

1 MCDERMOTT WILL & EMERY LLP
Paul W. Hughes (*pro hac vice* to be filed)
2 phughes@mwe.com
Andrew A. Lyons-Berg (*pro hac vice*
3 to be filed)
4 500 North Capitol Street NW
Washington, DC 20001
5 (202) 756-8000
Christopher Foster (#51739)
6 cfoster@mwe.com
7 415 Mission Street, Suite 5600
San Francisco, CA 94105
8 (628) 218-3800
9 *Counsel for Amici Curiae*

10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE WESTERN DISTRICT OF WASHINGTON**

12 DEEPTHI WARRIER EDAKUNNI, et al.,
13
14 Plaintiffs,
15 v.
16 ALEJANDRO MAYORKAS,
17 Defendant.

Case No. 2:21-cv-393-RAJ

**BRIEF OF LEADING COMPANIES
AND BUSINESS ASSOCIATIONS AS
AMICI CURIAE IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

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**BRIEF OF LEADING COMPANIES AND BUSINESS ASSOCIATIONS
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS’ MOTION
FOR PRELIMINARY INJUNCTION**

INTRODUCTION AND INTEREST OF THE *AMICI CURIAE*¹

This case is about the federal government’s failure to fulfill its duty—enacted into statute and regulation—to timely process employment authorization documents for two classes of highly-educated, highly-valued noncitizens: certain H-4 and L-2 visa-holders. Spouses of H-1B specialty-occupation workers enter the United States on H-4 visas; when the H-1B visa-holder has been approved for lawful permanent resident status and is simply waiting for an immigrant visa to become available, the H-4 spouse may obtain employment authorization. L-2 visa-holders, the spouses of L-1 intra-company transferees, may likewise qualify for employment authorization.

Amici—a group of leading companies and organizations that employ H-1B, H-4, L-1, and L-2 visa-holders as critical colleagues and team members, as well as national business associations representing such companies—respectfully submit this brief to aid the Court’s consideration of Plaintiffs’ legal challenges, in particular by drawing attention to the substantial practical importance of the issues presented here. The unjustified processing delays addressed by this litigation are freezing thousands of employees out of their employment. This is to the grave detriment of the tens of thousands of families across the country that rely upon the continued employment of H-4 and L-2 visa-holders. The delays likewise enormously disrupt the numerous employers—including many *amici*—that depend on the irreplaceable talents and knowledge of their H-4 and L-2 employees.

1. The delays challenged in this case affect, directly and indirectly, some of the most important visa categories in this country’s immigration system. The H-1B visa is issued to highly skilled workers “who [are] coming temporarily to the United States to perform services . . . in a specialty occupation”—that is, “an occupation that requires . . . theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent).” 8 U.S.C. §§ 1101(a)(15)(H)(i)(b); 1184(i)(1).

¹ A full list of the *amici* is included in the Appendix.

1 These highly sought-after workers boost innovation in the United States—as measured by proxies
 2 such as patenting activity—driving the economy and helping to ensure American competitiveness
 3 on the global stage. *See, e.g.*, U.S. Dep’t of Homeland Security, *Improving and Expanding Train-*
 4 *ing Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for*
 5 *All Eligible F-1 Students*, 81 Fed. Reg. 13,040, 13,048 (Mar. 11, 2016) (collecting authorities);
 6 U.S. Dep’t of Homeland Security, *Employment Authorization for Certain H-4 Dependent Spous-*
 7 *es*, 80 Fed. Reg. 10,284, 10,284 (Feb. 25, 2015) (H-4 Rule) (explaining that H-1B visa-holders
 8 “contribute to advances in entrepreneurship and research and development, which are highly cor-
 9 related with overall economic growth and job creation”).

10 H-4 visas are issued to the spouses and minor children of H-1B nonimmigrants. *See* 8
 11 U.S.C. § 1101(a)(15)(H); 8 C.F.R. § 214.1(a)(1)(iii). In 2015, the Department of Homeland Secu-
 12 rity (DHS) promulgated a regulation permitting certain H-4 spouses—those whose H-1B spouses
 13 have been approved for permanent residency but are waiting for a green card to become availa-
 14 ble—to work in the United States. *See generally* H-4 Rule, 80 Fed. Reg. 10,284. This work au-
 15 thorization is critically important in part because of the lengthy period of time it currently takes
 16 for certain H-1B visa-holders to obtain a green card.² As DHS explained, allowing H-4 spouses to
 17 work during this years-long transitional period “ameliorate[s] certain disincentives that currently
 18 lead H-1B nonimmigrants to abandon efforts to remain in the United States while seeking [lawful
 19 permanent resident (LPR)] status, thereby minimizing disruptions to U.S. businesses employing
 20 such workers” and “assist[ing] overall economic growth and job creation.” *Id.* at 10,285.

