. 5 U.S.C. § 706(1). Federal agencies must comply with the APA when crafting and enforcing final agency actions (e.g., decisions, sanctions, orders, regulations, and legislative rules). 5 U.S.C. § 553.

While the APA generally governs judicial review for individuals who have suffered a legal wrong through agency action, section 701(a) provides two exceptions. First, there is no judicial review where a statute precludes it. Second, there is no judicial review for agency actions committed to agency discretion by law. 5 U.S.C. § 701(a). Neither exception applies in this case. Plaintiffs seek a decision on pending waivers of inadmissibility under one or more of the following sections of law: 8 U.S.C. § 1182(i) (waiver of inadmissibility for misrepresentation), 8 U.S.C. § 1182(h) (waiver of criminal grounds of inadmissibility), 8 U.S.C. § 1182(a)(9)(B)(v) (waiver of inadmissibility for past unlawful presence in the United States), and 8 U.S.C. § 1182(d)(11) (waiver of inadmissibility for having encouraged, induced, assisted, abetted, or aided a family member to enter the U.S. unlawfully). While Congress did not impose a statutory deadline for the adjudication of Form I-601 waiver applications, it has provided clear expectations to the agency: "It is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application." 8 U.S.C. § 1571(b).

In moving to dismiss, Defendant incorrectly argues that the INA overrides the strong presumption of judicial review of USCIS's pace of adjudication of Plaintiffs' Form I-601 waiver applications. ECF No. 12 at 8. First, Defendant posits that 8 U.S.C. § 1252(a)(2)(B)(i) bars review of unreasonable delay claims on waivers of inadmissibility under 8 U.S.C. § 1182(h) (waiver of criminal conviction-based grounds) and 8 U.S.C. § 1182(i) (waiver of misrepresentation-based ground). ECF No. 12 at 8-11. The provision at 8 U.S.C. §

1252(a)(2)(B)(i) states, "Notwithstanding any other provision of law," no court shall have jurisdiction to review "*any judgment regarding the granting of relief under section 1182(h), 1182(i)*, 1229b, 1229c, or 1255 of this title[.]" 8 U.S.C. § 1252(a)(2)(B)(i) (emphasis added).

Next, Defendant argues that 8 U.S.C. § 1252(a)(2)(B)(ii) precludes judicial review of unreasonable delay claims on waivers of inadmissibility under 8 U.S.C. § 1182(a)(9)(B)(v) (waiver of unlawful presence-related ground) and 8 U.S.C. § 1182(d)(11) (waiver of ground for having encouraged, induced, assisted, abetted, or aided a family member to enter the U.S. unlawfully). ECF No. 12 at 11-16. 8 U.S.C. § 1252(a)(2)(B)(ii) provides that no judicial review is available for "any other decision or action" specified "to be in the discretion of the Attorney General or the Secretary of Homeland Security…" 8 U.S.C. § 1252(a)(2)(B)(ii). Because 8 U.S.C. § 1182(a)(9)(B)(v) gives "sole discretion" to the Attorney General to waive the unlawful presence ground of inadmissibility and 8 U.S.C. § 1182(d)(11) authorizes the Attorney General to waive the ground related to encouraging a family member to enter unlawfully "in his discretion," Defendant argues that these waiver applications are immune from unreasonable delay challenges under the APA. ECF No. 12 at 11-16.

Finally, Defendant argues that waiver-specific jurisdiction stripping in 8 U.S.C. § 1182(a)(9)(B)(v) ("No court shall have jurisdiction to review a decision or action … regarding a waiver under this clause), 8 U.S.C. § 1182(i)(2) ("No court shall have jurisdiction to review a decision or action of the [Secretary] regarding a waiver under paragraph (1)"), and 8 U.S.C. § 1182(h) ("No court shall have jurisdiction to review a decision of the [Secretary] to grant or deny a waiver under this subsection") precludes this court from reviewing Plaintiffs' unreasonable delay challenges under the APA. ECF No. 12 at 18-20.

