UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MITESH K. GALA, *Plaintiff,* v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*, *Defendants.*	Civil Action No.: 20-3042 (EGS)

DEFENDANTS' COMBINED [1] OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION; AND [2] MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Plaintiff Mitesh Gala ("Gala") applied for certain immigration benefits on June 29, 2020. *See* Compl. ¶ 27. At present, Defendant U.S. Citizenship and Immigration Services ("USCIS") is processing those applications. According to Gala, however, USCIS has unreasonably delayed adjudicating the applications and Gala asks this Court to enter preliminary injunctive relief ordering USCIS to grant his application. *See* Mot. for Prelim. Inj. at 17 ("PI Mot.").

Typically, USCIS adjudicates the types of immigration applications Gala submitted within a matter of months (including the necessary in-person collection of biometric information). This process has been delayed because the USCIS locations at which biometric information is collected were closed for three months as part of the Government's response to the COVID-19 pandemic. And while those centers have now resumed operations, they are working through a substantial backlog of applications for which biometric appointments must be scheduled. As set forth herein, Gala is currently in the queue along with other applicants also awaiting their biometric appointments. Thus, there can be no showing of delay sufficient to merit judicial relief—and certainly no showing sufficient to merit the extraordinary interim relief Gala seeks. Indeed, Gala may not use this action simply to skip ahead of others in line.

Noticeably absent from Gala's Motion is any acknowledgment that two other courts within this Circuit have rejected motions for preliminary injunctive relief that rely on precisely the same arguments and facts. *See Muvvala v. Wolf*, No. 20-cv-2423 (CJN), 2020 WL 5748104 (D.D.C. Sept. 25, 2020); Hr'g Tr., *Mahendiran v. Wolf*, No. 20-cv-2292 (TFH) (D.D.C. Sept. 23, 2020) (attached hereto as Ex. A). This Court should do likewise and deny Gala's request for a preliminary injunction because he has failed to establish any of the factors required under this Circuit's case law. Rather, the Court should enter judgment in Defendants' favor.

BACKGROUND

A. Statutory Framework

The Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101, *et seq.*, regulates the admission of aliens into the United States, including the temporary admission of nonimmigrants for a particular purpose. Relevant here, the H-1B program allows for the temporary admission of foreign citizens to work for American employers in "specialty occupation[s]," as defined by the Act. 8 U.S.C. § 1101(a)(15)(H)(i)(B). An employer seeking to hire a nonimmigrant employee must file an H-1B petition on Form-129, Petition for a Nonimmigrant Worker, with USCIS. *See* 8 C.F.R. § 214.2(h)(2)(i)(A). If USCIS approves the petition, the nonimmigrant employee's approved status is valid for an initial period of up to three years and can be extended for up to an additional three years. *See* 8 U.S.C. § 1184(g)(4); 8 C.F.R. §§ 214.2(h)(9)(iii)(A)(1), 214.2(h)(15)(ii)(B)(1). For individuals who are the beneficiaries of certain pending or approved employment-based petitions for immigrant status or labor-certification applications, H-1B status may be further extended beyond the six-year maximum. *See Am. Competitiveness in the Twenty–First C. Act*, Pub. L. No. 106–313, §§ 104(c), 106(a) (2000), as amended by 21st C. Dep't. of Justice Appropriations Authorization Act, Pub. L. No. 107–273, § 11030A (2002) (codified at 8 U.S.C. § 1184 note). USCIS typically considers H-1B petitions in the order in which they are received, but employers may opt for premium processing, under which USCIS guarantees adjudication within fifteen days in exchange for a fee. *See* 8 C.F.R. § 103.7(e); *Law Office of Azita Mojarad v. Aguirre*, No. 05-cv-0038 (CKK), 2006 WL 785415, at *1 (D.D.C. Mar. 27, 2006).

