BRIAN M. BOYNTON
Acting Assistant Attorney General
WILLIAM C. PEACHEY
Director
YAMILETH G. DAVILA
Assistant Director
MICHAEL A. CELONE
Senior Litigation Counsel
SERGIO SARKANY
Trial Attorney
KEVIN HIRST (MD Atty. #18121101731)
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation,
District Court Section

P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 353-8536
Email: kevin.c.hirst@usdoj.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TONY N., et al.,

Plaintiffs,

v.

U.S. CITIZENSHIP & IMMIGRATION SERVICES, et al.,

Defendants.

No. 3:21-cv-8742-MMC

DEFENDANTS' NOTICE OF MOTION, MOTION TO DISMISS, AND MEMORANDUM IN SUPPORT

Judge: Hon. Maxine M. Chesney
Hearing: March 11, 2022, 9:00 a.m.
Place: San Francisco U.S. Courthouse,
Courtroom 5, 17th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on March 11, 2022, at 9:00 a.m., before the Honorable Maxine M. Chesney of the United States District Court for the Northern District of California, in Courtroom 5 of the 17th Floor of the Philip E. Burton Courthouse and Federal Building, 450 Golden Gate Avenue, San Francisco, California, Defendants will move this Court to dismiss all claims in this case.

Defendants' motion to dismiss is being made pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The bases for this are set forth more fully in the following Memorandum of Points and Authorities.

Dated: January 21, 2022

Respectfully submitted,

By: */s/ Kevin Hirst*

KEVIN HIRST
Senior Litigation Counsel
U.S. Department of Justice
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel.: (202) 353-8536
kevin.c.hirst@usdoj.gov

Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case is over. Plaintiffs are five asylum applicants who brought this action to compel U.S. Citizenship and Immigration Services (USCIS) to adjudicate their applications to renew their employment authorization documents (EAD). USCIS has done just that, granting the EAD renewal applications of all five named Plaintiffs. There remains no effective relief for the Court to order here and the case is therefore moot. Nor does an exception to mootness apply here. As this Court recognized in denying Plaintiffs' motion for preliminary injunctive relief, it is not reasonably foreseeable that Plaintiffs will experience another lapse in their employment authorization thirty months from now, and they therefore have "not shown their claims qualify for the 'capable of repetition, yet evading review' exception to mootness." Order, ECF No. 61, at 4 (quoting *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002)). Nor do Plaintiffs' claims qualify for voluntary cessation exception to mootness: the grant of Plaintiffs' EAD renewals ensures that the harm alleged here—the failure to adjudicate Plaintiffs' renewal applications within 180 days—cannot reasonably be expected to continue. Having granted the applications, the agency has no means to "un-adjudicate" them. Moreover, as the Court recognized, the *TRAC* factor analysis courts apply to unreasonable delay claims like Plaintiffs' is highly fact-specific. As a result, a judgment on the merits of Plaintiffs' now moot claims based on the facts presented here would not define the rights of the parties. Even if Plaintiffs' EADs were to lapse thirty months from now, a future claim will involve different facts and circumstances that will impact the Court's assessment of whether any delay by the agency has been reasonable.

But if the Court should conclude that Plaintiffs' claims are not moot, there is no basis for the Court to hold, as Plaintiffs contend, that *any* lapse in their employment authorization constitutes an unreasonable delay in violation of the Administrative Procedure Act (APA). As this Court acknowledged, Plaintiffs seek an order compelling adjudication within a "time period not otherwise required by statute or regulation," Order, ECF No. 61, at 5. And while the APA gives courts the power to compel agency action unreasonably delayed, the Supreme Court has made clear that only legally *required* action may be compelled. *Norton v. So. Utah Wilderness Alliance*,

542 U.S. 55, 63 (2004). Absent any authority imposing an adjudicatory deadline on the agency, the Court is without power to create one.

The Court should therefore dismiss Plaintiffs' complaint in its entirety and with prejudice.

