No. 25-1201

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SANJAY KRISHNA, MAKSIM PISKUNOV, DANIYAL AHMED FAHEEM, SABITHA KAJULURI, CHANIKYA SAI RAM GOPISETTY, ELENA KOKUEVA, IDRIS SYED, NATHAEL BEKELE,

Plaintiffs-Appellants,

v.

LORI CHAVEZ-DEREMER, Secretary, U.S. Department of Labor,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Massachusetts No. 1:24-cv-10241-MJJ

BRIEF FOR APPELLEE

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Defendant-Appellee does not request oral argument, but Counsel for Defendant-Appellee is ready to appear and present oral argument at the Court's request.

INTRODUCTION

This appeal is now moot. Plaintiffs-Appellants appeal the district court's February 5, 2025 decision granting summary judgment for Defendant-Appellee and holding that the Department of Labor ("DOL") had not unreasonably delayed the adjudication of applications for permanent labor certifications, colloquially known as "PERM" applications, filed on behalf of the Plaintiffs-Appellants. Joint Appendix ("JA") 377. Every PERM application filed on behalf of the Plaintiffs-Appellants that was the subject of the Amended Complaint has now been adjudicated by the DOL, rendering this appeal moot.[1]

In the alternative, if this Court concludes that this appeal is not moot, it should affirm the district court's decision granting summary judgment for Defendant-Appellee. The district court correctly concluded that Plaintiffs-Appellants did not

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[1] *See* Exhibit A, Declaration of Brian Pasternak (June 11, 2025). The case status can also be verified using OFLC's case status online search feature available at https://flag.dol.gov/case-status-search (last visited June 12, 2025). "Because mootness implicates a court's jurisdiction, the court can properly look to facts outside the record so long as those facts are relevant to a colorable claim of mootness." *Manguriu v. Lynch*, 794 F.3d 119, 121 (1st Cir. 2015).

and cannot demonstrate that the DOL unreasonably delayed the adjudication of the PERM applications. JA 375.

Furthermore, the district court did not abuse its discretion in granting Defendant-Appellee's request to extend the time within which to file its opposition to Plaintiffs-Appellants' Motion for Summary Judgment. JA 8 (Dkt. 25). In summary, if this Court finds that it has jurisdiction over this appeal, it should affirm the district court's decision.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review a district court's decision granting a motion for summary judgment under 28 U.S.C. § 1291. On February 5, 2025, the district court correctly held that the DOL had not unreasonably delayed the adjudication of the Plaintiffs-Appellants' PERM applications. JA 353-375. On February 26, 2025, Plaintiffs-Appellants noticed their appeal. JA 377.

The Court does not have jurisdiction over this appeal because, as of May 15, 2025, the DOL has adjudicated all the PERM applications at issue in this case. The appeal is now moot where the court can no longer provide any meaningful relief. *See, e.g.*, *J.S. v. Westerly Sch. Dist.*, 910 F.3d 4, 9 (1st Cir. 2018).

COUNTER-STATEMENT OF THE ISSUES

1. Whether Plaintiffs-Appellants' appeal of the district court's decision is moot where the DOL adjudicated all PERM applications at issue in this litigation.

2. Whether the district court correctly allowed the Defendant-Appellee to file its opposition to Plaintiffs-Appellants' Motion for Summary Judgment after filing its responsive pleading in the case.

3. Whether the district court correctly found that Plaintiffs-Appellants had failed to demonstrate that the DOL had unreasonably delayed the adjudication of Plaintiffs-Appellants' PERM applications.

STATEMENT OF THE CASE

I. Legal Background

A. Statutory and Regulatory History of PERM Applications

Overview of the employment-based immigrant visa process. In order to sponsor a foreign national worker for permanent residence in the United States on the basis of employment (with limited exceptions not applicable here), an employer must conduct a test of the labor market and obtain a certification from the DOL. *See generally* 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.17. This process exists in part to ensure that the "employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1182(a)(5)(A)(i)(II); 20 C.F.R. § 656.17. Upon receipt of the labor certification, petitioning employers may submit an immigrant visa petition to United States Citizenship and Immigration Services ("USCIS") on behalf of the beneficiary employee. 8 U.S.C. § 1154(a)(1)(F). If an immigrant visa is immediately available,

the beneficiary may concurrently submit an application to USCIS to adjust their status to that of a permanent resident (colloquially known as a "green card" application). 8 U.S.C. § 1255(a); 8 C.F.R. § 245.2(a)(2)(i)(C)(2).

The labor certification process. The labor certification process, or "PERM process" is a multi-step process designed to protect the availability of jobs, as well as the wages and working conditions of U.S. workers. *See* 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.1. There is no requirement that, in order for the PERM process to commence, a foreign national be employed with the petitioning employer or be present in the United States. Rather, the first step requires employers to obtain a Prevailing Wage Determination (hereinafter, "PWD") from DOL. *See* 8 U.S.C. § 1182(p); 20 C.F.R. § 656.40. Upon receipt of the PWD, employers can begin their recruitment efforts for U.S. workers, which is a prerequisite to filing the PERM application and must be conducted no more than 180 days before filing the application. *See generally* 20 C.F.R. § 656.17(e). After recruitment has concluded, an employer may submit the PERM application to DOL for certification, where the petitioning employer attests:

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1182(a)(5)(A)(i).

The PERM application is then reviewed and adjudicated by a Certifying Officer at DOL, who determines whether the petitioning employer has met all regulatory requirements, and whether there is a U.S. worker who is willing, able, qualified, and available at the place of the job opportunity. *See* 20 C.F.R. §§ 656.24(a)(1), (b). Critically, the Certifying Officer must consider whether the employment of the foreign national will have an adverse effect upon the wages and working conditions of U.S. workers who are similarly employed. *Id.* § 656.24(b)(3). This determination requires consideration of "labor market information, the special circumstances of the industry, organization, and/or occupation, the prevailing wage in the area of intended employment, and prevailing working conditions, such as hours, in the occupation." *Id.*

Certifying Officers have the authority to certify, deny, or place a PERM application under audit. *See* 20 C.F.R. § 656.24(b); *id.* § 656.20. In the event of a denial, an employer has the opportunity to request reconsideration within 30 days from the issuance of the decision. *Id.* § 656.24(g)(1). The Certifying Officer has the discretion to reconsider the determination or treat it as a request for review with DOL's Board of Alien Labor Certification Appeals ("BALCA") under 20 C.F.R. § 656.26(a); *id.* § 656.24(g)(4). If the Certifying Officer upholds his or her decision on reconsideration, the employer has the opportunity to request review with BALCA

within 30 calendar days of the issuance of the reconsideration decision. *Id.* § 656.26(a). Alternatively, an employer can forgo a request for reconsideration and directly file a request for review with BALCA. *Id.* §§ 656.26(a)(1)-(2).

B. Review Under the APA

The Administrative Procedure Act ("APA") requires federal administrative agencies to address matters presented to them within a reasonable time. *See* 5 U.S.C. § 555(b). The APA further instructs federal courts to "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1). However, the scope of review is limited: "§ 706(1) empowers a court only to compel an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing how it shall act." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (quotations omitted). Thus, "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*." *Id.* (emphasis in original).

The First Circuit has adopted the *TRAC* factors to evaluate claims of agency delay. *See Towns of Wellesley, Concord & Norwood, Mass. v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) (citing *Telecomms. Research & Action Ctr. v. FCC ("TRAC")*, 750 F.2d 70, 79 (D.C. Cir. 1984)). The test articulated in *TRAC* analyzes the following six factors:

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

> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason,
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake,
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority,
> (5) the court should also take into account the nature and extent of the interest 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."

