No. 21-1037

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Edmer Barrios Garcia,

Appellants,

v.

U.S. Department of Homeland Security, *et al.*,

Appellees.

On Appeal from the Western District of Michigan
(C/A No.: 1:20-cv-00457)

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE

Pursuant to 6th Cir. R. 26.1, Appellants make the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

None.

February 23, 2021

Respectfully Submitted,

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant requests oral argument for the following reasons: First, there are three other nearly identical cases pending in this Court, which will likely rise or fall on the outcome of this appeal. *See Patel v. Renaud,* No. 21-5022 (6th Cir.), *Arguijo v. DHS, et al.*, No. 21-1056 (6th Cir.), and *Mendez-Mendez, et al., v. DHS, et al.,* No. 21-1063 (6th Cir.). Because this case could control the outcome of these related pending appeals, this Court should hold oral argument.

Second, the United States Court of Appeals for the Fourth Circuit recently rendered a decision in a nearly identical case that, in part, undermines the district court's decision here. *See Gonzalez v. Cuccinelli*, 985 F.3d 357 (4th Cir. 2021). Because this Court's disposition of this appeal—and the three others aforementioned—may create a Circuit split on the issues presented, this Court should hold oral argument.

Finally, there is no published precedent in this Circuit related to unreasonable delay claims for immigration benefits petitions. Because unreasonable delay or mandamus cases in the immigration context have increased in this Circuit, this Court should hold oral argument to ensure any decision this Court issues can be published and provide necessary guidance to the districts in this Circuit.

JURISIDCTIONAL STATEMENT

The district court had jurisdiction over this case under 28 U.S.C. § 1331 because the Appellants sought an order to compel unreasonably delayed agency action under 5 U.S.C. §§ 701, 706. *See Califano v. Sanders*, 430 U.S. 99, 106 (1977) (holding § 1331 provides jurisdiction for claims under the Administrative Procedure Act). This Court has jurisdiction over this direct appeal under 28 U.S.C. § 1291 because the United States District Court for the Western District of Michigan is within this Circuit and it issued a final decision on December 16, 2020. This appeal is timely because Plaintiff had 60 days to file an appeal of the district court's December 16, 2020 decision, and Plaintiff filed he notice of appeal on January 14, 2021. Fed. R. App. P. 4(a)(1)(B). Finally, the district court's December 16, 2020 decision is a final order that disposed of all parties and claims in the complaint.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by determining a federal agency has unfettered discretion to refuse to implement a statutory benefit where the statute provides meaningful standards for judicial review?

2. Whether the district court erred by finding that it lacked jurisdiction over a federal agency's pace of adjudicating a benefits petition where its own regulation requires a decision?

3. Whether the district court erred by holding the Appellants failed to state a claim for an unreasonable delay based on unsupported and contested factual averments in the Appellee's motion to dismiss?

STATEMENT OF THE CASE

Law enforcement is only effective if victims are willing to report crime and assist prosecutors. To ensure all foreign national, regardless of immigration status, are willing to report crime and assist law enforcement, congress provided law enforcement a carrot to offer foreign national victims of crime in exchange for their assistance. In 2000, Congress enacted 8 U.S.C. § 1101(a)(15)(U) ("U-status") to ensure law enforcement could identify and sponsor immigration status for foreign national victims that report and assist in the prosecution of serious crime. U-status is necessary to encourage victims to come out of the shadows and allow them to remain and live in the United States for the benefit of law enforcement. The program has been an outrageous success, leading to law enforcement sponsoring thousands of foreign national victims a year. Inexplicably, United States Citizenship and Immigration Services ("the Agency") is destroying this win-win program through inaction.

This case—like dozens filed across the country in recent years—presents two separate challenges to such the Agency's inaction. First, it challenges the Agency's refusal—in defiance of a congressional mandate—to provide work

authorization to U-status applicants who have "pending, bona fide application[s] for" U-status. *See* 8 U.S.C. § 1184(p)(6). Courts are split on their jurisdiction over this claim.[1] Second, Mr. Barrios challenge the Agency's unreasonable delays in making waiting list decisions under 8 C.F.R. § 214.14(d)(2). The lower court's decision on this point is an outlier.[2]

Legal Framework

Congress created U-status in 2000 as part of a decades-long legislative effort to empower and assist law enforcement to investigate and prosecute crime

[1] *See Gonzalez v. Cuccinelli*, 985 F.3d 357 (4th Cir. 2021) (finding no jurisdiction to review this claim); *Patel v. Cissna*, 400 F. Supp. 3d 1373, 1384 (M.D. Ga. 2019) (same); *but see Rodriguez v. Nielsen*, No. 16-cv-7092, 2018 WL 4783977, at * 13 (E.D.N.Y. Sep. 30, 2018).

[2] *See, e.g., Gonzalez v. Cuccinelli*, 985 F.3d 357 (4th Cir. 2021) (reversing the lower court's decision to grant the Agency's Rule 12(b)(6) motion to dismiss); *Patel v. Cissna*, 400 F. Supp. 3d 1373 (M.D. Ga. 2019); *Pandya v. Cuccinelli*, No. 5:20-CV-01541-JMC, 2021 WL 119304, at *7 (D.S.C. Jan. 13, 2021); *Ruiz v. Wolf*, No. 20 C 4276, 2020 WL 6701100, at *4 (N.D. Ill. Nov. 13, 2020); *Gonzalez v. United States Dep't of Homeland Sec.*, No. 2:20-CV-1262 WBS JDP, 2020 WL 6582450, at *9 (E.D. Cal. Nov. 10, 2020); *Romero Ramires v. Wolf*, No. 1:20-cv-203-KWR-SMV, 2020 U.S. Dist. LEXIS 195854, at *7 (D.N.M. Oct. 20, 2020) (same); *Camarena v. Cuccinelli*, No. 19 C 5643, 2020 WL 550597, at *1 (N.D. Ill. Feb. 4, 2020); *Garcia v. Dep't of Homeland Sec.*, No. 19-CV-1265, 2019 WL 7290556, at *1 (N.D. Ill. Dec. 30, 2019); *Haus v. Nielsen*, No. 17 C 4972, 2018 WL 1035870, at *3 (N.D. Ill. Feb. 23, 2018); *Solis v. Cissna*, No. CV 9:18-00083-MBS, 2018 WL 3819099, at *1 (D.S.C. Aug. 10, 2018); *A.C.C.S., et al. v. Kirstjen M. Nielsen, et al.*, No. CV1810759DMGMRWX, 2019 WL 7841860, at *10 (C.D. Cal. Sept. 17, 2019); *M.J.L. v. McAleenan*, No. A-19-CV-00477-LY, 2019 WL 6039971, at *7 (W.D. Tex. Nov. 13, 2019); *Rodriguez v. Nielsen*, No. 16-cv-7092, 2018 WL 4783977 (E.D.N.Y. Sep. 30, 2018).