II. LEGAL BACKGROUND

Unreasonable Delay Claims Under the APA. The APA authorizes suits to "compel agency action unlawfully withheld or unreasonably delayed." *See* 5 U.S.C. § 706(1). Equitable relief under the APA's unreasonable delay provision "is an extraordinary remedy [and requires] similarly extraordinary circumstances to be present before we will interfere with an ongoing agency process." *In re United Mine Workers*, 190 F.3d 545, 549 (D.C. Cir. 1999) (quoting *Cmty. Nutrition Inst. v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985)). An injunction to remedy unreasonable delay is appropriate only upon a showing that the delay is "egregious." *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001). In cases alleging unreasonable delay, the Ninth Circuit applies the six-factor test set forth in *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*). *See In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1138 (9th Cir. 2020). Under the test, courts consider:

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

Id. While the Ninth Circuit has held that the first factor—the rule of reason—is the most important factor, neither it nor any other factor is determinative. *See In re A Cmty. Voice*, 878 F.3d 779, 786 (9th Cir. 2017). Courts must therefore consider each *TRAC* factor before determining whether a delay is unreasonable. *Id*.

EAD Renewals. The Immigration and Nationality Act (INA) states that "[a]n applicant for asylum is not entitled to employment authorization, but such authorization may be provided under

regulation by the Attorney General." 8 U.S.C. § 1158(d)(2). The current regulations provide that asylum applicants may apply for initial employment authorization, but not "earlier than 365 days after the date USCIS or the immigration court receives the[ir] asylum application," and must meet other eligibility criteria for initial and renewal applications. *See* 8 C.F.R. §§ 208.7, 274a.12(c)(8). A number of these requirements have been enjoined for members of two organizations—Casa de Maryland (CASA) and the Asylum Seeker Advocacy Project (ASAP)—who apply for employment authorization, including the 365-day waiting period for initial EAD applicants, and a biometrics collection submission requirement for both initial and renewal applicants. *See Casa de Maryland v. Wolf*, 486 F. Supp. 3d 928, 973-74 (D. Md. 2020). The regulations do not require USCIS to issue an EAD, and in fact prohibit issuance in a variety of circumstances not applicable here. *See* 8 C.F.R. § 208.7.

To apply for initial employment authorization, an asylum applicant must submit a properly completed form with signature, two identical passport style photographs, photo identification, proof of their asylum applicant status, and full biometrics from an Application Support Center, with the exception of CASA and ASAP members who are exempt from the biometrics requirements. *See Casa de Maryland*, 486 F. Supp. 3d at 974 (D. Md. 2020); USCIS, Form I-765 Instructions, *available at* https://www.uscis.gov/sites/default/files/document/forms/i-765instr.pdf. If the initial application is granted, the asylum applicant is issued an EAD, *see* 8 C.F.R. § 274a.13(b), that is valid "for a period USCIS determines is appropriate at its discretion, not to exceed two years." 8 C.F.R. § 208.7(a)(1)(i); *see also* 8 C.F.R. § 274a.12(c)(8).

USCIS may renew employment authorization "in increments determined by USCIS in its discretion, but not to exceed increments of two years." 8 C.F.R. § 208.7(b)(1). To obtain a renewal of their employment authorization, an asylum applicant must submit new biometrics and a biometrics fee (except for CASA and ASAP members), a filing fee, and evidence that the applicant's asylum application is still pending. While a renewal application may be filed any time, USCIS recommends that asylum applicants "not file for a renewal EAD more than 180 days before [the] original EAD expires." *See* USCIS, Employment Authorization Document, https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-

authorization-document (last visited Dec. 2, 2021). If the EAD renewal application is filed before the prior EAD expires and it has not been adjudicated when the prior EAD expires, the prior EAD is automatically extended "for an additional period not to exceed 180 days from the date of [the EAD]'s . . . expiration." 8 C.F.R. § 274a.13(d)(1).

Critically, no statute or regulation requires USCIS to adjudicate EAD renewals within a specified timeframe. Nor does any statute or regulation bar USCIS from allowing EADs to expire before adjudicating a pending renewal application.