21 There are over 580,000 noncitizens working in the United States on H-1B visas, and the
 22 population of H-4 spouses with work authorization is estimated at approximately 90,000, with an
 23

24 ² As Plaintiffs explain, the Immigration and Nationality Act’s geographical quota system re-
 25 stricts the number of permanent resident visas (colloquially, green cards) available to nationals of
 26 any given country each year, with the result that certain countries—particularly India—are over-
 27 subscribed, leading to extremely long wait times for visa availability. PI Mem. (Dkt. 16) at 6-7;
 28 *see* U.S. Dep’t of State, *Visa Bulletin* 3-4 (May 2021) (State department is currently only issuing
 employment-based immigrant visas to Indian nationals whose petitions were approved prior to
 February 2011), perma.cc/V7D4-73BB. Indeed, one commentator has calculated that this signifi-
 cant backlog, unless reformed, could lead to a wait time of 89 years for a green card. David J.
 Bier, *Backlog for Skilled Immigrants Tops 1 Million: Over 200,000 Indians Could Die of Old Age*
While Awaiting Green Cards, Cato Institute (Mar. 30, 2020), perma.cc/F97Q-RCQX.

1 additional 180,000 H-4 spouses eligible to be authorized. *See* U.S. Dep’t of Homeland Security,
2 *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Fed. Reg. 63,918, 63,921
3 (Oct. 8, 2020) (H-1B authorized-to-work population); David J. Bier, *The Facts About H-4 Visas*
4 *for Spouses of H-1B Workers*, Cato at Liberty (June 16, 2020) (estimates of H-4 spouses with, and
5 eligible for, employment authorization), perma.cc/Z6QL-WKSW.

6 L-1 visas are issued to intra-company transferees—that is, noncitizens who have “been
7 employed continuously for one year by a firm or corporation . . . and who seek[] to enter the
8 United States temporarily in order to continue to render [their] services to the same employer”
9 and will either perform a “managerial” or “executive” function, or have “specialized knowledge”
10 about the company’s product or processes and procedures. *See* 8 U.S.C. § 1101(a)(15)(L). L-2
11 visas are available for accompanying spouses and minor children, and the INA explicitly author-
12 izes L-2 spouses to seek employment. *Id.* §§ 1101(a)(15)(L); 1184(c)(2)(E).

13 Around 75,000 L-1 visas were issued in 2019 (the most recent non-COVID year), and ap-
14 proximately 25,000 L-2 spouses were granted new or renewed work authorizations in fiscal year
15 2020. U.S. Dep’t of State, *Nonimmigrant Visas Issued by Classification, FY 2016-2020*, perma.cc/2LRF-DZJX;
16 USCIS, *Form I-765 Application for Employment Authorization, FY 2003-*
17 *2020* (Oct. 2020), perma.cc/SP7U-ZJZR.

18 2. This lawsuit alleges that, beginning with a new, duplicative biometric scanning re-
19 quirement instituted in 2019, DHS is unreasonably delaying the processing of employment au-
20 thorization documents for noncitizens with H-4 and L-2 visas, resulting in the loss of many Plain-
21 tiffs’ work authorization. As discussed more fully below, *amici* agree that Plaintiffs have present-
22 ed compelling evidence demonstrating that the government’s delays are unreasonable, and there-
23 fore unlawful, under the doctrinal framework established in *Telecommunications Research and*
24 *Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*). *See* 5 U.S.C. § 706(1) (empowering
25 district courts to “compel agency action unlawfully withheld or unreasonably delayed”).

26 3. *Amici* are leading U.S. companies (and associations of companies) that count H-4
27 and L-2 visa-holders as integral parts of their teams, helping to power critical projects and deliver
28 value to customers and clients alike. *Amici* also employ many team members on H-1B and L-1

1 visas—a great number of whom have relied on their spouses’ ability to pursue careers in the
 2 United States on H-4 and L-2 visas as an essential component of their families’ decision to bring
 3 their talents to this country.

4 *Amici* are committed to pursuing all available means to ensure these valued colleagues are
 5 not forced to forgo employment or leave the United States—harming those individuals and their
 6 families, *amici* and their member companies, the affected individuals’ greater communities, and
 7 the national economy—all because of arbitrary and capricious bureaucratic red tape. Indeed, *ami-*
 8 *ci* have attempted to work constructively with the government, standing alongside other business-
 9 es and industry groups in offering actionable solutions to U.S. Citizenship and Immigration Ser-
 10 vices (USCIS) for this growing problem. *See* Letter from 28 companies and organizations to Tra-
 11 cy Renaud, Senior Official Performing the Duties of the Director of USCIS 2-3 (Mar. 22, 2021),
 12 perma.cc/256W-RVFH.

13 *Amici* respectfully submit this brief for the Court’s consideration in order to illustrate the
 14 immense practical importance of H-4 and L-2 work authorizations, and to provide additional con-
 15 text for the Court’s application of the *TRAC* factors to this case.

16 ARGUMENT

17 A. Work authorization for H-4 and L-2 visa-holders is critically important to 18 individuals, leading employers, and the economy.