TRAC, 750 F.2d at 80 (internal citations omitted).

II. Factual and Procedural Background

On July 13, 2023, Sanjay Krishna ("Mr. Krishna") filed a PERM application with the DOL. JA 358. On January 29, 2024, when the application had been pending for only 201 days, Mr. Krishna filed an action claiming unreasonable delay under the APA in the District Court for the District of Massachusetts. JA 5. On April 15, 2024, Mr. Krishna filed a Motion for Summary Judgment.[2] JA 6 (Dkt. 15). On May 3, 2024, an amended complaint was filed, adding eight additional plaintiffs and an additional claim for unlawful withholding under the APA. JA 7 (Dkt. 18). On May 14, 2024, the DOL filed a motion seeking an extension of time to file a responsive

[2] Plaintiffs-Appellants argue that under Local Rule 7.1(b)(2) the opposition to the Motion for Summary Judgment was due 21 days later on May 6, 2024, which was eight days before the answer to the original complaint was due. Pl. Br. 15; *but see* Fed. R. Civ. P. 56, advisory committee notes ("If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.").

pleading and its opposition to the Motion for Summary Judgment.[3] JA 7 (Dkt. 23). On May 16, 2024, the district court extended the deadline for a responsive pleading to May 31, 2024 and the opposition to the Motion for Summary Judgment to June 21, 2024. JA 7 (Dkt. 25). On May 31, 2024, the DOL filed a Motion to Dismiss. JA 8 (Dkt. 26). On June 13, 2024, Plaintiffs-Appellants filed an opposition to the Motion to Dismiss. JA 8 (Dkt. 28). On June 21, 2024, the DOL filed its opposition to the Motion for Summary Judgment and a Cross-Motion for Summary Judgment. JA 8 (Dkt. 29). On July 19, 2024, Plaintiffs-Appellants filed their opposition to the Cross-Motion for Summary Judgment. JA 8 (Dkt. 34). The district court held a hearing on the motions on October 8, 2024, where Plaintiffs-Appellants conceded their unlawful withholding claim under the APA was moot.

On February 5, 2025, the district court granted the Defendant-Appellee's Cross-Motion for Summary Judgment. JA 353. At the time the district court entered summary judgment for the DOL, the agency had processed the applications for all

[3] On April 22, 2024, before the amended pleading was filed, Mr. Krishna's counsel indicated "we are happy to agree to an extension to respond to the complaint and pending MSJ for 30 days from the date of the answer with the understanding there will be no motions to stay consideration of the MSJ while the court considers any MTD. In other words, we will agree to the extension if DOL agrees to file its MTD and MSJ response at the same time." Then, on May 8, 2024, counsel for Plaintiffs-Appellants informed the DOL that "I can only assume your client rejected our condition on the extension. Our offer is now rescinded." Dkt. 24 at 2. Despite this, the DOL consented to every extension of time requested by Plaintiffs-Appellants in the district court and before this Court.

but three of the Plaintiffs-Appellants. JA 358. Accordingly, the district court held that the unreasonable delay claims brought on behalf of those individuals were moot. JA 358 (citing *Matt v. HSBC Bank USA, N.A.*, 783 F.3d 368, 372 (1st Cir. 2015)). As to the remaining Plaintiffs-Appellants, the district court applied the *TRAC* factors and found that the DOL follows a rule of reason, Congress has not set forth a clear timeline for the adjudication of PERM applications, the Plaintiffs-Appellants have not demonstrated sufficient harm as compared to other PERM applicants, and expediting the PERM applications would conflict with competing DOL priorities. *Id.*

On February 25, 2025, Plaintiffs-Appellants filed their Notice of Appeal. JA 10. Since then, the DOL has processed the remaining applications, mooting those claims as well. *See Matt*, 783 F.3d at 372. There are currently no PERM applications that are subject to the Amended Complaint pending with the DOL.

SUMMARY OF THE ARGUMENT

This appeal is moot due to the DOL's adjudication of the PERM applications that are the subject of this litigation. In the alternative, this Court should affirm the district court's grant of summary judgment in favor of Defendant-Appellee. Plaintiffs-Appellants' argument that the district court erred in extending the time for the DOL to file its opposition to Plaintiffs-Appellants' Motion for Summary Judgment has no merit. Each of the *TRAC* factors weigh in favor of the DOL;

Plaintiffs-Appellants have failed to establish that their PERM applications have been unreasonably delayed. The district court was correct in granting summary judgment in favor of the Defendant-Appellee. Thus, if this Court concludes that it has jurisdiction, it should affirm the district court's decision.

STANDARD OF REVIEW

This Court reviews a grant of an extension of time for abuse of discretion. *Bennett v. City of Holyoke*, 362 F.3d 1, 4 (1st Cir. 2004). This is a deferential standard. *Tubens v. Doe*, 976 F.3d 101, 104 (1st Cir. 2020). "Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." *Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988).

This Court reviews a grant or denial of summary judgment *de novo*. *Murray v. Kindred Nursing Centers W. LLC*, 789 F.3d 20, 25 (1st Cir. 2015). The standard does not change by the incidence of cross-motions for summary judgment. *Blackie v. State of Me.*, 75 F.3d 716, 721 (1st Cir. 1996). This Court is not bound by the district court's reasoning and may affirm the decision of the district court on any ground supported by the record. *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999). "Summary judgment is appropriate when the moving party shows that 'there is no genuine dispute as to any material fact and the movant

is entitled to judgment as a matter of law.'" *Joseph v. Lincare, Inc.*, 989 F.3d 147, 157 (1st Cir. 2021) (quoting Fed. R. Civ. P. 56(a)).

ARGUMENT

I. This appeal is moot.

Plaintiffs-Appellants appeal the district court's grant of summary judgment in favor of Defendant-Appellees. The stated goal of the Amended Complaint was for the "DOL to take administrative action on Plaintiff's pending application[4] within 7 days." JA 49 at ¶ 310. Because the DOL has already adjudicated each of the PERM applications that are the subject of the Amended Complaint, this appeal is now moot. *See Am. C.L. Union of Massachusetts v. U.S. Conf. of Cath. Bishops*, 705 F.3d 44, 52–53 (1st Cir. 2013) (dismissal is required where "events have transpired to render a court opinion merely advisory") (quoting *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003)); *see also Jean v. Garland*, 636 F. Supp. 3d 221, 223 (D. Mass. 2022) (dismissing complaint alleging unreasonable delay in immigration applications where the government subsequently adjudicated those applications). Mootness is a threshold ground which should be decided before any determination on the merits. *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67 (1997).

Because Article III restricts the Court's jurisdiction to "Cases" and

[4] The Amended Complaint refers to the "Plaintiff's pending application" in the singular rather than the plural. Plaintiffs-Appellants each were the beneficiaries of different PERM applications identified in the Amended Complaint.

"Controversies," U.S. Const. art. III § 2, "a suit becomes moot 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). "The doctrine of mootness enforces the mandate 'that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Mangual*, 317 F.3d at 60 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974)). "[A] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome … [or] the court cannot give any effectual relief to the potentially prevailing party." *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 157 (1st Cir. 2021) (quoting *Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 58 (1st Cir. 2016)). Because the PERM applications have already been adjudicated and Plaintiffs have received all of the relief sought in their Amended Complaint, there are no longer any live issues in the case.

