IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ANDRE BOULAY, et al., Plaintiffs, vs. UR M. JADDOU, in her official capacity as Director of United States Citizenship and Immigration Services, Defendant.	4:23-cv-03052 DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Pursuant to the Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant Ur. M. Jaddou, in her official capacity as Director of United States Citizenship and Immigration Services ("USCIS") ("Defendant"), submits this motion to dismiss Plaintiffs' claim of unreasonable delay, arising under the Administrative Procedure Act ("APA"), for lack of subject-matter jurisdiction and failure to state a claim.

Plaintiffs are 20 non-citizens seeking an order requiring USCIS to immediately adjudicate their individually filed Forms I-601, Application for Waiver of Grounds of Inadmissibility ("Form I-601"). Each plaintiff has committed an act that renders him or her inadmissible to the United States and, therefore, is prohibited from entering the country. By filing Form I-601, Plaintiffs are requesting USCIS to waive any ground of inadmissibility and allow them to enter the country and pursue visa applications filed by family members. This Court, however, lacks jurisdiction over Plaintiffs' unreasonable delay claim. The jurisdiction-stripping provisions at both 8 U.S.C. § 1252(a)(2)(B)(i) and 8 U.S.C. § 1252(a)(2)(B)(ii) preclude review of the grounds of inadmissibility. Additionally, the waiver statutes at issue preclude judicial review.

Even if this Court finds that it has jurisdiction to adjudicate Plaintiffs' unreasonable delay claim, the Court should still dismiss their amended complaint pursuant to Rule 12(b)(6), because Plaintiffs have not alleged facts sufficient to state a plausible claim for unreasonable delay.

Finally, the parties agree that Plaintiff Srisailam Gangapuri's claim should be dismissed for mootness because USCIS approved his waiver application on April 26, 2023.

STATEMENT OF FACTS

Plaintiffs are 20 foreign nationals—eight from Mexico, three from India, two from Canada, and one each from China, Ecuador, Honduras, Ireland, North Macedonia, Turkey, and the United Kingdom. Am. Compl. ¶¶ 8-27, Dkt. No. 6. All reside outside of the United States. *Id.* ¶ 1. Each is the beneficiary of either an approved Form I-130, Petition for Alien Relative ("Form I-130") filed by a U.S. citizen or permanent resident spouse or parent or, alternatively, an approved Form I-129F, Petition for Alien Fiancé(e) ("Form I-129F") filed by a U.S. citizen fiancé. *Id.*

Nineteen of Plaintiffs' 20 waivers have been pending with USCIS for 9 to 22 months. *Id.* ¶ 35. At the time Plaintiffs filed their Complaint, USCIS's publicly posted processing time for eighty percent of Form I-601 waivers at the Nebraska Service Center, the processing center for these waivers, was 25.5 months, although it has since decreased to 23 months. Compl. ¶ 4, Dkt. No. 1; *see also* USCIS, *Check Case Processing Times, Processing Time for Application for Waiver of Grounds of Inadmissibility (I-601) at Nebraska Service Center*, https://egov.uscis.gov/processing-times (last visited June 28, 2023). Only one of Plaintiffs' waivers falls outside this range, alleged to be pending for 36 months.[1] Am. Compl. ¶ 35. In fiscal year ("FY") 2022,

[1] On June 5, 2023, USCIS mailed this Plaintiff, [redacted], a request for evidence ("RFE") in connection with her pending Form I-601 waiver application. [redacted] response

USCIS received 77,895 applications covering all categories of inadmissibility waivers (Forms I-191, I-192, I-212, I-601, I-602, I-612), except Form I-601A. *Id.* ¶¶ 5, 57; *see also USCIS, Number of Service-wide Forms by Quarter, Form Status, and Processing Time, Fiscal Year 2022, Quarter 4, Fiscal Year – To Date*, https://www.uscis.gov/sites/default/files/document /data/Quarterly_All_ Forms_FY2022_Q4.pdf (last visited June 28, 2023). It adjudicated 44,317 of these applications, leaving the agency with a backlog of 269,549 waiver applications remaining. *Id*. The latest *median* processing time for these six waivers has risen from 8 months in FY 2022 to 13.4 months in FY 2023. *See USCIS, Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year, Fiscal Year 2018 to 2023 (up to April 30, 2023)*, https://egov.uscis.gov/processing-times/historic-pt (last visited June 28, 2023).

On April 12, 2023, 16 Plaintiffs initiated this action by filing a Complaint. Compl. On May 24, 2023, Plaintiffs filed an amended complaint that included four additional Plaintiffs. Am. Compl. ¶¶ 24-27. Plaintiffs' sole cause of action arises under the APA, 5 U.S.C. § 706(1). *Id*. ¶¶ 69-81. Plaintiffs allege that USCIS has unreasonably delayed the adjudication of their Form I-601 waiver applications, resulting in financial, emotional, and physical hardship because they cannot proceed with their adjustment of status applications and thus are unable to reunite with their families or otherwise live and work in the United States. *Id*. ¶¶ 8-28, 59-60. Plaintiffs allege that they have filed Form I-601 waivers seeking, in the aggregate, to waive four grounds of inadmissibility that would otherwise bar them from obtaining permanent resident status, but they fail to specify which ground(s) of inadmissibility apply to which Plaintiff. *Id.* ¶ 41. Plaintiffs do

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to the RFE is due September 11, 2023, and once she responds, the agency may continue its processing of her waiver application.

sufficiently allege and USCIS has confirmed that each Plaintiff is subject to one or more of the following inadmissibility grounds: (1) having, by fraud or willful misrepresentation of a material fact, procured or sought to procure a visa, other documentation, or admission into the United States, or another immigration benefit, pursuant to 8 U.S.C. § 1182(i)(1);[2] (2) having engaged in certain crimes, pursuant to 8 U.S.C. § 1182(h);[3] (3) having been unlawfully present in the United States, pursuant to 8 U.S.C. § 1182(a)(9)(B)(v);[4] and (4) having smuggled noncitizens into the United States, pursuant to 8 U.S.C. § 1182(d)(11).[5] Am. Compl. ¶ 41.

For relief, Plaintiffs request this Court to find that Defendant has unreasonably delayed the adjudication of Plaintiffs' Form I-601 waivers, enter an order for Defendant to adjudicate such waivers within 30 days and, if USCIS issues a request for evidence ("RFE") to any applicant, adjudicate the application within 30 days of the agency having received the applicant's response to the RFE. *Id.* at 26.

On April 26, 2023, USCIS approved [redacted] Form I-601. *See* Exhibit A (Form I-601 Approval Notice [redacted]).

[2] These Plaintiffs are [redacted] On April 26, 2023, USCIS approved the Form I-601 of [redacted] who also sought to waive this ground of inadmissibility. Gangapuri's claim is, therefore, moot. *See infra*, Argument, section V; *see also* Exhibit A.

[3] These Plaintiffs are [redacted]

[4] These plaintiffs are [redacted]

[5] These plaintiffs are [redacted]

STATUTORY BACKGROUND

Overview of the Immigration Process

Under the Immigration and Nationality Act ("INA"), certain noncitizens are eligible to apply for permanent resident status based on their relationship to a U.S. citizen or permanent resident, their employment, their special immigrant classification, or some other immigrant category. *See generally* 8 U.S.C. §§ 1151, 1153. As an initial step in this process, the noncitizen must generally be the beneficiary of an approved immigrant petition filed on their behalf (such as a Form I-130; a Form I-140, Immigrant Petition for Alien Worker; or a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant), or be selected to participate in the Diversity Visa program. *See generally* 8 U.S.C. §§ 1153, 1154 (granting immigrant status); 8 C.F.R. § 204 (immigrant petition process); 22 C.F.R. § 42.33 (diversity visa process). If USCIS approves the underlying immigrant visa petition (or if the noncitizen is selected to participate in the Diversity Visa program), and the noncitizen is eligible to adjust and is present in the United States, the noncitizen must apply for adjustment of status. 8 U.S.C. § 1255(a). If the noncitizen is eligible to adjust but is outside the United States, the noncitizen must first apply for an immigrant visa with the U.S. Department of State ("State Department"), 8 U.S.C. § 1202(a); 22 C.F.R. § 42.61(a). Certain categories of non-immigrants are also eligible to apply for permanent resident status. *See, e.g.,* 8 U.S.C. § 1101(a)(15)(K) (spouse, child, or fiancé of U.S. citizen); 8 U.S.C. § 1101(a)(15)(V) (spouses and children of permanent residents whose visa petitions have been pending for at least three years).