victimizing undocumented immigrants. These efforts began with the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, 108 Stat. 1796 (1994). To encourage foreign nationals to report domestic violence to law enforcement, VAWA created legal protections for foreign nationals who were the victims of battery or "extreme cruelty." *Id*. at § 40701, 108 Stat. 1953 (codified at 8 U.S.C. § 1154(a)(1)). VAWA provided an effective tool for law enforcement to ferret out, investigate, and prosecute domestic violence among a vulnerable community that historically would not report such crimes for fear of immigration consequences. But VAWA fell short where the abuser was not an immediate relative. *Id.*

To address this gap in protections, in 2000, Congress created U-status. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(B), 114 Stat. 1464, 1533 (codified at 8 U.S.C. § 1101(a)(15)(U)). Congress recognized that foreign nationals without lawful status were unable to report crimes or fully participate in the investigation and prosecution of the perpetrators because they feared deportation. *Id.* at § 1513(a)(1)(B). U-status would only extend to the victims of "serious crimes." 8 C.F.R. § 214.14(a)(9). By adding this list of serious crimes, U-status would "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute" additional serious crimes. *Id.* at § 1513(a)(2)(A).

Congress also recognized that foreign national victims could only assist law enforcement if they had the ability to live and work in the United States. Congress required that U-status holders be granted work authorization, 8 U.S.C. § 1184(p)(3)(B), and U-status could be afforded to foreign nationals otherwise removable and lead to lawful permanent resident status. 8 U.S.C. § 1155(m). But Congress limited the number of U-status "visas" to 10,000 a year. 8 U.S.C. § 1184(p)(2)(A).

U-status is available to foreign national victims who suffer direct and proximate harm as a consequence of such qualifying crime *and* who acquire U-status "certification" from a "certifying agency." Such certification from an independent law enforcement agency states, *inter alia*, that the foreign national possesses important information about the crime and he or she will cooperate in the agency's ongoing investigation or prosecution. 8 C.F.R. § 214.14(c)(2)(i). A "certifying agency" is a "federal, state, or local law enforcement agency, prosecutor, judge, or other authority that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity." 8 C.F.R. § 214.14(a)(2) After obtaining a supplemental B U-status certification from law enforcement, the foreign national must complete and submit an application for U status. *Id.* In addition, "qualifying family members" of the victim may also acquire U-status. 8 C.F.R. § 214.14(f).

By 2007, the Agency anticipated that law enforcement would certify U-status applicants beyond the annual cap. It therefore created a regulatory waiting list where it would place eligible applicants when the year's allotment of U visas had already been assigned. *See* 8 C.F.R. § 214.14(d)(2); New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sep. 17, 2007). The first 10,000 approved petitions received the U status, and the other petitions that were eligible were placed on the waiting list. *Id.* The Agency interpreted its organic statute to *require* a waiting list decision for eligible U status applicants if there were no actual visas available: "All eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status *must be placed on a waiting list and receive written notice of such placement.*" 8 C.F.R. §214.14(d)(2) (emphasis added). Once the applicant is moved to the waiting list, he or she would receive deferred action (protection from removal) or parole (permission to physically enter the United States) and would have the right to apply for work authorization. *Id.* But in 2007 U-status applicants were not entitled to apply for work authorization until they were placed on the waiting list. Congress would step in and fix this oversight.

Only one year later, Congress recognized that wait times for *the waiting list* were growing and U-status applicants now needed pre-waiting list work authorization. 154 Cong. Rec. H10,888, 10,905 (Dec. 10, 2008) (statement of

Reps. Berman and Conyers), 2008 WL 5169865. The bill's sponsor stated U-visa applicants "should not have to wait for up to a year before they can support themselves and their families" and added that USCIS should strive to issue work authorization within 60 days of filing. *Id.* Congress therefore enacted pre-waiting list work authorization for "any alien who has a *pending, bona fide* application for [U] status." Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), Pub. L. 110-457, 122 Stat. 5044 (codified in part at 8 U.S.C. § 1184(p)(6)) (emphasis added). This "fix" would ensure U-status applicants could swiftly get work authorization and allow them to make a living while assisting law enforcement.

Today, victims of qualifying crimes with law enforcement certifications navigate the following adjudicatory phases to go from U-status applicant to lawful permanent resident:

- *Pre-Waiting List Phase*: Applicants with pending and *bona fide* U-status applications are entitled to apply for work authorization, *see* § 1184(p)(6);
- *Waiting List Phase*: Applicants with approved waiting list decisions are entitled to deferred action or parole; they may apply for work authorization; and when a U-status "visa" becomes available, they may acquire U-status, *see* 8 C.F.R. § 214.14(d)(2); and
- *U-Status Phase*: Applicants are entitled to work authorization for up to four years and, after three years in U-status, Applicants may apply for lawful permanent residency, *see* 8 U.S.C. § 1155(m).

This case challenges the Agency's refusal to provide work authorization to U-status applicants in the pre-waiting list phase, and the Agency's delay in making waiting list decisions.

Mr. Barrios

After being the victim of a qualifying crime, Mr. Barrios filed a U status visa petition on March 1, 2018. Second Am. Compl., R.22, page ID ## 9-10 ("SAC"). Within his application, Mr. Barrios included a certification from a law enforcement agency that stated he assisted the investigation and prosecution in his crime. *Id.* After filing his U status petition, Mr. Barrios has heard nothing. Unless or until the Agency puts Mr. Barrios on the U status waiting list, he will not have work authorization, he will not be able to get a social security card, and he will not be able to get a drivers' license in Michigan.

After waiting 31 months, Mr. Barrios initially filed the case in May of 2020, but the final operative complaint was filed October 10, 2020. SAC, R.22, page ID ## 1-25. First, Mr. Barrios alleged the Agency either unreasonably delayed or unlawfully withheld agency action on his requests for pre-waiting list work authorization under 8 U.S.C. § 1184(p)(6). SAC, R.22, page ID # 11-15. Second, Mr. Barrios alleged the Agency unreasonably delayed his U status waiting list decision under 8 C.F.R. § 214.2(d)(2). SAC, R.22, page ID # 15-19.

The Agency moved to dismiss the case for lack of jurisdiction and failure to state a claim. Mot. to Dismiss, R. 24, page ID ## 1-24. Mr. Barrios timely responded, and the Agency replied. Resp. to Mot. to Dismiss, R. 26, page ID ## 1-15; Reply to Mot. to Dismiss, R. 28, page ID ## 1-10. On December 16, 2020, the lower court granted the Agency's motion to dismiss both of Mr. Barrios' causes of action. This appeal followed.

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's decision and remand this case with instructions to order the Agency to file an answer to Mr. Barrios' entire complaint within 14 days. First, the district court erred by determining that it lacked jurisdiction over Mr. Barrios' pre-waiting list work authorization claim because the Agency does not have discretion to refuse to implement a congressional mandate. Second, the district court erred by finding it lacked jurisdiction over claims challenging the Agency's "pace of adjudication." Finally, it erred by considering the Agency's motion to dismiss for failure to state a claim because such motion was premature, and to the extent it properly considered such motion, Mr. Barrios stated a claim that a 31-month adjudication delay is unreasonable.