The INA also authorizes nonimmigrant "H-4 status," which allows the spouse and minor children of H-1B nonimmigrants to be admitted with the H-1B nonimmigrant to the United States. *See* 8 U.S.C. § 1101(a)(15)(H). In order for an applicant within the United States to apply for or extend H-4 status, the applicant must submit a completed Form I-539, Application to

Extend/Change Nonimmigrant Status. Once approved, the H-4 status is subject to the same period of admission as the related H-1B status. *See* 8 C.F.R. § 214.2(h)(9)(iv). Nonimmigrants with H-4 status are permitted to live—but not work—in the United States. *See Save Jobs USA v. U.S. Dep't of Homeland Sec*., 105 F. Supp. 3d 108, 111 (D.D.C. 2015). In 2015, however, USCIS modified existing regulations to allow certain H-4 nonimmigrants to apply for employment authorization if the related H-1B nonimmigrant has shown an intent to stay in the United States and become a legal permanent resident. *See* 80 Fed. Reg. 10,284, 10,285 (Feb. 25, 2015); *see also* 8 C.F.R. §§ 214.2(h)(9)(iv), 274a.12(c)(26).

To request employment authorization, an eligible H-4 nonimmigrant must file an Application for Employment Authorization (Form I-765) in accordance with 8 C.F.R. § 274a.13, and provide evidence that, among other things, establishes the H-4 applicant's eligibility for the benefit, the relationship between the H-4 applicant and the H-1B nonimmigrant, and the eligibility of the H-1B nonimmigrant. *See* 8 C.F.R. § 214.2(h)(9)(iv). Effective March 11, 2019, USCIS now requires all applicants submitting an I-539 application for H-4 status to appear at the Application Support Center closest to the applicant's primary address and provide biometric information (i.e., fingerprints, photograph, or signature). *See* https://www.uscis.gov/news/alerts/update-uscis-to-publish-revised-form-i-539-and-new-form-i-539a-on-march-8; *see also* 8 C.F.R. § 103.2(b)(9) (permitting USCIS to require any applicant or group of applicants to appear for the collection of biometric information). If approved, the H-4 nonimmigrant receives an H-4 Employment Authorization Document ("EAD").

Because the adjudication of the application for H-4 status (Form I-539) and the application for employment authorization (Form I-765) are interrelated and submitted to the same USCIS locations, USCIS allows applicants to file both forms concurrently. *See* 80 Fed. Reg. at 10,298.

But USCIS cannot adjudicate the Form I-765 until a determination is made on the underlying Form I-539. *Id.* at 10,297. Due to the institution of the biometric requirement in March 2019, USCIS cannot adjudicate I-539/I-765 applications filed with premium I-129s within the same 15-day timeline, and so those applications are not reviewed concurrently.

B. Gala's H-4 and EAD Applications

On June 29, 2020, Gala filed an I-539 application for extension of H-4 status and an I-765 application for employment authorization, both of which are currently being processed at USCIS's Nebraska Service Center. *See* PI Mot. at 4; Decl. of Jennifer A. Roller ¶ 7 ("Roller Decl.") (attached as Ex. B). Gala, as the spouse of an H-1B nonimmigrant, became eligible for these benefits when his wife's H-1B extension petition was approved. *See* Roller Decl. ¶ 8. Gala contends that USCIS has unreasonably delayed the adjudication of his applications because he has been waiting just over five months for adjudication of his H-4 and EAD applications. *See generally* Pls.' Compl.; PI Mot.; Roller Decl. ¶ 7. As of this filing, Gala's applications are in progress, although delayed due to the nearly four-month-long closure of Application Support Centers during the global COVID-19 pandemic from March 18, 2020, to July 13, 2020, and the resulting delays in scheduling biometrics appointments. *See* Roller Decl. ¶¶ 7-11.

C. District Court Proceedings

Gala filed his Complaint on October 21, 2020. *See* Compl. In his Complaint, Gala brings claims under the Administrative Procedure Act and the Mandamus Act, requesting that the Court "[c]ompel Defendants to adjudicate [his] I-539 and I-765 applications before December 7, 2020." Compl. ¶¶ 69-80, Prayer for Relief. On November 20, 2020, Gala filed his Motion for a Preliminary Injunction, which requests an order directing Defendants to "immediately provide him with evidence of continuing work authorization[.]" PI Mot. at 2. With the Parties' consent, the Court ordered that Gala's Preliminary Injunction Motion would be consolidated with a

determination on the merits pursuant to Federal Rule of Civil Procedure 65. *See* Min. Order (Nov. 24, 2020).

STANDARDS OF REVIEW

I. Injunction Standards

"[A] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008). A party seeking preliminary relief must make a "clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest." *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (quoting *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 505 (D.C. Cir. 2016)). The moving party bears the burden of persuasion and must demonstrate, "by a clear showing," that the requested relief is warranted. *Hospitality Staffing Solutions, LLC v. Reyes*, 736 F. Supp. 2d 192, 197 (D. D.C. 2010) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)).