Plaintiffs-Appellants' request for a declaratory judgment regarding the time for the DOL to adjudicate PERM applications does not overcome the fact that their claims are moot.[5] Issuance of a declaratory judgment deeming past conduct illegal

[5] Plaintiffs-Appellants brought their claims under the APA. Amended Complaint ¶ 12. With their APA claim being moot, the Court does not have subject matter jurisdiction to issue a declaratory judgment under the Declaratory Judgment Act. *See Schilling v. Rogers*, 363 U.S. 666, 677 (1960) ("The Declaratory Judgment Act is not an independent source of federal jurisdiction; the availability of such relief

is impermissible as it would be merely advisory. *State of Me. v. U.S. Dep't of Lab.*, 770 F.2d 236, 239 (1st Cir. 1985). "For declaratory relief to withstand a mootness challenge, the facts alleged must 'show that there is a substantial controversy … of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *American Civil Liberties Union of Massachusetts*, 705 F.3d at 53–54 (quoting *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975)). Plaintiffs-Appellants have not and cannot show any facts that are substantial or of sufficient immediacy to warrant a declaratory judgment. Just because Plaintiffs-Appellants could theoretically be the beneficiary of another PERM application filed in the future does not entitle them to a declaratory judgment on PERM application adjudication times. *See Harris v. Univ. of Massachusetts Lowell*, 43 F.4th 187, 192 (1st Cir. 2022) (holding that a student that was no longer enrolled at a university was barred by mootness to receive a declaratory judgment on university policy even though the student could re-enroll in the future); *see also Calvary Chapel of Bangor v. Mills*, 52 F.4th 40, 47 (1st Cir. 2022) (holding that the plaintiffs were not entitled to a declaratory judgment because the defendants could theoretically issue new COVID related mandates).

Plaintiffs-Appellants have the burden to demonstrate that an exception to the

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presupposes the existence of a judicially remediable right."); *see also Duclerc v. Massachusetts Dep't of Correction*, No. CIV.A. 10-12050-DJC, 2012 WL 6615040, at *10 (D. Mass. Dec. 18, 2012) (holding that when claims are moot and there is no remaining cause of action, the court cannot issue a declaratory judgment).

mootness doctrine applies and they cannot meet that burden. *See Lowe v. Gagné-Holmes,* 126 F.4th 747, 756 (1st Cir. 2025) (citing *Gulf of Maine Fisherman's All. v. Daley*, 292 F.3d 84, 89 (1st Cir. 2002)). "Unless an exception to the doctrine applies, to do otherwise would render an advisory opinion, which Article III prohibits." *Pietrangelo v. Sununu*, 15 F.4th 103, 105 (1st Cir. 2021) (citing *American Civil Liberties Union of Massachusetts*, 705 F.3d at 52–53). First, Plaintiffs-Appellants cannot show that the "capable of repetition yet evading review exception" to the mootness doctrine applies. *See Lowe*, 126 F.4th at 759. "[T]he capable-of-repetition doctrine applies only in exceptional situations." *American Civil Liberties Union of Massachusetts*, 705 F.3d at 57 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). An APA claim of unreasonably delay on PERM applications is not an exceptional situation. To demonstrate that the exception applies, Plaintiffs-Appellants "must show that '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Gulf of Maine Fisherman's Alliance*, 292 F.3d at 89 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). Plaintiffs-Appellants must show both and the burden is on Plaintiffs-Appellants to show that the exception applies. *Calvary Chapel of Bangor*, 52 F.4th at 47. To the first factor, claiming that an administrative agency is taking too long to adjudicate

an application requiring judicial intervention under the APA while simultaneously claiming that the same adjudication is too short to litigate the claim is illogical. A claim for unreasonably delay is not "inherently transitory" like an election, a pregnancy, or a temporary restraining order. *See, e.g.*, *American Civil Liberties Union of Massachusetts*, 705 F.3d at 57 (collecting cases). Plaintiffs-Appellants must show "a realistic threat [exists] that no trial court will ever have enough time to decide the underlying issue." *Harris*, 43 F.4th at 194 (quoting *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001)). This they cannot do. This Court has recognized that a year and a half or two years would not allow the exception to mootness to apply. *Lowe*, 126 F.4th at 759; *see also Fund For Animals, Inc. v. Hogan*, 428 F.3d 1059, 1064 (D.C. Cir. 2005).

Nor can Plaintiffs-Appellants show that they will be subject to the same delay on a PERM application filed at some point in the future. The "capable of repetition" exception requires the Plaintiff-Appellants to "show a 'reasonable expectation' or 'demonstrated probability' that [they] will again be subjected to the alleged illegality.'" *Harris*, 43 F.4th at 195 (quoting *American Civil Liberties Union of Massachusetts*, 705 F.3d at 57). "Just as standing cannot rest on 'conjectural' or 'hypothetical' harm … avoiding mootness cannot rest on 'speculation' about some future potential event." *Harris*, 43 F.4th at 195 (first citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), then citing *Pietrangelo*, 15 F.4th at 106). Plaintiffs-

Appellants cannot show that there is a "reasonable expectation" or "demonstrated probability" that they will need their employers to file PERM applications on their behalf in the future, and that those applications would be unreasonably delayed. Indeed, all of the PERM applications that are the subject of this litigation have been certified, so it is unclear why Plaintiffs-Appellants would require an additional PERM application in the future.

The district court found that claims of unreasonable delay as to the six PERM applications adjudicated prior to its decision were moot. JA 358 (citing *Matt*, 783 F.3d at 372). Plaintiffs-Appellants do not challenge this in their opening brief. "[A]rguments not made in an opening brief on appeal are deemed waived." *Brox v. Hole*, 83 F.4th 87, 97 n.2 (1st Cir. 2023) (citing *United States v. Vanvliet*, 542 F.3d 259, 265 n.3 (1st Cir. 2008)). Plaintiffs-Appellants also failed to make any argument before the district court that those claims were not moot; Plaintiffs-Appellants have waived the argument regarding mootness below and on appeal. *See United States v. Colon-De Jesus*, 85 F.4th 15, 25 (1st Cir. 2023). Plaintiffs-Appellants cannot now argue that the claims relating to the PERM applications that were adjudicated after the district court's decision are not also moot. Plaintiff-Appellants have waived any argument to the contrary. *Id.*

For these threshold reasons, Plaintiffs-Appellants' appeal should be dismissed as moot.

II. The district did not err in extending the time for the DOL to file its opposition to the Motion for Summary Judgment.

Plaintiffs-Appellants argue that the district court abused its discretion by granting the DOL an extension to file its opposition to their Motion for Summary Judgment. App. Br. 16. Plaintiffs-Appellants are wrong.

First, Mr. Krishna was the only plaintiff when the Motion for Summary Judgment was filed. JA 6 (Dkt. 15). The Amended Complaint adding the additional Plaintiffs-Appellants was filed after the Motion for Summary Judgment. JA 6 (Dkt. 18). It was not renewed by the additional plaintiffs after they were added through the Amended Complaint. The operative complaint when the Motion for Summary Judgment was filed was the original Complaint and it was superseded when the Amended Complaint was filed. *See InterGen N.V. v. Grina*, 344 F.3d 134, 145 (1st Cir. 2003); *see also Kolling v. Am. Power Conversion Corp.*, 347 F.3d 11, 16 (1st Cir. 2003) (the "amended complaint completely supersedes [the] original complaint, and thus the original complaint no longer performs any function in the case"). Any motions related to the prior complaint become moot when an amended complaint is filed. *See, e.g., Scott v. Oklahoma Student Loan Auth.*, No. 23-CV-10841-PBS, 2024 WL 4765692, at *2 (D. Mass. Feb. 7, 2024) (holding that pending motions based on original complaint are moot when amended complaint is filed); *see also* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. Civ. § 1476 (3d ed.) ("Once an amended pleading is interposed, the original pleading no longer

performs any function in the case and any subsequent motion made … should be directed at the amended pleading."). Furthermore, because the other Plaintiffs-Appellants were not parties to the case when the Motion for Summary Judgment was filed by Mr. Krishna, the motion did not apply to their complaint. *See Lopez-Carrasquillo v. Rubianes*, 230 F.3d 409, 412 (1st Cir. 2000) (holding that summary judgment filed before amending a complaint cannot be entered relative to parties that were added to the case through an amended complaint filed after the motion for summary judgment).