III. PROCEDURAL AND FACTUAL BACKGROUND

Named Plaintiffs. Plaintiffs are five asylum applicants who have obtained an initial EAD, have received an automatic 180-day extension under 8 C.F.R. § 274a.13(d)(1), but whose renewal applications were not adjudicated prior to the expiration of their EAD. *See* Compl. ¶¶ 15-19. USCIS received Plaintiff Tony N.'s EAD renewal application on December 23, 2020. Compl. ¶ 15. He received a 180-day automatic extension of his work authorization, which expired on October 11, 2021. *Id.* Plaintiff Tony N. alleges that when his employment authorization lapsed "he was on the verge of starting his own truck driving business" but lost his driver's license and his current job as a truck driver. Compl. ¶ 23. His EAD renewal was approved on November 29, 2021. Nolan Decl. ¶ 25.

USCIS received Plaintiff Muradyan's EAD renewal application on April 6, 2021. Compl. ¶ 18. She received an automatic 180-day extension of her work authorization, which expired on October 13, 2021. Compl. ¶ 18. Nolan Decl. ¶ 25. Plaintiff Muradyan alleges that she lost her residency position at two hospitals and her health insurance when her employment authorization lapsed. Compl. ¶ 83. Her EAD renewal was approved on November 23, 2021. Nolan Decl. ¶ 25.

USCIS received Plaintiff Karen M.'s EAD renewal application on April 2, 2021. Compl. ¶ 16. She received an automatic 180-day extension of her work authorization, which expired on November 15, 2021. Compl. ¶ 16. Plaintiff Karen M. alleged that she would lose her management position at McDonald's should her employment authorization lapse, had been unable to renew her driver's license, and speculated that she "w[ould] also lose her primary means to support herself

and her family" a month before she was due to give birth. Compl. ¶ 84. Her EAD renewal was approved on January 10, 2022. *See* Ex. A, Karen M. Approval Notice.

USCIS received Plaintiff Jack S.'s EAD renewal application on March 8, 2021. Compl. ¶ 17. He received an automatic 180-day extension of his work authorization, which expired on October 18, 2021. Compl. ¶ 17. After his employment authorization lapsed, Jack S. was put on work permit leave by his employer while USCIS continued adjudicating his renewal. ECF No. 17-5, at 3. He noted that in the absence of a renewed EAD, his employment-based health insurance would lapse once his leave runs out. *Id.* at 4. Jack S. also alleges he lost his driver's license making it difficult to acquire necessities and attend medical appointments. Compl. ¶ 85. His EAD renewal was approved on December 9, 2021. *See* Ex. B, Jack S. Approval Notice.

USCIS received Plaintiff Vera de Aponte's EAD renewal application on February 25, 2021. Compl. ¶ 19. She received an automatic 180-day extension of her work authorization, which expired on November 9, 2021. Compl. ¶ 19. Plaintiff alleges she lost her job as a Registered Behavior Technician after her employment authorization lapsed. Compl. ¶ 86. Her EAD renewal was approved on January 12, 2022. *See* Ex. C, Vera de Aponte Approval Notice.

Procedural Background. Plaintiffs filed suit on behalf of themselves and a putative class of all individuals: (a) who filed applications to renew their employment authorization documents pursuant to 8 C.F.R. §§ 208.7(b); 274a.12(c)(8); (b) who received a 180-day automatic extension of their employment authorization pursuant to 8 C.F.R. § 274a.13(d); and (c) whose applications have a processing time of at least 180 days pursuant to 8 C.F.R. § 103.2(b)(10)(i). *See* Compl. ¶ 105. The crux of Plaintiffs' claim is that USCIS "created a 180-day rule of reason" for adjudication of EAD renewals, *see* Compl. ¶¶ 46-54, which Plaintiff alleges USCIS failed to comply with in adjudicating Plaintiffs' renewal applications, *see* Compl. ¶¶ 55-68. Plaintiffs argue that the agency's failure to adjudicate EAD renewal applications before the expiration of the automatic, 180-day extension constitutes unreasonable delay under the APA. Compl. ¶¶ 114-24. They ask the Court to "[c]ompel Defendants to adjudicate Plaintiffs' and class members' applications to renew their EADs within the 180-day automatic extension period." Compl. 32-33. Plaintiffs also seek a

declaratory judgment that their EAD renewal applications were unreasonably delayed in violation of the APA. *Id.* 32.