Defendant's reliance on the jurisdiction-stripping provisions suffers from the same fundamental flaw. They conflate a challenge to a factual or legal determination or ultimate judgment with a challenge to the agency's delay and failure to process an application within a reasonable time--the failure to actually make a final judgment whatsoever. Plaintiffs do not come to this Court requesting an order directing the agency to approve their applications, they understand that they cannot control the outcome or ask this Court to compel a particular outcome. Rather, they request an order directing the agency to adhere to its own regulations and make a judgment adjudicate their applications regardless of whether the decision is to approve or deny the waiver applications. 8 C.F.R. § 212.7(a)(3) (USCIS "*will* provide a written decision and notify the applicant and his or her attorney or accredited representative…") (emphasis added).

Statutory text precludes judicial review only of decisions, actions, or judgments concerning these waiver applications. 8 U.S.C. § 1252(a)(2)(B)(i) ("any judgment regarding the granting of relief"); 8 U.S.C. § 1252(a)(2)(B)(ii) ("any other decision or action" specified "to be in the discretion of the Attorney General…"); 8 U.S.C. § 1182(a)(9)(B)(v) ("decision or action"); 8 U.S.C. § 1182(i)(2) ("decision or action"); 8 U.S.C. § 1182(h) ("a decision... of the [Secretary] to grant or deny").

Defendant asserts that the "pace at which the government adjudicates waivers … represents the culmination of the agency's judgments, decisions, and actions relating to the granting or denying of relief." ECF No. 12 at 10. The agency's position, that a delay or blanket stoppage of work on making decisions *is itself a decision*, is incompatible with the text of the statute, principles of statutory interpretation, and precedent. Think of the logical outcome of Defendant's quoted statement. The Defendant is saying that they have made the "judgement, decision[s], and action[s]" to go from a 4–6-month processing window, to a 44 months

processing window, and that this Court has no power to tell the Defendant and her agency that this is a violation of the APA. It is a groundless statement. The Defendant's failure to act on Plaintiffs' Form I-601 applications is the opposite of a judgment, decision, or action. Had Defendant made a judgment, Plaintiffs would not be before the Court asking for one unreasonably delayed and unlawfully withheld.

The statutes at issue preclude judicial review of agency judgments, decisions, and actions concerning Plaintiffs' waiver applications. Nothing USCIS has done constitutes a judgment, decision, or action under any reasonable interpretation of those words. Plaintiffs each submitted their Form I-601 waiver applications at least ten months ago. ECF 6 ¶ 35. With the exception of Plaintiff Tenesaca Delgado,[1] USCIS has not requested any additional documents or information from remaining Plaintiffs[2] and has not otherwise responded their applications. ECF 6 ¶¶ 8-26. In failing to respond to the applications, USCIS has not made any judgment, decision, or action on Plaintiffs' cases. As alleged, USCIS has not done anything at all. *See Saleem v. Keisler*, 520 F. Supp. 2d 1048, 105 (W.D. Wisc. 2007). ("[N]o matter how narrowly a court defines 'action,' it would require an Orwellian twisting of the word to conclude that it means a failure to adjudicate."); *Kamal v. Gonzales*, 547 F. Supp. 2d 869, 875 (N.D. Ill. 2008) (rejecting the "illogical[]" conclusion that "'inaction' is tantamount to 'action'").

Plaintiffs' interpretation of the statute finds support in the common usage of the relevant terms. The American Heritage Dictionary, for example, defined "action" in 1996 to mean "[t]he state or process of acting or doing." *Action, American Heritage Dictionary*, 17-18 (3d ed. 1996).

[1] As noted in Defendant's motion, USCIS issued [redacted] a request for evidence on June 5, 2023. ECF No. 12 at 2 n1.
[2] As noted in Defendant's motion, USCIS approved [redacted] waiver application on April 26, 2023, and the parties agree that his claim can be dismissed as moot. ECF No. 12 at 33.