Regardless of whether the noncitizen is within or outside the United States, the non-citizen must, among other requirements, be "admissible" by virtue of not being "inadmissible" under any ground set forth in 8 U.S.C. § 1182(a). *See*, *e.g.*, 8 U.S.C. § 1255(a). An applicant who is "inadmissible" under any provision of 8 U.S.C. § 1182(a) for which a waiver is available may

apply for the related waiver by filing the form designated by USCIS, with the fee prescribed in 8 C.F.R. § 103.7(b)(l), and in accordance with the form instructions. 8 C.F.R. § 212.7(a). If a consular officer conducts an overseas visa interview with an applicant who seeks to adjust status pursuant to 8 U.S.C. § 1255(a) with an approved immigrant (or K or V non-immigrant) petition, and if the consular officer finds the noncitizen "inadmissible," the noncitizen may seek a waiver of inadmissibility by filing a Form I-601 for any available waiver. Plaintiffs are seeking to waive their inadmissibility for: (1) certain crimes, 8 U.S.C. § 1182(a)(2), pursuant to the waiver specified at 8 U.S.C. § 1182(h); (2) immigration fraud, 8 U.S.C. § 1182(a)(6)(c), pursuant to the waiver specified at 8 U.S.C. § 1182(i); (3) smuggling noncitizens into the United States, 8 U.S.C. § 1182(a)(6)(E), pursuant to the waiver specified at 8 U.S.C. § 1182(d)(11); (4) prior unlawful presence in the United States, 8 U.S.C. § 1182(a)(9)(B), pursuant to the waiver specified at 8 U.S.C. § 1182(a)(9)(B)(v).

STANDARD OF REVIEW

Claims are subject to dismissal if the court lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The party asserting jurisdiction bears the burden of proving jurisdiction is proper. *Great Rivers Habitat All. v. Fed. Emergency Mgmt. Agency*, 615 F.3d 985, 988 (8th Cir. 2010). A court deciding a motion under Rule 12(b)(1) must distinguish between a "facial attack" and a "factual attack." *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914 (8th Cir. 2015). In a facial attack, the Court merely needs to look and see if the plaintiff has sufficiently alleged a basis of subject-matter jurisdiction. *Id*. The Court restricts itself to the face of the pleadings, accepts all factual allegations in the pleadings as true, and views them in the light most favorable to the nonmoving party. *Id*.; *Hastings v Wilson*, 516 F.3d 1055, 1058 (8th Cir. 2008). However, a court need not credit legal conclusions, conclusory statements or "'naked assertion[s] devoid of further factual enhancement.'" *Retro Television Network, Inc. v. Luken Commc'ns, LLC*, 696

F.3d 766, 768 (8th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). But in a factual attack, "[t]he district court has authority to consider matters outside the pleadings when subject-matter jurisdiction is challenged under Rule 12(b)(1)." *Osborn v. United States*, 918 F.2d 724, 728 & n.4 (8th Cir. 1990).

In considering a Rule 12(b)(6) motion to dismiss, the Court must accept all factual allegations of the complaint to be true and determine whether the allegations contained within the complaint show the plaintiff is entitled to relief. *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 555-56 (2007). The complaint must allege facts, which, when taken as true, raise more than a speculative right to relief. *Benton v. Merrill Lynch & Co., Inc.*, 524 F.3d 866, 870 (8th Cir. 2008) (internal citations omitted). A court may consider documents or exhibits attached to a complaint, as well as matters of public and administrative record referenced in the complaint. *See Owen v. Gen. Motors Corp.*, 533 F.3d 913, 918 (8th Cir. 2008). Where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate. *Benton*, 524 F.3d at 870.

ARGUMENT

The Court should dismiss the entire amended complaint. First, Plaintiffs' claim is subject to several jurisdictional bars that require dismissal for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure Rule 12(b)(1). Second, even if the Court finds that it can consider Plaintiffs' claim, Plaintiffs fail to adequately allege that adjudication of their Form I-601s have been unreasonably delayed, requiring dismissal under Federal Rule of Civil Procedure Rule 12(b)(6). Finally, even if the Court dismisses no other individual claim, it should dismiss the claim of Plaintiff Srisailam Gangapuri because the parties agree that USCIS rendered his claim moot when it adjudicated his Form I-601 on April 26, 2023.

Although Plaintiffs bring their claim under the APA, that statute does not provide the Court with authority to consider Plaintiffs' claim in this case. The APA provides that courts shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). USCIS's allegedly unreasonable delay or failure to act constitutes "agency action" as defined under the APA. *See Norton v. S. Utah Wilderness All.* ("*SUWA*"), 542 U.S. 55, 62 (2004) ("'[A]gency action' is defined in § 551(13) to include 'the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.'") (alterations and emphasis in original). Plaintiffs appear to agree. *See* Am. Compl. ¶ 69 ("Agency action includes an agency's failure to act."); *id.* ¶ 79 (USCIS's "failure to adjudicate . . . I-601 waivers within 180 days after filing constitutes an unreasonable delay."); *see also id.* ¶ 8 (alleging USCIS's "failure to decide"). But Plaintiffs simultaneously concede that the APA does not apply when "statutes preclude judicial review." *Id.* ¶ 71 (citing APA, 5 U.S.C. § 701(a)(1)). Here, several statutes preclude judicial review of USCIS's pace of adjudication of Plaintiffs' Form I-601 waiver applications.

I. Section 1252(a)(2)(b)(i) Bars this Court from Reviewing Delay Claims Relating to Waivers under Sections 1182(h) and 1182(i)

The jurisdictional bar at 8 U.S.C. § 1252(a)(2)(b)(i) requires dismissal of Plaintiffs' claim that USCIS has unreasonably delayed the adjudication of waivers of inadmissibility for certain crimes, pursuant to 8 U.S.C. § 1182(h), and immigration fraud, pursuant to 8 U.S.C. § 1182(i). Section 1252(a)(2)(B)(i) provides that "[n]otwithstanding 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). Plaintiffs inadmissible for certain crimes or immigration fraud have sought relief under sections 1182(h) and 1182(i), respectively. However, the plain language of section

1252(a)(2)(B)(i) bars this Court from reviewing these Plaintiffs' claim that USCIS has unreasonably delayed adjudicating their waivers under sections 1182(h) and 1182(i).

Section 1252(a)(2)(B)(i) precludes judicial review of not only the ultimate decision to grant or deny a waiver under sections 1182(h) and 1182(i), but also "any judgment regarding" such waivers, including USCIS's decisions regarding the pace with which it adjudicates such waivers. *See Patel v. Garland*, 142 S. Ct. 1614, 1622 (2022). In *Patel*, the Supreme Court held that "judgement" under section 1252(a)(2)(B)(i) means "any authoritative decision" and that, under this broad definition, federal courts lack jurisdiction over "any and all decisions relating to the granting or denying of discretionary relief." *Id.* at 1621-22. In doing so, the Supreme Court explained that 8 U.S.C. § 1252(a)(2)(B)(i)'s jurisdictional bar "does not restrict itself to certain kinds of decisions." *Patel*, 142 S. Ct. at 1622. Notably, the Supreme Court rejected the interpretation that section 1252(a)(2)(B)(i) was limited to only "discretionary judgments or the last-in-time judgment[,]" *id*., because "[h]ad Congress intended instead to limit the jurisdictional bar to 'discretionary judgments,' it could easily have used that language—as it did elsewhere in the immigration code." *Id*. at 1624. Additionally, it underscored that the word "any" has "an expansive meaning" and that word "regarding" has a "broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Id*. at 1622 (internal quotation marks and citation omitted). While *Patel* involved an adjustment of status application under section 1255 adjudicated in removal proceedings, *id.* at 1615, the jurisdictional bar at section 1252(a)(2)(B)(i) applies regardless of whether the decision or action is made in removal proceedings. *Al-Saadoon v. Barr*, 973 F.3d 794, 802 n.6 (8th Cir. 2020) (finding that the jurisdictional bar at section 1252(a)(2)(B) applies "regardless of whether the judgment ... is made in removal proceedings."). Furthermore, the plain language of section 1252(a)(2)(B)(i) makes it

clear that its jurisdictional bar applies to sections 1182(h) and 1182(i) exactly as it applies to section 1255. 8 U.S.C. § 1252(a)(2)(B)(i) ("[N]o court shall have jurisdiction to review "*any judgment regarding the granting of relief under section 1182(h), 1182(i)…*or 1255 of this title."). Thus, the *Patel* Court's reasoning regarding the scope of section 1252(a)(2)(B)(i) as it relates to section 1255 applies to sections 1182(h) and 1182(i) with equal force, including with regard to a claim of unreasonable delay in the adjudication of Plaintiffs' Form I-601 waivers under these sections. The pace at which the government adjudicates waivers under sections 1182(h) and 1182(i) represents the culmination of the agency's judgments, decisions, and actions relating to the granting or denying of relief.[6] *See Patel*, 142 S. Ct. at 1622. Those judgments, decisions, and actions represent the agency's consideration of controlling laws, regulations, and policies, as well as the discretionary allocation of agency resources and priorities, and various exigencies. As such, this court is precluded from reviewing Plaintiff's claim because each of these decisions and the ultimate pace as which an application is adjudicated is a "judgment regarding the granting of relief." *See* discussion of USCIS addressing these considerations, *infra*, Argument section IV.A. Indeed, this Court recently cited the plain language in section 1252(a)(2)(B)(i) (along with section 1252(a)(2)(B)(ii)) in finding that it was precluded from reviewing a pace of adjudication claim *precisely* because the pace at which the government adjudicates adjustment of status applications is a "discretionary decision." *See Bansal v. U.S. Citizenship & Immigr. Servs.*, No. 21-cv-3203, 2021 WL 4553017, at *5 (D. Neb. Oct. 5, 2021) (Gerrard, J.) (finding the pace of

