JUDGE TANA LIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARIA SILVIA GUEVARA ENRIQUEZ, et al., Plaintiffs, v. U.S. CITIZENSHIP & IMMIGRATION SERVICES, et al., Defendants.	Case No. 2:23-cv-00097-TL **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** NOTE ON MOTION CALENDAR: April 28, 2023 **ORAL ARGUMENT REQUESTED**

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

I. INTRODUCTION

Plaintiffs oppose Defendants U.S. Citizenship and Immigration Services (USCIS) and Director Jaddou's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim for relief.

Defendants are wrong that the Administrative Procedure Act (APA) precludes jurisdiction over an unreasonable delay claim. *See* 5 U.S.C. § 701(a)(1). Defendants incorrectly claim that because a decision to grant or deny an unlawful presence waiver is discretionary, this court lacks jurisdiction to review a claim of agency *delay*. Defendants' reading of the APA to bar judicial review of delay would lead to the absurd result that Defendants could collect fees for adjudicating provisional waiver applications and then stop adjudicating any, without any consequence or recourse. That defeats both the letter and spirit of the APA.

In a further attempt to quash jurisdiction, Defendants misapply *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 immigration court, not a claim for unreasonable *delay* in the affirmative benefits context. Accordingly, Defendants' application of *Patel* has no basis in law and its application to this case is unfounded for multiple reasons.

Defendants' 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

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

"[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-601A waiver applications. While Defendants contend that the factors set forth in *TRAC v. FCC*, 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, taking Plaintiffs' facts plausibly 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 Defendants' motion and allow the parties to proceed to discovery to test the factual claims made in Defendants' motion, and the three declarations that USCIS has submitted in this case to defend their claims.

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). Defendants have asserted a "facial attack," as they claim this Court lacks jurisdiction because the waiver provision, 8 U.S.C. § 1182(a)(9)(B)(v),

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

supposedly bars judicial review. ECF 36 at 2, 10. "A 'facial' attack accepts the truth of the plaintiff's allegations but asserts that they 'are insufficient on their face to invoke federal jurisdiction.'" *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). 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 allegations are "sufficient as a legal matter to invoke the court's jurisdiction." *Leite*, 749 F.3d at 1121 (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013).

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

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

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); *see Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). 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. Stated differently, "[d]ismissal for failure to state a claim is appropriate only 'if it appears beyond doubt that the [non-moving party] can prove no set of facts in support of his claim which would entitle him to relief.'" *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007) (*quoting Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001)).

III. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CAUSE OF ACTION FOR UNREASONABLE DELAY UNDER THE ADMINISTRATIVE PROCEDURE ACT.

A. Jurisdiction exists because Defendants USCIS and Director Jaddou have a nondiscretionary duty to decide provisional waiver applications.

This Court has subject matter jurisdiction to decide Plaintiffs' claim for unreasonable delay. The APA authorizes suit by "[a] person suffering [a] legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The APA allows the Court to compel agency action that is unlawfully withheld of unreasonably delayed. § 706(1). In this case, the discrete agency action at issue is **to render** a decision from Defendants on the Plaintiffs' provisional waiver applications—and **not** what decision to make. Construing the discretionary nature of the

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

unlawful presence waiver to bar judicial review under the APA § 701(a)(2), leads to the absurd result that Defendants could collect fees for adjudicating provisional waiver applications and then stop adjudicating any, without any consequence.

A reviewing court's authority under the APA applies generally to agency action or inaction "except to the extent that . . . (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id*. § 701(a)(1)-(2). "[S]ection 706(1) coupled with [§] 555(b) does indicate a congressional view that agencies should act within reasonable time frames and that courts designated by statute to review agency actions may play an important role in compelling agency action that has been improperly withheld or unreasonably delayed." *TRAC*, 750 F.2d at 77. The APA carries a "strong presumption that Congress intends judicial review of administrative action." *Am. Hosp. Ass'n v. Azar*, 967 F.3d 818, 824 (D.C. Cir. 2020). In view of this presumption, the Supreme Court has interpreted the § 701(a)(2) exception to judicial review for agency action committed to agency discretion "quite narrowly." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019). This presumption may be overcome only (1) by "clear and convincing evidence that Congress intended" to foreclose review, *see Azar*, 967 F.3d at 824, or (2) in "those rare circumstances where a court would have no meaningful standard against which to judge the agency's exercise of discretion," *see Dep't of Commerce*, 139 S. Ct. at 2568. Furthermore, the Supreme Court has circumscribed review of administrative failures to act in a reasonable time. *See Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 64 (2004). In *SUWA*, the Supreme Court concluded that an APA claim under § 706(1) "can proceed