19 The provision of employment authorization to certain H-4 and L-2 visa-holders is a vital
 20 component of the immigration system: Not only is this employment authorization immensely sig-
 21 nificant to the tens of thousands of families that have organized their lives around the availability
 22 of H-4 and L-2 employment, but it also brings critical benefits to the companies, including *amici*
 23 and their members, that employ these skilled, motivated, and vibrant individuals as valued col-
 24 leagues. In all, these individuals contribute immediately to America’s overall economy and the
 25 nation’s continued global economic competitiveness.

26 1. Widespread processing delays are devastating to H-4 and L-2 27 employees and their families.

28 To begin, the delays challenged in this lawsuit inflict severe harm on the very people the
 work-authorization rules are intended to benefit: the H-4 and L-2 spouses themselves, along with

1 their families. *Cf.* H-4 Rule, 80 Fed. Reg. at 10,284-10,285 (one purpose of H-4 work authoriza-
2 tion is “to reduce the economic burdens and personal stresses that H-1B nonimmigrants and their
3 families may experience during the transition from nonimmigrant to LPR status while, at the
4 same time, facilitating their integration into American society.”).

5 In the experience of many companies, including *amici*, it now takes around 11 months for
6 an H-4 visa-holder to secure work authorization, including a renewal, from USCIS. *See* Letter
7 from 28 companies and organizations, *supra*, at 2. That experience is in line with USCIS’s own
8 statistics, which indicate, for example, that the current *expected* wait time for an I-765 application
9 for employment authorization at USCIS’s California Service Center is up to 14 months for H-4
10 visa-holders and up to 15 months for L-2 visa-holders. *See* USCIS, *Check Case Processing Times*
11 (visited Apr. 27, 2021), <https://egov.uscis.gov/processing-times/>; *accord* PI Mem. 20 (describing
12 Plaintiffs’ experience of 6 to 10-month wait times “even though the biometric requirement had
13 been satisfied.”). Meanwhile, an application for an H-4 employment authorization, including a
14 renewal, cannot be made more than six months prior to the date of need (*see, e.g.*, H-4 Rule, 80
15 Fed. Reg. at 10,299)—meaning that it is frequently *impossible* for H-4 spouses to avoid indeter-
16 minate gaps in their employment authorization.

17 This is a devastating result for many families. Most obviously, gaps in employment result
18 in lost income, leaving some families unable to pay their bills. As one of the Plaintiffs in this ac-
19 tion put it after losing her work authorization—and therefore her skilled job diagnosing cancer
20 samples—in March: “I am not sure how we are going to meet our monthly expenses. . . . I haven’t
21 been sleeping from the stress.” Michelle Hackman, *Work-Permit Backlog for Immigrant Spouses*
22 *Takes Toll on Professional Women*, Wall Street Journal (Apr. 17, 2021), perma.cc/6SZC-DRUJ;
23 *see also id.* (discussing another of the Plaintiffs here, who lost her job as a technology-consulting
24 manager at the accounting and consulting firm Ernst & Young because of processing delays; she
25 and her husband have had to “put off making an offer on a home, and have been dipping into sav-
26 ings to make ends meet”); Ethan Baron, *H-1B: Bay Area Spouses of Visa Holders Thrown out of*
27 *Work by Government Delays; Feds Demand Fingerprinting That Feds Can’t Provide*, San Jose
28 Mercury News (Feb. 25, 2021) (quoting an affected H-4 software engineer: “We are draining our

1 savings. I don't know how long that will go.”), perma.cc/83W6-UQU6; *id.* (another affected H-4
2 employee: “It’s a constant tension. . . . We have to cut short on many things.”). Indeed, for a
3 family with two professional breadwinners making roughly equal salaries, an unexpected halving
4 of household income may be catastrophic—particularly given the widespread economic uncer-
5 tainty brought on by the COVID-19 pandemic.

6 Such unexpected job losses are especially harmful in this context because the vast majori-
7 ty of families with H-4 work authorization have made major, and frequently irreversible, life de-
8 cisions in explicit reliance on the economic security provided by H-4 employment. A study con-
9 ducted in 2018 found that over 40% of families with a working H-4 spouse decided to have a
10 child—and to incur the major, unavoidable expenses that having a child entails—based on the
11 dual income enabled by H-4 employment authorization. Ike Brannon & M. Kevin McGee, *Repealing H-4 Visa Work Authorization: A Cost-Benefit Analysis* 14-15 & tbl. 4 (Apr. 2, 2019),
12 perma.cc/HQ9X-78WA. Applied to the current H-4 employment-authorized population of rough-
13 ly 90,000 (*see* page 2, *supra*), that is over 36,000 families who have chosen the size of their fami-
14 lies, at least in part, through reliance on the H-4 employment authorization that DHS’s delays
15 have now imperiled.