[6] Plaintiffs here do not allege that USCIS has absolutely refused to adjudicate their waiver applications, merely that the pace of adjudication resulting from USCIS's handling of their applications has been too slow. *See* Am. Compl. ¶ 7 ("Defendant has not acted with due regard for the convenience and necessity of Plaintiffs"), ¶ 34 ("The case involves a question of law common to all Plaintiffs' claims: Has USCIS unreasonably *delayed* the adjudication of I-601 waiver applications.") (emphasis added).

adjudication of adjustment applications to be discretionary and dismissing plaintiff's claim for lack of subject-matter jurisdiction, in addition to mootness and lack of standing).[7]

Therefore, this Court should find that it lacks jurisdiction to review Plaintiffs' claim of unreasonable delay in the adjudication of their Form I-601 waivers under sections 1182(h) and 1182(i) because the APA does not apply where Congress foreclosed review to "any judgment regarding the granting of relief" under these two sections, including judgments as to the pace of adjudication. 8 U.S.C. § 1252(a)(2)(B)(i); *see Patel*, 142 S. Ct. at 1622; *Britkovyy v. Mayorkas*, 60 F.4th 1024, 1027 (7th Cir. 2023) (citing the *Patel* Court's reasoning in finding that 8 U.S.C. § 1252(a)(2)(B)(i) prevents a plaintiff from using the APA to challenge "any authoritative decision" relating to the granting of his adjustment of status application under section 1255, not merely discretionary decisions or the ultimate denial of relief) (internal citations omitted).

II. Section 1252(a)(2)(B)(ii) Precludes Review of Delay Claims Relating to Waivers under Sections 1182(a)(9)(B)(v) and 1182(d)(11)

In addition to the jurisdictional bar provided in section 1252(a)(2)(B)(i), the separate jurisdictional bar provided in section 1252(a)(2)(B)(ii) requires dismissal of Plaintiffs' claim that USCIS has unreasonably delayed the adjudication of waivers of inadmissibility for prior unlawful presence in the United States, pursuant to section 1182(a)(9)(B)(v), and the smuggling of noncitizens into the United States, pursuant to section 1182(d)(11). Section 1252(a)(2)(B)(ii)

[7] In dismissing *Bansal* for lack of jurisdiction, this Court dismissed on the same day a number of other similar cases on the same basis. *See Cheema v. USCIS*, No. 21-cv-3209, 2021 WL 4553039 (D. Neb. Oct. 5, 2021); *Vempati v. USCIS*, No. 21-cv-3269, 2021 WL 4553352 (D. Neb. Oct. 5, 2021); *Verma v. USCIS*, No. 21-cv-3270, 2021 WL 4553427 (D. Neb. Oct. 5, 2021); *Gambhir v. USCIS*, No. 21-cv-3215, 2021 WL 4553189 (D. Neb. Oct. 5, 2021); *Sharma v. USCIS*, No. 21-cv-3257, 2021 WL 4553321 (D. Neb. Oct. 5, 2021); *Kalvakunta v. USCIS*, No. 21-cv-3223, 2021 WL 4553221 (D. Neb. Oct. 5, 2021); *Laud v. USCIS*, No. 21-cv-3235, 2021 WL 4553273 (D. Neb. Oct. 5, 2021); *Misra v. USCIS*, No. 21-cv-3241, 2021 WL 4553276 (D. Neb. Oct. 5, 2021); *Pindiprolu, v. USCIS*, No. 21-cv-3250, 2021 WL 4553320 (D. Neb. Oct. 5, 2021).

bars judicial review of "any . . . decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security . . . ." 8 U.S.C. § 1252(a)(2)(B)(ii). "This subchapter" in section 1252(a)(2)(B)(ii) refers to Title 8, Chapter 12, Subchapter II, of the United States Code, codified at 8 U.S.C. §§ 1151–1381 and titled "Immigration." *Kucana v. Holder*, 558 U.S. 233, 239 n.3 (2010). Section 1252(a)(2)(B)(ii)'s jurisdictional bar applies to any decision or action made discretionary by statute. *Id.* at 246–49. This includes statutes establishing discretionary waivers. *See Suvorov v. Gonzales*, 441 F.3d 618, 619 n.3, 621-22 (8th Cir. 2006) (finding that section 1252(a)(2)(B)(ii) precludes judicial review of a denial of a waiver under 8 U.S.C. § 1186a(c)(4)(B) because the statute specifies that the [Secretary] "may" waive [the joint filing requirement] in his "sole discretion," thereby specifying that the underlying decision is wholly discretionary).

The INA grants the government discretion to waive inadmissibility for prior unlawful presence in the United States, pursuant to section 1182(a)(9)(B)(v), and smuggling noncitizens into the country, pursuant to section 1182(d)(11). Section 1182(a)(9)(B)(v) specifies that the "[Secretary of the U.S. Department of Homeland Security] has *sole discretion* to waive clause (i) [relating to unlawful presence] . . . if it is established *to the satisfaction of the* [*Secretary*]" that the noncitizen meets the waiver's requirements. *See* 8 U.S.C. § 1182(a)(9)(B)(v) (emphases added). Similarly, section 1182(d)(11) commits waiver authority to the Secretary, providing he "may, in his *discretion* for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E)." 8 U.S.C. § 1182(d)(11) (emphases added). Thus, because these two statutes grant the Secretary discretion to waive inadmissibility under their respective grounds, section 1252(a)(2)(B)(ii)'s jurisdictional

bar applies. This bar precludes judicial review of *any* of the Secretary's discretionary decisions or actions under sections 1182(a)(9)(B)(v) and 1182(d)(11). *See Suvorov*, 441 F.3d at 621-22. This includes the pace at which the government adjudicates its applications, which, as noted above, represents the culmination of the agency's consideration of controlling laws, regulations, and policies, and discretionary analysis of agency resources and priorities, and various exigencies, all of which are factored into the time the agency takes to adjudicate an application.

Indeed, this Court recently held that section 1252(a)(2)(B)(ii), along with section 1252(a)(2)(B)(i), precluded it from reviewing a pace of adjudication claim under the APA relating to an adjustment of status application precisely because the pace at which the government adjudicates such applications is a "discretionary decision." *See Bansal*, 2021 WL 4553017, at *5-6 (noting that the plaintiff did not dispute that the pace of adjudication is committed by statute to the agency's discretion while adding that, "[j]ust because a decision has consequences doesn't mean it's not discretionary."). In fact, after reviewing the language of section 1255(a), which provides that the status of a noncitizen may be lawfully adjusted "by the Attorney General*, in his discretion and under such regulations as he may prescribe*," this Court stated that "[i]t's hard to imagine statutory language that would more clearly describe a discretionary decision, and when a statute specifies that a decision is wholly discretionary, regulations or agency practice will not make the decision reviewable." *Id.* (citing *Rajasekaran v. Hazuda*, 815 F.3d 1095, 1099 (8th Cir. 2016) (emphasis added); *see also Yang v. Gonzalez,* No. 06-cv-3290, 2007 WL 1847302, at *1-2 (D. Neb. June 25, 2007) (Kopf, J.) ("Adjustment of status is discretionary . . . and the statute does not set forth any time frame in which a determination must be made."). Courts around the country have similarly applied section 1252(a)(2)(B)(ii) to preclude review of pace of adjudication claims involving adjustment