On November 11, 2021, Plaintiffs moved to certify the putative class, *see* ECF No. 16, and moved for preliminary injunctive relief, *see* ECF No. 17. On December 22, 2021, the Court denied the preliminary injunction motion as moot as to the three named Plaintiffs who had their EAD renewals granted prior to the hearing, explaining that they "ha[d] not shown their claims qualify for the 'capable of repetition, yet evading review' exception" "given that their newly issued EADs will remain valid for a period of thirty months." ECF No. 61, at 4. Applying the *TRAC* factors to the remaining Plaintiffs, the Court concluded that the third and fifth *TRAC* factors concerning the nature of the harm tipped in favor of injunctive relief. *Id.* at 10. But the Court explained that the first and most important factor—whether the time USCIS took to make its decision was governed by a rule of reason—tipped against injunctive relief "where the period of time in which [Plaintiffs] have been waiting [wa]s just over one month." *Id.* at 9. It also explained that the second and fourth *TRAC* factors weighed against injunctive relief. As to the second factor, the Court noted the absence of a congressional timetable for adjudication of EAD renewals. *Id.* at 9-10. And for the fourth factor—the impact of injunctive relief on competing priorities—the Court noted that "a judicial order putting [Plaintiffs] at the head of the queue would simply move all others back one space and produce no net gain." *Id.* at 19 (quoting *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003)). It emphasized that the same reasoning applied where an injunction would "move one category of aliens . . . over all others who have applied for the same benefit." *Id.* at 11. Finally, the Court found that the sixth factor—impropriety/bad faith—either tipped in the Government's favor or was at least neutral. ECF No. 61, at 11. Based on its *TRAC* factor analysis, the Court concluded that Plaintiffs did not show a "clear likelihood of success on the merits" as required to justify a preliminary injunction. *Id.*

The Court likewise denied Plaintiffs' motion for class certification. *Id.* at 12-13. The Court reiterated that "to determine the merits of plaintiffs' claims, as well as those of putative class members" the Court "must . . . balance the *TRAC* factors." *Id.* at 12. It held that because the third, fifth, and the first factor, in part, are "subject to determination on an individual basis," an

"individual evaluation would be necessary in order to determine if a class member is entitled to injunctive relief." *Id.* at 13. Thus, the Court held that Plaintiffs failed to satisfy the requirements of Federal Rule of Civil Procedure 23 and denied their motion for class certification. *Id.*

LEGAL STANDARDS

Federal courts are limited to deciding "cases" and "controversies." U.S. Const. art. III, § 2. The "case-or-controversy requirement subsists through all stages of federal judicial proceedings." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). "To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* Courts may not "decide questions that cannot affect the rights of litigants in the case before them" or give "opinion[s] advising what the law would be upon a hypothetical state of facts." *Id.* (quoting *North Carolina v. Rice,* 404 U.S. 244, 246 (1971). Thus, a suit becomes moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Employees,* 567 U.S. 298, 308 (2012) (internal quotation marks omitted). Where a "case has been mooted by the defendant's voluntary conduct," the defendant must show that "subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167 (2000) (internal citations and quotations omitted).

An exception to mootness exists where the issues are capable of repetition, yet evade review. *Native Vill. of Nuiqsut v. Bureau of Land Mgmt.*, 9 F.4th 1201, 1209 (9th Cir. 2021). While the party asserting mootness bears the burden initially, if met, the burden shifts to the opposing party to demonstrate that the exception applies. *Id.* The exception has two requirements: "(1) the duration of the challenged action is too short to allow full litigation before it ceases or expires, and (2) there is a reasonable expectation that the plaintiffs will be subjected to the challenged action again." *Wildwest Inst. v. Kurth*, 855 F.3d 995, 1002 (9th Cir. 2017).

Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for mootness, which pertain to a court's subject matter jurisdiction. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Jurisdictional attacks may be either facial or factual. *Id.* A factual challenge asserts that the court

lacks subject matter jurisdiction, regardless of what is stated in the complaint, and may rely on extrinsic evidence. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Conversely a facial attack argues that the facts as pleaded do not establish subject matter jurisdiction.

Federal Rule of Civil Procedure 12(b)(6) addresses "the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal under Rule 12(b)(6) is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A court may consider documents attached or incorporated by reference to the complaint, or matters of judicial notice, *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003), including public websites, *Minor v. FedEx Office & Print Servs., Inc.*, 78 F. Supp. 3d 1021, 1027 (N.D. Cal. 2015). While some courts in this district have been reluctant to entertain Rule 12(b)(6) motions to dismiss in unreasonable delay cases, this Court has sided with the weight of authority and held that it is "appropriate to conduct the *TRAC* factor inquiry at this stage of the proceedings." *Zafarmand v. Pompeo*, No. 20-cv-803, 2020 WL 4702322, at *14 (N.D. Cal. Aug. 13, 2020) (Chesney, J.).

ARGUMENT

A. Plaintiffs' Claims Are Moot Because the Court Can No Longer Provide Effective Relief.

Plaintiffs Complaint alleges that USCIS unreasonably delayed their EAD renewals and asks the Court to compel the agency to adjudicate their renewals within 14 days. As each of Plaintiffs' renewals has now been adjudicated—the very relief they asked for—"it is impossible for [this C]ourt to grant any effectual relief," and the case is therefore moot. *Knox,* 567 U.S. at 308. And because no exception to mootness applies here, Plaintiffs' claims must be dismissed.

1. *The Voluntary Cessation Exception Does Not Apply*.

As a threshold matter, for the voluntary cessation doctrine to apply, the cessation "must have arisen *because* of the litigation." *Public Utilities Comm'n of State of Cal. v. F.E.R.C.,* 100 F.3d 1451, 1460 (9th Cir.1996) (emphasis in original). Here, because USCIS adjudicated Plaintiffs' applications in due course, within its existing workflow and not in response to the

litigation the doctrine of voluntary cessation does not apply. But even assuming the litigation prompted the agency's actions, a claim remains moot when the "allegedly wrongful behavior [can]not reasonably be expected to recur." The voluntary cessation doctrine stems from the concern that depriving federal courts of its power to determine the legality of an agency action would leave the defendant "free to return to his old ways." *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 n.10 (1982) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). But that concern is absent where the alleged harm stems from the agency's delay in adjudicating Plaintiffs' EAD renewals. Once adjudicated, there is no mechanism for the agency to return the renewal applications to an un-adjudicated state and therefore no reasonable expectation that the harm will recur. The worst that the agency could do from Plaintiffs' perspective would be to terminate Plaintiffs' employment authorization pursuant to USCIS's employment authorization termination regulations at 8 C.F.R. § 274a.13(d)(3) or 8 CFR § 274a.14. But Plaintiffs' Complaint did not, nor could it, preemptively challenge the agency's ultimate decision on the renewal application, only its delay in adjudication. Even so, a challenge to the agency's ultimate decision would be a fundamentally different claim premised on a fundamentally different harm. *See Kuzova v. U.S. Dep't of Homeland Sec.*, 686 F. App'x 506, 508 (9th Cir. 2017) (holding agency adjudication mooted claim of unreasonable delay notwithstanding plaintiff's dissatisfaction with the result).

2. *There is No Reasonable Expectation that Plaintiffs Will Be Subjected to the Same Conduct Again*.

