

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 26-cv-60340-ARTAU

SADIEL VISET-KINET,

Petitioner,

v.

KRISTI NOEM, *et al.*,

Respondents.

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**PETITIONER'S REPLY BRIEF ON SUBJECT MATTER JURISDICTION**

Pursuant to the Court's order (D.E. 9), the petitioner, by and through the undersigned, submits this reply brief explaining why the Court has subject matter to rule upon all four Counts in his Petition for Writ of Habeas Corpus (D.E. 1).<sup>1</sup>

**Argument**

- I. The Court has jurisdiction to review Count I because the petitioner has a right to a ruling on his pending application under the Cuban Refugee Adjustment Act, and the APA itself provides meaningful standards to conduct review of claims of unlawful withholdings of agency action and/or unreasonable delay following discovery and a bench trial.**

1. The petitioner's application for permanent residence was made under Section 1 of the Cuban Refugee Adjustment Act of 1966 (CAA), Pub. L. No. 89-732, 80 Stat. 1161, as amended. The receipt notice expressly states "Cuban Adjustment Act" in the "Preference Classification" box

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<sup>1</sup> Last night, the Eleventh Circuit entered an administrative stay of removal in the petitioner's favor with respect to the petitioner's interlocutory appeal from the Court's order (D.E. 8) denying his emergency motion for a stay of removal. Order (Doc. 18-2), *Viset-Kinet v. Sec'y, U. S. Dep't of Homeland Sec.*, No. 26-10488 (CA11 Mar. 3, 2026).

near the top of the receipt. (D.E. 1-3, at 9.) None of the Immigration and Nationality Act's (INA) bars regarding discretionary determinations under 8 U. S. C. § 1252(a)(2)(B) apply because "the CAA is not part of [8 U. S. C.] § 1255." *Perez v. USCIS*, 774 F. 3d 960, 967 (CA11 2014) (citations omitted).

2. Additionally, 5 U. S. C. § 701(a)(2) does not preclude a challenge to the delayed or withheld adjudication of a benefit request regardless of whether the ultimate decision to deny or grant the request is discretionary. See *INS v. St. Cyr*, 533 U.S. 289, 307–08 (2001) ("Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand. . . . Eligibility that was 'governed by specific statutory standards' provided '**a right to a ruling on an applicant's eligibility,**' even though the actual granting of relief was 'not a matter of right under any circumstances, but rather is in all cases a matter of grace.' . . . Thus, even though the actual suspension of deportation authorized by § 19(c) of the Immigration Act of 1917 was a matter of grace, in *United States ex rel. Accardi v. Shaughnessy*, . . . we held that a deportable alien had **a right to challenge the Executive's failure to exercise the discretion authorized** by the law.") (emphasis added) (citations and parentheticals omitted).

The longstanding "distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other," *id.*, shows that the plaintiff has "'a right to a ruling on [his] eligibility'" for relief under his pending application under the Cuban Refugee Adjustment Act, "even though the actual granting of relief was 'not a matter of right under any circumstances, but rather is in all cases a matter of grace,'" *id.* (citations omitted). Importantly, there is a meaningful judicial standard for judicial adjudication of delay claims under the Administrative Procedure Act (APA). See *Telecomms. Research & Action Center v. F.C.C.*

(*TRAC*), 750 F.2d 70 (CA10 1984); *Arenales-Salgado-De-Oliveira v. Jaddou*, No. 23-61167-CIV-ALTONAGA, 2024 WL 68291, at \*12 (S.D. Fla. Jan. 5, 2024), appeal filed, No. 24-12360 (CA11 July 22, 2024) (Claims of “delay when no statutory deadline exists leaves a reviewing court with ‘discretion to decide whether agency delay is unreasonable.’”) (citing *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (CA10 1999)). As a remedy, “the Court could certainly order the Government to finalize adjudications of [a] Plaintiff[’s] [application] within a set time.” *Arenales-Salgado-De-Oliveira*, 2024 WL 68291, at \*8.

Agency delay and inaction “is not the exercise of discretion or any other type of decisionmaking but rather is the result of agency failures.” Koch, 4 *Administrative Law and Practice* 183, § 11:52[1] (3d ed. 2010, 2025 Supp.) “Such failures should not be perceived as the exercise of discretion.” *Id.*, at 183, § 11:52[2].