Before the Supreme Court's decision in *Winter*, courts weighed these factors on a "sliding scale," allowing "an unusually strong showing on one of the factors" to overcome a weaker showing on another. *Damus v. Nielsen*, No. 18-cv-0578 (JEB), 2018 WL 3232515, at *4 (D.D.C. July 2, 2018) (quoting *Davis v. PBGC*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009)). This Circuit has hinted, though not held, that *Winter*—which overturned the Ninth Circuit's "possibility of irreparable harm" standard—establishes that "likelihood of irreparable harm" and "likelihood of success" are "independent, free-standing requirement[s]" *Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011); *see also League of Women Voters*, 838 F.3d at 7 (declining to address whether "sliding scale" approach is valid after *Winter*).

And where, as here, a party "seeks a mandatory injunction—to change the status quo through action rather than merely to preserve the status quo—typically the moving party must meet

a higher standard than in the ordinary case: the movant must show 'clearly' that [it] is entitled to relief or that extreme or very serious damage will result." *Farris v. Rice*, 453 F. Supp. 2d 76, 78 (D.D.C. 2006).

II. Summary Judgment Standards

"The Court must grant summary judgment if the moving party demonstrates that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." *Johnson v. Perez*, 66 F. Supp. 3d 30, 35 (D.D.C. 2014). "A fact is material if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Steele v. Schafer*, 535 F.3d 689, 692 (D.C. Cir. 2008)).

The party moving for summary judgment has "the burden of demonstrating the absence of a genuine dispute as to any material fact." *Johnson*, 66 F. Supp. 3d at 35 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party satisfies this burden, the "non-moving party must designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* (citing *Celotex*, 477 U.S. at 324). While the Court must view evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor, the "non-moving party must show more than '[t]he mere existence of a scintilla of evidence in support of' his or her position." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). "Moreover, the non-moving party 'may not rest upon mere allegation or denials of his pleading but must present affirmative evidence showing a genuine issue for trial.'" *Id.* (quoting *Laningham v. United States Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987)).[1]

[1] Although Gala brings an Administrative Procedure Act claim, the basis for his challenge is not final agency action, but rather agency inaction. Because an administrative record for the challenged agency inaction is unnecessary to resolve the legal arguments presented in this motion, Defendants do not submit an index of an administrative record contemporaneously with this

ARGUMENT

I. Defendants Are Entitled To Summary Judgment Because USCIS Did Not Unreasonably Delay Adjudication Of Gala's Applications

The Court should grant summary judgment in Defendants' favor because USCIS has not unreasonably delayed the adjudication of Gala's H-4 and EAD applications.

When a plaintiff seeks a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), the court "starts from the premise that issuance of the writ is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act." *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000). "The central question in evaluating 'a claim of unreasonable delay' is 'whether the agency's delay is so egregious as to warrant mandamus.'" *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoting *Telecomms. Research & Action Ctr. v. FCC* ("*TRAC*"), 750 F.2d 70, 79 (D.C. Cir. 1984)). Courts in this Circuit apply a six-factor test to determine whether agency action has been unreasonably delayed:

> (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;

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dispositive motion. *See* LCvR 7(n); *Nat'l Law Ctr. on Homelessness & Poverty v. U.S. Dep't of Veterans Affairs*, 842 F. Supp. 2d 127, 130 (D.D.C. 2012) (citing *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984)) ("Said another way, if an agency fails to act, there is no 'administrative record' for a federal court to review.").

To the extent the Court deems Local Civil Rule 7(n) applicable in this situation, Defendants request that the Court waive compliance with the requirements of Local Civil Rule 7(n) because the Court need not consider an administrative record in evaluating Defendants' dispositive motion. *See Connecticut v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 279, 294 (D.D.C. 2018) (granting the government's motion to waive compliance with LCvR 7(n) because the court did not need to consider the administrative record in deciding the government's motion).

> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
>
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
>
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
>
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is "unreasonably delayed."

In re United Mine Workers of Am. Int'l Union, 190 F.3d 545, 549 (D.C. Cir. 1999) (quoting *TRAC*, 750 F.2d at 80) (citations and quotation marks omitted).