ARGUMENT

The district court erred by granting the Agency's motion to dismiss and, therefore, this Court should reverse its decision. This Court reviews the district court's decision to grant the Agency's motion to dismiss *de novo*. *Lipman v. Budish*, 974 F.3d 726, 740 (6th Cir. 2020) ("We review a district court's grant of a motion to dismiss de novo.").

I. This Court has jurisdiction over Mr. Barrios' pre-waiting list work authorization claim.

This Court has jurisdiction over Mr. Barrios' pre-waiting list work authorization claim. Neither 5 U.S.C. § 701(a)(1) nor 701(a)(2) preclude subject matter jurisdiction over these claims because the Agency does not have discretion to refuse to implement a statutory benefits program that has meaningful standards to apply.

A. The Agency has a discrete and required duty to implement pre-waiting list work authorization

The Agency has a discrete and required duty to implement pre-waiting list work authorization. The Administrative Procedure Act empowers courts to compel the executive to take unreasonably delayed or unlawfully withheld actions so far as the actions are discrete and required. *Sheldon v. Vilsack*, 538 F. App'x 644, 650 (6th Cir. 2013) "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to

take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004); *see id.* at 65 ("The limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law."). In other words, § 706(1) empowers a court to compel an agency to perform only "non-discretionary" actions. *See id*. at 64 (internal quotation marks omitted).

As a threshold issue, there is no authority "suggesting that an agency can refuse to implement a statute . . . where Congress provides specific standards of eligibility for a benefit." *Rodriguez*, 2018 WL 4783977, at * 13 (holding that § 1184(p)(6) created an obligation for USCIS to adjudicate pre-waiting list work authorization applications); *Solis v. Cissna*, No. CV 9:18-00083-MBS, 2019 WL 8219790 (D.S.C. July 11, 2019) (same). Even the lack of a timeframe in the statute "does not render the statute optional." *Rodriguez*, 2018 WL 4783977, at *12. Rather Congress creates obligations for agencies by engaging in bicameralism and presentment, and then the president signing the bill. *See generally INS v. Chadha*, 462 U.S. 919 (1983). Courts do have jurisdiction to review the refusal to implement a program when it impacts a benefits-granting program even where that benefit is discretionary. *See Dep't of Homeland Security v. Regents of the Univ. of Ca.*, — U.S. —, 2020 U.S. LEXIS 3254 at *22-24 (2020) (exercising jurisdiction over deferred action for childhood arrival program despite the program being discretionary); *Casa De Maryland v. United States Dep't of Homeland Sec.*, 924

F.3d 684, 699 (4th Cir. 2019) (same). While Congress may include discretionary language that renders a final decision discretionary—a proposition Plaintiff do not dispute—the existence of a discretionary decision does not negate USCIS's *duty to make the decision or implement*. *INS v. St. Cyr*, 533 U.S. 289, 307-08 (2001). Even if USCIS has affirmatively chosen not to implement this provision, it has failed to provide any explanation about why it has chosen not to implement it in a regulation, policy statement, or guidance document. A wholesale failure to explain an agency action violates the APA. *See, e.g., ItServe All., Inc. v. Cissna,* No. 18-2350, 2020 U.S. Dist. LEXIS 41136, *60 (D.D.C. Mar. 10, 2020).

If this Court adopted the Agency's argument, it would be in effect granting the Agency a general power to dispense with its statutory duties. But the executive is bound to abide by the requirements of duly enacted and otherwise constitutional statutes. *See* U.S. CONST. Art. II, § 3, cl. 3 (the President "shall take Care that the Laws be faithfully executed"); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838); *Chamber of Commerce of the United States v. Reich*, 316 U.S. App. D.C. 61, 74 F.3d 1322, 1332 (1996); *NTEU v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974). The purported power of the executive to grant a dispensation *non obstante* or to suspend enacted law has a dark history that was resolved in favor of legislative supremacy by the time the Constitution was ratified. *See* Carolyn Edie, *Revolution and the Rule of Law: The End of the Dispensing Power, 1689*, 10

Eighteenth-Century Studies 434 (1977); William Holdsworth, IV *History of English Law* 240 (Sweet and Maxwell 2d Ed. 1937) (under the English Bill of Rights the suspending power was absolutely condemned). As a result, under the Constitution, the executive is not endowed with a general dispensing power. *See Kendall*, 37 U.S. at 613. It lacks the authority to set aside specific provisions of the INA or refuse to implement a statute because it is busy. Rather, that legislative power remains in the hands of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952); *Federalist Papers* Nos. 33 & 78 (Hamilton) (Clinton Rossiter Ed. 1961).

Despite the district court failing to identify any case law that would allow an Agency to ignore a statutory command, the statutory, regulatory, and sub-regulatory history of work authorization for U-status applicants with pending, *bona fide* U-status applications demonstrates that congress intended implementation of § 1184(p)(6). In the wake of successfully creating immigration benefits for the victims of domestic violence[3], in 2000, Congress created U-status to protect vulnerable

[3] Congress created the U-status regime in 2000 as part of a decades-long legislative effort to encourage immigrants who had been victims of a crime to seek justice. These efforts began with the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, 108 Stat. 1796 (1994). VAWA created legal protections for foreign nationals, including immigrants subject to battery or "extreme cruelty" by a qualifying spouse. *Id*. at § 40701, 108 Stat. 1953 (codified at 8 U.S.C. § 1154(a)(1)). Whereas prior to VAWA these battered spouses depended on the abusive spouse to petition for immigration status, VAWA allowed battered immigrants to "self-petition" for lawful permanent resident status. *Id*. Although the program was effective

immigrants that fell outside the protections of VAWA. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(B), 114 Stat. 1464, 1533 (codified at 8 U.S.C. § 1101(a)(15)(U)). Congress recognized that persons without lawful status were unable "to report these crimes" or to "fully participate" in the investigation and prosecution of the perpetrators because they feared deportation. *Id.* at § 1513(a)(1)(B). Congress thus enacted U-status to serve the dual purpose of "offering protection to victims of such offenses in keeping with the humanitarian interests of the United States," and "strengthen[ing] the ability of law enforcement agencies to detect, investigate, and prosecute" certain crimes. *Id.* at § 1513(a)(2)(A). Congress also recognized that for the program to be effective and to truly assist with law enforcement, the U-status holders would need work authorization to support themselves while assisting law enforcement. It therefore required that U-status holders be granted work authorization. 8 U.S.C. § 1184(p)(3)(B).

By 2007, USCIS anticipated that U-status applications would exceed the annual cap. It therefore created a regulatory waiting list where it would place eligible applicants when a year's allotment of U visas had already been assigned. *See* 8

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in providing relief for survivors of domestic violence who (but for their abuser's control of the immigration system) would have been eligible for permanent residence, it did not address the needs of survivors of abuse who were not immediate relatives.