applications. *See Bian v. Clinton*, 605 F.3d 249, 253–54 (5th Cir. 2010) ("If Congress had intended for only the USCIS's ultimate decision to grant or deny an application to be discretionary, as distinguished from its interim decisions and actions taken during the adjudicative process, including the pace of adjudication, then the word 'action' [under 8 U.S.C. § 1252(a)(2)(B)(ii)] would be superfluous."), *vacated on mootness grounds*, No. 09-10568, 2010 WL 3633770 (Sept. 16, 2010); *Beshir v. Holder*, 10 F. Supp. 3d 165, 174 (D.D.C. 2014) (reasoning that discretion over an adjudication necessarily includes discretion over the pace of adjudication, "[o]therwise, the grant of discretion would be illusory."); *Namarra v. Mayorkas*, 924 F. Supp. 2d 1058, 1064 (D. Minn. 2013) (recognizing agency's discretion over adjudication but not pace of adjudication "merely puts form over substance."); *Zhang v. Chertoff,* No. 06-cv-00066, 2007 WL 1753538, *3 (W.D. Va. June 19, 2007) ("A holding that USCIS does not have discretion over the pace of application processing would lead to the illogical conclusion that USCIS must reach an unreviewable decision within a reviewable period of time."); *Bugulu v. Gonzalez,* No. 06-cv-756S, 2007 WL 1746373, *2 (W.D. Wis. May 1, 2007) (delay in processing an adjustment status application is a "discretionary action by the Attorney General" under the statute); *Dong Liu v. Chertoff,* No. 07-cv-0005, 2007 WL 1300127, *5 (S.D. Cal. April 30, 2007) (stating that the majority of courts have dismissed similar actions for lack of subject-matter jurisdiction); *Safadi v. Howard,* 466 F.Supp. 2d 696, 699 (E.D. Va. 2006) ("it is clear that 'action' in § 1252(a)(2)(B)(ii) encompasses the entire process of reviewing an adjustment application, including the completion of background and security checks and the pace at which the process proceeds.").

Here, section 1182(a)(9)(B)(v) grants the Secretary with as much, if not greater discretion, than that granted by section 1255(a): "The [Secretary] has *sole discretion* to waive

[unlawful presence] . . . if it is established *to the satisfaction of the* [*Secretary*]" that the noncitizen meets the remaining statutory requirements. 8 U.S.C. § 1182(a)(9)(B)(v) (emphases added). Furthermore, similar to section 1255(a), section 1182(a)(9)(B)(v) imposes no deadline for any decision or action undertaken pursuant to the statute, highlighting Congress' intent to commit any such decision or action to the Secretary's discretion. *See SUWA*, 542 U.S. at 64 ("[A] court can compel the agency to act" [only] "when an agency is compelled by law to act within a certain time period"); *Beshir*, 10 F. Supp. 3d at 176 ("[T]he absence of a congressionally mandated timeline . . . support[s] the conclusion that the pace of adjudicating [plaintiff's] adjustment application is discretionary."); *cf.* 8 U.S.C. § 1447(b) (requiring adjudication of naturalization applications within 120 days after examination). Similarly, section 1182(d)(11) commits the waiver's authority to the Secretary's *discretion*, whereby he *may* waive an applicant's inadmissibility for alien smuggling for "humanitarian purposes," "family unity," or when it is "otherwise in the public interest." 8 U.S.C. § 1182(d)(11) (emphases added). Section 1182(d)(11) also fails to set a deadline for any decision or action undertaken pursuant to this statute, including the pace of adjudication. *Id*.

The Eighth Circuit reached the merits of pace of adjudication claims in two distinguishable cases that should not preclude this Court from dismissing Plaintiffs' claim for lack of jurisdiction. In both *Irshad v. Johnson*, 754 F.3d 604 (8th Cir. 2014), and *Debba v Heinauer*, 366 F. App'x 696 (8th Cir. 2010), the Eighth Circuit assumed it had the jurisdiction to consider the pace of adjudication claims without considering the jurisdictional bar at section 1252(a)(2)(B)(ii) that the government now raises. *See Irshad*, 754 F.3d at 606-07 (noting that it need not decide whether an allegedly unreasonable delay could create a cause of action under the APA); *Debba*, 366 F. App'x at 699 (same). In the absence of an Eighth Circuit opinion clearly

deciding whether section 1252(a)(2)(B)(ii) precludes pace of adjudication claims, a judge in this Court, has held that it does. *See Bansal*, 2021 WL 4553017, at *5. *Irshad* and *Debba* both preceded the *Patel* decision which underscored the breadth of the review bars at issue here.

Some courts in this district have found that the jurisdictional bar at section 1252(a)(2)(B)(ii) does not preclude judicial review of pace of adjudication claims, but those courts did not apply the proper standard, as clarified by the Supreme Court in *Patel* and *Kucana*, for overcoming a presumption of judicial review over administrative action. *See, e.g., Irshad v. Napolitano*, No. 12-cv-173, 2012 WL 4593391, at *5 (D. Neb. Oct. 2, 2012) (exercising jurisdiction over an unreasonable delay claim in adjudicating an adjustment of status application and citing line of cases exercising same[8]) (Urbom, J.), *aff'd sub nom. Irshad*, 754 F.3d at 607 (assuming, without deciding, jurisdiction). The district court in *Irshad* erred by requiring that a statute "express precisely" that the government has discretion "to withhold indefinitely the adjudication" of an immigration benefit in order for section 1252(a)(2)(B)(ii)'s jurisdictional bar to apply. *Irshad*, 2012 WL 4593391, at *5. Instead, the converse is true – if the statute affords an agency discretion and fails to provide an express timeline for adjudication, section 1252(a)(2)(B)(ii)'s jurisdictional bar should apply. *Patel*, 142 S. Ct. at 1624-25; *Kucana*, 558 U.S. at 246–49; *see also Abdelwahab v. Frazier*, 578 F.3d 817, 821 (8th Cir. 2009) ("If the

[8] *See Debba v. Heinauer,* No. 08-cv-304, 2009 WL 146039, at *3 (D. Neb. Jan. 20, 2009) (Smith Camp, J.), *aff'd*, 366 F. App'x 696 (8th Cir. 2010) (assuming, without deciding, jurisdiction); *Shata v. U.S. Citizenship & Immigr. Servs.*, No. 08-cv-74, 2008 WL 2165192, at *2 (D. Neb. May 21, 2008) (Bataillon, J.); *Al Kurdy v. U.S. Citizenship & Immigr. Servs.*, No. 07-cv-225, 2008 WL 151277, at *2–5 (D. Neb. Jan. 10, 2008) (Bataillon, J.); *Ansari v. U.S. Citizenship & Immigr. Servs.*, No. 07-cv-160, 2007 WL 4553920, at *2-5 (D. Neb. Dec. 18, 2007) (Bataillon, J.); *Qijuan Li v. Chertoff*, No. 07-cv-50, 2007 WL 2123740, at *3 (D. Neb. July 19, 2007) (Strom, J.); *but see Wali v. U.S. Citizenship & Immigr. Servs.*, No. 4:21-CV-3288, 2021 WL 5041207, at *2 (D. Neb. Oct. 29, 2021) (Beuscher, J.) (assuming, without deciding, jurisdiction); *Suastegui Vega v. McAleenan*, No. 19-cv-189, 2019 WL 3219326, at *3 (D. Neb. July 17, 2019) (Gerrard, J.) (same).

statute specifies that the decision is wholly discretionary, regulations or agency practice will not make the decision reviewable."). In any case, the court in *Irshad* did not find that USCIS lacked the discretion to determine its pace of adjudication, but rather that it lacked the discretion to "*refuse* to resolve the applications placed before it, or to delay its decisions *indefinitely*." *Irshad*, 2012 WL 4593391, at *5 (finding USCIS's failure to adjudicate plaintiff's adjustment of status application for nearly nine years and subsequently reopening it *sua sponte* without clarifying whether it can or will exercise its discretion to grant his application as constituting a refusal to resolve the application or delay its decision indefinitely). Plaintiffs do not allege, as in *Irshad*, that USCIS has absolutely refused to adjudicate their applications. Plaintiffs instead desire that USCIS adjudicate their applications on their preferred accelerated timeline. *See*, *e.g.,* Am. Compl. ¶ 34 ("The case involves a question of law common to all Plaintiffs' claims: Has USCIS unreasonably *delayed* the adjudication of I-601 waiver applications.") (emphasis added).