A. TRAC Factors 1 and 2

The first and second *TRAC* factors weigh in Defendants' favor. These factors ask whether the length of time for the agency to act is governed by a rule of reason as informed by any specific timetable established by Congress. Here, Congress has provided no specific timetable by which USCIS must adjudicate H-4 and EAD applications, and Plaintiff does not argue otherwise. *See generally* Pls.' Mot.; *Muvvala*, 2020 WL 5748104, at *3 (noting that "Congress has not provided a specific timetable by which USCIS must process applications to extend H-4 status or renew EADs").

Because Congress has established no firm timetable, the question is whether Plaintiff's H-4 and EAD applications have been pending for an unreasonable amount of time as established by case law. *See Sarlak v. Pompeo*, No. 20-cv-0035 (BAH), 2020 WL 3082018, at *6 (June 10, 2020) ("Absent a congressionally supplied yardstick, courts typically turn to case law as a guide" to determine whether a delay is reasonable.). Here, Gala's applications have been pending for far less time than courts have found to be reasonable in similar contexts. As noted, Gala filed his applications on June 29, 2020. *See* PI Mot. at 4; Roller Decl. ¶ 7. As such, those applications have

been pending before USCIS for approximately five months. Courts in this district and elsewhere have routinely concluded that far longer wait times for immigration benefits do not constitute unreasonable delay. *See Ghadami v. U.S. Dep't of Homeland Sec.*, No. 19-cv-0397 (ABJ), 2020 WL 1308376, at *8 (D.D.C. Mar. 19, 2020) ("[M]any courts evaluating similar delays have declined to find a two-year period to be unreasonable as a matter of law."); *Bagherian v. Pompeo*, 442 F. Supp. 3d 87, 94 (D.D.C. 2020) (finding that "the roughly twenty-five-month delay to this point in adjudicating [plaintiff's] waiver eligibility is not unreasonable"); *Didban v. Pompeo*, 435 F. Supp. 3d 168, 177 (D.D.C. 2020) (holding that the plaintiffs had "failed to establish that the two-year delay in processing [a] waiver application is unreasonable"); *Skalka v. Kelly*, 246 F. Supp. 3d 147, 153–54 (D.D.C. 2017) (citing case law that even a five- to ten-year delay in the immigration context may be reasonable); *Xu v. Cissna*, 434 F. Supp. 3d 43, 55 (S.D.N.Y. 2020) (finding a three-year delay in adjudicating an asylum application to not be unreasonable under the APA); *Yavari v. Pompeo*, No. 19-cv-02524, 2019 WL 6720995, at *8 (C.D. Cal. Oct. 10, 2019) ("District courts have generally found that immigration delays in excess of five, six, seven years are unreasonable, while those between three to five years are often not unreasonable.").

Further, H-4 and EAD applications may be submitted along with the principal's H-1B petition up to six months before the H-1B employee's requested employment period begins. *See* Form I-129 Instructions at 30 (available at https://www.uscis.gov/sites/default/files/document/forms/i-129instr-pc.pdf). Despite the ability to apply on June 8, 2020, Gala did not file his applications until June 29, 2020. Roller Decl. ¶ 7; *see also* Compl., Ex. F. At present, the average wait time for I-539 applications at the Nebraska Service Center is approximately 5.5 to 7.5 months. *See* Roller Decl. ¶ 5. For I-765 applications, the average wait time is also approximately 5.5 to

7.5 months. *See id.* Yet, Gala has been waiting fewer than six months for his applications to be decided. *See* PI Mot. at 4; Roller Decl. ¶ 7.