16 Similarly, 77% of H-4 families bought a house in reliance on the availability of two in-
17 comes, and 29% have invested in additional education. Brannon & McGee, *Repealing H-4 Visa*
18 *Work Authorization, supra*, at 14-15 & tbl. 4, 30. All told, 87% of working H-4 families—over
19 78,000 families in total—took at least one of these major life decisions in express reliance on the
20 government’s approval of their H-4 employment authorization applications. The government’s
21 current delays pull the rug out from under these tens of thousands of working families. *Cf., e.g.,*
22 *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (“When an agency changes course,
23 as DHS did here, it must ‘be cognizant that longstanding policies may have engendered serious
24 reliance interests that must be taken into account.’ . . . ‘It would be arbitrary and capricious to
25 ignore such matters.’”) (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126
26 (2016), and *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).
27
28

1 Apart from the immediate economic impacts on families, DHS’s delays also threaten the
2 progress achieved by the H-4 employment rule in addressing gender disparities, thereby imposing
3 dignitary harms on those—overwhelmingly women—who are prevented from pursuing their ca-
4 reers. According to the quantitative analysis discussed above, a full 90% of H-4 visa-holders are
5 women. Ike Brannon & M. Kevin McGee, *Hurting Americans in Order to Hurt Foreigners*, Reg-
6 ulation (Spring 2019), at 9, perma.cc/QV8H-2QBJ. This is a highly educated, career-oriented
7 group; as one affected individual—a biochemical engineer, who worked on developing corona-
8 virus diagnostic tests in California until her employment authorization ran out in March—put it:
9 “It’s affecting me financially, but more than that, career wise. . . . I want to achieve higher and
10 higher but these are the kinds of thing that come on your way and stop you. It’s really hard. It’s
11 depressing.” Ethan Baron, *H-1B: Google Urges Feds to Fix ‘Logjam’ Costing Foreign Workers’*
12 *Jobs*, San Jose Mercury News (Apr. 12, 2021), perma.cc/N795-DW6X. Another female H-4 EAD
13 holder: “I’m used to working. . . . It’s so traumatic to just sit at home and be dependent on some-
14 one else.” Hackman, *Work-Permit Backlog*, *supra*. Another: “I’m highly qualified. . . . A right to
15 work is a basic right.” Baron, *Google Urges Feds to Fix ‘Logjam,’ supra*. Yet another: “Every
16 time I speak about it I literally end up crying. . . . I worked really hard to get that position.” Bar-
17 on, *Bay Area Spouses, supra*.

18 Indeed, affected H-4 spouses have reported developing depression and anxiety from being
19 prevented from working—just as was commonplace before H-4 work authorization was first en-
20 acted in 2015. *See* Baron, *Google Urges Feds to Fix ‘Logjam,’ supra*. As a group of sixty Mem-
21 bers of Congress wrote to President-elect Biden in urging him to extend expiring H-4 employ-
22 ment authorizations, “[b]efore the rule was granted, many women on H-4 visas described depres-
23 sion and isolation in moving to a new country and not being allowed to work outside of the
24 home.” Letter from Rep. Bonnie Watson Coleman to President-elect Joe Biden (Dec. 16, 2020),
25 perma.cc/XD6A-CRBQ; *see also, e.g.*, Brannon & McGee, *Repealing H-4 Visa Work Authoriza-*
26 *tion, supra*, at 15 (“the depression associated with not being able to work” “arose repeatedly” as a
27 theme in survey responses from H-4 visa-holders); *id.* at 15-17 (collecting representative exam-
28 ples of responses); H-4 Rule, 80 Fed. Reg. at 10,288 (acknowledging comments that authorizing

1 H-4 employment “assuage[es] negative health effects (such as depression).”). These harms begin
2 even before work authorization is lost: The processing delays themselves introduce confusion,
3 stress, and uncertainty for both current and prospective visa-holders.

4 Such mental health concerns are particularly acute now, in the midst of an isolating pan-
5 demic that is already causing symptoms of depression and anxiety to skyrocket. *See* Nirmita Pan-
6 chal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, Kaiser Family
7 Foundation (Feb. 10, 2021) (“During the pandemic, about 4 in 10 adults in the U.S. have reported
8 symptoms of anxiety or depressive disorder, . . . up from one in ten adults” prior to the pandem-
9 ic.), perma.cc/449Q-QUQL. Now is no time to deny individuals the sense of purpose provided by
10 meaningful employment.

11 What is more, the pandemic has also taken a heavy toll on women’s progress towards
12 workplace equality. The fact is that “[w]omen—especially women of color—are more likely to
13 have been laid off or furloughed during the COVID-19 crisis, stalling their careers and jeopardiz-
14 ing their financial security.” *Women In the Workplace 2020*, McKinsey & Co. (Sept. 30, 2020),
15 perma.cc/22U4-GYD6. Indeed, “[m]ore than 2 million women left the labor force in 2020,” and
16 “[w]omen are now at the lowest workforce participation level since 1988.” *Pandemic Sets Back*
17 *Women’s Progress in Workforce*, NPR (Feb. 14, 2021), perma.cc/5G7P-ST3E; *see also, e.g.*, Ni-
18 cole Betterman & Martha Ross, *Why Has COVID-19 Been Especially Harmful for Working*
19 *Women*, Brookings Institution (Oct. 2020) (pandemic “ha[s] the potential to set back the labor
20 force participation and wage gains women have made in the labor market over the last several
21 decades”), perma.cc/6KJ7-J5JX; *Seven Charts That Show COVID-19’s Impact on Women’s Em-*
22 *ployment*, McKinsey & Co. (Mar. 8, 2021), perma.cc/V38P-UPJL. With this context, the gov-
23 ernment’s apparent lack of concern that its inaction is threatening the careers of tens of thousands
24 of promising and productive female employees becomes even more troubling still.