Plaintiffs-Appellants argue that the deadline for filing a response to their Motion for Summary Judgment was May 6, 2024, 21 days after the motion was filed. App. Br. 15 (citing Local Rule 7.1(b)(2)). But the local rule clearly states that the deadline is 21 days "or another period is fixed by rule or statute, or by order of the court." Local Rule 7.1(b)(2). Plaintiffs-Appellants' preferred May 6, 2024 deadline fell before the responsive pleading was due; the original deadline for the answer or responsive pleading was May 14, 2024, but was extended to May 17, 2024 when Plaintiffs filed their Amended Complaint. Fed. R. Civ. P. 15(a)(3). The earliest deadline for opposition to the Motion of Summary Judgment was not until 21 days after the responsive pleading was due. Fed. R. Civ. P. 56 advisory committee notes ("If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after

the responsive pleading is due.").[6] The district court's order setting the responsive pleading due date as May 31, 2024 with a deadline for responding to the Motion for Summary Judgment 21 days later, on June 21, 2024 was correct and consistent with the Federal Rules of Civil Procedure.

It would have been premature and unjust for the district court to rule on the Motion for Summary Judgment before Defendant-Appellee's answer was due. Courts may deny or defer on motions for summary judgment that are filed before a responsive pleading is due. 10A Charles Alan Wright & Arthur Miller, Federal Practice And Procedure § 2717 Motion for Summary Judgment by Claimant (4th ed. 2016) ("[w]hen the claimant seeks summary judgment at a very early stage in the litigation, the court may be reluctant to grant the motion, despite its technical timeliness under Rule 56(b). Deferring a motion is a particularly appropriate step for the court to take if it believes that the summary-judgment request is premature."); *First Am. Bank, N. A. v. United Equity Corp.*, 89 F.R.D. 81, 87 (D.D.C. 1981). The district court did not abuse its discretion in granting Defendant-Appellee's request for an extension of the deadline to oppose the Motion for Summary Judgment, enabling them to file their opposition after filing the responsive pleading.

Plaintiffs-Appellants' argument related to "excusable neglect" is inapposite.

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[6] "Although not binding, the interpretations in the Advisory Committee Notes 'are nearly universally accorded great weight in interpreting federal rules.'" *Horenkamp v. Van Winkle And Co.*, 402 F.3d 1129, 1132 (11th Cir. 2005) (citation omitted).

See App. Br. 17 (citing *Nnodim v. U.S. Bank Tr. Ass'n as Tr. for LB-Igloo Series IV Tr.*, No. 22-CV-11125-DLC, 2024 WL 1675688, at *1 (D. Mass. Mar. 29, 2024)). A district court analyzes excusable neglect if the motion is made after the time to act has expired. Fed. R. Civ. P. 6(b)(1)(B). As noted above, however, it is not clear that Defendant-Appellee's motion was, in fact, out of time. In any event, while the district court did not explicitly analyze "excusable neglect" under Fed. R. Civ. P. 6(b)(2) in its order, Plaintiffs-Appellants fail to demonstrate that the district court erred in granting the extension request under the circumstances. *See Tubens v. Doe*, 976 F.3d 101, 105 (1st Cir. 2020). First, Plaintiffs-Appellants were not prejudiced by the extension. *See Aguiar-Carrasquillo*, 445 F.3d at 25 (holding that an unopposed motion for summary judgment is not automatically granted). Second, the length of delay was minimal; Defendant-Appellee filed their opposition 21 days after their responsive pleading was filed. Third, with respect to the reason for the delay, as explained above, the deadline for filing an opposition was unclear given the procedural history of the case. Lastly, Defendant-Appellee acted in good faith in filing its request for an extension before the deadline for filing a responsive pleading. The district courts did not abuse its discretion in granting the request for an extension to file the opposition.

While the district court did not err, any purported error in the district court's order extending the date for the Government to respond the Plaintiff's Motion for

Summary Judgment would be harmless. *See Dusel v. Factory Mut. Ins. Co.*, 52 F.4th 495, 511 (1st Cir. 2022) ("We may affirm in spite of an erroneous evidentiary ruling if the error was harmless, meaning that it is highly probable that the error did not affect the outcome of the case.") (internal quotation marks omitted) (quoting *Tersigni v. Wyeth*, 817 F.3d 364, 369 (1st Cir. 2016)); *see also* Fed. R. Civ. P. 61 ("Unless justice requires otherwise, no error in admitting or excluding evidence -- or any other error by the court or a party -- is ground for granting a new trial .... At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). A motion for summary judgment "does not automatically give rise to a grant of summary judgment." *Aguiar-Carrasquillo v. Agosto-Alicea*, 445 F.3d 19, 25 (1st Cir. 2006). "[T]he district court [is] still obliged to consider the motion on its merits, in light of the record as constituted, in order to determine whether judgment would be legally appropriate." *Id.* (quoting *Mullen v. St. Paul Fire & Marine Ins. Co.*, 972 F.2d 446, 452 (1st Cir. 1992)). "It is well-settled that 'before granting an unopposed summary judgment motion, the court must inquire whether the moving party has met its burden to demonstrate undisputed facts entitling it to summary judgment as a matter of law.'" *Id.* (quoting *Lopez v. Corporacion Azucarera de Puerto Rico*, 938 F.2d 1510, 1517 (1st Cir. 1991)). Plaintiffs-Appellants were not prejudiced where the district court took all of the briefing into consideration before ruling on the cross-motions. The district court

correctly concluded that the Plaintiffs-Appellants failed to meet their burden for summary judgment. Accordingly, Plaintiffs-Appellants' argument on appeal that the district court erred in allowing an extension for Defendant-Appellee to file its opposition to summary judgment is meritless.

The district court did not abuse its discretion in granting an extension to file an opposition to Plaintiffs' Motion for Summary Judgment.

III. The district court correctly held that the DOL did not unreasonably delay the adjudication of Plaintiffs' PERM applications.

Plaintiffs-Appellants have failed to demonstrate that DOL unreasonably delayed the adjudication of the PERM applications filed on their behalf. The APA requires federal agencies to adjudicate matters before them "within a reasonable time." 5 U.S.C. § 555(b). A federal court is permitted to "compel agency action unlawfully withheld or unreasonably delayed" in limited circumstances. 5 U.S.C. § 706(1). Lawsuits under Section 706(1) "can be maintained where there is a clear, mandatory, non-discretionary duty to act." *King v. Off. for C.R. of U.S. Dep't of Health & Hum. Servs.*, 573 F. Supp. 2d 425, 429 (D. Mass. 2008) (internal citation and quotation marks omitted).