Plaintiffs do not meet the requirements for the capable of repetition yet evading review exception to mootness because, as this Court recognized, there is no "reasonable expectation that the plaintiffs will be subjected to the [challenged conduct] again." ECF No. 61, at 4 (quoting *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2022)) (alteration in original). In fact, Plaintiffs' EADs have been renewed and extended for another two years. If they apply for another renewal before their current EADs expire, the current regulations entitle them to an automatic 180-day extension while USCIS adjudicates their renewals. It is pure speculation that Plaintiffs' EAD renewals will once again lapse at the end of that thirty-month period. Plaintiffs'

asylum applications may be adjudicated. For instance, Plaintiffs may submit their applications earlier than they did previously, allowing USCIS to adjudicate their renewal applications before a lapse in employment authorization occurs. Or USCIS's continued efforts to eliminate its backlog of EAD renewal applications may lead to a decrease in processing times.

3. *A Decision on the Merits Would be Advisory*

Even if Plaintiffs' EADs lapse again in the future, a decision on the facts here would merely inform and would not decide a future claim of unreasonable delay, rendering any such decision an impermissible advisory opinion. Courts "are without power to decide questions that cannot affect the rights of litigants in the case before [the Court]." *DeFunis v. Odegaard,* 416 U.S. 312, 316 (1974) (per curiam) (quoting *North Carolina v. Rice,* 404 U.S. 244, 246 (1971)). As this Court has recognizes, unreasonable delay cases are highly individualized and the analysis will necessarily vary depending on each individual's circumstances and the facts specific to their claim. *See* ECF No. 61, at 4-5; *see also CRVQ v. U.S. Citizenship & Immigr. Servs.*, No. CV 19-8566, 2020 U.S. Dist. LEXIS 252515, at *21 (C.D. Cal. Sep. 24, 2020) (emphasizing the fact-intensive nature of the *TRAC* analysis).

The same holds true when comparing the facts alleged in the Complaint to the factual basis for a hypothetical, future claim of unreasonable delay. Indeed, when evaluating the first and most important factor, whether the agency's delay is governed by a rule of reason, courts must look to the length of the delay, the source of the delay, and the extent to which the defendant participated in delaying the proceeding. *See Qureshi v. Napolitano*, No. 11-cv-5814, 2012 WL 2503828, at *4 (N.D. Cal. June 28, 2012). The length of the delay and any lapse in employment authorization will vary as will the agency's ability to point to the operational impact of the COVID-19 pandemic or other factors to explain those delays. *See* ECF No. 61, at 8 (taking into consideration the impact of the COVID-19 pandemic on USCIS operations when assessing the first *TRAC* factor). Moreover, while USCIS had no need to issue requests for evidence to adjudicate Plaintiffs' most recent EAD renewals, there is no guarantee that the agency will not have to do so for future applications—a step that would necessarily affect a court's analysis under the first and most important *TRAC* factor. Likewise the extent and nature of any resulting harm under the third and

fifth factors may be fundamentally different. *See* ECF No. 61, at 12 (acknowledging that the analysis of the third and fifth factors will vary based on individual circumstances). And while Plaintiffs may argue that such factual differences are inconsequential, the Ninth Circuit has made clear that no one TRAC factor alone is dispositive, and all must be considered. *See In re A Cmty. Voice*, 878 F.3d 779, 786 (9th Cir. 2017). Thus *all* the facts matter.

At bottom, deciding whether the facts Plaintiffs present here constitute unreasonable delay "cannot affect the rights of [the] litigants" in a hypothetical, unreasonable delay case thirty months from now based on a different set of circumstances. *DeFunis,* 416 U.S. at 316; *see also Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc) (mootness doctrine prohibits courts from deciding cases if "events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.") (internal quotations omitted). As a result, any decision on the merits would be, by definition, advisory. *See Church of Scientology of Haw. v. United States*, 485 F.2d 313, 314 (9th Cir. 1973) ("[T]he court does not render advisory opinions or decide abstract propositions.").

B. Even if Plaintiffs' Claims Are Not Moot, USCIS is Not Required to Adjudicate EAD Renewals Within the 180-day, Automatic Extension Window.