In short, sections 1182(a)(B)(9)(v) and 1182(d)(11) grant the Secretary of Homeland Security discretion to waive a noncitizen's inadmissibility for having been unlawfully present in the United States or for having smuggled noncitizens into the United States, respectively, thereby triggering the application of section 1252(a)(2)(B)(ii)'s jurisdictional bar. In turn, any discretionary decision or action undertaken pursuant to these two sections, including the pace of adjudication, is precluded from judicial review. *See Suvorov*, 441 F.3d at 621-22. As a result, this Court should find that it lacks jurisdiction to review Plaintiffs' claim of unreasonable delay in the adjudication of their Form I-601 waivers under sections 1182(a)(9)(B)(v) and 1182(d)(11) because the APA does not apply where Congress foreclosed review of "any . . . decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of

Homeland Security . . . " 8 U.S.C. § 1252(a)(2)(B)(ii); *see* APA, 5 U.S.C. § 701(a)(2) (stating that the APA does not apply if "agency action is committed to agency discretion by law"); *see also SUWA*, 542 U.S. at 63–64 (holding that a court cannot, under the APA, compel an agency to act unless there is a nondiscretionary, specific act – i.e., a discrete action that the agency is required to take).

III. Sections 1182(a)(9)(B)(v), 1182(h), and 1182(i) Preclude Judicial Review

Plaintiffs bring suit under the APA, yet simultaneously concede that the APA does not apply when "statutes preclude judicial review." Am. Compl. ¶ 71 (citing APA, 5 U.S.C. § 701(a)(1)). Here, in addition to the jurisdictional bars at sections 1252(a)(2)(B)(i) and (ii), three of the waiver statutes contain independent jurisdictional bars that also require dismissal for lack of subject-matter jurisdiction. Congress enacted these waiver-specific jurisdictional bars in 1996, as part of legislation intended to reduce, and in some cases eliminate, judicial review of certain immigration-related decisions. *See* Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA") at § 306, 110 Stat. 3009 (Sept. 30, 1996); *see Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) ("*many* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation.") (emphasis in original). Section 301(b) of IIRIRA accordingly amended sections 1182(a)(9)(B)(v), 1182(i), and 1182(h) to expressly limit judicial review. *See* Public Law 104-208, Div. C, 110 Stat. 3009 (Sept. 30, 1996), *codified at* 8 U.S.C. § 1182(a)(9)B)(v) ("No court shall have jurisdiction to review a decision or action by the [Secretary of the U.S. Department of Homeland Security] 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)"); 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.").

As with section 1252(a)(2)(B)(i), which the Supreme Court interpreted broadly in *Patel*, a plain reading of section 1182(a)(9)(B)(v), which permits the government to waive an applicant's prior unlawful presence in the United States, reveals jurisdiction-stripping language that renders *any* "decision or action" regarding this waiver unreviewable because the waiver provides no textual limitation requiring the "decision or action" to be discretionary in nature. *See Patel*, 142 S. Ct. at 1624 ("[T]he point is simply that the absence of any reference to discretion in § 1252(a)(2)(B)(i) undercuts the . . . efforts to read it in."). Indeed, just last month, a district court relied upon the *Patel* Court's reasoning when it cited section 1182(a)(9)(B)(v)'s jurisdictional bar as the basis for dismissing an unreasonable delay claim regarding the adjudication of a Form I-601A waiver: "[P]laintiffs ask the court to distinguish between USCIS having the discretion to either grant or deny a waiver and a non-discretionary duty to decide the waiver application. However, the failure or refusal to act on a waiver application, in and of itself, is 'a decision or action . . . regarding a waiver . . .'" § 1182(a)(9)(B)(v)." *Lovo v. Miller*, No. 22-CV-00067, 2023 WL 3550167, at *3 (W.D. Va. May 18, 2023). In reaching its decision, the *Lovo* court made it clear it was relying upon the Supreme Court's reasoning in *Patel*. *See Lovo*, 2023 WL 3550167, at *3. ("[The *Patel* Court's] interpretation was in relation to the term 'judgment' in § 1252(a)(2)(B), but it can be applied equally to the 'decision or action' language in § 1182(a)(9)(B)(v)."). Accordingly, with *Patel* in mind and taking together "decision or action" and the broadening effect of "regarding" as applied to "a waiver under this clause," this Court should follow *Lovo* and treat the jurisdictional bar at section 1182(a)(9)(B)(v) as

encompassing *any* claim relating to the Secretary's waiver authority, including any claim of unreasonable delay. *See Lovo,* 2023 WL 3550167, at *3.

Because section 1182(i), which permits the government to waive an applicant's inadmissibility for immigration fraud, shares *identical* jurisdiction-stripping language with section 1182(a)(9)(B)(v), this Court should find that section 1182(i)'s jurisdictional bar also encompasses any claim relating to the Secretary's waiver authority, including any claim of unreasonable delay. *Compare* 8 U.S.C. § 1182(a)(9)(B)(v) ("No court shall have jurisdiction to review a decision or action of the [Secretary] regarding a waiver under this clause"), *with* 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)").

Finally, section 1182(h), which permits the government to waive an applicant's inadmissibility for certain crimes, also shares similar jurisdiction-stripping language with sections 1182(a)(9)(B)(v) and 1182(i), precluding judicial review of "*a decision* of the [Secretary] to grant or deny a waiver." 8 U.S.C. § 1182(h) (emphasis added). As previously discussed, "a decision" may extend to USCIS's alleged inaction, which not only constitutes "agency action" under the APA, *SUWA*, 542 U.S. at 55, but also "a decision" in and of itself under section 1182(h). *See Lovo*, 2023 WL 3550167, at *3 (citing *Patel*, 142 S. Ct. at 1622, 24). Accordingly, with *Patel* in mind, including its broad definition of a "decision," this Court should find that section 1182(h)'s jurisdictional bar, similar to the jurisdictional bars of sections 1182(a)(9)(B)(v) and 1182(i), encompasses any claim relating to the Secretary's waiver authority, including any claim of unreasonable delay. *See id.*

In short, this Court should find that it lacks jurisdiction to review Plaintiffs' claim of unreasonable delay in the adjudication of their Form I-601 waivers under sections

1182(a)(9)(B)(v), 1182(h), and 1182(i) because the APA does not apply to any "decision" or "action" under these provisions. *See generally* 8 U.S.C. § 1182(a)(9)(B)(v); 8 U.S.C. § 1182(h); 8 U.S.C. § 1182(i); *see also* APA, 5 U.S.C. § 701(a)(1) (stating that the APA does not apply when "statutes preclude judicial review").

* * *

In summary, the Court should dismiss Plaintiffs' claim of unreasonable delay in the adjudication of their inadmissibility waivers under sections 1182(h) and 1182(i) because section 1252(a)(2)(B)(i) explicitly precludes judicial review of any judgment undertaken pursuant to these sections. The Court should dismiss Plaintiffs' claim of unreasonable delay in the adjudication of their inadmissibility waivers under sections 1182(a)(9)(B)(v) and 1182(d)(11) because section 1252(a)(2)(B)(ii) explicitly precludes judicial review of any decision or action committed to the discretion of the Secretary of Homeland Security, which includes any decision or action under these two provisions. The Court should dismiss Plaintiffs' claim of unreasonable delay in the adjudication of their inadmissibility waivers under sections 1182(a)(9)(B)(v), 1182(h), and 1182(i) because the jurisdictional bars within those three provisions preclude judicial review.

IV. Plaintiffs Fail to State a Claim of Unreasonable Delay under the TRAC Factors

Even if this Court determines it has subject-matter jurisdiction to consider Plaintiffs' claim of unreasonable delay in the adjudication of their inadmissibility waiver provisions, dismissal would still be required under Rule 12(b)(6) because Plaintiffs have failed to state a cognizable claim of unreasonable delay.

To avoid dismissal of an APA unreasonable delay claim, a plaintiff must show that: (1) the agency has a nondiscretionary duty to act; and (2) the agency has unreasonably delayed in acting on that duty. *See SUWA*, 542 U.S. at 63–65. At the outset, the plain language of sections

1182(h), 1182(i), 1182(a)(9)(B)(v), and 1182(d)(11) makes it clear that the adjudication of these waivers, which includes the pace at which they are adjudicated, is committed to the government's discretion. *See* 8 U.S.C. § 1182(h) ("The [Secretary of Homeland Security] *may*, *in his discretion*, waive…"); 8 U.S.C. § 1182(i) ("The [Secretary] *may*, in the *discretion* of the [Secretary], waive …"); 8 U.S.C. § 1182(a)(9)(B)(v) ("The [Secretary] has *sole discretion* to waive…"); 8 U.S.C. § 1182(d)(11) ("The [Secretary] *may, in his discretion*…waive…") (emphases added). Furthermore, none of the regulations that Plaintiffs cite in their amended complaint provide any mandatory timeframe for the adjudication of any waiver or otherwise explicitly state that the government has a nondiscretionary duty to act. *See* Am. Compl. ¶ 70 (citing 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); 8 C.F.R. § 212.7(a)(3) ("*If* the waiver application is denied, an agency will provide a written decision and notify the applicant and his or her attorney or accredited representative...") (emphasis added). Therefore, Plaintiffs fail to establish that Defendant has a nondiscretionary duty to act.