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." 542 U.S. at 64.

The text of the provisional waiver statute—"[n]o court shall have jurisdiction to review a decision or action . . . regarding a waiver"—does not support Defendants' claim that no jurisdiction exists to review agency *delay*. ECF 36 at 10; 8 U.S.C. § 1182(a)(9)(B)(v). Here, USCIS has not issued "a decision . . . regarding a waiver" while Plaintiffs' and class members' waiver applications remain pending. By failing to act, USCIS has not yet taken an "action . . . regarding a waiver"; in fact, that is precisely the relief Plaintiffs and class members seek via this lawsuit—agency action.

Contrary to Defendants' claim (ECF 36 at 10), Plaintiffs do not agree that delay is an "action" pursuant to § 1182(a)(9)(B)(v) when Plaintiffs allege "[a]gency action includes an agency's failure to act. 5 U.S.C. § 551(13)." Am. Compl., ECF 27, ¶ 78. As addressed in *Soneji v. Dep't of Homeland Sec.*, 5 U.S.C. § 551 is clear that "this definition applies 'only for the purpose of this subchapter.'" 525 F. Supp. 2d 1151, 1154 n.2 (N.D. Cal. 2007) (quoting 5 U.S.C. § 551). "There is nothing to indicate . . . that this definition also applies to INA section 242, codified at 8 U.S.C. § 1252." *Id.*

Defendants' position that their failure to adjudicate Plaintiffs' waiver applications is an unreviewable discretionary decision "defies logic." *Nigmadzhanov v. Mueller*, 550 F. Supp. 2d 540, 546 (S.D.N.Y. 2008). Taken to its logical conclusion, Defendants are arguing that they can take money for a service they offer, and then simply take as long as they wish to provide that service, or never provide that service at all, and the federal courts would have no

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

ability to require their performance under the APA. As many courts have held, such a position is untenable in the law and would belie Congress' intent behind the APA to allow judicial review of agency action or inaction. *See, e.g., Hong Wang v. Chertoff*, 550 F. Supp. 2d 1253, 1256-57 (W.D. Wash. 2008) (collecting cases in this district); *see also Saini v. USCIS*, 553 F. Supp. 2d 1170, 1176 (E.D. Cal. 2008) ("[A]djudication must occur within a reasonable period of time, since a contrary position would permit the USCIS to delay indefinitely, a result Congress could not have intended.") (internal citations omitted); *Ruiz v. Wolf*, No. 20 C 4276, 2020 WL 6701100, at *3 (N.D. Ill. Nov. 13, 2020) (same).

Some courts have concluded that statutory discretion to grant or deny an application or benefit does not grant "the authority *to not act* on an application." *Asmai v. Johnson*, 182 F. Supp. 3d 1086, 1091-92 (E.D. Cal. 2016) (emphasis added) (court had jurisdiction to decide unreasonable delay claim because neither the discretionary authority to decide an adjustment of status application nor the discretionary exemption for terrorism-related inadmissibility gave the agency discretion to hold application indefinitely without adjudication). These courts apply the holding in *Kucana v. Holder*, a Supreme Court decision that held that a provision of the INA—8 U.S.C. § 1252(a)(2)(B)(ii)—stripped jurisdiction over discretionary agency actions, but only if Congress *specifically* granted the Executive discretionary authority over the decision or action in the applicable statute. 558 U.S. 233, 247-49 (2013). In applying that holding, courts have held that discretionary statutes do not bar claims of unreasonable delay. *See, e.g.*, *Geneme v. Holder*, 935 F. Supp. 2d 184, 191-92 (D.D.C. 2013) (applying *Kucana* to find that court retained jurisdiction over claim of

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

unreasonable delay in adjudicating adjustment application: "an order that USCIS adjudicate Ms. Geneme's application would not afford her substantive relief, but only ensure that she got a fair chance to have her claims heard in a timely manner").