Webster's similarly defined "action" as "the process or state of acting or of being active," "something performed; an act; deed," or "an act that one consciously wills and which may be characterized by physical or mental activity." *Action, Webster's Encyclopedic Unabridged Dictionary*, 15 (1996). Those same dictionaries define "decision" as "[t]he passing of judgment on an issue under consideration" or "[t]he act of reaching a conclusion or making up one's mind" (*Decision, American Heritage, supra*, at 484) or "the act of deciding; determination as of a question or doubt by making a judgment" (*Decision, Webster's, supra*, at 375).

The challenged reasonableness of delays on pending applications cannot be cloaked into garb that makes them judgments, decisions, or actions. Even if ambiguity existed, and there is none, the strong presumption of review under APA weighs against dismissal of Plaintiffs' claims for lack of subject matter jurisdiction. *Bowen*, 476 U.S. at 670. Plaintiffs challenge USCIS's failure to do anything with respect to their applications and while "[t]he words of a statute can be read to mean many things, . . . they should not be read to mean the exact opposite of what the statute clearly says." *Ohio v. Wright*, 992 F.2d 616, 619 (6th Cir. 1993).

The APA's definition of "agency action" which includes the "failure to act" at 5 U.S.C. § 551(13) confirms that when Congress does want a statutory term like "action" to encompass its own opposite, it can make that clear through an explicit statutory definition. It did so in the APA to enable judicial review of both agency action and agency delay and inaction. S. Rep. No. 79-572, at 198 (1945) (explaining that the definition of "agency action" was intended to "assure the complete coverage of every form of agency power, proceeding, action, or inaction"); *accord* H.R. Rep. No. 79- 1980, at 255 (1946). Absent an explicit definition that alters the plain meaning, the terms "judgment," "decision," and "action" in the jurisdiction-stripping language in the INA carry their common meanings, not the opposite.

That these terms do not encompass delays in making judgments or decisions or taking any action is reinforced by consistent case law. In *Iddir v. INS*, the Seventh Circuit considered an appeal from the dismissal of noncitizens' attempt to challenge the Immigration and Naturalization Service's delays in adjudicating their visa applications. 301 F.3d 492, 493-94 (7th Cir. 2002). As is the case here, after the noncitizens "jumped through all the applicable hoops," "all that remained was for the INS to adjudicate the [noncitizens]' status and either grant or deny the applications." *Id*. at 493. But "the INS did nothing." *Id*. The Seventh Circuit held that by using the term "decision or action," the provision "only bars review of actual discretionary decisions to grant or deny relief." *Id*. at 496- 97; *see Obioha v. Gonzales*, 431 F.3d 400, 405 (4th Cir. 2005) (favorably citing *Iddir*). The court concluded that in cases where a "[p]laintiff is not seeking a review of a decision or action, which would be barred, but is seeking remediation of the lack of action," jurisdiction remains available. *Iddir*, 301 F.3d at 497-98 (*quoting Nyaga v. Ashcroft*, 186 F. Supp. 2d 1244, 1250-53 (N.D. Ga. 2002)). A variety of courts have joined the Seventh Circuit in holding that "decision or notice" includes cases "in which the [agency] does award or deny relief," as opposed to those in which it "never held a hearing or made any determinations." *Id*. The Fourth Circuit has held that Section 1252 does not preclude review of delays where USCIS is obligated to act even if the actual decision is unreviewable—a result that would be impossible if inaction were swept into the ultimate "decision or action." *Gonzalez v. Cuccinelli*, 985 F.3d 357, 374 n.10 (4th Cir. 2021). District courts have held that USCIS's reading conflating action and inaction "contradicts . . . common sense." *Saleem*, 520 F. Supp. 2d at 1051; accord *Liu v. Novak*, 509 F. Supp. 2d 1, 7 (D.D.C. 2007) (holding that because "action and inaction are distinct, and § 1252(a)(2)(B)(ii) by its plain terms only covers the former, the provision does not apply to" claims alleging delay); *Doe v. Trump*, 288 F. Supp. 3d 1045, 1072

n.18 (W.D. Wash. 2017) ("When the statute grants discretion only as to the ultimate decision but not as to the timing of when that decision is made, jurisdiction is not barred by section 1252(a)(2)(B)(ii)."); *Roe v. Mayorkas*, 2023 WL 3466327, at *8 (D. Mass. 2023); *Boussana v. Hohnson*, 2015 WL 3651329, at *5-*6 (S.D.N.Y. 2015) (joining "the overwhelming majority of district courts" in concluding that Section 1252 does not divest courts of jurisdiction over delay cases).