25 In short, continued government inaction and delays threaten to vitally harm the roughly
26 90,000 families who depend upon H-4 work authorization. Continued processing delays will in-
27 flict severe financial and emotional trauma on tens of thousands of individuals and families across
28 the country.

1 **2. Leading companies, including *amici* and their members, rely daily on**
2 **this highly accomplished cohort of employees.**

3 The government’s unreasonable delays further harm employers, like *amici* and the associ-
4 ational *amici*’s members, whose relationships with tens of thousands of their highly skilled, high-
5 performing employees are being disrupted or even severed due to DHS’s unreasonable delay.

6 As noted above, H-4 spouses—like their H-1B counterparts—are a highly educated, high-
7 ly skilled group. Nearly 60% of H-4 visa-holders have attained a master’s degree or higher, and
8 99% have at least a college degree. Brannon & McGee, *Hurting Americans*, *supra*, at 9; *see also*
9 Brannon & McGee, *Repealing H-4 Visa Work Authorization*, *supra*, at 5 tbl. 1. Moreover, their
10 training is overwhelmingly in highly desirable fields such as science, technology, engineering,
11 and mathematics (STEM): Two thirds of employed H-4 visa-holders work in a STEM occupation,
12 with an additional 16% employed in business, finance, and management, and 8% in health care,
13 working as doctors, nurses, pharmacists, and the like. *Id.* at 5-6 & tbl. 2. Separately, over two
14 thirds of H-4 employees work in fields that, prior to the pandemic in 2018, had unemployment
15 rates below 2%, indicating that their skills are in high demand. Brannon & McGee, *Hurting*
16 *Americans*, *supra*, at 11; *see also*, e.g., New American Economy Research Fund, *Sizing Up the*
17 *Gap in our Supply of STEM Workers: Data & Analysis* (Mar. 29, 2017) (noting that in 2016, “13
18 STEM jobs were posted online for each unemployed worker that year—or roughly 3 million more
19 jobs than the number of available, trained professionals who could potentially fill them.”), per-
20 ma.cc/4BZR-ED9S. And H-4 workers’ average salary is more than double the median annual in-
21 come in the U.S., pointing to the same conclusion. *Compare* Brannon & McGee, *Hurting Ameri-*
22 *cans*, *supra*, at 9 (average salary of \$77,000 for H-4 visa-holders), *with* Federal Reserve Bank of
23 St. Louis, *Real Median Personal Income in the United States* (Sep. 16, 2020) (median income of
24 roughly \$36,000 in 2019), perma.cc/6WB2-FN2R. As the same study reported, “[s]ome common
25 self-reported job titles in our survey include systems engineers, software developers, automation
26 engineers, quality assurance analysts, and data analysts—all jobs that U.S. employers have trou-
27 ble filling.” Brannon & McGee, *Hurting Americans*, *supra*, at 9-10.

1 These statistics capture what *amici* already know: H-4 visa-holders are important con-
2 tributors and valued teammates, with skills and experience that make them irreplaceable. DHS’s
3 systemic failure to timely adjudicate employment authorization applications thus directly harms
4 employers. Not only does a lapse in work authorization sever important professional and personal
5 relationships and destroy institutional knowledge within companies, it requires employers to ex-
6 pend significant resources on searching for, hiring, and training replacements (often temporary)—
7 all because the government is refusing to process a simple form within a 6-month window.

8 Indeed, one *amicus* alone “employs several dozen people whose work permits have ex-
9 pired and hundreds more whose spouses are affected.” Hackman, *Work-Permit Backlog, supra*.
10 The costs—economic, institutional, and cultural—of either replacing these valued co-workers or
11 leaving their positions temporarily unfilled is by no means minor. As another *amicus* put it, H-4
12 employment authorization “has been important to the business community to attract and retain
13 skilled workers. . . . Unfortunately, the processing delays are disrupting the lives of countless
14 workers and their families.” Baron, *Google Urges Feds to Fix ‘Logjam,’ supra*. The loss of this
15 productivity further harms the users of products and services, the delivery of which depend on the
16 talents of H-4 employees. In evaluating the government’s injection of significant, unreasonable
17 delay into the processing of basic immigration forms, the costs imposed on American businesses
18 must be taken into account.