C.F.R. § 214.14(d)(2). The first 10,000 approved petitions received U status, and the other petitions that were eligible were placed on the waiting list. *Id.* Once the applicant moved to the waiting list, he or she would automatically receive work authorization. 8 C.F.R. § 214.14(d)(2).

Because timely work authorization was key to the success of the U-status program and waiting list paradigm, USCIS adjusted its U-status application forms to allow for U-status principal applicants to request U-status and work authorization on one form. This one-step process comported with the rationale in the contemporaneous rulemaking:

> For principal aliens seeking their first [work authorization] based upon U nonimmigrant status, USCIS will use the information contained in the Form I-918 to automatically generate [work authorization], such that a separate request for [work authorization] is not necessary . . . USCIS has designed the Form I-918 so that it serves the dual purpose of requesting U nonimmigrant status and their employment authorization to streamline the Petition process. Therefore, principal aliens will not have to file additional paperwork to obtain an initial [work authorization].

New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sep. 17, 2007). The U-status forms at the time ask the U-visa applicant whether they are also requesting work authorization; the applicants needed to merely check the box next to "yes."

USCIS similarly updated its instructions for its work authorization applications to take into account this one-step work authorization request process.

See Former Work Authorization Application Instructions. At page 6, the instructions make clear that, if a U-status principal applicant applied for work authorization separately from the U-status application, it would be rejected as improper because it would constitute a second request for work authorization. *Id.* Thus, to comport with congressional policy, USCIS used its authority to create binding forms and instructions[4] to setup a streamlined, one-step process for U-status applicants[5] to request work authorization at the time of their initial application because timely work authorization was key to the applicants' ability to assist law enforcement and fulfill the congressional purpose for U-status.

At the same time, USCIS reaffirmed its mandatory obligation to adjudicate *all* requests for work authorization within 90 days of filing. *See generally* 8 C.F.R. §274a.13(d) (2007). The provision in force at the time mandated a decision on work authorization request within 90 days or a grant of interim work authorization. *Id.* When USCIS engaged in rulemaking to modify the work authorization regulation in 2007, it did not exclude the U-status application requests for work authorization from this 90-day mandatory adjudication period. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 FR 53014-01 (Sep.

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[4] The Agency's forms carry the weight and force of law. 8 C.F.R. §103.2(a).

[5] Derivative applicants would, however, have to file a separate form seeking work authorization. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 FR 53014-01.

17, 2007). Thus, USCIS affirmed that, like all work authorization requests, requests for work authorization through the new one-step process should be granted within 90 days.[6] *Id.*

With knowledge of the 2007 waiting list regulation, in 2008, Congress recognized growing delays in work authorization for U-status applicants in light of the growing numbers of applications and the adjudicatory time for waiting list decisions. The bill's sponsor stated U-visa applicants "should not have to wait for up to a year before they can support themselves and their families" and added that USCIS should strive to issue work authorization within 60 days of filing. 154 Cong. Rec. H10,888, 10,905, 2008 WL 5169865 (Dec. 10, 2008) (statement of Reps. Berman and Conyers). To create a new benefit, in addition to work authorization for meritorious U status applications awaiting the availability of a visa, Congress authorized work authorization for good faith U status applicants: "any alien who has a pending, bona fide application for [U] status." Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), Pub. L. 110-457, 122 Stat. 5044 (codified in part at 8 U.S.C. § 1184(p)(6)). This "fix" would provide good faith U status applicants with the rights necessary to allow them to make a living while assisting

[6] The Agency later admitted that the mandatory 90-day rule indeed applied to victim-based visas. Final Rule, Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reb. 82398, 82456 (Nov. 18, 2016).

law enforcement and awaiting the waiting list determination. Congress would go so far as to require the Agency to report back within six months on "[i]nformation on the time in which it takes to adjudicate victim-based immigration applications, including the issuance of visas, *work authorization* and deferred action *in a timely manner consistent with the safe and competent processing of such applications*, and steps taken to improve in this area." *Id.* at Pub. L. 110-457, §§ 238(a), (b)(7) (emphasis added).[7] This would allow congress to ensure that the Agency was implementing the new, pre-waiting list work authorization it just created.

Again, the overarching purpose of these provisions is to ensure U-status applicants are present in the United States to assist the detection and prosecution of crime and that they have the legal rights to live in the United States to do so. Based on this history, it is clear congress intended § 1184(p)(6) to provide U-status applicants work authorization at the outset of the U-status application process while the applicants awaited a waiting list decision. In fact, congress gave the Agency 6 months to report back about their progress. Thus, the text, structure, and history indicate that the Agency has a non-discretionary (or required) duty to implement and

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[7] The *Gonzalez* court made a significant error by ignoring this provision of the TVPRA. *See Gonzalez*, 985 F.3d at 367-68. It also committed significant error by analogizing the issuance of work authorization—a ministerial act—with creating a land use plan, which was the agency action in *Norton*. *Id.* at 369-370. For these reasons, this Court should distinguish *Gonzalez*'s pre-waiting list work authorization analysis.

adjudicate pre-waiting list work authorization requests (a discrete agency action). Because Mr. Barrios applied for pre-waiting list work authorization on the face of his U status application, the Agency has unlawfully withheld a decision thereon.

B. § 701(a)(2): Implementation of pre-waiting list work authorization is not committed to agency discretion.

The district court determined that 5 U.S.C. § 701(a)(2) precludes jurisdiction over Mr. Barrios' pre-waiting list work authorization claim because congress "committed to agency discretion by law" the decision to implement pre-waiting list work authorization by using the word "may." MTD Order, R. 20, page ID # 4-7.

Congress did not commit the decision to implement § 1184(p)(6) to the discretion of the Agency under § 701(a)(2) because it provided meaningful standards for judicial review. "The phrase 'committed to agency discretion by law' is a term of art in administrative law, representing 'a very narrow exception' to judicial review for two particular types of discretionary agency action." *Berry v. United States Dep't of Labor*, 832 F.3d 627, 634 (6th Cir. 2016) (internal citations omitted). It applies only where "a court would have no meaningful standard against which to judge the agency's exercise of discretion" and, therefore, there is no "law to apply." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (internal quotation marks omitted).