Here, the time Defendants take to adjudicate H-4 and EAD applications is governed by a rule of reason. *See Muvvala*, 2020 WL 5748104, at *3 (stating that claims like Gala's are "governed by a 'rule of reason'"). USCIS's approach to managing H-4 and EAD petition inventory prioritizes first-filed petitions before later-filed petitions, with a select few petitions being expedited subject to criteria set forth by the agency. *See id.* ¶¶ 2, 14. Federal Courts have held that this process satisfies the first *TRAC* factor. *See, e.g.*, *Muvvala*, 2020 WL 5748104, at *3-4 (holding in similar case that USCIS's first-in/first-out process satisfied the rule of reason); *Gonzalez v. Cissna*, 364 F. Supp. 3d (E.D.N.C. 2019) (holding that USCIS's processing of first-filed petitions before later-filed petitions constituted "a 'rule of reason' under the first *TRAC* factor in the context of U-Visas and EAD adjudications."). The time it takes USCIS to adjudicate H-4 and EAD applications is thus governed by a rule of reason and an "identifiable rationale." *Ctr. for Sci. in the Pub. Interest v. FDA*, 74 F. Supp. 3d 295, 300 (D.D.C. 2014); *see also Pasem v. USCIS*, No. 20-cv-0344 (CRC), 2020 WL 2514749, at *2 (D.D.C. May 15, 2020) ("the new biometric screening has predictably extended the amount of time it takes USCIS to adjudicate the applications"). For these reasons, the first and second *TRAC* factors weigh heavily in favor of Defendants.

B. Factor 4

The fourth *TRAC* factor—the effect of granting relief on the agency's competing priorities—also weighs heavily in Defendants' favor. *See Muvvala*, 2020 WL 5748104, at *4 (holding in a nearly identical case that this factor "weighs heavily in the government's favor"). Under this Circuit's precedent, a court will not compel agency action where the result would be

merely to expedite the consideration of a plaintiff's application ahead of others. *See Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 117 (D.D.C. 2005) (courts will not compel agency action where result "would mean putting [plaintiff] at the head of the queue at the expense of others"); *Mashpee Wampanoag Tribe Council, Inc. v. Norton*, 336 F.3d 1094, 1101 (D.C. Cir. 2003) ("We agree with the Secretary that the district court erred by disregarding the importance of there being 'competing priorities' for limited resources. The district court offered no legal justification for precluding the Secretary from relying upon her 'first-come' procedure, and we can conjure none."); *In re Barr Labs.*, 930 F.2d 72, 76 (D.C. Cir. 1991) ("The 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."); *Sarlak*, 2020 WL 3082018, at *6 (finding that the fourth factor weighed in the government's favor because expediting the plaintiff's waiver would harm other agency activities of equal or greater priority); *Ghadami*, 2020 WL 1308376, at *9 (finding that "expediting review in Ghadamy's case would merely direct government resources from the adjudication of other waiver applications"); *accord Fangfang Xu*, 434 F. Supp. 3d at 55 ("The effect of leapfrogging Plaintiff's application to the front of the line would do nothing to cure the deficiencies of the asylum application process; it would only harm other applicants, who are equally deserving of prompt adjudication.").

The same reasoning applies here. Granting Gala the relief requested would only serve to advance his applications ahead of others who are faced with the same situation. As the *Muvvala* court explained in a virtually identical case, "[s]uch an action merely 'impose[s] offsetting burdens on equally worthy' applicants and produces 'no net gain.'" *Muvvala*, 2020 WL 5748104, at *4 (second alteration in original) (quoting *In re Barr Labs*, 930 F.2d at 75; *see also* Hr'g Tr. 24:9-13, *Mahendiran* (holding in similar case that "if I pull her out of line, then others who are already

waiting ahead of her would be then delayed to lose their jobs as well"). Moreover, the *Muvvala* court noted, when holding that this factor weighs heavily in the Government's favor, that "Court intervention would impermissibly interfere with the agency'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." *Muvvala*, 2020 WL 5748104, at *4 (quotation marks omitted); Hr'g Tr. 24:4-7, *Mahendiran* (noting that the "agency has their priority[,] .. to make a decision on how to best handle all these applications"). Both of Gala's applications are within the normal processing times currently applicable to H-4 and EAD applications pending at the Nebraska Service Center. *See* Roller Decl. ¶¶ 5, 7. The amount of time that Gala's applications have been pending reflects USCIS's competing priorities and limited resources.

Granting mandamus relief would reorder USCIS's method of balancing the competing priorities and would move Gala arbitrarily ahead of others in line who are awaiting action on their own H-4 and EAD applications. Mandamus is inappropriate in this context. *See Liberty Fund*, 394 F. Supp. 2d at 117; *see also Gong v. Duke*, 282 F. Supp. 3d 566, 569 (E.D.N.Y. 2017) ("There are many other applicants who have waited even longer than plaintiff; to grant him priority is to push them further back in line when the only difference between them is that plaintiff has brought a federal lawsuit. That factor should not give him any advantage."); *Varol v. Radel*, 420 F. Supp. 3d 1089, 1098 (S.D. Cal. 2019) ("[G]ranting relief to the Plaintiff simply moves her to the front of the line at the expense of all other applicants who may not have filed an application for mandamus relief.").