The APA plainly provides the judicial review for such unreasonable delays or unlawful withholding of action and authorizes district courts to compel an action. *See* 5 U.S.C. §§ 555(b), 706(1). The court in *He v. Chertoff* highlights the flaw in conflating the nondiscretionary duty to adjudicate with the result of the adjudication, commenting that if the agency had discretion as to the pace of adjudication, then this theoretically could result in "indefinite delay" which the court would be unable to review and remedy. 528 F. Supp. 2d 879, 883 (N.D. Ill. 2008) (and cases cited therein); *see also Doe v. Trump*, 288 F. Supp. 3d 1045, 1072 & n.18 (W.D. Wash. 2017) ("[T]he Secretary may have discretion over what the decision will be, but not over whether a decision will be made"). Nothing in the INA or regulations support a conclusion that the agency has discretion on whether to ever decide a properly presented application for a provisional unlawful presence waiver. Although non-binding, Congress expects USCIS to process immigration benefit applications within 180 days (about 6 months) after the initial filing of the application. 8 U.S.C. § 1571(b); *see also* Am. Compl., ECF 27 ¶ 49. This codified expectation further demonstrates that adjudication of an immigration benefit is not discretionary.

In sum, Defendants USCIS and Jaddou are required to adjudicate Plaintiffs' and class members' provisional waiver applications; whether to adjudicate a properly-paid-for application is not committed to the agency's unfettered discretion. Defendants' argument has

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

no basis in law and this Court has subject matter jurisdiction to decide Plaintiffs' claim for unreasonable delay.

B. *Patel v. Garland* does not apply to provisional unlawful presence waiver applications.

Defendants have asked this Court (ECF 36 at 11-12) to apply *Patel v. Garland* beyond the scope of the statute the Supreme Court reviewed. 142 S. Ct. 1614 (2022). In *Patel*, the Supreme Court interpreted the meaning of the word "judgment" as used in the text of 8 U.S.C. § 1252(a)(2)(B)(i) (hereinafter the "(B)(i) jurisdictional bar"). *Id*. at 1621. But Congress limited the applicability of the (B)(i) jurisdictional bar to discretionary denials under specific INA provisions, including adjustment of status to lawful permanent resident under § 1255, which are not at issue in this case. Congress did not include the agency's consideration of provisional unlawful presence waiver applications, among the judgments for which judicial review is unavailable. *See id.* (listing five types of relief, "[8 U.S.C.] section 1182(h), 1182(i), 1229b, 1229c, or 1255," none of which govern unlawful presence waivers). Congress specifically chose to exclude provisional unlawful presence waivers from the (B)(i) jurisdictional bar, while including two other waiver provisions—§ 1182(h) and (i)—showing that Congress knows how to restrict judicial review of immigration waivers if it chooses to do so.

Patel does not preclude judicial review of actions challenging agency delay. A delay in adjudication is not a "judgment regarding the granting of relief . . ." 8 U.S.C. § 1252(a)(2)(B)(i). Defendants have not identified, and Plaintiffs have not found, any decision that applies the (B)(i) jurisdictional bar to a lawsuit that challenges agency delay in

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

adjudication. Furthermore, *Patel* did not decide whether § 1252(a)(2)(B)(i) applies outside of removal proceedings, and in this case, Plaintiffs and putative class members are not in removal proceedings. 142 S. Ct. at 1626; *see also Hernandez v. U.S. Citizenship & Immigr. Servs.*, --- F.Supp.3d ----, No. C22-904, 2022 WL 17338961, at *5-6 (W.D. Wash. Nov. 30, 2022). However, neither of these questions is before this Court, and need not be considered here, because Congress excluded 8 U.S.C. § 1182(a)(9)(B)(v) from the scope of the (B)(i) jurisdictional bar.