The defendant has a non-discretionary duty to adjudicate the petitioner’s pending application, and is required to give notice of an approval or denial for all properly filed benefits requests. See 8 CFR §§ 103.3(b)(19) (defining procedures for notification of approvals), 103.3 (defining procedures for denials). “With due regard for the convenience and necessity of the parties or their representative and within a reasonable period of time, each agency **shall proceed to conclude a matter presented to it.**” 5 U. S. C. § 555(b) (emphasis added). “[B]y using the term ‘shall’ in requiring that the courts compel agency action unlawfully withheld or unreasonably delayed, Congress imposes a mandatory duty in that regard.” *Saini v. USCIS*, 553 F. Supp. 2d 1170, 1176 (E.D. Cal. 2008); *id.* (“the duty to act on an application, as opposed to what action will be taken, is not discretionary on the part of the USCIS.”).

With regard to deciding a claim of unreasonable delay or unlawful withholding of agency action on the merits, “the Government ‘bears the burden to show that the complaint should be

dismissed.’ ” *Arenales-Salgado-De-Oliveira*, 23-61167-CIV, 2024 WL 68291, at \*13 (citation omitted). In fact, however, many courts recognize that such claims are not properly resolved under Federal Rule of Civil Procedure 12(b)(6). See, e. g., *Tikhonov v. Mayorkas*, No. 23-24572-CIV-LENARD, 2024 WL 3327777, at \*2 (S.D. Fla. Mar. 12, 2024) (“However, this Court finds that analysis of the *TRAC* factors is inappropriate at the motion to dismiss stage due to their fact-intensive nature.”) (citing *Gonzalez v. Cuccinelli*, 985 F. 3d 357, 375 (CA4 2021); *Girges v. Sec’y, Dep’t of Homeland Sec.*, No. 6:22-CV-158-GAP-LHP, 2022 WL 2774211, at \*4 (M.D. Fla. June 8, 2022); *Ignatova v. Jaddou*, No. 0:22-CV-62103-SINGHAL/DAMIAN, 2023 WL 5611902, at \*7 (S.D. Fla. Aug. 15, 2023), report and recommendation adopted, No. 22-62103-CIV, 2023 WL 5608433 (S.D. Fla. Aug. 30, 2023)); *Akbar v. Blinken*, No. 23CV1054-LL-BLM, 2023 WL 8722119, at \*4 (S.D. Cal. Dec. 18, 2023) (“Although Defendant contends that Plaintiffs fail to demonstrate unreasonable delay based on the *TRAC* factors, the determination of whether the *TRAC* factors are satisfied as to Plaintiff’s APA claim is not capable of resolution at the motion to dismiss stage.”); *Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 117 (D.D.C. 2020) (“At the motion to dismiss stage, this Court need not consider whether the agency delay alleged here is unreasonable. Undergoing such a fact-specific inquiry at this stage would be premature.”) (citing *M.J.L. v. McAleenan*, No. A-19-CV-00477-LY, 420 F. Supp. 3d 588, 597–98, 2019 WL 6039971, at \*6 (W.D. Tex. Nov. 13, 2019); *Hamandi v. Chertoff*, 550 F. Supp. 2d 46, 54 (D.D.C. 2008); see also *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F. 3d 1094, 1100 (CADDC 2003)) (footnote omitted).

Courts have explained that discovery is needed to build the fact intensive record needed for a court to conduct a *TRAC* factor analysis:

[T]his Court agrees with Plaintiffs that the *TRAC* test is more appropriately applied after further briefing and **discovery**. See *Salihi*, 2023 WL 80007348, at \*7 (“The

ultimate determination of whether the *TRAC* factors are satisfied is not capable of resolution on the pleadings and without further evidence and briefing.”); *Tailawal v. Alejandro Mayorkas, Sec’y of Homeland Sec.*, 2022 WL 4493725, at \*4 (C.D. Cal. Aug. 18, 2022) (“[B]ecause the *TRAC* factor analysis is necessarily fact-intensive, it is more appropriately applied after some **discovery** than at the pleading stage”); *Hui Dong v. Cuccinelli*, 2021 WL 1214512, at \*4 (C.D. Cal. Mar. 2, 2021) (“The *TRAC* test is fact-intensive, and courts have declined to resolve whether the *TRAC* test has been satisfied at the pleading stage, including with respect to immigration applications.”).

The *TRAC* test is fact-intensive and the “[r]esolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court.” *Gonzalez v. United States Dep’t of Homeland Sec.*, 500 F. Supp. 3d 1115, 1129–30 (E.D. Cal. 2020) (quoting *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003)). An assessment of whether the agency’s delay is unreasonable, even in the context of consular processing, “would require the court to look beyond the face of plaintiffs’ complaint and, without the benefit of the administrative record, evaluate facts concerning USCIS’ general practices, whether those practices were followed in this case, and the number of [ ] visa petitions filed over the past several years.” *Id.* at 1130.