When reviewing the current time required for processing, it is important to note that the adjudication time for H-4 applications is impacted by the agency's legitimate requirement that such applicants submit biometrics as an additional security check, and the agency's ability to

collect that biometric information was just recently resumed after a nearly four-month-long suspension due to the ongoing global pandemic involving COVID-19. *See* Roller Decl. ¶ 6; *see also* Decl. of B. Broderick ¶ 3 (attached as Ex. C). This temporary but necessary closure has created a backlog for biometrics appointment scheduling. *See* Roller Decl. ¶ 11; Broderick Decl. ¶¶ 5-6. It is well within USCIS's authority to require applicants or classes of applicants to submit biometrics, *see* 8 C.F.R. § 103.2(b)(9), and applicants attest on their I-539 applications that they understand that they will be required to appear and provide biometrics. *See* Form I-539 at 5 (available at https://www.uscis.gov/sites/default/files /document/forms/i-539-pc.pdf) (containing certification that applicant "understand[s] that USCIS will require me to appear for an appointment to take my biometrics (fingerprints, photograph, and/or signature)"). The biometrics requirement prohibits USCIS from adjudicating applications submitted with premium processing H-1B applications within 15 days and adds to the overall processing time for all H-4 applications. *See* Roller Decl. ¶ 13. In addition, the agency legitimately prioritized the health and safety of its staff and public health by closing its Application Support Centers during the COVID-19 outbreak in the United States. *See* Broderick Decl. ¶ 3. Gala cannot override that prioritization in a mandamus action. *See Mashpee Wampanoag*, 336 F.3d at 1101. For these reasons, the fourth *TRAC* factor weighs heavily in favor of Defendants.

C. Factors 3 and 5

"The third and fifth factors overlap—the impact on human health and welfare and economic harm, and the nature and extent of the interests prejudiced by the delay." *Liberty Fund*, 394 F. Supp. 2d at 118. Gala contends that the time USCIS is taking to adjudicate his applications interrupts his ability to work. *See, e.g.*, PI Mot. at 1. This is purely economic harm, and does not implicate human health or welfare. Further, while Gala may be "adversely impacted by his

inability to obtain lawful employment and associated benefits … [it does not] rise to a level that would significantly change the … assessment of the unreasonableness of the delay in light of the importance of the agency's competing priorities" in collecting biometrics and processing applications in the normal course. *Id.* As such, these factors similarly weigh in Defendants' favor.

D. Factor 6

The sixth and last *TRAC* factor provides that "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. Conversely, the good faith of the agency in addressing the delay weighs against compelling action. *See In re Am. Fed'n of Gov't Emps.*, 837 F.2d 503, 507 (D.C. Cir. 1988) (declining to issue a writ to expedite resolution of administrative appeals because, inter alia, "[the agency] has shown marked improvement in managing its docket, and there is little reason to believe that this Court's order is necessary to sustain that improvement or would be helpful in spurring greater effort"). USCIS has shown good faith by taking measures to address the increased time to adjudicate applications. It accepts requests to expedite applications. *See* Roller Decl. ¶ 14. And it has proposed increasing application fees so that it may "collect sufficient fee revenue to fund additional staff that will support FY 2019/2020 workload projections." 84 Fed. Reg. at 62,294. Accordingly, the sixth *TRAC* factor also weighs in Defendants' favor.

In sum, application of the *TRAC* factors to the undisputed facts of this case show that the alleged delay by USCIS is not "so egregious as to warrant mandamus." *TRAC*, 750 F.2d at 79. Because Gala has failed to establish an unreasonable delay in violation of the APA, 5 U.S.C. § 706(1), his separate claim for mandamus relief under 28 U.S.C. § 1361 necessarily fails as well. *See Didban*, 435 F. Supp. 3d at 177 (citing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63–64 (2004)). Consequently, Defendants are entitled to judgment as a matter of law.