The unpublished decision in *Bansal v. United States Citizenship & Immigration Servs.*, 2021 U.S. Dist. LEXIS 192234, at *12-13 (D. Neb. 2021), and its progeny, are inapposite. ECF 12 at 10-11. In *Bansal*, the district court questioned its authority to review an agency decision to waste 90,000 immigrant visas in fiscal year 2021 due to administrative nonfeasance. 2021 U.S. Dist. LEXIS 192234, at *12-15. Without considering the textual arguments presented here, the district court reasoned that "adverse consequences ensue from discretionary decisions all the time, which is presumably why they are insulated from judicial review and committed to the branches of government which are accountable to voters. Just because a decision has consequences doesn't mean it's not discretionary." *Id*. at 15.

Defendant does not point to any agency decision or judgment in this case that would conceivably deprive this Court from exercising the responsibility Congress entrusted to Article III courts in the Administrative Procedure Act. Had Congress intended to preclude courts from reviewing immigration-related claims for unreasonable delay, it could have easily said so, but it did not, and reading statutes that preclude review only when a judgment is made to claims for which there has been no action or judgment is not in accordance with the law and the APA for the reasons stated above. Defendant's claim to the contrary and the decisions cited in support are

wrong. ECF 12 at 10-12. This Court would agree to limit its own authority in a manner that is inconsistent with the words of the statute, if it agreed with Defendant's arguments.

The statutes authorizing waiver of inadmissibility—like all statutes—must be interpreted in accordance with the "familiar principle of statutory construction: the presumption favoring judicial review of administrative action." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (*quoting Kucana v. Holder*, 558 U.S. 233, 251 (2010). In essence, whenever a statute is "reasonably susceptible to divergent interpretation," courts must "adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995). A corollary of the presumption of judicial review is that courts must construe such jurisdiction-stripping provisions narrowly. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001). This presumption is "'well-settled' and 'strong.'" *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quoting *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991)).

In addition, it can be presumed "that Congress legislates with knowledge of [these] basic rules of statutory construction." *McNary*, 498 U.S. at 496. Overcoming the presumption of judicial review thus requires unusually strong evidence of legislative intent. Absent "'clear and convincing evidence' of congressional intent to preclude judicial review," courts are to presume that Congress meant for review to be available. *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quoting *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993)).

There is no evidence that Congress intended to preclude claims of indefinite or unreasonable delay in immigration benefits adjudications. Defendant's interpretation would leave noncitizens without any recourse in the face of interminable delays, like those presented here, and thereby allow USCIS to effectively nullify a statutory grant of authority, all without any

unambiguous evidence of congressional intent to do so. The Court should therefore heed the Supreme Court's instruction to "read limitations on . . . jurisdiction to review narrowly." *Utah v. Evans*, 536 U.S. 452, 463 (2002).