*Akbar v. Blinken*, No. 23CV1054-LL-BLM, 2023 WL 8722119, at \*4 (S.D. Cal. Dec. 18, 2023) (emphasis added); see also *Akhter v. Blinken*, No. 2:23-CV-1374, 2024 WL 1173905, at \*5 (S.D. Ohio Mar. 19, 2024) (denying motion to dismiss to proceed to discovery, because, “in *Barrios Garcia v. U.S. Dep’t of Homeland Sec.*, 25 F.4th 430, 451 (6th Cir. 2022) . . . the court pointed favorably to sister circuits’ holdings that ‘[a] claim of unreasonable delay is necessarily fact dependent and thus sits uncomfortably at the motion to dismiss stage and should not typically be resolved at that stage.’”) (alteration in original); *Arenales-Salgado-De-Oliveira*, at \*13, n. 16 (Some courts, however, have declined to use the *TRAC* factors at the motion-to-dismiss stage given the ‘fact-intensive nature of unreasonable delay cases.’”) (citation omitted).

3. Surprisingly, the government is now arguing that it does not even have to adjudicate the petitioner’s application because of new agency memoranda stating that USCIS will no longer

adjudicate applications for Cuban nationals for the indefinite future. (D.E. 16, at 3–4 & 6.) This is illegal. Two courts have already held as such.

Last week, a court granted a preliminary injunction prohibiting USCIS “from applying the adjudication hold of the December 2, 2025 and January 1, 2026 USCIS Policy Memoranda (PM-602-0192 and PM-602-0194)” to the plaintiffs before it. *Bowser v. Noem*, No. 26-CV-10382-AK, 2026 WL 555624, at \*10 (D. Mass. Feb. 27, 2026). Among other additional reasons for finding the hold memoranda to be arbitrary and capricious, the court explained:

Defendants ostensibly rely on the talisman of public safety and national security as justification for the hold. Although never explained, it appears USCIS is concerned that it may provide immigration benefits to those who are later discovered to pose a threat. But in those circumstances, the government still has remedy, including the rescission of any grant of residency, criminal charges, and the initiation of removal proceedings. *Varniab*, 2026 WL 485490, at \*20 (citing *Hong Wang v. Chertoff*, 550 F. Supp. 2d 1253, 1260 (W.D. Wash. 2008); *Singh v. Still*, 470 F. Supp. 2d 1064, 1070 (N.D. Cal. 2007)). Further, this justification for the hold makes even less sense for those, like Amaro Bowser, who are already in the country. “If [an applicant present in the country] presents a threat to national security and public safety, the Government does not ameliorate that threat by delaying a decision on his I–485 application . . . . If the Government is concerned about public safety and national security, it should find a way to process name checks more rapidly, thereby revealing threats to security more quickly. The Government protects no one by delaying a decision on [an] application . . . .” *Hong Wang*, 550 F. Supp. 2d at 1260. With this in mind, there is no rational connection between the facts and the decision to put a hold on all applications for immigration benefits. Instead, the justification for the hold is conclusory at best.

*Id.*, at \*8.

The week prior, another court granted a motion “seek[ing] a preliminary injunction directing the Government to complete adjudication of their pending applications for permanent residency and work authorization.” *Varniab v. Edlow*, No. 25-CV-10602-SVK, 2026 WL 485490, at \*1 (N.D. Cal. Feb. 20, 2026). In steps, the court held:

The regulations concerning adjustment of status require that the applicant “be notified of the decision” on his or her application for adjustment of status “and, if the application is denied, the reasons for the denial.” 8 C.F.R. § 245.2(a)(5)(i).

Courts have concluded that this regulation establishes a “mandatory duty to act” on Form I-485 applications for adjustment of status. *See Singh v. Still*, 470 F. Supp. 2d 1064, 1067 (N.D. Cal. 2007); *Wang*, 550 F. Supp. 2d at 1258.