The distinctions don't end there. The Court in *Patel* interpreted the jurisdictional bar to preclude judicial review only after the agency had already denied Mr. Patel adjustment of status as a defense to removal. 142 S. Ct. at 1620-21. The question before the Court was whether "any judgment . . . regarding the granting of relief under" 8 U.S.C. § 1255, the adjustment of status provision, included a bar against district court review of the Immigration Judge's factual findings underlying the legal conclusion that Mr. Patel was ineligible for relief. *Id*. In this case, Defendants have not denied any immigration relief to Plaintiffs and putative class members, and the relief sought in this case does not ask for judicial review of any decision made by Defendants as to the provisional waiver applications. Defendants would have the court believe that their decision to delay any adjudication, to literally ignore thousands of case files for years, is a "decision or action [by the agency] regarding a waiver" under § 1182(a)(9)(B)(v). That is an implausible reading of the statutory phrase "regarding the granting of relief" that is in no way supported by *Patel.*

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

In sum, for the multiple reasons described above, Defendants' efforts to stretch *Patel* to cover the present lawsuit is misguided and finds no basis in law.

IV. PLAINTIFFS HAVE STATED A PLAUSIBLE CLAIM FOR RELIEF

Plaintiffs' well-pleaded complaint raises a plausible claim under the APA for unreasonable delay. By virtue of the APA, 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 if an agency does not "within a reasonable time, . . . proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). Courts shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

A. Unreasonable Delay Claims Are Governed by the *TRAC* Factors

When resolving the merits of whether an agency action has been unreasonably delayed, federal courts typically consider the following six *TRAC* factors associated with the decision in *TRAC v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984):

> (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 delay; and

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

> (6) the court need not 'find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.'

Indep. Mining Co. v. Babbitt, 105 F.3d 502, 507 n.7 (9th Cir. 1997) (*quoting TRAC*, 750 F.2d at 80); *see also Weday v. Mayorkas*, No. 2:21-cv-01595-RSM-JRC, 2022 WL 1143227, at *5 (W.D. Wash. Mar. 22, 2022). "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).

This Court need only look to the well-pleaded allegations of the amended complaint to find that Plaintiffs set forth specific allegations to show a plausible claim for unreasonable delay. ECF 27 ¶¶ 29-44. When viewed in the context a motion to dismiss under Rule 12(b)(6), 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 act within a reasonable amount of time, as required by the APA. The named Plaintiffs are 299 beneficiaries of approved immigrant visa petitions who filed a Form I-601A with USCIS at least twelve months prior to the filing of the operative complaint on February 17, 2023. ECF 27 ¶¶ 1, 73. Of those plaintiffs, four Named Plaintiffs seek to represent a class of similarly aggrieved I-601A waiver applicants who have experienced harm from the unbounded growth

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

in processing times from less than 5 months in recent years to 3 years today. That Plaintiffs and the proposed class are suffering as a result of these extraordinary delays cannot be surprising given that the applicants cannot work or travel abroad unless and until the waiver is approved. These facts are sufficient to raise a claim for unreasonable delay under APA, 5 U.S.C. § 706(1).

Addressing the parties' factual disagreement on whether the increase in processing times is due to a rule of reason or otherwise justified would necessarily entangle the court in a merits-based discussion without the benefit of a record. Defs. Mot. to Dismiss, ECF 36 at 14-17. It is sufficient that Plaintiffs have pointed to specific facts that, if true, would support a claim for unreasonable delay. The facts Defendants submit in support of their motion to dismiss do not raise a question about the *plausibility* of Plaintiffs' claim but go to the ultimate merits of the case—whether USCIS' delay in deciding I-601A waivers is unreasonable. At this early stage, it is premature to determine the fact-intensive question of whether the delay was unreasonable through a *TRAC*-factor analysis. *Weday*, 2022 WL 1143227, at *5 (citing *Garcia v. Johnson*, No. 14-cv-01775, 2014 WL 6657591, at *12 (N.D. Cal. Nov. 21, 2014) (motion to dismiss denied where *TRAC* analysis required) and quoting *Hui Dong v. Cuccinelli*, No. CV 20-10030, 2021 WL 1214512, at *4 (C.D. Cal. Mar. 2, 2021) ("[T]he Court finds it is premature to rule on the issue of whether Plaintiff has satisfied the *TRAC* test at the pleading stage as to Plaintiff's APA claim.")).