In support of their unreasonable delay claim, Plaintiffs-Appellants cited the factors articulated by the D.C. Circuit Court of Appeals in *TRAC*, 750 F.2d at 79. *See* JA 42-43 at ¶¶ 249, 254. The First Circuit has adopted the *TRAC* test to evaluate claims of agency delay. *See Towns of Wellesley, Concord & Norwood, Mass.*, 829

F.2d at 275. The test articulated in *TRAC* analyzes the following six factors:

> (1) the time agencies take to make decisions must be governed by a "rule of reason,"
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason,
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake,
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority,
> (5) the court should also take into account the nature and extent of the interest 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."

TRAC, 750 F.2d at 80 (internal citations omitted). As set forth below, each factor weighed in favor of Defendant-Appellee.

TRAC Factor 1 – "The Rule of Reason." The district court correctly ruled that the first factor weighs in favor of the Defendant-Appellee. JA 363. "The rule of reason is the first and most important *TRAC* factor." *Novack v. Miller*, 727 F. Supp. 3d 70, 77 (D. Mass. 2024) (quoting *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008)). Whether or not the agency abides by a rule of reason "cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part . . . upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Milligan v. Pompeo*, 502 F. Supp. 3d 302, 317–318 (D.D.C. 2020) (quoting *Mashpee Wampanoag Tribal*

Council, Inc. v. Norton, 336 F.3d 1094, 1102 (D.C. Cir. 2003)).

Plaintiffs-Appellants alleged that "DOL does not follow the rule of reason it declared in its rulemaking." JA 43. Plaintiffs-Appellants further contend that "DOL has no policy that governs how long it takes to decide a PERM application." *Id.* at ¶ 255. Plaintiffs-Appellants also allege that DOL does not have a rule of reason for adjudicating PERM applications submitted through the Foreign Labor Application Gateway ("FLAG")[7]. JA 41. According to Plaintiffs-Appellants, statistical analysis shows that DOL "has no guardrails, limits, or controls governing the actual time it takes to decide a single PERM application." JA 28-30 at ¶¶ 100-12.

Plaintiffs-Appellants' arguments with respect to the purported absence of a rule of reason are without merit. DOL posts the processing times for PERM applications on its public-facing website. *See* PERM Processing Times, https://flag.dol.gov/processingtimes (last visited June 10, 2025). Each month, the Office of Foreign Labor Certification ("OFLC") receives and processes thousands of PERM applications from employers. JA 241-242 (ECF No. 15-2 at 191:17-192:3); *see* JA 312-315. However, due to a combination of (1) rising caseload in the PERM program and (2) OFLC's responsibilities in administering other foreign labor certification programs in which the caseloads have increased even more and in which

[7] "FLAG" is the online system for the submission of PERM applications that began accepting applications on June 1, 2023.

there are short statutory and regulatory deadlines for adjudication and funding constraints, OFLC's backlog of pending PERM applications—and the average processing times—generally continue to increase. JA 246-247 at 196:13-197:4.

OFLC adjudicates PERM applications based on the month filed, that is, all cases filed in the same month are assigned for review at the same time, and that filing month becomes the "processing month." *See* JA 169 at 15-21. OFLC has determined that the "processing month" method is more efficient and creates more consistent results than a straight first-in/first-out processing method. *Id.* at 25-34:2. Immediately after an employer submits a new PERM application, the application undergoes an electronic (fully automated) sponsorship review process. JA 166 at 32-25, JA 167 at 17-22. Due to the volume of pending PERM applications, once sponsorship review is completed, the new application will remain unassigned, "in a waiting queue," until OFLC reaches its filing month. JA 167 at 23- JA 168 at 3.

While staff work through the current processing month, the applications for the next processing month are reviewed for audit flag matches. JA 168 at 10-21. Matched cases include those that meet audit criteria and those that are placed on hold (for example, cases designated by the Inspector General). JA 178 at 1-9. Matched cases are placed in an assignment queue for contractor analyst review. JA 169 at 5-9. Unmatched cases are placed into an assignment queue for federal employee analysts. *Id.* at 9-11.

When the federal analysts have worked the current processing month caseload down to about a thousand applications, the cases in the unmatched processing queue for the new processing month are assigned "as equally as possible . . . to all the available immigration program analysts." *Id.* at 15-22. An analyst's assignment may include a group assignment consisting of all PERM applications filed by the same employer at any time during the processing month. *Id.* at 23-25. A federal analyst's assignment also includes matched cases once the contract analysts complete their reviews of the matched cases and return them to the assignment queue for federal analysts. JA 170 at 2-5, 178 at 18. Once the federal analysts receive case assignments for the new processing month, they continue working to close out the prior month's cases while beginning the new month. *Id.* at 6-11. The federal analysts are also responsible for "straggler" cases that they were assigned. JA 227 at 22. A straggler is a PERM application with a filing date earlier than the processing month, such as the approximately one thousand pending PERM applications still awaiting adjudication when a new processing month is opened and assigned. *Id.* A federal analyst may organize her assigned cases for the processing month in any way she wants to make processing easier and achieve daily production standards. JA 170 at 8-11. Thus, all cases filed in the processing month are simultaneously assigned to analysts and are not necessarily processed in filing date order; "anything that is in an active processing month can be issued at any time." JA 185 at 22-24.

As of March 4, 2024, OFLC had 12 federal analysts reviewing PERM applications. JA 192 at 4-7. As of March 4, 2024, there was also a flex team that was moved between PERM and other visa programs as needed and had been assigned to work H-2B cases during the peak filing season for the H-2B temporary non-agricultural visa program. JA 191 at 3-12. As of March 4, 2024, the flex team consisted of six federal analysts. JA 192 at 8-11. Each federal analyst has a goal to issue 35 to 42 PERM decisions per full workday. JA 198 at 7-18. The next workday, the analyst must review stragglers in oldest to latest priority month order, and for each straggler, must either process it or enter a case note stating the reason it still needs to be held, before working on processing month cases. *See* JA 170 at 12-18, JA 228 at 9-13. Once the federal analyst completes review of a PERM application, she must issue a decision—or case action—to either certify, deny, refer for audit, or document a withdrawal by the employer. JA 171 at 13-19. DOL has a long-standing policy to refrain from expediting the processing of PERM applications based on the circumstances of any individual employer, foreign worker, or foreign worker's family member and it does not have the authority or resources to verify the accuracy of a request to expedite an application. JA 266 at 5-13; *see also* Employment and Training Administration, OFLC, *Frequently Asked Questions, Permanent Labor Certification Round 11* (Aug. 3, 2010) ("The Office of Foreign Labor Certification (OFLC), as a matter of long standing policy, does not expedite the processing of

applications due to the particular circumstances of any individual employer, foreign worker, or a family member.")

"Absent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable" "is entitled to considerable deference." *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 555 (D.C. Cir. 2015) (internal quotations and citations omitted). DOL's decision-making here "involves a complicated balancing of a number of factors which are peculiarly within [an agency's] expertise." *Lincoln v. Vigil*, 508 U.S. 182, 190–91 (1993); *see Massachusetts v. E.P.A.*, 549 U.S. 497, 527 (2007) ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."). Courts should defer to the DOL's determination on how to best handle processing thousands and thousands of PERM applications. *See Caswell v. Califano*, 583 F.2d 9, 15 (1st Cir. 1978) ("[C]ourts must normally defer to agency judgment to allow the evolution of procedures as need arise"); *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1102 (whether delay is unreasonable "cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part ... upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency").

Plaintiffs-Appellants continue to argue that a statistical report by their expert

shows that DOL does not follow a "month processing rule of reason." App. Br. 22. A "Court's determination that [a processing method] is a rule of reason is, however, based on the policy's rationale, not on its efficacy." *Celebi v. Mayorkas*, 744 F. Supp. 3d 100, 106 (D. Mass. 2024) (citing *Ctr. for Sci. in the Pub. Int. v. United States Food & Drug Admin.*, 74 F. Supp. 3d 295, 300 (D.D.C. 2014) (requiring only that defendants provide a "rhyme or reason" for their policy and delay)).