Here, there are meaningful standards for this Court to apply. First, the text of § 1184(p)(6) accords work authorization to U-Status applicants whose applications

are "pending" and "*bona fide*." These two terms are meaningful. *Rodriguez*, 2018 WL 4783977 at *7-8. Both "pending" and "*bona fide*" are susceptible to plain language interpretations. *Bona fide* means "1. Made in good faith; without fraud or deceit." Bona Fide, Black's Law Dictionary (10th ed. 2014). USCIS has recognized that the required police certification "acts as a check against fraud and abuse." DHS, *U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies* at 26[8]. Even in its 2007 rulemaking, USCIS determined that the certifying agency was in the best position to verify certain factual information: "USCIS determined that since the certifying agency is the primary point of contact between the petitioner and the criminal justice system, the certifying agency is in the best position to verify certain factual information." 72 FR 53014-01, 53024. "Pending," under the Agency's regulations, would mean the application was received, receipted, and (most importantly) not rejected. 8 C.F.R. §103.2(a)(7) Thus, the Plaintiff urges this Court to find that a U-status application is pending and *bona fide* if it is accepted and receipted by USCIS, and it includes an I-918, Supplement B, U Nonimmigrant Status Certification, duly executed by a certifying agency. These terms constitute

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[8] *Available at* https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law Enforcement-Resource%20Guide_1.4.16.pdf (last visited Feb. 22, 2021).

meaningful standards, and as such, § 701(a)(2) does not preclude judicial review. *Rodriguez*, 2018 WL 4783977 at *7-8.

C. § 701(a)(1): § 1252(a)(2)(B)(ii) does not preclude jurisdiction.

The Agency argued below that 8 U.S.C. § 1252(a)(2)(b)(ii) strips this Court of jurisdiction to review Mr. Barrios' pre-waiting list work authorization claim. This argument overstates the scope of § 1252(a)(2)(B)(ii). There is a strong presumption in favor of judicial review of administrative action. *Kucana v. Holder*, 558 U.S. 233, 251 (2010). The presumption controls when the statute is "reasonably susceptible to divergent interpretation." *Id.* at 251 (quoting *Guiterrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)). Even where congress enacted an express jurisdiction stripping provision, the presumption of judicial review is so strong that it takes "clear and convincing evidence" to preclude judicial review. *Kucana*, 558 U.S. at 252.

The relevant question is whether § 1252(a)(2)(B)(ii) precludes judicial review of claims arising from § 1184(p)(6), expressly or implicitly. Section 1252(a)(2)(B)(ii) in relevant part states:

> no court shall have jurisdiction to review . . . any other decision or action of . . . the Secretary of Homeland Security the authority of which is *specified under this subchapter to be in the discretion of the . . . Secretary of Homeland Security* . . . .

(emphasis added). When it passed this section, "Congress had in mind decisions . . . made discretionary by legislation." *Kucana*, 558 U.S. 246-47. The plain language of § 1252(a)(2)(B)(ii) only precludes judicial review of decisions "specified" to be in

the Attorney General's discretion by other legislation, not every discretionary decision. *Kucana*, 558 U.S. at 243 n.10. And it is important to see that Congress, in fact, "specified" certain decisions to be in the Attorney General's discretion and the Secretary of Homeland Security's discretion in the relevant sub-chapter; Congress did not leave it to the imagination. *Id.* (citing §§ 1157(c)(1), 1181(b), and 1182(a)(3)(D)(iii))[9]. Thus, while Congress did use § 1252(a)(2)(B)(ii) to preclude judicial review over some discretionary decisions, it intended only to do so where it *explicitly* specified as such.

Here, § 1184(p)(6) does not specify that *implementation* of § 1184(p)(6) is in USCIS's discretion. While it cannot be disputed that § 1184(p)(6) uses the word "may," 8 U.S.C. § 1184(p)(6), under *Kucana,* this is insufficient to overcome the presumption in favor of jurisdiction for judicial review. This language "implies" discretion, but "implies" is not synonymous with "specifies." *Kucana*, 558 U.S. at 243 n.10. Further, the Agency's argument is premised on an interpretation of § 1184(p)(6) that reads the "may" to render two different agency actions

[9] Similarly, the remaining decisions identified in § 1252(a)(2)(B)(i) use the word "discretion" in the statute: §1182(i) ("The Attorney General may, in the discretion of the Attorney General, waive the application . . ."); § 1229b(B)(2)(D) ("The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.") § 1229c ("he Attorney General may, in the discretion of the Attorney General for humanitarian purposes, waive application of subparagraph (A) . . ."), and § 1255(a) (noting the status of an alien "may be adjusted by the Attorney General, in his discretion . . .").

discretionary; it claims that the word "may" renders the final decision discretionary *and* the decision to implement the statutory right discretionary. This ambiguity alone is sufficient to render the inaction reviewable. *Kucana*, 558 U.S. at 251 ("When a statute is 'reasonably susceptible to divergent interpretation,' this Court adopts the reading 'that executive determinations generally are subject to judicial review.'") (quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)). Thus, § 701(a)(1) *via* § 1252(a)(2)(B)(ii) does not strip this Court of jurisdiction to review Mr. Barrios' pre-waiting list work authorization claim because Congress did not specify the decision to *implemen*t § 1184(p)(6) was in the discretion of the Agency.

Because this Court has jurisdiction over Mr. Barrios' pre-waiting list work authorization claim, it should reverse the district court's holding to the contrary.

II. The district court had jurisdiction over Mr. Barrios' unreasonable delay claim.

The lower court erred by determining it lacked jurisdiction over Mr. Barrios' waiting list unreasonable delay claim. "There is no dispute that Defendants are required by law to decide whether to place Plaintiff on the waiting list and have not yet done so." *Patel v. Cissna*, 400 F. Supp. 3d 1373, 1384 (M.D. Ga. 2019); *see also Gonzalez*, 985 F.3d at 374 n.10 ("the agency has committed itself by regulation to place eligible applicants on the waiting list."); *L.D.G. v. Holder*, 744 F.3d 1022, 1024 (7th Cir. 2014); *M.J.L. v. McAleenan*, 420 F. Supp. 3d 588, 595-96 (W.D. Tex. 2019). Congress designated the Agency as the agency responsible

for "[a]djudications of immigrant visa petitions." 6 U.S.C. § 271(b)(1). This alone gives USCIS a nondiscretionary statutory duty to adjudicate U Visas. *See, e.g.*, *Calderon-Ramirez v. McCament*, 877 F.3d 272, 276 (7th Cir. 2017) (noting that "both parties agree that USCIS has a duty to process [petitioner's U Visa] application"). "The secretary cannot be charged with immigration administration and simultaneously have no duty to administrate. Such a result is irrational." *Nigmadzhanov v. Mueller*, 550 F. Supp. 2d 540, 546 (S.D.N.Y. 2008) (internal citations and quotations omitted). Importantly, the Agency then interpreted its statutory obligations via notice and comment rulemaking to require itself to make waiting list decisions: "[a]ll eligible petitioners who, due solely to the cap, are not granted U–1 nonimmigrant status must be placed on a waiting list". 8 C.F.R. § 214.14(d)(2). Simply said, "these claims are reviewable." *Gonzalez*, 985 F.3d at 374 n.10.