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

B. The Plaintiffs' Well-Pleaded Complaint Easily Surpasses the Plausibility Test

Should this Court seek to test 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 27 ¶¶ 46-68. Addressing the first factor, 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 five months. *Id.* at ¶¶ 29-30. For example, USCIS's median processing times ranged from 3 months to nearly 5 months during FYs 2013 through 2018, with a median of 3.5 months for Fiscal Year 2013, the year the I-601A waiver was first introduced by regulation. *Id*. at ¶ 30. But between 2017 and 2022, USCIS's median processing time for a Form I-601A increased approximately 600% from 4.6 months to 31.7 months. *Id*. at ¶ 29. At the time of filing the operative complaint, Defendant USCIS published information that its Nebraska Service Center decided 80% of provisional waiver applications in 34.5 months and USCIS's Potomac Service Center decided eighty percent in 39.5 months. *Id*. at ¶ 46. Plaintiffs thus do far more than identify USCIS Director, Ur. M. Jaddou's public admission that the processing times at the agency were "too long." *Id*. at ¶ 47; ECF 36 at 15. Plaintiffs point to specific facts showing that the agency's processing times have radically increased; processing times which are significantly different from how USCIS historically acted and a departure from Congress's expected 180-day timeline. 8 U.S.C. § 1571(b); Am. Compl. at ¶¶ 49-50.

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

Plaintiffs have sufficiently pleaded facts to make a claim for unreasonable delay on USCIS's current processing of Form I-601A waivers.

In their motion to dismiss, Defendants try to explain the 600% increase from USCIS's median processing times largely through the introduction of a declaration from Sharon Orise, the Adjudications Division Chief for the Service Center Operations Directorate ("SCOPS") of USCIS. ECF 37. Ms. Orise justifies this increase as a by-product of COVID-based restrictions on processing and staffing. *Id.* ¶ 4. Setting aside the fact that such an explanation does not track when processing times began to climb—in 2018—this explanation should be saved for summary judgment or trial on the merits and is not appropriate for the Court to determine at this stage. *Weday*, 2022 WL 1143227, at *5. In essence, Defendants seek to have the Court do exactly what is not countenanced in the review of a motion to dismiss: to resolve factual disputes and to do so in favor of the moving party. *Weday*, 2022 WL 1143227, at *5 (court decides motion to dismiss for failure to state a claim based on plaintiffs' allegations and not by considering extrinsic evidence as to the reasons for delay; "plaintiffs have alleged enough to survive defendants' motion"). Resolving the factual issues and drawing all reasonable inferences in favor of Plaintiffs demonstrates a plausible case for delay given the markedly sharp departure in processing times.

Plaintiffs' harms are real and tangible, and they are not the fault of the Plaintiffs, as averred by Defendants (ECF 36 at 16-17): agency regulations prevent them from working during the pendency of their waiver applications and do not protect them against being placed in removal proceedings and removed. Plaintiffs also identified hardships of particular

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

applicants that are typical of other applicants now subject to the prolonged and indefinite processing times. For example, Plaintiff Maria Silva Guevara Enriquez and her U.S. citizen husband are each suffering from the uncertainty caused by USCIS' delay in adjudicating her I-601A provisional waiver application. ECF 27 ¶ 52. Ms. Guevara Enriquez "has no path forward to live in the United States in status and with employment authorization unless she becomes a U.S. lawful permanent resident." *Id*. Defendants acknowledge no harm to Plaintiffs from USCIS's increase of the processing times on their applications from approximately 6 months to more than three years. ECF 36 at 16-17. While the pleading stage is not where the Court should resolve these issues, Defendants' attempt to cast blame on Plaintiffs for the harms they are suffering demonstrates a callous disregard for the damage resulting from the agency's failure to act with due regard to the convenience and necessity of the applicants who cannot work or obtain lawful permanent residency until USCIS adjudicates their applications, an adjudication which the applicants must pay for in advance. In any event, Defendants identify 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. ECF 36 at 17.