Even if the Court holds that Plaintiffs claims are not moot, the Court would need to weigh whether *any* lapse in Plaintiffs' employment authorization is per se unreasonable under the APA, such that a binding decision would dictate the agency's legal obligations relative to Plaintiffs should their employment authorizations lapse thirty months from now. But the Court has already ruled that such a one-size-fits-all assessment of liability is inappropriate in this case. Indeed, the Court denied Plaintiffs' motion for class certification for that very reason, holding that "to determine the merits of plaintiffs' claims . . . [the Court] must . . . balance the TRAC factors," which are "subject to determination on an individual basis." ECF No. 61, at 12. Thus to consider that question would undercut the Court's prior determination that there is no bright-line answer on the issue of liability and would essentially allow Plaintiffs to pursue a classwide remedy without a certified class. What's more, Plaintiffs' claim that USCIS had an obligation to adjudicate their EAD renewals within the 180-day automatic extension window has no basis in the law, and

Plaintiffs should not be allowed to bootstrap the *TRAC* factor analysis to create a legal obligation where none exists.

The Supreme Court has explained that "the only agency action that can be compelled under the APA is action legally *required*." *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). Courts do not have "license to compel agency action whenever the agency is withholding or delaying an action [the court] think[s] it should take." *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010) (internal quotations omitted). Defendants do not dispute that they have an obligation to adjudicate Plaintiffs' EAD renewals—indeed they have already done so. But even if they had not, there is no regulation, statute or other authority that legally requires USCIS to adjudicate Plaintiffs' applications before their prior EAD lapses. Plaintiffs' arguments to the contrary rest on precatory language in the INA and non-binding agency statements made during rulemaking. *See* Compl. ¶¶ 48-54. Neither argument has merit.

To start, Plaintiffs point to USCIS's 2016 decision to eliminate a 90-day processing requirement for adjudication of EAD renewal applications and implement an automatic 180-day extension of expiring EADs for noncitizens who timely filed renewal applications.[1] Compl. ¶ 48. During the rulemaking process, the agency stated that the automatic extension was meant "to help prevent gaps in employment authorization." *Id*. (quoting 81 Fed. Reg. 82398, 82455). Four years later, the agency eliminated a 30-day processing rule for initial EAD applications as well as a requirement for EAD renewal applicants to submit their applications at least 90 days before their EAD was set to expire. Compl. ¶ 52 (citing 85 Fed. Reg. 37502). During the rulemaking process, the agency stated that because the 180-day extension "effectively prevents gaps in work authorization for asylum applicants with expiring employment authorization," the agency "f[ound] it unnecessary to continue to require pending asylum applicants file for renewal of their employment authorization 90 days before the EAD's scheduled expiration." Compl. ¶ 52 (citing

[1] Defendants note that the 90-day processing requirement previously located at 8 CFR § 274a.13(d) (2016) eliminated during the prior rulemaking, effective January 17, 2017, did not apply to asylum applicants like Plaintiffs. *See* 81 Fed. Reg. 82398, 82455 fn.95 ("Excepted from the 90-day processing requirement . . . prior to its elimination in this rulemaking, are . . . [a]pplicants for asylum.").

85 Fed. Reg. 37502, 37509). But neither statement creates a legal obligation for the agency to adjudicate Plaintiffs' EAD renewal applications within the 180-day automatic extension window.

As the Ninth Circuit has explained, agency pronouncements that lack the force of law do not create enforceable rights. *See Scales v. Immigration and Naturalization Serv.*, 232 F.3d 1159, 1166 (9th Cir. 2000); *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 900-01 (9th Cir. 1996). The Court should not divert from that precedent and ascribe to informal agency statements the power to bind the agency in any and all circumstances. And USCIS's rulemaking statements themselves speak of *preventing* lapses in employment authorization, not eliminating them. *See* 81 Fed. Reg. at 82455; 85 Fed. Reg. at 37509. Indeed, in response to comments asking for a processing requirement, USCIS *expressly* declined to "set an adjudicative timeframe for adjudicating renewals"—a position reflected in the regulations themselves. *See* 85 Fed. Reg. 37502, 37524; 8 C.F.R. § 274a.13(d)(1). And it did so knowing full well that not all adjudications are completed within that window. *See* 85 Fed. Reg. at 37521 (providing processing statistics for EAD renewals for 2017-2020, including for fiscal year 2019 when just 81.5 percent of renewal applications were adjudicated within 180 days); 85 Fed. Reg. at 37524 (same). *See also* 85 Fed. Reg. at 37509 ("[I]t is advisable to submit the [renewal] application earlier . . . *to account for current Form I–765 processing times*.") (emphasis added). While some courts in this circuit have held that a *regulation* may bind an agency to a set processing timeline, *see, e.g.*, *Rosario v. U.S. Citizenship & Immigr. Servs.*, 365 F. Supp. 3d 1156, 1161-62 (W.D. Wash. 2018), no regulation sets a mandatory processing time for adjudication of EAD renewals. Rather the rule changes referenced by Plaintiffs, in both instances, *removed* processing requirements. They did not create any. This Court should not impute to the agency an intent to set for itself a binding deadline for adjudicating EAD renewals based on a strained reading of non-binding statements, especially when the imputed intent is expressly contradicted by the agency's statements and the regulations themselves.