This accords with the basic tenets of fundamental fairness and a meaningful opportunity to be heard. It is "untenable for the Government to charge a fee for the adjudication of a[n] . . . application, and then argue that it has no duty to adjudicate a properly filed application." *Maciel v. Rice*, 2007 WL 4525143, at *4 (E.D. Cal. 2007). USCIS's binding regulations require it to complete the discrete task of adjudicating Form I-601 waiver applications after they are properly filed. *See* 8 C.F.R. § 212.7(a)(3) (USCIS "*will* provide a written decision and notify the applicant and his or her attorney or accredited representative…") (emphasis added); 8 C.F.R § 103.3. Congress has also expressed its expectation that the processing of these applications should be completed within 180 days. 8 U.S.C. § 1571(b). Because USCIS is legally obligated to adjudicate the applications, this Court has jurisdiction to review claims that they have unreasonably delayed the adjudication of Plaintiffs' waiver applications.

b. *Patel v. Garland* does not strip this Court of jurisdiction to consider Plaintiffs' claims for unreasonable delay

In *Patel v. Garland*, the Supreme Court reviewed jurisdiction stripping in the INA in another context where an individual in removal proceeds had actually received a final decision on his application. 142 S. Ct. at 1618. If only Plaintiffs were this fortunate.

In general, the Attorney General has discretion "to adjust the status of an eligible noncitizen who entered the United States illegally to that of lawful permanent resident, forgiving the illegal entry and protecting the noncitizen from removal on that ground." *Id*. at 1619 (citing 8 U.S.C. § 1255(i)). A separate provision, 8 U.S.C. § 1252(a)(2)(B)(i) "strips courts of jurisdiction to review 'any judgment regarding the granting of relief' under § 1255." *Id*. at 1621. Because

that provision "prohibits review of any judgment regarding the granting of relief," the Court determined that it encompasses factual findings that underlie grants or denials of relief. *Id*. at 1622.

Patel does not foreclose jurisdiction over delay cases. The issue in *Patel* was whether the statute's bar to judicial review of "any judgment regarding the granting of relief" applied to disputes concerning factual findings underpinning discretionary judgments. The Court read the jurisdiction-stripping language to apply to underlying "factual findings." *Id*. 1622. In Patel's case, the Immigration Judge "weighed Patel's testimony, reviewed documents, and considered Patel's history to conclude that he was an evasive and untrustworthy witness." *Id*. at 1624. This determination fell within § 1252(a)(2)(B)(i)'s jurisdictional bar because "[f]inding that fact involved the same exercise of evaluating conflicting evidence to make a judgment about what happened." *Id*.

The factual finding in *Patel* could be considered a "judgment regarding the granting of relief" for purposes of the jurisdictional bar at 8 U.S.C. § 1252(a)(2)(B)(i), but that does not support Defendant's interpretation that lack of any finding or action is also a judgement, decision, or action for purposes of the jurisdictional bars. Plaintiffs allege USCIS has unreasonably delayed taking any action (including any judgment, decision, or action that may underpin a future decision on their applications) despite the applications having been pending for over ten months. USCIS has done nothing regarding Plaintiffs' applications.

Patel precludes judicial review of component judgments of an ultimate discretionary outcome. The Court described a deliberative "decisionmaking process" consisting of both "subjective" and "objective" "determinations" *Patel*, 142 S. Ct. at 1624. The Court considered that every step was a determination—it said nothing about the result when the agency fails to act

at all. Plaintiffs do not seek the review of any judgment, decision, or action. Rather, they seek an order compelling USCIS to decide one way or the other. *Patel* does not address claims where the agency indefinitely or unreasonably delays the adjudication of a discretionary benefit and lends no support to Defendant's arguments.

c. Plaintiffs' factual allegations, taken as true, state a plausible claim for unreasonable delay

Plaintiffs have stated a plausible claim for unreasonable delay. Rather than take the government at its word and resolve factual disputes, district courts reviewing a motion to dismiss under 12(b)(6) must draw all reasonable inferences in favor of Plaintiffs. *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

"Resolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Mashpee Wampanoag Tribal Council, Inc., v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003). Accordingly, "[a] claim of unreasonable delay is necessarily fact dependent and thus sits uncomfortably at the motion to dismiss stage and should not typically be resolved at that stage." *Gonzalez v. Cuccinelli*, 985 F.3d 357, 375 (4th Cir. 2021); *see also Barrios Garcia v. U.S. Dep't of Homeland Sec.*, 25 F.4th 430, 451 (6th Cir. 2022). Should this Court seek to evaluate the plausibility of Plaintiffs' case through a discussion of the *TRAC* factors, Plaintiffs' allegations easily meet the plausibility threshold.