As of June 1, 2025, DOL is processing PERM applications filed in January 2024. PERM Processing Times, https://flag.dol.gov/processingtimes (last visited June 10, 2025). The website instructs that if an "application was filed more than three months prior to the month posted, [a petitioner or beneficiary] may contact the OFLC PERM Helpdesk for a status on the application at plc.atlanta@dol.gov." *Id.* In this case, DOL was well within the processing time window posted on its website, not taking longer to process the PERM applications at issue than other similarly situated PERM applications. Plaintiffs-Appellants fail to demonstrate DOL does not adhere to a rule of reason when processing PERM applications. *See Chuttani v. United States Citizenship & Immigr. Servs.*, No. 3:19-CV-02955-X, 2020 WL 7225995, at *4 (N.D. Tex. Dec. 8, 2020) ("The Court is reluctant to hold unreasonable any delay in adjudicating an immigration benefit application that's less than the upper limit of [the agency's] current estimated processing time for that particular application form and will not do so here.").

In fact, it is clear that the process OFLC uses to adjudicate employers' PERM applications based on month of submission and without preference to any individual application, constitutes a rule of reason. Plaintiffs-Appellants' argument that the DOL does not process PERM applications in a straight first-in/first-out order does not automatically render the DOL's processing method unreasonable.

The reality is each PERM application at issue in this case was pending for less than the published processing times and Plaintiffs-Appellants' claims contained nothing more than conclusory allegations criticizing the month processing method. Each PERM applications at issue in this lawsuit was certified in accordance with posted processing times, demonstrating that PERM processing is governed by a rule of reason. The first *TRAC* factor therefore weighs in favor of Defendant-Appellee.

TRAC Factor 2 – Congressional Timetable. "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 th[e] rule of reason." *Am. Acad. of Pediatrics v. United States Food & Drug Admin.*, 330 F. Supp. 3d 657, 665 (D. Mass. 2018) (quoting *TRAC*, 750 F.2d at 80). The district court was correct in finding that Congress has not set an explicit timetable or processing goal. JA 368. Plaintiffs-Appellants contend that 8 U.S.C. § 1182(a)(5)(A) demonstrates that Congress expected DOL to adjudicate PERM applications in a timely enough fashion to ensure the protection of the American labor force. Pl. Br. 26-27. Plaintiffs-

Appellants further ask the Court to declare that any processing time over 60 days is unreasonable. *Id.* There is no congressional timetable for the adjudication of PERM applications, JA 196 at 7-13, and Plaintiffs-Appellants cannot show otherwise. Before the district court, Plaintiffs-Appellants instead attempted to deflect from this reality by referencing the preamble to a rule DOL proposed in 2002[8] and promulgated in 2004.[9] The preamble to the proposed rule stated that "[i]f an application is not denied or selected for audit we anticipate that the application will be certified and returned to the employer within 21 days." 67 FR 30466-01, 30471. This language, however, did not include an administratively (let along Congressionally) imposed time-period for completing the permanent labor certification process. *Id.* at 30491-30505 (proposed revision of 20 C.F.R. part 656). The preamble, or Supplementary Information, to the final rule similarly included an aspirational statement that "[w]e anticipate an electronically filed application not selected for audit will have a computer-generated decision within 45 to 60 days of the date the application was initially filed." 69 FR 77326-01, 77328. As in the proposed rule, the final rule did not include an administratively-imposed time-period for completing the permanent labor certification process. *Id.* at 77386-77401

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[8] *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, NPRM, 67 Fed. Reg. 30466 (May 6, 2002)
[9] *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,* Final Rule, 69 Fed. Reg. 77326 (Dec. 27, 2004).

(revision of 20 C.F.R. part 656).

As explained in *Aziz v. Chadbourne*, an aspirational processing goal does not impose an enforceable requirement upon an agency to adjudicate immigration benefit applications within a certain time frame. *See* No. CIV.A.07-11806GAO, 2007 WL 3024010, at *2 (D. Mass. Oct. 15, 2007) (O'Toole, J.) (aspirational processing goal from Congress of six months did not create an enforceable standard "[b]ecause Congress stopped short of mandating a time limit"). In attempting to create a mandate from an aspirational goal suggested more than 19 years ago during agency rulemaking (not by Congress), Plaintiffs-Appellants disregard both the significant, continuous growth in the number of PERM applications and the corresponding growth in the backlog of PERM applications. OFLC began fiscal year 2020 with 34,677 PERM applications pending; during the year it received 115,113 new applications and processed 94,019 applications; and it ended the year with a backlog of 56,066 applications. JA 311, 315. In fiscal year 2021, OFLC received 120,660 new applications, processed 108,264 applications, and ended with 68,052 pending applications. JA 312. In fiscal year 2022, OFLC received 141,951 new PERM applications, processed 104,600 applications, and ended the year with a 105,612-case backlog. JA 313. In fiscal year 2023, OFLC received 158,987 new applications, processed 116,427 applications, and ended with 146,179 pending applications. JA 314. Under OFLC's processing month procedure, as of May 8,

2025, its analysts were processing PERM applications filed in January 2024, and reported an average processing time (from filing until adjudication for nonaudited cases) of 499 days. *See* PERM Processing Times, https://flag.dol.gov/processingtimes (last visited June 10, 2025).

OFLC's pace of adjudication of PERM applications reflects the significant increase in applications that has outpaced budget growth, and OFLC's responsibilities with respect to other foreign labor certification programs, including temporary and seasonal labor programs in which there are short statutory and regulatory deadlines for adjudication.[10] In light of these factors, OFLC's system for adjudicating applications by filing month is an equitable and efficient means for processing them.

In any event, contrary to Plaintiffs-Appellants' contention otherwise, by the time they were adjudicated, each of the PERM applications subject to this litigation had been pending for less than the posted processing time. Therefore, the purported delays cannot be deemed unreasonable in this case. *See Skalka v. Kelly*, 246 F. Supp. 3d 147, 153–54 (D.D.C. 2017) (noting that a two-year delay "does not typically require judicial intervention"); *Ghadami v. United States Dep't of Homeland Sec.*, No. CV 19-00397 (ABJ), 2020 WL 1308376, at *8 (D.D.C. Mar. 19, 2020)

[10] For example, the H-2A and H-2B programs for temporary and seasonal workers impose short deadlines on OFLC's processing and adjudication of applications. *See, e.g.*, 8 U.S.C. § 1188(c) (H-2A); 20 C.F.R. §§ 655.31, 655.33 (H-2B).

(collecting cases where courts have granted motions to dismiss claims of unreasonable delay where plaintiffs alleged delays between 14 months and five years). In this case, all of the PERM applications were adjudicated in less than 16 months. Plaintiffs-Appellants have failed to demonstrate that the DOL's processing times are unreasonable or egregious. *Anversa v. Partners Healthcare Sys., Inc.*, 835 F.3d 167, 178 (1st Cir. 2016) ("The duration of administrative proceedings, without more, cannot suffice to demonstrate that an agency's actions are unreasonable"). Furthermore, the certification of each of Plaintiffs-Appellants' PERM applications, in accordance with the posted processing times, demonstrates that any alleged delay was not unreasonable.

As such, the second *TRAC* factor also weighs in favor of Defendant-Appellee.