Even if Plaintiffs could allege that USCIS has a nondiscretionary duty to act, Plaintiffs fail to establish that Defendant has unreasonably delayed the adjudication of their Form I-601 waiver applications. To evaluate an unreasonable delay claim under the APA, courts often analyze six factors set forth in *Telecommunications Research & Action Center v. FCC* ("*TRAC* factors"):

> (1) the time agencies take to make decisions must be governed by a "rule of reason"[;]
> (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[;]

> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake[;]
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;]
> (5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and
> (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

750 F.2d 70, 80 (D.C. Cir. 1984). To show a likelihood of success on the merits, the plaintiffs must show the balance of the *TRAC* factors weigh in their favor. *MPAY Inc. v. Erie Custom Comput. Applications, Inc.*, 970 F.3d 1010, 1015 (8th Cir. 2020). "[I]n cases . . . involving claims of unreasonably delayed waiver determinations, the *TRAC* factors have been generally employed at the motion to dismiss stage to determine whether a plaintiff's complaint has alleged facts sufficient to state a plausible claim for unreasonable administrative delay." *Sarlak v. Pompeo*, No. 20-cv-35-BAH, 2020 WL 3082018, at *5 (D.D.C. June 10, 2020) (internal citations and quotation marks omitted). In other words, the court would not be "determining whether there has been an unreasonable delay; rather, it is determining whether Plaintiffs' complaint has alleged facts sufficient to state a plausible claim for unreasonable administrative delay." *Ghadami v. DHS*, No. 19-cv-00397-ABJ, 2020 WL 1308376, at *7 n.6 (D.D.C. Mar. 19, 2020).

A. Factors One and Two

The first TRAC factor requires USCIS's adjudicatory process be governed by a "rule of reason." *TRAC*, 750 F.2d at 80. Here, Plaintiffs claim that USCIS's adjudicatory process does not follow a rule of reason, such as processing waivers in the order in which they are received. Am. Compl. ¶ 50. But USCIS explicitly states that it generally processes its Form I-601 waivers on a first in, first out basis. *See Check Case Processing Times*, USCIS, https://egov.uscis.gov/processing-times/ (last visited June 28, 2023) (selecting "I-601" from the "Form" drop-down menu

and then selecting "Waiver of Grounds of Inadmissibility" from the "Form Category" drop-down menu and "Nebraska Service Center" in the "Field Office or Service Center" drop-down menu, then clicking "Get processing time" and scroll down to "What does this processing time mean?").

Nevertheless, Plaintiffs cite the increase in USCIS's median processing time for six different categories of waivers – Forms I-191, I-192, I-212, I-601, I-602, and I-612 – from under 7.5 months between FY 2012 to 2016, 7.3 months in FY 2020, 7.6 months in FY 2021, 8 months in FY 2022, to 13.4 months in FY 2023. Am. Compl. ¶¶ 43, 50; *see also USCIS, Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year, Fiscal Year 2012 to 2017,* https://egov.uscis. gov/processing-times/historic-pt-2 (last visited June 28, 2023); *USCIS, Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year, Fiscal Year 2018 to 2023 (up to April 30, 2023),* https://egov.uscis.gov/processin g-times/historic-pt (last visited June 28, 2023). But Plaintiffs omit publicly-available data showing that the median processing times for such waivers in FY 2018 and 2019 were 12.8 months and 10.3 months, respectively – facts that significantly undercut their assertions that, "historically, applicants have waited six to eight months for a decision" and that there has been "unbounded growth" in median processing times in FY 2023 relative to fiscal years stretching back to 2012. Am. Compl. ¶¶ 2, 75; *see USCIS, Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year, Fiscal Year 2018 to 2023 (up to April 30, 2023),* https://egov.uscis.gov/processing-times/historic -pt (last visited June 28, 2023).

Plaintiffs also fail to explain how any increase in processing times for waivers at the Nebraska Service Center supports their contention that USCIS does not follow a rule of reason.

Plaintiffs simply argue that the increase in processing times establishes that USCIS does not follow a rule of reason, "but that just asserts the conclusion the plaintiff is trying to prove." *Bansal*, 2021 WL 4553017, at *7. Plaintiffs also allege that USCIS does not follow a first-in, first-out processing system and does not apply a consistent processing rule. *Id.* ¶ 51-52 ("Defendant Jaddou may allege that the agency adjudicates waiver applications first in, first out, but such assertions should not be taken at face value"; "USCIS has no consistent processing rule."). But Plaintiffs fail to provide *any* data to support their contention. A court need not credit legal conclusions, conclusory statements, or "'naked assertion[s] devoid of further factual enhancement.'" *Retro Television Network, Inc.*, 696 F.3d at 768 (quoting *Iqbal*, 556 U.S. at 678); *see also Iqbal*, 556 U.S. at 662 (a pleading "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation . . . labels and conclusions" will not suffice) (internal citations omitted). In *Kurakula*, another court in this district rejected the plaintiffs' allegation that USCIS does not follow a first in, first out process, even though they had "some data to support" it. *Kurakula*, 2021 WL 308189, at *3 ("Plaintiffs argue, *and have some data to support*, that not every application processed at the Nebraska Service Center is adjudicated in strict chronological order," but finding that these slight variations were inadequate to establish that USCIS does not follow a first-in, first-out process). Here, with *no* data to support their contention that USCIS does not follow a first-in, first-out process, dismissal of Plaintiffs' claim is even more warranted. *See Wali*, 2021 WL 5041207, at 3 ("[Plaintiffs] argue that USCIS's 'first-in/first-out' rule of reason for processing applications fails because 'USCIS does not follow this rule in any strict sense' . . . But Plaintiffs provide no evidentiary support for this contention . . . nor do they explain how the potential existence of exceptions to this rule render it unreasonable.").

The second *TRAC* factor considers whether Congress has established a statutory timetable. *See TRAC*, 750 F.2d at 80. Plaintiffs argue Congress has expressed an expectation that the government will adjudicate properly filed immigration applications within 180 days of filing. Am. Compl. ¶ 56 (citing 8 U.S.C. § 1571(b) ("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")). However, this precatory provision does not impose a mandatory deadline for adjudication of immigration applications. *See Bansal*, 2021 WL 4553017, at *4 (Section 1571 "may be some sort of benchmark, but the Court declines the plaintiff's invitation to impose it as a deadline."); *Wali*, 2021 WL 5041207, at *3 (This "sense of Congress" is an aspirational standard and the Court thus declines to impose it as a hard deadline); *Kurakula,* 2021 WL 308189 ("[T]he Court will not transform a precatory guideline into a mandatory deadline."). In addition, courts in at least four other circuits have recognized a "sense of Congress" resolution or similar language does not create a binding deadline on the government. *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 529 n.26 (D.C. Cir. 2015) (noting the First, Third, and Ninth Circuits have treated similar language as "precatory" and "a statement of opinion," rather than "a statement of fact"); *see, e.g., Yang v. Cal. Dep't of Social Servs.,* 183 F.3d 953, 958 (9th Cir.1999); *Monahan v. Dorchester Counseling Ctr.,* 961 F.2d 987, 994-95 (1st Cir.1992); *Trojan Techs., Inc. v. Pennsylvania,* 916 F.2d 903, 909 (3d Cir. 1990). Secondly, the language from section 1571 does not come from the enabling statute providing for inadmissibility waivers, *see TRAC*, 750 F.2d at 80, but from a "2000 statute authorizing funds to eliminate a then-existing backlog of certain immigration petitions." *Jain v. Renaud*, No. 21-cv-3115, 2021 WL 2458356, at *5 (N.D. Cal. June 16, 2021). Thirdly, even if 8 U.S.C. § 1571(b) has force in other contexts, it has no force in the context of waivers. Section 1571 refers only to an application or petition "to

confer, certify, change, adjust, or extend" an immigration status, not an application to waive a bar to immigration status. *See* 8 U.S.C. § 1572(2).