II. Gala's Motion For A Preliminary Injunction Should be Denied

As noted above, to succeed on his request for a preliminary injunction, Gala must make a "clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest." *League of Women Voters of the U.S.*, 838 F.3d at 6. Gala bears the burden of persuasion and must demonstrate, "by a clear showing," that the requested relief is warranted. *Hospitality Staffing Solutions*, 736 F. Supp. 2d at 197. And where, as here, a party "seeks a mandatory injunction—to change the status quo through action rather than merely to preserve the status quo—typically the moving party must meet a higher standard than in the ordinary case: the movant must show 'clearly' that [it] is entitled to relief or that extreme or very serious damage will result." *Farris*, 453 F. Supp. 2d at 78; *see also* Hr'g Tr. 21:14-17, *Mahendiran* ("Really it is an extraordinary remedy in this case where it's mandamus and it's not barring somebody from doing something, but demanding, compelling the government to do something").

A. Gala is unlikely to succeed on the merits

For the reasons discussed above, Defendants are entitled to judgment as a matter of law and Gala is therefore unlikely to succeed on the merits. *See Muvvala*, 2020 WL 5748104, at *4 (holding in similar case that the plaintiffs, who relied on virtually identical arguments, had "failed to demonstrate that they are likely to succeed on the merits of their unreasonable delay claim"). For this reason alone, the Court should deny Gala's motion for a preliminary injunction. *See Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Housing and Urban Dev.,* 639 F.3d 1078, 1089 (D.C. Cir. 2011) (holding that if the movant fails to demonstrate a likelihood of success on the merits, the court "need not consider the other factors.")

B. Gala has not demonstrated that he would suffer irreparable injury

Gala has not demonstrated that he would suffer irreparable injury in the absence of an injunction because his alleged injury is speculative and relatively minor. This failure is fatal to Gala's Motion. "Regardless of whether the sliding scale framework applies, a movant must at minimum demonstrate irreparable harm, which has 'always' been '[t]he basis of injunctive relief in the federal courts.'" *Dallas Safari Club v. Bernhardt*, No. 19-cv-3696 (APM), 2020 WL 1809181, at *3 (D.D.C. Apr. 9, 2020) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). "A movant's failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Indeed, if a court concludes that a movant has not demonstrated irreparable harm, it need not even consider the remaining factors. *See CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995).

The standard for irreparable harm is particularly high in this Circuit. "[P]roving irreparable injury is a considerable burden, requiring proof that the movant's injury is *certain, great and actual*—not theoretical—and *imminent*, creating a clear and present need for extraordinary equitable relief to prevent harm." *Power Mobility Coal. v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)) (quotation marks omitted) (emphasis in original). In addition, "the certain and immediate harm that a movant alleges must also be truly irreparable in the sense that it is 'beyond remediation.'" *Elec. Privacy Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32, 44 (D.D.C.2014) (citation omitted). The movant must provide some evidence of irreparable harm: "the movant [must] substantiate the claim that irreparable injury is likely to occur" and "provide proof that the harm has occurred in the past and is likely to

occur again, or proof indicating that the harm is certain to occur in the near future." *Wis. Gas Co.*, 758 F.2d at 674 (quotation marks and citation omitted). This is because "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

Gala states that he is currently working "as a Business/Quality Analyst on a critical project within the Risk Grading team under Corporate Risk Management at CIT Bank, a top 50 U.S. bank[.]" Gala Aff. ¶ 7 (ECF No. 8-2). According to Gala, his "services … are critical and essential" and his inability to work after December 7, 2020, would cause "the Bank's project delivery schedule [to] be delayed, thereby financially impacting the organization." *Id.* ¶ 8. Additionally, Gala states that he will "immediately suffer a $8,000-9,000 monthly shortfall in income due to my termination on this project[.]" *Id.* ¶ 11. And Gala states that his wife is currently pregnant and will soon be on maternity leave, causing "her income for the family household [to] be significantly reduced during this time." *Id.* ¶ 2.

"While it is true that if a movant seeking a preliminary injunction will be unable to sue to recover any monetary damages against a government agency in the future because of, among other things, sovereign immunity, financial loss can constitute irreparable injury, the fact that economic losses may be unrecoverable does not absolve the movant from his considerable burden of proving that those losses are *certain, great and actual* …. In other words, the mere fact that economic losses may be unrecoverable does not, in and of itself, compel a finding of irreparable harm." *Nat'l Min. Ass'n v. Jackson,* 768 F. Supp. 2d 34, 52–53 (D.D.C. 2011) (quotation marks and citations omitted) (emphasis in original).