TRAC Factors 3 & 5 – Impact on Human Health and Welfare and the Nature and Extent of the Interests Prejudiced by the Delay. TRAC factors three and five, which concern human health and welfare and the nature and extent of the interests prejudiced by the delay, overlap. *See Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 118 (D.D.C. 2005); *see also Pushkar v. Blinken*, Civ. A. No. 21-2297 (CKK), 2021 WL 4318116, at *9 (D.D.C. Sept. 23, 2021) ("[I]t is not just [plaintiff's] 'health and welfare' that the Court must consider, but also that of others similarly-situated."). Plaintiffs-Appellants contend that "[a] PERM delay impacts a beneficiary's health and welfare." Pl. Br. 29. Plaintiffs-Appellants claim that the

delay in adjudication of the PERM applications precluded them from applying for permanent residency and work authorization and have limited their promotion opportunities. *Id.* These allegations do not suffice to prevail on an unreasonable delay claim as a matter of law, as these concerns are purely economic. *See Liberty Fund, Inc.*, 394 F. Supp. 2d at 118 ("Even assuming that there is a substantial economic impact on any individual . . ., it is unlikely to rise to a level that would significantly change the Court's assessment of the unreasonableness of the delay in light of the importance of the agency's competing priorities."). Plaintiffs-Appellants also provide no evidence to support the claim of harm to their promotion opportunities. There is no evidence to support the claim that these delays "cause family separation" as there is nothing prohibiting the family of said foreign worker from seeking to join the beneficiary in the United States while he or she awaits the certification of the PERM application filed on their behalf. *See* 8 C.F.R. § 214.2(h)(9)(iv) ("The spouse and children of an H nonimmigrant, if they are accompanying or following to join such H nonimmigrant in the United States, may be admitted, if otherwise admissible, as H-4 nonimmigrants").

Plaintiffs-Appellants have not alleged any facts that would lead this Court to conclude that the delay here will place any of the Plaintiffs-Appellants' human health and welfare at stake. *See Telles v. Mayorkas*, No. CV 21-395 (TJK), 2022 WL 2713349, at *4 (D.D.C. July 13, 2022) (finding that plaintiff's inability to "move

forward" with "life in the United States" and "expense, stress, and uncertainty" was insufficient to demonstrate an impact on health and human welfare). Indeed, each of the Plaintiffs-Appellants are lawfully present in the United States, most in H-1B nonimmigrant status. Am. Compl. at ¶¶ 126-127, 139-140, 149-150, 163-164, 175-176, 187-88, 201, 211-212, 224.

Plaintiffs-Appellants therefore may benefit from additional protections that will minimize any impact of a pending PERM application in the event they reach the maximum duration of stay in H-1B status. *See* 8 C.F.R. § 214.2(h)(13)(iii)(D) (providing that an employer may seek one-year extensions beyond the statutory cap when at least 365 days have elapsed without a final decision on the PERM application); *see also* Pub. Law. 106-313, § 106 (Oct. 17, 2000), 114 Stat 1251 (set out as note to 8 U.S.C. § 1184) (noting that when qualifications are met, a foreign beneficiary of a pending labor certification action is entitled to extension of authorized stay, in one-year increments, "until such time as a final decision is made on the alien's lawful permanent residence.").

In relation to the argument that the PERM delays, or delay in adjudication in relation to Mr. Krishna specifically, disqualified him from the ability to apply for extensions of H-1B status beyond the usual maximum duration of stay in H-1B status—the qualifying action related to these extensions is the employer's timely filing of the PERM application. DOL has no control over when the employers choose

to file a PERM application. The district court was correct to find that Plaintiffs-Appellants failed to provide any evidence of harm to the health and welfare of any of the other Plaintiffs-Appellants, and at that time, DOL already certified the PERM application filed on behalf of Mr. Krishna. JA 371; *see Celebi*, 744 F. Supp. 3d 100 ("While the Court acknowledges the difficulties posed by plaintiff's pending status, he has failed to allege facts that set him apart from the hundreds of thousands of other asylum seekers"); *V.U.C. v. United States Citizenship & Immigr. Servs.*, 557 F. Supp. 3d 218, 223 (D. Mass. 2021) ("[W]hile plaintiffs' welfare interests are weighty (*TRAC* factors three and five), they are no more so than those of all U-visa petitioners awaiting waitlist adjudication").

As such, *TRAC* factors three and five weigh in favor of Defendant-Appellee. *See In re Barr Labs., Inc.*, 930 F.2d 72, 75–76 (D.C. Cir. 1991) (observing that "a judicial order putting [the petitioner] at the head of the queue [would] simply move[ ] all others back one space and produce[ ] no net gain[,]" and that agencies are in the best position to allocate their own resources); *Skalka*, 246 F. Supp. 3d at 154 (noting that courts step outside of their "limited role" where they require "agencies to invest the high degree of resources that would be necessary to accurately investigate plaintiffs' visa petitions," because such a requirement "would presumably delay other adjudications" and make others "suffer in response"). The district court was correct in determining that factors three and five weigh in favor of Defendant-

Appellee. JA 372.

TRAC Factor 4 – The Effect of Expediting Delayed Action on Agency Activities of a Higher or Competing Priority. The fourth *TRAC* factor requires a court to consider the "effect of expediting delayed action on agency activities of a higher competing priority." *TRAC*, 750 F.2d at 80. This fourth factor carries great weight "because courts have no basis for reordering agency priorities." *Durrani v. Bitter*, No. CV 24-11313-FDS, 2024 WL 4228927, at *5 (D. Mass. Sept. 18, 2024). Courts have often "refus[ed] to grant relief to petitioners when all factors other than the fourth favored the petitioner[s]." *Id.*; *see also Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1100. This factor weighs heavily in favor of Defendant-Appellee because the relief Plaintiffs-Appellants sought was to have each of the PERM applications moved to the front of the processing queue and adjudicated immediately. *See* JA 49 at ¶ 310 (where Plaintiffs-Appellants request that the district court "[o]rder DOL to take administrative action on Plaintiff's pending application within 7 days"). In other words, they sought "a judicial order putting [each Plaintiff-Appellant] at the head of the queue [that would] simply move[ ] all others back one space and produce[ ] no net gain." *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1100 (internal citations omitted); *see also V.U.C.*, 557 F. Supp. 3d at 224. In these instances, courts have found that the fourth *TRAC* factor weighs heavily in Defendant-Appellee's favor. *See Bega v. Jaddou*, No. CV 22-02171 (BAH), 2022

WL 17403123, at *8 (D.D.C. Dec. 2, 2022) ("Despite plaintiffs' understandable frustration with [the agency's] pace of adjudication, judicial relief cannot serve as a vehicle for plaintiffs to 'jump the line, functionally solving their delay problem at the expense of other similarly situated applicants.'") (quoting *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 192 (D.C. Cir. 2016)), *aff'd sub nom. Da Costa v. Immigr. Inv. Program Off.*, 80 F.4th 330 (D.C. Cir. 2023).

Before the district court, Plaintiffs-Appellants contended that some applications are decided before others with earlier filing dates, which they dub "line jumping" in contravention of the queue order. They further argued that this is not due to resource or volume issues. PERM application processing *is* impacted by the increasing volume of applications, competing priorities, and resource constraints. OFLC does not dispute the budget figures contained in Plaintiffs-Appellants' Amended Complaint (JA 27 at ¶ 96), but Plaintiffs-Appellants fail to account for the fact that the responsibilities OFLC must shoulder within those budgetary constraints are far broader in scope than merely adjudicating PERM applications. OFLC must allocate its budget and resources—including staff—among multiple programs in addition to PERM processing, including prevailing wage programs and non-immigrant employment visa programs. JA 258 at 11-23. And a significant portion of its budget must be used for awarding and administering grants to the States. *Id.* at 208:24-209:6 (In 2023, $23.3 million—more than 25 percent of OFLC's budget—

went to States).