In the operative complaint, Plaintiffs have made specific and cogent allegations that addressed each *TRAC* factor. ECF No. 6 ¶¶ 50-67. Addressing the first and second factors,

Plaintiffs identified reports from USCIS showing the agency historically processed the waiver, a condition precedent before Plaintiffs can finalize the process to become U.S. lawful permanent residents, in under 7.5 months. *Id.* ¶ 50. The processing time posted by USCIS at the time of filing the operative complaint had ballooned to 25.5 months. *Id*. As alleged, USCIS has no consistent processing rule or rule of reason for the processing of Form I-601 waivers. *Id*. ¶¶ 51-52. The operative complaint points to Defendant, in public comments, acknowledging the unreasonableness of USCIS delays: "Let me be very clear. Our processing times are too long. There are not ifs, ands, or buts about it." *Id*. ¶ 54.

In Defendant's motion to dismiss, Defendant asserts that the agency processes waiver applications on a "first in, first out" basis. ECF No. 12 at 23. Besides being untrue, this is a factual dispute that cannot be resolved at the pleading stage on a Rule 12(b)(6) motion. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570. Defendant complains that Plaintiffs do not have data to disprove the agency's purported first in, first out processing, but that is why resolution of this dispute must wait until Defendant produces the certified administrative record and the parties engage in discovery.[3] . 5 U.S.C. § 706; *Raju v. Cuccinelli*, No. 20-cv-01386-AGT, 2020 U.S.

[3] Other courts have recognized the necessity of discovery in delay cases. For instance, in *Barrios Garcia v. U.S. Dep't of Homeland Sec*., the Sixth Circuit considered a delay claim regarding immigrant visas and found discovery "to be critical to understanding" whether the process at issue was systematic. 25 F.4th 430, 453 (6th Cir. 2022). The court further noted that "[t]he average adjudication time says little about the unreasonableness of USCIS's delay" as it is "unhelpful to fixate on the average snail's pace when comparing snails against snails." *Id.* at 454; *see also Gonzalez v. Cuccinelli*, 985 F.3d 357, 376 (4th Cir. 2021) (vacating dismissal of APA unreasonable delay count due to lack of sufficient information and suggesting limited discovery); *Saharia v. U.S. Citizenship & Immigr. Servs.,* No. 21 CV- 3688- NSR, 2022 WL 3141958, at *4 (S.D.N.Y. Aug. 5, 2022) ("TRAC analysis is a fact-sensitive test" not suitable for resolution on a challenge to the pleadings); *Ren v. Mueller*, No. 6:07 CV 790-PCF, 2008 WL 191010, at *11 (M.D. Fla. Jan. 22, 2008) (noting that the reasonableness of a delay is "a fact-intensive inquiry").

Dist. LEXIS 153269, at *1-3, 2020 WL 4915773, at *1 (N.D. Cal. Aug. 14, 2020) ("grounds for agency delay will often be unknown to Plaintiff at the pleading stage.").

Even at this preliminary stage, Plaintiffs can show that out of twenty plaintiffs in this action, only two have had any action taken and the actions taken on their applications are *not* consistent with Defendant's purported first in, first out processing. [redacted] filed his Form I-601 waiver application on August 1, 2021. ECF No. 6 at 35. The Form I-601 waiver for [redacted] was approved on April 26, 2023. ECF No. 12-1. [redacted] filed her Form I-601 waiver application on June 4, 2020, 14 months before [redacted] i. The first action taken on [redacted] application was the issuance of a request for evidence on June 5, 2023. ECF No. 12 at 2. That [redacted] application was approved before any action on [redacted] application, despite having been filed 14 months later, is not consistent with the first in, first out processing that USCIS espouses. In sum, the only case-specific data available to Plaintiffs and before the Court at this stage is not consistent with their purported rule of reason.