Recently, the court in *M.J.L.* rejected the Agency's identical argument in a U status waiting list delay case. After noting that the Agency has a non-discretionary duty to make a decision on a U status application, it further went on to cite *St. Cyr* for the proposition that the Court held that "a discretionary decision to grant or deny an application is distinct and separate from the nondiscretionary duty to adjudicate those applications." *M.J.L.*, 420 F. Supp. 3d at 596. The *M.J.L.* court

when on to reject the Agency's argument that the Agency has no mandatory duty to make a decision unless a statute has a timeline in it:

> Defendants argue that the pace of adjudication of U Visas is discretionary because the INA and related regulations do not provide a timeline for how quickly USCIS must adjudicate such visas. However, "a lack of timeframe alone does not render the statute optional." *Rodriguez v. Nielson*, 2018 WL 4783977, at *7 (E.D.N.Y. Sept. 30, 2018). As one district court reasoned: "The absence of a specified deadline within which action must be taken does not change the nature of USCIS' obligation from one that is ministerial to a matter within the agency's discretion." [*Saini v. USCIS*, 553 F. Supp. 2d 1170, 1176 (E.D. Cal. 2008)]. Although the INA does not specify the timeframe within which a decision on U Visa Petitions should be made, "by necessary implication the adjudication 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." Id. (internal quotation marks and citations omitted). Plaintiffs, moreover, are not simply complaining about the delay in the adjudication of their U Visas, but also that USCIS has failed to act on their Petitions at all.

M.J.L., 420 F. Supp. 3d at 595-96. The *M.J.L.* court then distinguished the very same cases that the Agency cited for the proposition that the pace of adjudication is discretionary. *See id.* at 595 n.9 (distinguishing *Gonzalez v. Cissna*, 364 F. Supp. 3d 579 (E.D.N.C. 2019); *Bian v. Clinton*, 605 F.3d 249 (5th Cir. 2010), *Beshir v. Holder*, 10 F. Supp. 3d 165, 173 (D.D.C. 2014), and *Asgeirsson v. Abbott*, 696 F.3d 454, 459 (5th Cir. 2012)). Finally, for good measure, the *M.J.L.* court noted that the Agency's own regulations create a mandatory obligation to make a decision that the Agency fails to mention or distinguish: "In addition to the statutory requirement to adjudicate U Visas, the regulations promulgated under the

INA provide that '[a]ll eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status *must* be placed on a waiting list and receive written notice of such placement.' 8 C.F.R. § 214.14(d)(2). The Agency fails to explain how this provision is not mandatory. *M.J.L.*, 420 F. Supp. 3d at 597.

The lower court erred by determining the Agency's pace of adjudication is discretionary. The lower court's decision on this point is an outlier. *See infra* n.2. And therefore, this Court should reverse this decision.

III. Mr. Barrios stated a claim for unreasonable delay claim for his waiting list decision.

Mr. Barrios stated a claim under the APA. Under the APA, a federal agency is obligated to "conclude a matter" presented to it with "due regard for the convenience and necessity of the parties or their representatives and within a reasonable time," 5 U.S.C. § 555(b), and a reviewing court may "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). There is "no *per se* rule as to how long is too long" to wait for agency action, but a reasonable time for agency action is typically counted in weeks or months, not years. *See Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987). But "a reasonable time for an agency decision could encompass 'months, occasionally a year or two, but not several years or a decade.'" *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) (collecting cases of courts compelling unreasonable delays).

Such an extreme delay presents an extraordinary circumstance because it signals the "breakdown of regulatory processes." *Cutler v. Hayes*, 818 F.2d 879, 897 n. 156 (D.C. Cir. 1987). Accordingly, courts should not hesitate to interfere with the normal progression of agency proceedings in the face of such extreme delays, *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000), because "[i]t is obvious that the benefits of agency expertise and creation of a record will not be realized if USCIS never takes action." *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("*TRAC*"); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004).

Courts use the *TRAC* Factors to determine whether an administrative delay is unreasonable. Those factors include:

> (1) the time agencies take to make decisions must be governed by a rule of reason;
>
> (2) where Congress has provided a timetable [*36] 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

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

Gonzalez, 985 F.3d at 375 (quoting *TRAC*, 750 F.2d at 80 (internal citations omitted)).

A. The Court erred by considering the Agency's Rule 12(b)(6) motion without a record or discovery.

Immigration benefits delay cases "should not typically be resolved at" the Rule 12(b)(6) stage. *Gonzalez*, 985 F.3d at 375. This is because "[w]hat constitutes an unreasonable delay in the immigration context depends to a great extent on the facts of the particular case." *Haus v. Nielsen*, No. 17 C 4972, 2018 WL 1035870, at *3 (N.D. Ill. Feb. 23, 2018) (internal quotation marks omitted). Courts should and have "resisted drawing arbitrary lines as a matter of law of unreasonable delay claims . . . [and] refuse[] to accept [the Agency's] implicit invitation to rely upon evidence outside the pleadings at the is motion to dismiss stage." *Patel v. Cissna*, 400 F. Supp. 3d 1373, 1384 (M.D. Ga. 2019; *see also Raju v. Cuccinelli*, No. 20-CV-01386-AGT, 2020 WL 4915773, at *3 (N.D. Cal. Aug. 14, 2020) ("there may be good reasons for USCIS's delays. But at the pleading stage, next to nothing is known about those reasons and further factual development is necessary."). As the District of Columbia recently held in an immigration benefits delay case:

> Second, the agency argues that the plaintiffs cannot possibly succeed on the merits of their unreasonable delay claim. But the merits depend on the facts. To address the merits without knowing the facts would be

> precipitous. . . . The Court will wait until it has evidence before it to decide the merits of the plaintiffs' claim.

Addala v. Renaud, No. 1:20-cv-2460-RCL, 2021 U.S. Dist. LEXIS 13054, at *8 (D.D.C. Jan. 25, 2021).

A Rule 12(b)(6) motion is inapposite in unreasonable delay cases because they are typically framed under the *TRAC* factors and each *TRAC* factor presents a question of fact. It is indeed a question of fact whether the Agency has a rule of reason, *whether* the Agency actually follows its purported rule of reason, and *whether* the Agency can show resource constraints and competing priorities:

> While a 'first in, first out' approach with enumerated exceptions may be a rule of reason, we do not know enough about how the agency implements its rules and exceptions. . . . Among the issues that may be important on remand are the resource constraints. The agency may be well be able to show resource constraints and competing priorities in any number of ways. . . But at this point we cannot rely on the agency's allegations to find as a matter of law that this factor necessarily favors the agency.

Gonzalez, 985 F.3d at 375-76; *see also Gutta v. Renaud*, No. 20-CV-06579-DMR, 2021 WL 533757, at *8 (N.D. Cal. Feb. 12, 2021) ("The first *TRAC* factor—regarding the government's rule of reason—illustrates the extent of factual disputes in this case . . . Whether these allegations have merit and whether USCIS actually follows its purported rule of reason is a question of fact unsuitable for determination at the pleadings stage.").