Nevertheless, Plaintiffs argue that USCIS's processing times have increased "substantially" since they first filed their waiver applications and that such an increase is "unreasonable." Am. Compl. ¶¶ 54-55. Plaintiffs note that, in FY 2020, "during the height of the pandemic," USCIS received 62,154 waivers, and processed a total of 56,745 waivers, or approximately 91 percent of the waivers it received, ending with a backlog of 216,721 waivers, but that in FY 2022, USCIS received 77,895 waivers, and processed a total of only 44,317 waivers, or approximately 57 percent of the waivers it received, ending with a backlog of 269,549 waivers. *Id*. ¶ 57; *see also USCIS, Number of Service-wide Forms by Quarter, Form Status, and Processing Time, Fiscal Year 2022, Quarter 4, Fiscal Year – To Date*, https://www.uscis.gov/sites/default/files/document /data/Quarterly_All_ Forms_FY2022_Q4.pdf (last visited June 28, 2023). However, Plaintiffs fail to highlight that the same statistics reveal that USCIS received 33,578 more applications in FY 2022 than it did in FY 2020, which constitutes an approximately 25 percent increase, thereby undermining Plaintiffs' contention that it is the adjudication of *their* 20 waivers that is unreasonably delayed. *Id*. USCIS's backlog also increased by 52,828 waivers, constituting an approximately 25 percent increase, during the same two-year period, further undermining Plaintiffs' contention. *Id*. When evaluating timeliness, a court may also compare Plaintiffs' wait times to posted processing times. *See Chuttani v. U.S. Citizenship & Immigr. Servs.*, No. 19-cv-02955, 2020 WL 7225995, at *4 (N.D. Tex. Dec. 8, 2020) (taking posted processing times into consideration in concluding that an alleged delay in the processing of a Form I-526 petition was not unreasonable); *Shihuan Cheng v. Baran*, No. 17-cv-2001, 2017 WL 3326451, at *4 (C.D. Cal. Aug. 3, 2017) (same). Here, 19 of Plaintiffs' 20

waiver applications have been pending with USCIS for 9 to 22 months. Am Compl. ¶ 35. Furthermore, when they filed their Complaint, USCIS's publicly posted processing time for eighty percent of Form I-601 waivers was 25.5 months, although it has since decreased to 23 months. Compl. ¶ 4. Therefore, the time to adjudicate all but one of Plaintiffs' Form I-601 waivers is still within the normal processing time. Even taking this last application into account, which Plaintiffs allege has been pending for 36 months,[9] Am. Compl. ¶ 35, the Eighth Circuit has found significantly longer processing times reasonable as a matter of law. *See Irshad*, 754 F.3d at 607-08 (four-and-a-half year adjudication of an adjustment of status application was not unreasonable where there was "no indication that the deliberative process of the government officials . . . is a sham," where the "decision regarding the application must be based upon a high-level analysis of complex, sensitive factors," and where officials are "given complete discretion to grant or deny the application as they see fit."); *Debba,* 366 F. App'x at 699 (finding eight-and-a-half-year adjudication of an adjustment of status application to be reasonable, where USCIS first needed to adjudicate a waiver of inadmissibility); *see also Ayyoubi v. Holder,* No. 10-cv-1881, 2011 WL 2983462, at *10 (E.D. Mo. July 22, 2011), *appeal dismissed, judgment vacated in part on other grounds*, 712 F.3d 387 (8th Cir. 2013) (five-year delay in the adjudication of an adjustment of status application that was initially denied, reopened, and held-in-abeyance until further guidance was not unreasonable). District courts around the country have similarly found that processing times similar to – and significantly longer than – Plaintiffs are reasonable as a matter of law. *See e.g., Yavari v. Pompeo*, No. 19-cv-02524, 2019 WL 6720995, at *8 (C.D. Cal. Oct. 10, 2019) ("District courts have generally found that immigration

[9] *See supra* n.2, noting that USCIS sent this Plaintiff, [redacted], an RFE on June 5, 2013, in connection with her pending Form I-601 waiver application.

delays in excess of five, six, seven years are unreasonable, while those between three to five years are often not unreasonable."); *Gong v. Duke*, 282 F. Supp. 3d 566, 568 (E.D.N.Y. 2017) ("[T]he mere delay of less than four years is an inadequate ground [in the immigration context] to grant either mandamus or APA relief."); *Skalka v. Kelly*, 246 F. Supp. 3d 147, 153–54 (D.D.C. 2017) ("Congress has given the agencies wide discretion in the area of immigration processing," and a "delay of [two years] does not typically require judicial intervention" while citing caselaw that even a five- to ten-year delay in the immigration context may be reasonable).

Finally, Plaintiffs also cite data indicating USCIS takes an average of 2.06 hours to adjudicate a Form I-601 waiver and argue it is "unreasonable" for the agency to "accept a filing fee of $930 and then not spend the two necessary hours to adjudicate the case for 25.5 months" Am. Compl. ¶ 58; *see also U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, Proposed Rule*, 88 Fed Reg. 402, 446 (Jan. 4, 2023). Here, however, Plaintiffs confuse the time projected for a USCIS officer to adjudicate a Form I-601 waiver – otherwise known as the "completion rate" – with the total processing time. As stated in the January 2023 proposed rule on fees, the completion rate "does not reflect 'queue time,' or time spent waiting, for example, for additional evidence or supervisory approval" and thus does *not* reflect the "total processing time applicants, petitioners, and requestors can expect to wait for a decision on their case after USCIS accepts it." *See id.* Plaintiffs' argument regarding the average "completion rate" also overlooks that the same statistics they cited in their amended complaint indicate USCIS received approximately 25 percent more waiver applications in FY 2022 than it did two years prior in FY 2020 and that its backlog also grew by approximately 25 percent during the same period. Am. Compl. ¶ 57; *see also USCIS, Number of Service-wide Forms by Quarter, Form Status, and Processing Time,*

Fiscal Year 2022, Quarter 4, Fiscal Year – To Date, https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_ Forms_FY2022_Q4.pdf (last visited June 28, 2023). Instead, Plaintiffs point to a statement made by Defendant Jaddou, as reported in a publicly-available news article, in which she states: "Let me be very clear. Our processing times are too long. There are no ifs, ands or buts about it." *Id.* ¶ 47 (citing Suzanne Monyak, *USCIS director: Federal immigration funds 'critical' to agency*, Roll Call (Feb. 2, 2022), https://rollcall.com/2022/02/02/uscis-director-federal-immigration-funds-critical-to-agency). Ironically, the article highlights substantive reasons for the recent increase in USCIS's processing times that undercut Plaintiffs' allegation of *unreasonable* delay in adjudicating their waivers. Indeed, the article outlines that USCIS has endured significant financial strain and needs additional resources "to decrease processing times and to tackle the unprecedented backlog and [USCIS's] ever growing humanitarian mission":

> USCIS has also suffered financially in recent years, in part due to a dip in applications and to travel restrictions during the COVID-19 pandemic. The agency narrowly averted furloughs of more than half of its employees in 2020 and implemented a hiring freeze. In a July 2021 annual report to Congress, the Homeland Security ombudsman said the immigration agency "is still running at a revenue loss," which will lead to "continuing backlogs and lengthening processing times."

Monyak, *supra*; *see also Kurakula*, 2021 WL 308189, at *4 ("[S]ome slower adjudications are not unreasonable in light of the closures of the [Application Service Center] sites, adjusting to the implementation of the new biometrics requirement, and working through the backlog of cases caused by the ongoing COVID-19 pandemic.").

B. Factors Three and Five

"The third and fifth [*TRAC*] factors overlap—the impact on human health and welfare and economic harm, and the nature and extent of the interests prejudiced by the delay," *Liberty*

Fund, Inc. v. Chao, 394 F. Supp. 2d 105, 118 (D.D.C. 2005). In this regard, Plaintiffs argue that USCIS's allegedly unreasonable delay prevents Plaintiffs from completing consular processing, proceeding with their applications for permanent resident status, and reuniting with their families in the United States. Am. Compl. ¶¶ 59-61. Plaintiffs allege that USCIS's delays have caused them financial, emotional, and physical hardship. *Id*. ¶ 60. 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. *Id*. ¶ 41. Rather than any administrative delay, Plaintiffs' violations of U.S. immigration laws and, in some cases, criminal statutes currently bar them from proceeding with their adjustment of status applications, reuniting with their families, or otherwise living and working in the United States.