Where, as here, no specific "statute sets a deadline for an agency action, the second *TRAC* factor is not relevant to an 'unreasonably delayed' analysis." *Barrios Garcia*, 25 F.4th at 454 (citing *TRAC*, 750 F.2d at 80 ("(2) *where* Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme *may* supply content for this rule of reason")) (emphases added). In the absence of a statutory deadline, claims for unreasonable delay necessarily depend on the applicable factors, which are not, in and of themselves "iron clad." *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984).

Addressing *TRAC* Factors three and five, Plaintiffs' harms are weighty. They cite real and tangible harms as they wait for the agency to adjudicate their Form I-601 waiver applications. ECF No. 6 ¶¶ 59-61. These harms include family separation, financial hardship, and mental and physical health problems. *Id*. ¶¶ 8-27. These harms are not the fault of the Plaintiffs as averred by Defendant. ECF No. 12 at 31 ("But Plaintiffs alleged injuries are a direct result of their inadmissibility due to their immigration fraud, crimes, prior unlawful presence, and smuggling of non-citizens."). Plaintiffs are all too aware they have been found inadmissible. But Congress created waivers of inadmissibility that Plaintiffs have dutifully applied for along with the $930 filing fee in an attempt to obtain permanent lawful status. And Congress set forth an expectation that immigration benefits applications should be completed within 180 days under 8 U.S.C. § 1571(b) and that an agency "shall proceed to conclude a matter presented to it" with due regard for the convenience and necessity of the parties "and within a reasonable time" under 5 U.S.C. § 555(b). The injuries suffered are due to the agency's unlawful inaction, not Plaintiffs. Defendant identifies no competing harms that would make the third and fifth TRAC factors implausible from Plaintiffs' side of the ledger, which is all that is required at this early pleading stage.

The fourth *TRAC* factor raises another factual dispute that should not be resolved at this stage. Plaintiffs are not asking to jump the line; however, this Court could order the entire line to move more swiftly at the merits stage should the Court rule in Plaintiffs' favor. At this stage, there is nothing to suggest Plaintiffs are part of a line and, if there is a line, where each Plaintiff sits in the queue. Resolution of this factor is not appropriate now. *See Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1100.

Defendant's contrary "argument [for dismissal] would eliminate federal judicial review of any agency action and wipe the APA off the books" unless the administrative delay was a line of one—the plaintiff. *Barrios Garcia*, 25 F.4th at 454; *see also Wurtz v. United States Citizenship & Immigration Servs.*, 2020 U.S. Dist. LEXIS 146104, at *12, 2020 WL 4673949, at *4-5 (N.D. Cal. 2020) (unpublished); ECF 12 at 31-32.

It is sufficient at this stage that Plaintiffs have made a plausible claim that the agency's current processing times for Form I-601 waivers are not reasonable. *Twombly*, 550 U.S. at 556 ("'[O]f course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely."'" (quoting *Sheurer v. Rhodes*, 416 U.S. 232, 236 (1974)). Plaintiffs' ability to prove their case is far from improbable given the ever-increasing processing times and questions about USCIS' processing methodologies. Accordingly, at the motion to dismiss stage, Plaintiffs have alleged sufficient facts for an APA unreasonable delay claim to go forward.

V. CONCLUSION

The Court should deny Defendant's Rule 12(b)(1) and 12(b)(6) motion to dismiss. This Court has jurisdiction to consider Plaintiffs' well-pleaded claims under the Administrative Procedure Act.

July 21, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Nebraska Civil Rule 7.1(d)(3), I certify that this brief consists of 6432 total words. This word count was calculated using the word count feature in Microsoft Word, Version 2304, applied to include all text, including the caption, headings, footnotes, and quotations. This brief does not exceed the 13,000-word limit for opposing briefs at Nebraska Civil Rule 7.1(d)(1)(A).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Jesse M. Bless, hereby certify that the foregoing opposition to Defendant's motion to dismiss was served on July 21, 2023 through the Court's CM/ECF system.

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