19 **3. Continued delays risk permanently losing the contributions of these**
20 **high-skilled workers and innovators to other nations.**

21 Finally, there is a strong consensus that high-skilled noncitizens, like H-4 and L-2 visa-
22 holders and their H-1B and L-1 spouses, make enormous positive contributions to American
23 productivity, innovation, and competitiveness. For example, a recent comprehensive literature
24 review by the National Academies of Sciences, Engineering, and Medicine concludes that “im-
25 migration is integral to the nation’s economic growth. . . . [T]he infusion by high-skilled immigra-
26 tion of human capital . . . has boosted the nation’s capacity for innovation and technological
27 change. The contribution of immigrants to human and physical capital formation, entrepreneur-
28 ship, and innovation are *essential* to long-run sustained economic growth.” National Academies

1 of Sciences, Engineering, and Medicine, *The Economic and Fiscal Consequences of Immigration*,
 2 6, 317 (2017) (emphasis added), perma.cc/JU7U-LVJ2; *see also, e.g.*, Giovanni Peri & Chad
 3 Sparber, *Presidential Executive Actions Halting High Skilled Immigration Hurt the US Economy*
 4 2 (July 2020) (identifying three independent mechanisms through which immigrants drive eco-
 5 nomic growth), perma.cc/3B6B-25YU; Alex Nowrasteh, *Don't Ban H-1B Workers: They Are*
 6 *Worth Their Weight in Innovation*, Cato at Liberty (May 14, 2020) (summarizing and linking to
 7 several leading studies), perma.cc/SMW4-UUJT; Stuart Anderson, *Evidence Mounts that Reduc-*
 8 *ing Immigration Harms America's Economy*, Forbes (Apr. 1, 2021) (similar), [TQEL](https://perma.cc/UJ5Z-

 9 <a href=); H-4 Rule, 80 Fed. Reg. at 10,309 (“[M]uch research has been done to show the positive
 10 impacts on economic growth and job creation from highly skilled immigrants.”).

11 In fact, the need to attract and retain highly qualified foreign employees was the central
 12 premise of DHS’s 2015 decision to allow H-4 spouses to work in the first place. As the agency
 13 then explained, the change was made “to support the retention of highly skilled workers who are
 14 on the path to lawful permanent residence” by “ameliorat[ing] certain disincentives that currently
 15 lead H-1B nonimmigrants to abandon efforts to remain in the United States while seeking LPR
 16 status, thereby minimizing disruptions to U.S. businesses employing such workers.” H-4 Rule, 80
 17 Fed. Reg. at 10,284-10,285. In other words, families cannot be expected to put one spouse’s ca-
 18 reer on hold indefinitely, just so the other spouse can pursue employment in the United States—
 19 particularly when other countries competing for the same global talent freely permit spousal em-
 20 ployment for work-based immigrants. *Id.* at 10,309.³ And indeed, 28% of families with H-4 em-
 21 ployment authorization indicate that that employment authorization is important in their decision
 22 to remain in the United States. Brannon & McGee, *Hurting Americans*, *supra*, at 10.

23 The same reasoning lies behind Congress’s enactment of the statutory employment au-
 24 thorization for L-2 spouses. *See* H.R. Rep. No. 107-188, at 2-3 (2001) (“[W]orking spouses are
 25 now becoming the rule rather than the exception in the U.S. and many foreign countries’ multi-

26 _____
 27 ³ Again, women are disproportionately affected in such scenarios—and the global pandemic
 28 has already had a significant regressive effects on gender equality and employment. *See* pages 7-
 8, *supra*; *see also, e.g., COVID-19 and Gender Equality: Countering the Regressive Effects*,
 McKinsey & Co. (July 15, 2020), perma.cc/K32K-U2DK.

1 national corporations are finding it increasingly difficult to persuade their employees abroad to
2 relocate to the United States. Spouses hesitate to forgo their own career ambitions or a second in-
3 come to accommodate an overseas assignment. This factor places an impediment in the way of
4 these employers' use of the L visa program and their competitiveness in the international econo-
5 my. Thus, H.R. 2278 would allow the spouses of L visa recipients to work in the United States
6 while accompanying the primary visa recipients.”), perma.cc/ZJ3B-V8TX.

7 Economic analysis thus indicates that ending the H-4 employment program would reduce
8 U.S. gross domestic product by around \$7.5 billion per year, accounting for the lost productivity
9 of the H-4 employees themselves and that of the H-1B employees who would choose to leave the
10 country if their H-4 spouses were unable to work. Brannon & McGee, *Hurting Americans*, *supra*,
11 at 10. The federal government would also lose at least \$1.9 billion in tax revenue annually, with
12 States and municipalities forgoing an additional \$530 million in taxes per year. *Id.* at 10-11. Ef-
13 fectively repealing the program through untenable delays would lead to similar results.