C. Factor Four

The fourth *TRAC* factor requires this Court to analyze what effect, if any, expedited adjudication would have on "agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80. This factor carries significant weight and may be dispositive "even though all the other factors considered in *TRAC* favored" the plaintiff. *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003). In this regard, Plaintiffs argue that family unity has always been a priority for USCIS, that Plaintiffs have paid their fees to have their applications adjudicated, and USCIS has received money appropriated by Congress for such adjudication. Am. Compl. ¶¶ 62-66. But Plaintiffs' arguments assume, incorrectly, that family unity is USCIS's sole priority, that Form I-601 waivers exclusively serve that interest, and that Plaintiffs are the only ones who have paid for the adjudication of their immigration applications. In fact, the *Roll Call* article that Plaintiffs cite suggests USCIS has many competing priorities that serve a range of different interests, and that family unity is merely one such priority. *See* Monyak, *supra* ("USCIS must continue to receive appropriations to meet the increasing demand

for *many* of our humanitarian benefits.") (emphasis added). Just as importantly, "[g]ranting Plaintiffs the relief they seek would only "impose offsetting burdens on equally worthy applicants." *Kurakula,* 2021 WL 5041207, at *5 (internal citation omitted). As another court in this district summarized:

> "The public interest weighs against the court's interference because Plaintiffs are essentially asking the Court to permit them to have their cases treated differently from thousands of other similarly situated applicants because they decided to sue. It's difficult to even imagine, however, the disruptive effect on the courts and the immigration system of permitting litigious plaintiffs to reserve visas or "cut in line" ahead of other applicants, because *every* potential immigrant would have to protectively become a litigant. In the absence of any showing that *these plaintiffs* are distinguishable from any other hopeful immigrants in the admittedly regrettable backlog of applications, then the Court cannot help but conclude that the public interest would be ill-served by *ad hoc* judicial intervention."

Naramala v. U.S. Citizenship & Immigration Servs., 4:21CV3289, 3-4 (D. Neb. Oct. 29, 2021) (Kopf, J.) (emphases in original); *see also Xu v. Nielsen*, No. 18-cv-2048, 2018 WL 2451202, at *2 (E.D.N.Y. May 31, 2018) ("There are many other applicants who have waited even longer than plaintiff; to grant him priority is to push them further back in line when the only difference between them is that plaintiff has brought a federal lawsuit."). The effect that this queue-jumping would have on other applicants greatly militates against Plaintiffs in the *TRAC* factor analysis.

D. Factor Six

While the final factor states only that "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed," *TRAC*, 750 F.2d at 80 (citation and quotation marks omitted), courts have looked to good faith efforts to reduce delays as a factor weighing against injunctive relief. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 192-93 (D.C. Cir. 2016) ("[T]he Secretary's good faith efforts to reduce the delays within the constraints she faces . . . push in the same direction [against enjoining unreasonable

delay.]"). Here, Plaintiff argue their applications have been unreasonable delayed without alleging bad faith or impropriety. Am. Compl. ¶ 67; *see Bansal*, 2021 WL 4553017, at *8 ("[I]t is relevant that the plaintiff hasn't alleged anything to suggest USCIS is delaying its consideration of the plaintiff's application in bad faith; [t]here is, in fact, a tension between the plaintiff's allegation that the COVID-19 pandemic changed the world enough to create an unprecedented opportunity for [applicants], but unwillingness to concede that those same circumstances—both the flood of applications and the pandemic itself—might have understandably taxed the agency's resources."). Finally, the *Roll Call* article cited by Plaintiffs demonstrates that USCIS is making good-faith efforts to address backlogs and alleviate delays. *See* Monyak, *supra*. The article reports that Director Jaddou is addressing delays by seeking more funding through both appropriations and fee increases, along with further plans to increase staffing. *See id*.

* * *

In summary, this Court should find that Plaintiffs have not alleged facts sufficient to state a plausible claim for unreasonable delay under the *TRAC* factors.

V. [redacted] Claim is Moot

Finally, [redacted] claim should be dismissed. The parties agree his claim is moot because USCIS approved his Form I-601 waiver on April 26, 2023, 14 days after Plaintiffs filed their Complaint. *See Haden v. Pelofsky*, 212 F.3d 466, 469 (8th Cir. 2000) ("When, during the course of litigation, the issues presented in a case 'lose their life because of the passage of time or a change in circumstances . . . and a federal court can no longer grant effective relief,' the case is considered moot.") (internal quotation omitted). If an issue is moot, the court has "no discretion and must dismiss the action for lack of jurisdiction. *Ali v. Cangemi*, 419 F.3d 722, 724 (8th Cir. 2005) (internal citation omitted).

CONCLUSION

For the foregoing reasons, this Court should grant Defendant's motion to dismiss Plaintiffs' single claim of unreasonable delay, arising under the APA, for lack of subject-matter jurisdiction. Should this Court determine it does have subject-matter jurisdiction, it should nevertheless grant Defendant's motion to dismiss for Plaintiffs' failure to state a claim. This Court should also dismiss [redacted] claim for mootness because his waiver has been approved.

Dated: June 30, 2023

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
United States Department of Justice
Civil Division

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section

KATHLEEN A. CONNOLLY
Chief
Enforcement Unit

ANTHONY D. BIANCO
Assistant Director

/s/ M. Samer Budeir
M. SAMER BUDEIR
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
Enforcement Unit
P.O. Box 868
Washington, DC 20044
Telephone: (202) 305-9107
E-mail: samer.budeir@usdoj.gov

CERTIFICATE OF COMPLIANCE

Pursuant to D. Neb. Civ. R. 7.1(d)(3), I hereby certify this brief complies with the requirements of D. Neb. Civ. R. 7.1(d)(1). Relying on the word-count function of Microsoft Office, this document contains 10,904 words. The word-count function was applied to all text, including the caption, headings, footnotes, and quotations.

/s/ M. Samer Budeir
M. SAMER BUDEIR
Trial Attorney
United States Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 30, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

Dated: June 30, 2023

/s/ M. Samer Budeir

M. SAMER BUDEIR
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
Enforcement Unit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ANDRE BOULAY, et al., Plaintiffs, vs. UR M. JADDOU, in her official capacity as Director of United States Citizenship and Immigration Services, Defendant.	4:23-cv-03052 DEFENDANT'S MOTION TO DISMISS

EXHIBIT A

[redacted]

		Case Type I601 - APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY
Received Date 08/02/2021	**Priority Date**	[redacted]
Notice Date 04/26/2023	**Page** 1 of 1	

[redacted]

Notice Type: Approval Notice
Consulate: [redacted]

We have mailed an official notice about this case (and any relevant documentation) according to the mailing preferences you chose on Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. **This is a courtesy copy, not the official notice.**

What the Official Notice Said

The U.S. Citizenship and Immigration Services (USCIS) approved your Application for Waiver of Grounds of Inadmissibility, Form I-601. The waiver applies only to the grounds(s) of inadmissibility included on your application.

Please see additional information below regarding specific immigration benefit categories.

Department of State Visa Applicant
If you are an immigrant visa applicant, a K nonimmigrant visa applicant or a V nonimmigrant visa applicant, USCIS has notified the U.S. Embassy or consulate indicated above with information about the waiver approval. This completes all USCIS action on this waiver application. If you have any questions about visa issuance, please contact the U.S. Embassy or consulate directly.

If your waiver is based on an application for a K-1 or K-2 nonimmigrant visa, the approval of your waiver is conditioned upon the marriage of the K-1 visa applicant and the K-1 visa petitioner after the K-1 visa applicant is admitted to the United States.

Adjustment of Status Applicant
If your waiver is based on an Application to Register Permanent Residence or Adjust Status, Form I-485, USCIS will notify you of the decision on the Form I-485 in a separate notice.

Temporary Protected Status Applicant
If your waiver is based on an Application for Temporary Protected Status, Form I-821, USCIS will notify you of the decision on the Form I-821 in a separate notice. The waiver is only valid for the TPS application and any subsequent TPS re-registration applications; it is not valid for any other immigration benefit applications.

THIS NOTICE IS NOT A VISA AND MAY NOT BE USED IN PLACE OF A VISA.

NOTICE: Although this application or petition has been approved, USCIS and the U.S. Department of Homeland Security reserve the right to verify this information before and/or after making a decision on your case so we can ensure that you have complied with applicable laws, rules, regulations, and other legal authorities. We may review public information and records, contact others by mail, the internet or phone, conduct site inspections of businesses and residences, or use other methods of verification. We will use the information obtained to determine whether you are eligible for the benefit you seek. If we find any derogatory information, we will follow the law in determining whether to provide you (and the legal representative listed on your Form G-28, if you submitted one) an opportunity to address that information before we make a formal decision on your case or start proceedings.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

USCIS encourages you to sign up for a USCIS online account. To learn more about creating an account and the benefits, go to https://www.uscis.gov/file-online.

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Lincoln NE 68501-2521

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