The risks of deciding a delay case without a record at the Rule 12(b)(6) stage were revealed in *Solis v. Cissna*, No. 9:18-cv-083, 2019 U.S. Dist. LEXIS 229051 (D.S.C. Jul. 11, 2019). In *Solis*, a group of U-status applicants claimed that the Agency had unreasonably delayed adjudication of their U status petitions. *Id.* While the Agency's processing times were 50 months, the consolidated plaintiffs had waited between 37 and 45 months. *Id.* at *15-16. The Agency initially moved to dismiss the claims, arguing that the plaintiffs had failed to state a claim. *Solis v. Cissna*, No. CV 9:18-00083-MBS, 2018 WL 3819099, at *1 (D.S.C. Aug. 10, 2018). But the court denied the motion to dismiss and eventually reviewed cross-motions for summary judgment. *See Solis v. Cissna*, No. 9:18-cv-083, 2019 U.S. Dist. LEXIS 229051 (D.S.C. Jul. 11, 2019). After limited discovery—comprising a single Rule 30(b)(6) deposition—it became clear that the Agency could not provide factual support for the propositions raised in its initial motion to dismiss (or its cross-motion for summary judgment).

For example, in *Solis*, the Agency argued in its motion to dismiss that it followed a first in first out rule of reason. *Solis v. Cissna*, No. CV 9:18-00083-MBS, 2018 U.S. Dist. LEXIS 135014 (D.S.C. Aug. 10, 2018). But the court later determined that the Agency could not prove that it actually followed a first in, first out rule: "there is an absence of proof that USCIS adjudicates petitions according to the rule of reason it professes to follow. And, without evidence demonstrating that

USCIS adjudicates petitions in the order in which they are received, USCIS cannot show that such activity is entitled to any higher a priority than adjudicating Plaintiffs' eligibility, particularly in light of how long Plaintiffs have already waited." *Solis*, 2019 U.S. Dist. LEXIS 229051, at *51-52. Simply said, the Agency could not prove the facts to support the legal argument it made at the Rule 12(b)(6) stage. This also happened in *Solis* with the Agency's claim of a lack of resources. *Id.*

Here, the lower court erred by considering the Agency's Rule 12(b)(6) without a record or limited, expedited discovery. By doing so, it violated the rules governing Rule 12(b)(6) by deciding various questions of fact. First, it determined that the Agency had and followed a rule of reason, even though the Plaintiff repeatedly alleged otherwise. MTD Order, R. 32, page ID #9. In fact, to support its finding of fact, it cited to the trial court's decision in *Gonzalez* that was later reversed. *Id.*; *but see Gonzalez*, 985 F.3d at 375-76. Second, it implicitly found that the Agency's published processing times were accurate, contrary to the Plaintiff's allegations. MTD Order, R. 32, page ID #9; SAC, R. 22, page ID ## 14-15. But this holding "begs the question by assuming that USCIS's average processing time is itself reasonable," which "can only be resolved on an evidentiary record." *Gutta*, 2021 WL 533757, at *8. Finally, the trial court erred by adopting the Agency's allegations that it has competing priorities that will be hurt if the Court pushes Mr.

Barrios to the "front of the line." MTD Order, R. 20, page ID #21. As noted in *Gonzalez*, whether resources and other priorities will be impacted is a question of fact, requiring factual development. *Gonzalez*, 985 F.3d at 375-76.

The district court erred by deciding disputes of fact at the Rule 12(b)(6) stage, and as such, this Court should follow *Gonzalez* (and a vast majority of the case law in this context) and remand this cause of action for further proceedings.

B. Mr. Barrios have stated a claim for unreasonable delays.

Mr. Barrios stated a claim for an unreasonable delay under the APA. As a threshold issue, to state a claim under the APA for unreasonably delayed action, a plaintiff need only allege that he or she is entitled to a non-discretionary, required agency action, the action has been unreasonably delayed, and the delay has adversely affected or aggrieved the plaintiff. 5 U.S.C. §§ 555(b), 702, 706; *see Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). Mr. Barrios easily clears that low hurdle. SAC, R. 22, page ID ## 1-25. To the extent Mr. Barrios had to do more than allege sufficient facts that, if true, would state a claim for an unreasonable delay, the district court erred by determining they failed to state a claim.

The lower court relied heavily on the fourth *TRAC* factor—the competing priorities factor. It argues that, if the effect of an order compelling agency action would be to push the plaintiff to the front of the line at the expense of others, courts

consider the competing priorities factor dispositive and refuse to find unreasonable delays. *Id.*

This argument fails. First, no case indicates any single *TRAC* factor is dispositive. Second, where there are extreme delays, courts refuse to even consider the competing priorities *TRAC* factor: "extensive or repeated delays are unacceptable notwithstanding competing interests." *See MCI Telecommunications*, 627 F.2d at 340 (finding four-year delay unreasonable). Third, to even assert this factor, the Agency must identify and be "clear on nature, priority or hierarchy of competing interests." *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 40 (D.D.C. 2000) (compelling agency action). The Agency does not clearly identify any agency interest of competing or higher priority. Similarly (and finally), the Agency does not (and cannot) identify what impact an order compelling the adjudication of one U-Status application would have on any supposed competing priorities.

All the cases the lower court relies upon for its competing priorities holding suffer one fatal flaw; they fail to distinguish between administrative processes that can only be done consecutively while U-Status applications can be decided concurrently. This fundamental error stems from the Agency (and the cases the Agency cites) near sole reliance on *Mashpee Wampanoa Tribal Council, Inc. v.*

Norton, 336 F.3d 1094, 1100 (D.C. Cir. 2003).[10] In *Mashpee* a putative Indian tribe claimed a five-year wait was an unreasonable delay. *Id.* However, to determine whether a people group qualified as an Indian tribe under the relevant law, the Board of Indian Affairs would have to engage in a sophisticated, years-long analysis. Under the statute, each adjudication required a team of experts to review and determine whether a people-group had successfully proven they constituted an Indian tribe: "Each petition is evaluated against a demanding set of regulatory criteria by a three-person team comprising an historian, a cultural anthropologist, and a genealogist." *Id.* Further, the decisionmaker had only 13 total petitions in front of it and a total staff of 11. *Id.* It was undisputed in *Mashpee* that the agency could only adjudicate one such application at a time and each application would take years to complete. In such situation, compelling adjudication of one application would necessarily push the other pending applications back by years. *Id.*

Here, Mr. Barrios alleged the Agency has nearly 100 adjudicators assigned to adjudicate only U-Status applications. As alleged in good faith, compelling agency action on one application would not slow down the entire U-Status adjudications process or even a single adjudicators portfolio of applications. Any effect on the

[10] The lower court ignores *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 40 (D.D.C. 2000) (granting mandamus relief). In *Muwekma*, the court ordered the relevant agency to act in the same situation as *Mashpee.* Thus, at a minimum, these cases demonstrate every claim of delay is unique and must be decided upon its own facts.

overall adjudications process or one single application would be *de minimis* and unnoticeable. This is a far cry from the situation in *Mashpee.*

It is not reasonable to equate the massive, time-consuming adjudication required by *Mashpee* to the adjudication required to make a waiting list decision or a work authorization decision in the U-Status context; this would be like equating the decision to approve a new nuclear power plant to a decision on a work authorization or U-Status application. The competing priorities factor may weigh heavy when an agency can only do adjudications consecutively and those adjudications take the entirety of the agency's resources for years on end, but it should weigh far less (or be considered weightless) where an agency can do hundreds of adjudications concurrently and each adjudication can be done less than 6 hours for the principal and derivative petitions.