14 What is more, the economic contributions and critical innovations currently produced by
15 these highly skilled and motivated workers would not simply vanish in the absence of a function-
16 ing H-4 employment program. Rather, those workers would take their talents to other nations—
17 the United States' competitors on the global stage—whose policies and attitudes toward high-
18 skilled foreign workers are more welcoming. As DHS recognized in promulgating the H-4 em-
19 ployment rule, for example, Canada and Australia both “seek to attract skilled foreign workers”
20 by providing work permits to the spouses of temporary work-based visa-holders. H-4 Rule, 80
21 Fed. Reg. at 10,309. And it is no surprise that talented foreign workers respond to the incentives
22 created by more welcoming immigration systems elsewhere. *See, e.g.*, Stuart Anderson, *Indians*
23 *Immigrating to Canada at An Astonishing Rate*, *Forbes* (Feb. 3, 2020) (quoting one expert: “Can-
24 ada is benefiting from a diversion of young Indian tech workers from U.S. destinations, largely
25 because of the challenges of obtaining and renewing H-1B visas and finding a reliable route to
26 U.S. permanent residence.”), perma.cc/YV8Z-JLWM; Andrew Edgecliffe-Johnson, *US Compa-*
27 *nies Say Visa Rules Are Jobs Boon for Canada*, *Financial Times* (June 26, 2020) (quoting one
28

1 Fortune 100 CEO’s opinion that the Trump Administration’s restrictions on high-skilled immi-
2 gration would be “a Canadian Jobs Creation Act”), perma.cc/MP7G-ZSKB.

3 By frustrating the efforts of skilled professionals to remain in the United States, DHS’s
4 delays here thus not only siphon off U.S. gross domestic product, but gift that productivity—and
5 the innovation that comes with it—to other nations, harming America’s global economic competi-
6 tiveness into the future. Indeed, the effects are already starting, with affected H-4 families imple-
7 menting plans to emigrate to Canada: “Instead of going through this trauma every three years, we
8 would rather move.” Baron, *Google Urges Feds to Fix ‘Logjam,’ supra* (quoting a Silicon Valley
9 software engineer who, together with her daughter and engineer husband, are moving to Canada);
10 *see also id.* (reporting on another H-4 software engineer in Silicon Valley, whose company of-
11 fered to relocate her position to Canada or Ireland after her work authorization expired without
12 government action). In sum, the harmful effects of DHS’s inaction on H-4 and L-2 work authori-
13 zations threatens to resonate throughout the greater economy both now and for years to come, di-
14 verting the world’s best and brightest to innovate in other nations, in addition to harming employ-
15 ers and devastating the affected families themselves.

16 **B. The TRAC factors mandate relief here.**

17 *Amici* agree with Plaintiffs that the *TRAC* factors require relief in this case.

18 The Administrative Procedure Act empowers courts to “compel agency action unlawfully
19 withheld or unreasonably delayed” (5 U.S.C. § 706(1)), and “courts generally apply the so-called
20 *TRAC* factors in deciding whether to order relief in claims of agency delay brought under the
21 APA” (*Indep. Min. Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (citing *TRAC*, 750 F.2d at
22 79-80)). Those factors are:

- 23 (1) the time agencies take to make decisions must be governed by a rule of reason;
24 (2) where Congress has provided a timetable or other indication of the speed with
25 which it expects the agency to proceed in the enabling statute, that statutory scheme
26 may supply content for this rule of reason;
27 (3) delays that might be reasonable in the sphere of economic regulation are less tol-
28 erable when human health and welfare are at stake;
(4) the court should consider the effect of expediting delayed action on agency activ-
ities of a higher or competing priority;

1 (5) the court should also take into account the nature and extent of the interests prej-
2 udiced by delay; and

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

5 *In re A Community Voice*, 878 F.3d 779, 786 (9th Cir. 2017) (quoting *TRAC*, 750 F.2d at 80).

6 *Amici* broadly agree with Plaintiffs’ assessment that the *TRAC* factors weigh heavily in
7 favor of judicial intervention here. *See generally* PI Mem. 21-36. We offer this separate brief to
8 expand upon the analysis of the fifth *TRAC* factor—“the nature and extent of the interests prej-
9 duced by delay”—along with the related third factor, evaluating whether “human health and wel-
10 fare are at stake.” *Community Voice*, 878 F.3d at 786 (quoting *TRAC*, 750 F.2d at 80).

11 In short, everything discussed above about the critical importance of H-4 employment au-
12 thorization to families, employers, and the economy—and the harmful effects of withholding
13 such authorization—funnels into the *TRAC* analysis through these factors. That is, we agree with
14 Plaintiffs that their loss of employment authorization, and resulting lost wages, would alone make
15 the third and fifth factors weigh in their favor. PI Mem. 26; *cf. Indep. Min. Co.*, 105 F.3d at 509-
16 510 (suggesting that the third and fifth factors would favor relief if “employees’ jobs were in di-
17 rect or immediate danger due to the alleged economic harm”) (quotation marks and emphasis
18 omitted). At a minimum, loss of work authorization means employees must stop working until the
19 government processes their paperwork; other affected employees lose their positions permanent-
20 ly, causing even longer-term harms. Again, DHS does not permit renewal applications prior to six
21 months before expiration—and processing now routinely takes much longer than that. DHS’s six-
22 month rule and widespread processing delays thus combine to cause pervasive disruption that the
23 affected employees, and their employers, are powerless to prevent. Nor has the government pro-
24 vided any safety net to address this problem, such as 180- or 240-day automatic extensions for
25 timely filed renewal applications. *See* Letter from 28 companies and organizations, *supra* (pro-
26 posing this common-sense stopgap solution).