The same is true with respect to the fourth *TRAC* factor. *Id*. Plaintiffs' well-pleaded allegations demonstrate that processing times within the historical six-month median accords with the priorities of the agency. ECF 27 ¶¶58-67. In their motion to dismiss, Defendants claim that it is "implausible" that family unity is "essentially USCIS's sole priority and that Form I-601A waiver applications exclusively serve that interest." ECF 36 at 17. Defendants

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

misstate Plaintiffs' claim and the essence of the fourth *TRAC* factor which is meant to address the effect a remedy would have "on agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80 (citations omitted). Defendants' own actions since the inception of the I-601A program show that a return to its processing times is consistent with its priorities that can be accomplished without jeopardizing USCIS's responsibilities of a higher or competing priority. USCIS does not dispute that the adjudications of Form I-601A waivers s is a priority, and the agency announced on March 23, 2023 that it opened a sixth service center, the Humanitarian, Adjustment, Removing Conditions, and Travel Documents ("HART") Service Center on January 29, 2023, to address the processing delays for humanitarian-based applications, including Form I-601As. ECF 37 at ¶¶ 6-8.

While it remains too early to resolve whether there is any impropriety lurking behind the agency's dramatic increase in processing times, it is not necessary to find the agency has acted in bad faith. It is sufficient at this stage that Plaintiffs have shown a plausible claim that the agency's current processing times for Form I-601A 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.

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

C. Discovery is Necessary

As discussed *supra*, courts within the Ninth Circuit apply the *TRAC* factors to determine whether agency delay is unreasonable, and this fact-intensive analysis should not be made at the motion to dismiss stage. The Ninth Circuit recognizes that, in an unreasonable delay case, judicial "review is not limited to the record as it existed at any single point in time because there is no final agency action to demarcate the limits of the record." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). District courts in the Ninth Circuit have held that APA unreasonable delay actions require consideration of facts relating to each of the TRAC factors and, therefore, some discovery. *See, e.g., CRVQ v. U.S. Citizenship & Immigr. Servs.,* No. 19-CV-8566-CBM, 2020 WL 8994098, at *6 & n.13 (C.D. Cal. Sept. 24, 2020) (collecting cases, recognizing that the "T*RAC* test is fact-intensive," and denying motion to dismiss APA, delay count); *Raju v. Cuccinelli,* No. 20-CV-01386-AGT, 2020 WL 4915773, at *1 (N.D. Cal. Aug. 14, 2020) (holding that defendants' claim of legitimate reasons for delays can only be judged after discovery). Indeed, in *Edakunni v. Mayorkas*, an APA unreasonable delay case involving delayed adjudications of immigration applications, this Court required the defendant to "supplement the administrative record with information about the respective application filing dates and adjudication dates … as well as the reason(s) for deviation from the FIFO rule" and further ordered a limited deposition of

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

the USCIS official who provided a declaration in the matter. No. 2:21-CV-00393-TL, 2022 WL 16949330, at *3-4 (W.D. Wash. Nov. 15, 2022).[1]

Other circuits have also 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").

Here, Defendants have unequivocally demonstrated that there are important facts that are not ripe to decide at the motion to dismiss stage, and which need further probing through discovery. Specifically, they have submitted three declarations with factual assertions that need testing, especially where the facts in the declarations have changed:

[1] The *Edakunni* discovery order was entered after the Court denied the parties' cross-motions for summary judgment. *Id.* at *1.