*Id.*, at \*11;

“The distinction between agency withholding and delay is important.” *See Al Otro Lado v. Exec. Off. for Immig. Rev.*, 138 F.4th 1102, 1120-21 (9th Cir. 2025), *cert. granted sub nom. Noem v. Al Otro Lado*, No. 25-5, -- S. Ct. --, 2025 WL 3198572 (Mem) (Nov. 17, 2025). As the Ninth Circuit explained in *Al Otro Lado*, claims under 5 U.S.C. § 706(1) for unreasonable delay are analyzed under a different framework than claims for unlawful withholding. “If an agency withholds a required action, it violates § 706(1) regardless of its reason for doing so” but “if an agency delays a required action, it violates § 706(1) only if the delay is unreasonable,” which is a “fact-intensive inquiry analyzed under ‘the so-called TRAC factors’ ” set forth in *Telecomms. Rsrch. & Action Ctr. v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984). *Id.* at 1121 (internal quotation marks and citations omitted).

*Id.*, at \*12 (footnote omitted). Regarding unreasonable delay, the court applied the TRAC factors, *id.*, at \*12–\*14, and concluded that “[t]he TRAC factors therefore weigh in favor of Plaintiffs’ contention that Defendants’ delay in processing their applications for immigration benefits is unreasonable,” *id.*, at \*14. Importantly, the court noted the following exchange:

The particular facts and circumstances of this case are that although the past delay in processing Plaintiffs’ applications is currently approximately nine months, that processing is now on formal hold under PM-0192 and there is no discernable end point to the future delay. PM-0192 refers to a prioritized list to be completed by USCIS within 90 days of the issuance of the Policy Memorandum (Dkt. 8-1 at 3), but Defendants have been unable to explain how this event will impact the adjudication hold. When the Court asked the Government to explain what the “prioritized list for review” is, defense counsel stated: “I don’t know about that, your Honor. I’m not sure what that would be. We would have to – my understanding is that we would wait until March to understand that further.” Dkt. 34 (2/10/26 Hrg. Tr.) at 10:2-5; *see also id.* at 10:6-9 (response by defense counsel to question about whether she had any information about how the prioritized list would be used or how it would impact the process: “I don’t, your Honor”). Similarly, Government counsel referred to an expectation of “guidance” within 90 days of issuance of PM-0192 but could not identify what type of guidance is expected or from whom. *Id.* at 8:21-25 (“So applications that are subject to this hold would still go through all of those processes, until they are ready for the final decision, and then that’s where they would be held, and then we’re looking for further guidance as to kind of what to do at that point”). Moreover, PM-0192 links

the adjudication hold to the planned “comprehensive review of all policies, procedures, and guidance,” which could be a lengthy process. Dkt. 8-1 at 2.

*Id.*, at \*15. Further, “[e]ven if Defendants’ reasons for delaying adjudication of Plaintiffs’ immigration benefit applications were reasonable, ‘[i]f any agency withholds a required action, it violates § 706(1) regardless of its reason for doing so.’” *Id.* (quoting *Al Otro Lado*, 138 F. 4th, at 1121) (second alteration in original). And the court continued to determine that the memoranda were arbitrary and capricious, and also legislative rules that were not made in compliance with APA notice-and-comment rulemaking:

Plaintiffs’ third cause of action alleges that Defendants’ decision to withhold adjudications pursuant to PM-0192 was arbitrary and capricious. FAC ¶¶ 108-111. Plaintiffs argue that they are likely to succeed on this point because “Defendants did not acknowledge, let alone meaningfully consider, the reliance interests of Form I-765 and Form I-485 applicants harmed by their actions” nor did they “acknowledge the harm done to the United States in preventing physicians in the United States from practicing medicine in the United States.” Dkt. 9-1 at 12-13. The Court agrees.

*Id.*, at \*18;

As discussed in section III.B.1.b.i. above, the policy changes set forth in PM-0192 have substantive consequences for immigrants. Defendants’ argument that PM-0192 is not a final agency action tacitly concedes that notice-and-comment procedures were not followed before promulgating the PM-0192, *see* Dkt. 21 at 20, and Defendants do not directly address Plaintiffs’ claim that the agency was required to follow those procedures. Defendants also fail to invoke any of the exceptions to the notice-and-comment procedures, such as the exceptions for interpretative rules, general statements of policy, and rules of agency organization, procedure or practice. *See* 5 U.S.C. § 553(b)(4)(A). To the extent Defendants’ argument that PM-0192 is not a final agency action is intended to suggest that PM-0192 is not a substantive rule subject to notice-and-comment procedures, that argument fails for the reasons discussed in section III.B.1.b.i. above.

*Id.*, at \*20.

Ultimately, this is a merits issue, not a jurisdictional issue, and the Court should allow the case to move forward to discovery, and summary judgment or a bench trial on Count I of the petitioner’s complaint.