27 But the personal economic interests of the affected individuals—though compelling—are
28 far from the only interests that are being “prejudiced by delay” here. *Community Voice*, 878 F.3d
at 786 (quoting *TRAC*, 750 F.2d at 80). For example, countless H-4 families have detrimentally

1 relied on the government’s presumed ability to timely process the rote paperwork required for
2 employment authorization extensions, by having children and investing in home purchases and
3 higher education that they would have forgone absent this second family income. *See* pages 5-6,
4 *supra*. The fact that these interests are reliance interests—that tens of thousands of families have
5 built their lives on the government’s assurance of continued H-4 work authorization—only deep-
6 ens the unreasonableness of the agency’s inaction. *See Regents*, 140 S. Ct. at 1913 (“When an
7 agency changes course, as DHS did here, it must ‘be cognizant that longstanding policies may
8 have engendered serious reliance interests that must be taken into account.’ . . . ‘It would be arbi-
9 trary and capricious to ignore such matters.’”) (quoting *Encino Motorcars*, 136 S. Ct. at 2126, and
10 *Fox Television Stations*, 556 U.S. at 515).

11 Moreover, the harmful effects of the government’s inaction are not only economic, but ex-
12 tend to the mental and physical health of the affected H-4 employees—removing these career-
13 oriented individuals’ sense of pride and purpose, and leaving them isolated at home, subject to
14 widespread depression and anxiety. *See* pages 7-8, *supra*; *see also* Baron, *Google Urges Feds to*
15 *Fix ‘Logjam,’ supra*; Brannon & McGee, *Repealing H-4 Visa Work Authorization, supra*, at 15
16 (documenting widespread self-reported depression among H-4 spouses unable to work). These
17 harms cannot help but impact domestic life, touching everyone in the affected households. And
18 this at a time when, because of the COVID-19 pandemic, individuals across the country are al-
19 ready isolated—and experiencing symptoms of clinical depression and anxiety—like never be-
20 fore. *See* Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use,*
21 *supra*. This effect on the mental health of tens of thousands of individuals weighs strongly in the
22 *TRAC* analysis. *See Community Voice*, 878 F.3d at 786 (“[D]elays that might be reasonable in the
23 sphere of economic regulation are less tolerable when human health and welfare are at stake.”)
24 (quoting *TRAC*, 750 F.2d at 80).

25 What is more, as we have explained, the harms arising from the government’s inaction
26 here are not limited to Plaintiffs and other similarly situated individuals, but extend to their
27 broader communities and women’s progress in the workforce, to employers like *amici*, to the na-
28 tional economy, and to this nation’s ongoing competitiveness in the global race to attract leading

1 talent. *See* pages 9-13, *supra*. These harms are extremely weighty; indeed, they countermand the
2 very purposes for which the government has enacted H-4 and L-2 work authorizations, undermin-
3 ing a statutory and regulatory scheme expressly intended to ensure American global competitive-
4 ness. *See, e.g.*, H-4 Rule, 80 Fed. Reg. at 10,285; H.R. Rep. No. 107-188, at 2-3; Baron, *Google*
5 *Urges Feds to Fix ‘Logjam,’ supra*; Anderson, *Indians Immigrating to Canada at An Astonishing*
6 *Rate, supra*; Nowrasteh, *Don’t Ban H-1B Workers, supra*.

7 *Amici* therefore urge the Court to thoroughly evaluate the full spectrum of harms threat-
8 ened—and, indeed, already caused—by the government’s unreasonable delays in weighing the
9 *TRAC* factors in this case. Respectfully, we submit that this weighing can have only one outcome:
10 Relief must be granted here.

11 CONCLUSION

12 The Court should grant Plaintiffs’ motion for preliminary injunction, and require the gov-
13 ernment to process H-4 and L-2 work authorizations with dispatch.

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Respectfully submitted,

MCDERMOTT WILL & EMERY LLP

DATED: April 29, 2021

By: /s/ Christopher Foster

Paul W. Hughes (*pro hac vice* to be filed)
phughes@mwe.com

Andrew A. Lyons-Berg (*pro hac vice*
to be filed)

500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000

Christopher Foster (#51739)
cfoster@mwe.com
415 Mission Street, Suite 5600
San Francisco, CA 94105
(628) 218-3800

Counsel for Amici Curiae

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APPENDIX

Amici are:

- Argo AI LLC
- Chamber of Commerce of the United States of America
- Compete America Coalition
- FWD.us
- Google LLC
- Intel Corporation
- Microsoft Corporation
- National Association of Manufacturers
- Salesforce.com, Inc.
- TechNet
- Twitter, Inc.