Finally, Plaintiffs argue that their proposed rule of reason is consistent with "the *sense*" of Congress that "the processing of an immigration benefit application *should* be completed not later than 180 days after the initial filing…." Compl. ¶ 53 (citing 8 U.S.C. § 1571(b)) (emphases added). But as this Court recognized, this provision is merely precatory and an EAD application is not an

immigration benefit within the meaning of the statute. ECF no. 61, at 9 (citing 8 U.S.C. § 1572(2)); *see also Yang v. California Dep't of Soc. Servs*., 183 F.3d 953, 958 (9th Cir. 1999) (statute "coupl[ing] the phrase 'sense of the Congress' with the term 'should,' yielding the conclusion that this provision is precatory and did not bestow on Hmong veterans any right to food stamp benefits."). There is *no* statute that requires USCIS to adjudicate an EAD renewal within a set time frame. Indeed, the enabling statute declares that an asylum applicant "is not entitled to employment authorization, but such authorization may be provided under regulation." *See* 8 U.S.C. § 1158(d)(2). Congress said nothing more about the speed with which USCIS must adjudicate such requests for discretionary employment authorization.

Because there is no regulation, statute, or any other authority that requires USCIS to adjudicate Plaintiffs EAD renewal applications before their prior authorizations lapse, this Court cannot compel the agency to do so. And as this Court has observed, even "where the period of time in which [Plaintiffs] have been waiting is just over one month," the first and most important *TRAC* factor does not clearly tip in Plaintiffs' favor, *see* ECF No. 61, at 9, let alone compel the Court to conclude that the delay has become unreasonable. *See In re A Cmty. Voice*, 878 F.3d at 786-7 (holding that no single *TRAC* factor is determinative). *See also In re Cal. Power Exchange*, 245 F.3d 1110, 1125 (9th Cir. 2001) (noting that unreasonable delays under the *TRAC* factors "involve[] delays of years, not months"); *Islam v. Heinauer*, No. 10-04222, 2011 WL 2066661, at *6–8 (N.D. Cal. May 25, 2011) (point of unreasonableness had "not yet come" after three-year delay); *Khan v. Scharfen,* No. 3:08–CV–1398 SC, 2009 WL 941574, at *9–10 (N.D. Cal. Apr.6, 2009) (one-year delay not unreasonable); *Hassane v. Holder,* No. C10–314Z, 2010 WL 2425993, at *5 (W.D. Wash. June 11, 2010) ("22 month delay is not unreasonable as a matter of law in the circumstances of this case"). The Court should therefore decline to hold that a delay that causes *any* lapse in Plaintiffs' employment authorization is per se unreasonable.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' complaint in its entirety.

Dated: January 21, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General
Civil Division

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

YAMILETH G. DAVILA
Assistant Director

MICHAEL A. CELONE
Senior Litigation Counsel

SERGIO SARKANY
Trial Attorney

By: /s/ *Kevin Hirst*
KEVIN HIRST
Trial Attorney
U.S. Department of Justice
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 353-8536
Email: kevin.c.hirst@usdoj.gov

Attorneys for Defendants