The lower court also relies on *In re Barr Laboratories,* 930 F.2d 72 (1991), to argue that the competing priorities *TRAC* factor is dispositive. In that case, the D.C. Circuit reviewed every *TRAC* factor to determine that the delay was reasonable. *Id.* at 189-91. Though it discussed competing priorities at length, it recognized there could be situations it would find otherwise, such as where a particular plaintiff received "especially shabby treatment." *Id.* at 190. The court did not address such a claim in *Barr* because the plaintiff only raised such argument in its reply. *Id.* Again, *Barr* did not consider the competing priorities *TRAC* factor dispositive. *Barr* also

reviewed a far more rigorous analysis than that required to adjudicate a U-Status application.

Finally, the Agency erred by ignoring Mr. Barrios' allegations and determining the Agency adjudicates U-Status applications on a first in, first out basis with certain exceptions. Mr. Barrios alleged the following:

- "Plaintiff alleged that the number of applications filed after, yet decided before his is not insignificant and reflects a breakdown of any rule of reason that USCIS purports to follow in deciding when applications are reviewed and placed on the waitlist."
- "there is no rule of reason controlling USCIS's U status waiting list decisions."
- "USCIS does not make U-status waiting list decisions on a first in, first out basis."
- "USCIS systematically prioritizes later filed petitions over earlier filed petitions for U-status waiting list decisions."
- "USCIS has failed to follow its own policy in this case expediting waiting list decisions for those applicants in removal proceedings."

SAC, R. 22, page ID ## 10, 16-17. It is simply incorrect to find Mr. Barrios alleged there is a rule of reason.

In addition to these allegations, which the district court ignored, the Agency's exceptions to its alleged "first in first out" policy destroy it; if the exceptions destroy the rule, there is no rule. The Agency expedites U-status waiting list decisions for seven different reasons outlined in the Agency's policy manual. It also expedites U-status waiting list decisions for U-status applicants that are in removal proceedings and U-status applicants that have final orders of

removal. And the Agency adjudicates later- filed derivative applications at the same time as it adjudicates their earlier filed principal application. It is also possible that, if a derivative gets placed into removal proceedings or acquires a final order of removal, the Agency will adjudicate the principal applicant and all other derivatives based on that principal. SAC, R. 22, page ID ## 14-15.

First, when the Agency uses the "line" metaphor to describe its alleged rule of reason, it is important to note the line is not one applicant behind another applicant. Rather, because the Agency adjudicates family groups together, the space in the "line" that one principal takes up is actually the principal plus his or his derivatives (regardless of when the derivative applications are filed). Again, the Agency is clear that derivatives are an exception to the chronological rule; considering the number of U-status derivatives, this is a sizeable discrepancy to the chronological rule.

Second, the Agency's exception for U-status applicants in removal proceeding and those with final removal orders undercuts the chronological rule. This exception destroying the rule should be no surprise. In November 2018, the backlog of removal proceedings in the United States hit the 1,000,000 mark. *TRAC* Immigration, Immigration Court Backlog Surpasses One Million Cases (Nov. 6, 2018), available at http://*TRAC*.syr.edu/immigration/reports/536/ (last visited Dec. 21, 2018). This in turn is the consequence of two Attorney General decisions from

2018. *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018) ended administrative closure, and *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (A.G. 2018) effectively ended continuances during removal proceedings. These administrative litigation tools were used to allow a U-status applicant to wait for their waiting list decision (and deferred action) outside of the context of removal proceedings. These cases would not need to be "expedited" under this exception. This absurd result—rewarding U-status applicants in removal proceedings or with removal proceedings with expedited adjudications—undermines the Agency's "rule" of reason.[11]

The lower court seemingly determined that Mr. Barrios failed to state a claim because he did not allege any uniquely bad treatment of his petition because, for example, it was within the processing times. These processing times are inaccurate and USCIS knows it. *See* DHS, USCIS Launches Pilot Program for Processing Times (Apr. 3, 2018)[12]. In that announcement, the Agency announced that it was responding to "a significant need for better, more accurate information."

[11] While the lower court did agree that 8 U.S.C. §1571(b) provided some value to Mr. Barrios, it failed to consider that congress also indicated a further timeline in 2008. In the 2008 amendments to the U-status program, as noted above, the sponsor noted the need for quick adjudication in victim-based immigration benefits like waiting list decisions. 154 Cong. Rec. H10,888, 10,905 (Dec.10, 2008) (statement of Reps. Berman and Conyers), 2008 WL 5169865. The Bill sponsors express that one year is too long and urge the Agency to make the adjudications necessary for work authorization and deferred action within 60 days.

[12] Available at https://content.govdelivery.com/accounts/USDHS/bulletins/1e6fcec

Id. As early as 2014, the Agency recognize the published processing times were problematic:

> If a USCIS field office was falling behind on its goal, it would post the date of the application most recently completed. Noting the confusion and the inaccuracy of this system, the Ombudsman's Office made recommendations throughout 2015, 2016, and 2017 on how USCIS could improve the accuracy of processing times, including the use of time ranges based on real-time data. . . . Similarly, USCIS began studying the problem through a working group established in 2014.

Id. The Agency then notes that "more work needs to be done" but it is working towards a more accurate system. *Id.* Regardless of these public denunciations of its own published processing times, it represented to the district court that Mr. Barrios fell within their published processing times. It was error for the lower court to do so.[13]

CONCLUSION

For these reasons, this Court should reverse the district court's decision and remand it with instructions to the district court to order the Appellee to file an answer all of the Appellants causes of action within 14 days of remand.

February 23, 2021

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[13] The lower court did seemingly determine Mr. Barrios alleged that the waiting list impacted his health and welfare, but it appears to have given that factor no weight. By failing to give any weight to Mr. Barrios' plight, the lower court erred.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing brief to all counsel of record for the Appellees on February 23, 2021, via CM/ECF.

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ADDENDUM

DESIGNATION OF RELEVANT ORIGINATING COURT DOCUMENTS

- Second Amended Complaint, R. 22, Page ID ## 1-20;
- Brief in Support of Motion to Dismiss, R. 24, Page ID ## 1-25.
- Opposition to Motion to Dismiss, R. 26, Page ID ## 1-25.
- Reply to Response to Motion to Dismiss, R. 28, Page ID ## 1-15.
- Order on Motion to Dismiss, R. 32, Page ID ## 1-23.
- Judgment, R. 33, Page ID # 1.
- Notice of Appeal, R. 34, Page ID # 1.