Here, far from being "certain, great and actual," Gala's alleged losses are speculative and relatively minimal. In fact, Gala does not state that his employment will be terminated if his applications are not approved by December 7, 2020. *See generally* Gala Aff. Rather, his employer may merely place him in a brief period of administrative leave until his applications are approved. Indeed, the record is silent on Gala's employment status after December 7, 2020.

Gala's claim that his lost wages constitute irreparable harm fares no better. Rather, after explaining his current expenses, Gala notes that his family will be able to cover many of these expenses by "withdraw[ing] some savings[.]" Gala Decl. ¶¶ 10-11. Gala seems to argue that these comparatively minor monthly financial damages, which may (if processing times continue at the current rate) last only a month or two until his EAD is adjudicated, constitute *per se* irreparable harm because they are unrecoverable from the government. *See* PI Mot. at 13-15. It is not the law of this Circuit, however, that *any* damages in a suit against a defendant with sovereign immunity are irreparable *per se*. *See Air Transp. Ass'n of Am., Inc. v. Exp.–Imp. Bank of the U.S.*, 840 F. Supp. 2d 327, 335 (D.D.C. 2012). Such a rule would "effectively eliminate the irreparable harm requirement. Any movant that could show any damages against an agency with sovereign immunity—even as little as $1—would satisfy the standard. The wiser formula requires that the economic harm be significant, even where it is irretrievable because a defendant has sovereign immunity." *Id.* at 335–36 (citing cases where unrecoverable economic loss alone was not enough to show irreparable harm); *see also Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 105 F. Supp. 3d 108, 114 (D.D.C. 2015). As the *Muvvala* court explained, "[t]here can be no serious dispute that Plaintiffs will experience some level of harm from losing [plaintiff's] incomes, but the question of the magnitude of the harm remains." *Muvvala*, 2020 WL 5748104, at *5. Here, Gala has failed to demonstrate "significant" economic harm as the Court and Defendants are left to

guess regarding the ramifications of the alleged monthly shortfall.[2] *See Muvvala*, 2020 WL 5748104, at *5 (noting that the plaintiffs had "failed to demonstrate how a likely short period of lost wages will result in a harm so substantial as to be considered irreparable"); *see also* Hr'g Tr. 25:11-18, *Mahendiran* (rejecting similar irreparable injury argument, holding that "I … don't have information that this will lead into an extreme situation, that she will be evicted from her residence, her children will be evicted on the street, that she will be homeless, that she would have no income otherwise and that her husband has no income and couldn't help her").

C. The remaining factors weigh against a preliminary injunction.

The final two factors required for preliminary injunctive relief—balancing of the harm to the opposing party and the public interest—merge when the Government is the opposing party. *See, e.g.*, *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Colo. Wild Horse v. Jewell*, 130 F. Supp. 3d 205, 220–21 (D.D.C. 2015). Courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982). In this case, the balance of equities and the public interest tip strongly in favor of the Government as "the public interest favors applying federal law correctly." *Small v. Avanti Health Sys.*, 661 F.3d 1180, 1197 (9th Cir. 2011).

Gala baldly asserts that the project on which he is currently working is so important that not only will granting his Motion "not harm the public interest, it will specifically be in the public interest." PI Mot. at 16. That is likely cold comfort to the thousands of individuals who would be moved further down in the current processing queue to accommodate Gala's request. There is no

[2] The same is true of Gala's statement that his driver's license will expire on December 7, 2020. *See* Gala Aff. ¶ 13; *see also Muvvala*, 2020 WL 5748104, at *5 ("the Court has not found [ ] any case where a court in this Circuit or any other has held that the loss of driving privileges constitutes irreparable harm").

other way to describe this than a harm to the other individuals waiting for appointments and adjudication like Gala. *See Muvvala*, 2020 WL 5748104, at *6 (holding that these two factors "caution against granting Plaintiffs' Motion"); Hr'g Tr. 25:24-26:2, *Mahendiran* (holding that "the public interest and the balance of equities don't weigh in favor of requiring the government to adjudicate plaintiff-wife's application ahead of all those that were received before her in the same boat that she is in") (cleaned up).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Gala's Motion and grant Defendants' motion for summary judgment.

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