## II. Sections 1252(b)(9) and (g) do not apply to any of petitioner's claims.

For the most part, the petitioner rests on his argument from his initial jurisdictional brief (D.E. 13.) But the government oddly argues that the petitioner is challenging the “commencement” of removal proceedings. That makes no sense. As per the government’s own submission of evidence, the removal order that was entered against the petitioner has been administratively final for years. (D.E. 16-1 and 16-2.) In Count II, the petitioner is seeking process to apply for and obtain withholding only proceedings to seek protection as to third countries that the government may try to remove him to, and such proceedings make up no part of a removal proceeding. See *Riley v. Bondi*, 606 U. S. 259, 272 (2025) (“withholding-only proceedings do not disturb the finality of an otherwise final order of removal”).

As for Counts III and IV, the Supreme Court has made clear that detention challenges in the post-final removal order context are not barred by §§ 1252(b)(9) or (g). Compare *Johnson v. Guzman Chavez*, 594 U. S. 523, 533 n. 4 (2021) (“We have jurisdiction to review the decision below.”) (citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 839–841 (2018) (plurality opinion)); with *id.*, at 547–48 (Thomas, J., concurring except for footnote 4 and concurring in the judgment) (continuing argument that § 1252(b)(9) bars “challenges to detention **during** the removal process”) (emphasis added); see also *Zadvydas v. Davis*, 533 U. S. 678 (2001) (permitting challenges to post-final removal order detention); *id.*, at 688 (rejecting application of § 1252(g)). As for *Alvarez v. ICE*, 818 F. 3d 1194 (CA11 2016), that was a case saying that § 1252(g) prohibits *Bivens* actions. It does not stand for the proposition that habeas challenges to detention are prohibited.

## III. Counts III and IV present proper habeas claims.

A central theme in habeas jurisprudence is the distinction between core and non-core habeas challenges. This distinction can arise between the type of remedies pursued:

Habeas is at its core a remedy for unlawful executive detention. *Hamdi v. Rumsfeld*, 542 S. Ct. 507, 536, 124 S. Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion). The typical remedy for such detention is, of course, release. See, e.g., *Preiser v. Rodriguez*, 411 S. Ct. 475, 484, 93 S. Ct. 1827, 36 L.Ed.2d 439 (1973) (“[T]he traditional function of the writ is to secure release from illegal custody”).

*Munaf v. Geren*, 553 U. S. 674, 693 (2008); accord *Preiser v. Rodriguez*, 411 U. S. 475, 487 (1973) (describing the relief of “immediate release” or a “shortening [of] the length of . . . confinement in prison” as falling “within the core of habeas corpus”).

In addition to immediate release from custody, “[d]eclaratory and injunctive relief are proper habeas remedies.” *Mayorga v. Meade*, No. 24-cv-22131-BLOOM/Elfenbein, 2024 WL 4298815, at \*2 (S.D. Fla. Sept. 26, 2024) (citations omitted); accord *Carafas v. LaVallee*, 391 U. S. 234, 239 (1968) (“[T]he statute does not limit the relief that may be granted to discharge of the applicant from physical custody.”); *id.* (“The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of **relief other than immediate release** from physical custody.”) (emphasis added). The petitioner is clearly making proper habeas claims.

Additionally, the government is seeking to try the merits of the petitioner’s Count III and IV claims within briefing on the Court’s jurisdiction. (D.E. 16, at 11–12.) But that is premature. For example, given that the government has introduced a declaration from a Deportation Officer, that Deportation Officer is now subject to mandatory interrogatories. 28 U. S. C. § 2246 (“If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.”). “[I]f the petition, the return, and the traverse raise substantial issues of fact it is the petitioner’s right to have those issues heard and determined in the manner the statute prescribes.” *Walker v. Johnston*, 312 U. S. 275, 286 (1941).

### Conclusion

The Court has subject matter jurisdiction over every one of the petitioner’s claims.

**Signature Page**

Dated: March 4, 2026

Respectfully submitted,

**s/Alexandra Friz-Garcia**

Fla. Bar No. 0111496  
Fonte Friz-Garcia Immigration Firm, P.L.  
901 Ponce de Leon Blvd, Suite 402  
Miami, FL 33134  
Phone: (305) 446-1151  
afriz@visadoctors.com

**s/ Mark A. Prada**

Fla. Bar No. 91997  
Prada Dominguez, PLLC  
12940 SW 128 Street, Suite 203  
Miami, FL 33186  
o. 786.703.2061  
c. 786.238.2222  
mprada@pradadominguez.com

*Counsel for Petitioner*