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

(1) Declaration of Sharon Orise ("Initial Orise Declaration"), twelve pages long, filed on March 6, 2023, in support of Defendants' Opposition to Plaintiffs' Motion for Class Certification. ECF 31-1. The Initial Orise Declaration includes numerous alleged causes of I-601A adjudication delays. ECF 31-1 at ¶ ¶ 27-31.

(2) Additional Declaration of Sharon Orise ("Second Orise Declaration"), seven pages long, filed on April 11, 2023: the Second Orise Declaration reiterates previously alleged causes of delay while adding an additional causal factor, that the United Stated District Court for the Northern District of California enjoined the USCIS's August 3, 2020 fee rule, resulting in USCIS fees not covering the cost of operations. ECF 37 at ¶ 5.

(3) Simultaneously with the Second Orise Declaration, Defendants filed their Notice Regarding Announcement of New Service Center ("HART Service Center Notice"). ECF 38.[2] This declaration explains that USCIS has now changed the way it processes Form I-601A applications.

Defendants' filings demonstrate their asymmetric control of factual information relevant to the required TRAC factor analysis, and that those facts should not be resolved at this early stage of the litigation before Plaintiffs are given the opportunity to probe the proffered data and relevant facts through discovery. [3]

[2] Neither the Second Orise Declaration nor the HART Service Center Notice reference an association with any pending motion.

[3] Defendants filed a motion to stay initial discovery deadlines on March 2, 2023 (ECF 28), Plaintiffs opposed the motion (*see* ECF 30), and Defendants' replied thereto on March 9, 2023 (*see* ECF 32). The Court entered an Order denying the motion to stay while extending the initial scheduling deadlines. *See* Order, ECF 34 (March 15, 2023).

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080

V. CONCLUSION

Plaintiffs have easily met their burden to show subject-matter jurisdiction and the plausibility of their claims. Therefore, Plaintiffs respectfully ask the Court to deny Defendants' Rule 12(b)(1) and 12(b)(6) motion to dismiss.

DATE: April 24, 2023

Respectfully submitted,

/s/ *Adam W. Boyd*
WSBA # 49849
GIBBS HOUSTON PAUW
1000 Second Ave. Suite 1600
Seattle, WA 98104
206-682-1080
Adam.boyd@ghp-law.net

JESSE M. BLESS
MA Bar No. 660713*
Bless Litigation
6 Vineyard Lane
Georgetown MA 01833
Tel: 781-704-3897
jesse@blesslitigation.com

/s/ Katherine E. Melloy Goettel
KATHERINE E. MELLOY GOETTEL
IA Bar. No. 23821*
LESLIE K. DELLON
DC Bar No. 250316*
SUCHITA MATHUR
NY Bar No. 5373162*
American Immigration Council
1331 G. St. NW
Washington, DC 20005
Tel: 202-507-7552 (Goettel)
kgoettel@immcouncil.org
ldellon@immcouncil.org
smathur@immcouncil.org

CHARLES H. KUCK
GA Bar No. 429940*
Kuck Baxter LLC
365 Northridge Rd., Suite 300
Atlanta, Georgia 30350
Tel: 404-949-8154
ckuck@immigration.net

AARON C. HALL
CO Bar No. 40376*
Joseph & Hall, P.C.
12203 E. Second Avenue
Aurora, CO 80011
Tel: 303-297-9171
aaron@immigrationissues.com

GREGORY H. SISKIND
TN Bar No. 014487*
Siskind Susser, PC
1028 Oakhaven Road
Memphis, TN 38119
Tel: 901-682-6455 gsiskind@visalaw.com

JENNIFER R. COBERLY
FLA Bar. No. 930466*
American Immigration Lawyers Association
1331 G. St. NW
Washington, DC 20005
Tel: 202-507-7692
Jcoberly@AILA.org

Attorneys for Plaintiffs
* Admitted *pro hac vice*

CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 7(e)(6)

I hereby certify that this memorandum contains 5,655 words, in compliance with the Local Civil Rules.

/s/ Katherine Melloy Goettel
KATHERINE MELLOY GOETTEL

Gibbs Houston Pauw
1000 2d Ave. #1600
Seattle WA 98104
206-682-1080