Over the last 10 years, OFLC's workload has doubled in some programs, such as PERM and H-2B, while the H-2A program workload has quadrupled. JA 246 at 9-23. Unlike the PERM program, the H-2A and H-2B programs for temporary and seasonal workers impose short deadlines on OFLC's processing and adjudication of employers' applications. *See, e.g.,* 8 U.S.C. § 1188(c) (H-2A); 20 C.F.R. §§ 655.31, 655.33 (H-2B). Plaintiffs-Appellants do not allege, and cannot show, that their employers' applications have been processed under different procedures or have been handled differently than other cases. Instead, Plaintiffs-Appellants simply desire preferential treatment of moving their employers' PERM applications ahead of all pending PERM applications filed in earlier months. Moving the PERM applications filed on behalf of Plaintiffs-Appellants to the front of the line would divert resources from other cases. Moving all other applications in the current processing month back one space to accommodate these PERM applications would produce no net gain and would perversely reward Plaintiffs-Appellants for filing suit at the expense of applicants that filed in earlier months. *See Bagherian v. Pompeo*, 442 F. Supp. 3d 87, 96 (D.D.C. 2020) (citation omitted).

Moreover, an order of this nature would interfere with DOL's "unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way." *In re Barr Laboratories, Inc.*,

930 F.2d at 76; *see also Skalka*, 246 F. Supp. 3d at 153–54 (dismissing and recognizing "Congress has given the agencies wide discretion in the area of immigration processing"). In *Barr Labs.*, the court reasoned that the agency had not treated the petitioner differently from any other, instead, the problem was a lack of resources and "a problem for the political branches." 930 F.2d at 75. The court ultimately chose not to grant relief finding "no basis for reordering agency priorities," and reasoning that "[t]he agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack." *Id.* at 76. Here, too, granting the requested relief would be improper and would encourage a proliferation of copycat lawsuits. *See YER USA, Inc. v. Walsh*, No. 1:22-CV-00698-TWT, 2022 WL 1715959, at *1 (N.D. Ga. Apr. 20, 2022)[11]; *Liberty Fund, Inc.*, 394 F. Supp. 2d at 117.

Finally, Plaintiffs-Appellants' demands are at odds with DOL's long-standing policy against expediting the processing of PERM applications based on an employer or its foreign beneficiary's particular circumstances. Resources aside,

[11] "[Moving] YER USA, Inc.'s PERM application to the front of the line while pushing back the applications of other employers in the queue, ultimately creating an incentive to use litigation in order to secure expedited processing. Such an outcome would seriously interfere with the agency's processes. The Court finds that DOL's modified first-in-first-out processing method for PERM applications is not unreasonable considering the adjudicatory function the agency performs with respect to these applications." *YER USA*, 2022 WL 1715959, at *1.

DOL lacks both the authority and the expertise to evaluate the facts underlying requests to expedite, and a requirement to consider such particular circumstances—or to require adjudication of all PERM applications within 60 days—would create administrative chaos for OFLC. *See* JA 266 at 5-13. Therefore, this factor strongly favors Defendant-Appellee.

TRAC Factor 6 – Impropriety. While Plaintiffs-Appellants address the first five *TRAC* factors, they do not allege any impropriety on the part of DOL. As such, *TRAC* factor six weighs in Defendant-Appellee's favor.

In sum, each *TRAC* factor favors Defendant-Appellee. "The court is without the power to order [DOL] to accelerate the pace of adjudication generally, or to dictate the overall order of adjudications." *V.U.C.*, 557 F. Supp. 3d at 224 (citing *N-N v. Mayorkas*, 540 F. Supp. 3d 240 (E.D.N.Y. 2021)). Plaintiffs-Appellants have not demonstrated that the PERM applications filed on their behalf took any longer than those filed on behalf of other similarly situated beneficiaries. *Id.* Plaintiffs-Appellants' APA claim for unreasonable delay fails as a matter of law, and the district court's decision granting summary judgment in favor of Defendant-Appellee should therefore be affirmed.

CONCLUSION

WHEREFORE this Court should dismiss this appeal as moot. Alternatively, should this Court find it has jurisdiction, this Court should affirm the decision of the

district court granting Defendant-Appellee's Cross-Motion for Summary Judgment and denying Plaintiffs-Appellants' Motion for Summary Judgment.

DATE: June 12, 2025

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(g), this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was produced using proportionally spaced Times New Roman 14-point font. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12366 words.

DATED: June 12, 2025

s/ Brian V. Schaeffer
BRIAN V. SCHAEFFER
Trial Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2025, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice and an electronic link of this document to the attorneys of record because they are registered ECF users.

s/ Brian V. Schaeffer
BRIAN V. SCHAEFFER
Trial Attorney

No. 25-1201

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SANJAY KRISHNA, MAKSIM PISKUNOV, DANIYAL AHMED FAHEEM, SABITHA KAJULURI, CHANIKYA SAI RAM GOPISETTY, ELENA KOKUEVA, IDRIS SYED, NATHAEL BEKELE,

Plaintiffs-Appellants,

v.

LORI CHAVEZ-DEREMER, Secretary, U.S. Department of Labor,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Massachusetts No. 1:24-cv-10241-MJJ

DEFENDANT'S ADDENDUM

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SANJAY KRISHNA, MAKSIM PISKUNOV, FLORIAN ADOLF, DANIYAL AHMED FAHEEM, SABITHA KAJULURI, CHANIKYA SAI RAM GOPISETTY, ELENA KOKUEVA, IDRIS SYED, AND NATNAEL BEKELE, Plaintiffs, v. LORI CHAVEZ-DEREMER, *Secretary, U.S. Department of Labor,* Defendant.	No. 25-1201

DECLARATION OF BRIAN D. PASTERNAK

I, Brian D. Pasternak, make the following Declaration pursuant to section 18 U.S.C. § 1746. I am aware that this declaration will be filed with the United States Court of Appeals for the First Circuit and that it is the legal equivalent of a statement under oath.

1. I am employed with the United States Department of Labor's (Department) Employment and Training Administration as the Administrator of the Office of Foreign Labor Certification (OFLC). I am responsible for policy and regulatory oversight of OFLC's adjudication of applications for labor

certification required for temporary and permanent employment-based immigration. I have served in this position since January 2020. From June 2006 to December 2019, I served in several senior management positions in OFLC. In my capacity as Administrator, I am responsible for policy and regulatory oversight of OFLC's adjudication of applications for permanent labor certification.

2. I have personal knowledge of the facts in this Declaration.
3. The 9 PERM applications identified in the Amended Complaint have been adjudicated by the Department.[1]
4. None of the plaintiffs in the Amended Complaint are currently the beneficiaries of any pending PERM applications before the Department.
5. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11th day of June, 2025

Brian David Pasternak

Digitally signed by Brian David Pasternak
Date: 2025.06.11 08:17:35 -04'00'

BRIAN D. PASTERNAK
Administrator
Office of Foreign Labor Certification
Employment and Training Administration
United States Department of Labor

[1] The OFLC case numbers are as follows: A-23090-21514, G-100-23195-190138, G-100-23208-219660, G-100-23227-263994, G-100-23250-327361, G-100-23256-344232, G-100-23307-478851, G-100-23321-510403, and G-100-24022-656855.