[ORAL ARGUMENT NOT YET SCHEDULED]
Nos. 25-5001, 25-5180 (consol.)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHAHNAZ HAERI MEHNEH; ALIASGHAR NEJAT,
Plaintiffs-Appellants,

v.

MARCO RUBIO, IN HIS OFFICIAL CAPACITY AS U.S. SECRETARY OF STATE; ROBERT JACHIM, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF SCREENING, ANALYSIS AND COORDINATION,
Defendants-Appellees.

SAEID MOTEVALI; ALIREZA MOTEVALY ALAMOUTI,
Plaintiffs-Appellants,

v.

MARCO RUBIO, IN HIS OFFICIAL CAPACITY AS U.S. SECRETARY OF STATE; ROBERT JACHIM, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF SCREENING, ANALYSIS AND COORDINATION,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
Nos. 1:24-cv-01374-ZMF, 1:24-cv-01029-SLS

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* certifies as follows:

A. Parties And *Amici*

Except for any *amici* who had not yet entered an appearance in this case as of the filing of this brief, all parties, intervenors, and *amici* appearing before the district courts and this Court are listed in the Brief for Appellants (at p.i), including *amicus* Cato Institute.

B. Rulings Under Review

All rulings under review are listed in the Brief for Appellants (at p.i-ii).

C. Related Cases

Related cases are listed in the Brief for Appellants (at p.iii).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* certifies that the Cato Institute is a nonprofit entity operating under § 501(c)(3) of the Internal Revenue Code. *Amicus* is not a subsidiary or affiliate of any publicly owned corporation and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the *amicus*'s participation.

CERTIFICATE REGARDING SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(d), *amicus curiae* states that a separate brief is necessary to provide *amicus*'s unique perspective on why applying the *TRAC* framework to APA § 706(1) claims diminishes effective accountability of administrative agencies. The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato has a strong interest in the accountability of administrative agencies.

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APA	Administrative Procedure Act
DOD	Department of Defense
SAO	Security Advisory Opinion
TRAC	*Telecommunications Research & Action Center v. Federal Communications Commission*, 750 F.2d 70 (D.C. Cir. 1984)
USCIS	United States Citizenship & Immigration Services

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Cato Institute ("Cato") is a nonpartisan public policy research foundation founded in 1977 dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files *amicus* briefs.

Cato has a strong interest in the accountability of administrative agencies. This case interests Cato because actions for unreasonable delay provide an important check on administrative agencies, help protect the interests of those regulated by agencies, and benefit the public at large. Because the framework applied by the district courts here undermines those goals, Cato files this brief to urge the Court to reverse the district courts' dismissals and hold that the framework set forth in *Telecommunications Research & Action Center v. Federal Communications Commission*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"), does not govern Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1) claims.

Pursuant to D.C. Circuit Local Rule 29(b), all parties have been notified and have consented to the filing of this brief.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. Fed. R. App. P. 29.

RELEVANT STATUTES AND REGULATIONS

Pertinent authorities are reproduced in the Addendum to the Appellants' Brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district courts in *Haeri Mehneh* and *Motevali* dismissed Plaintiffs-Appellants' claims for unreasonable delay in withholding timely action on Plaintiff-Appellants Nejat's and Motevaly Alamouti's visa applications under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1) and the Mandamus Act, 28 U.S.C. § 1361. JA60; JA126-127. In doing so, the courts applied to both claims the six-factor test for determining whether to compel agency action from a 40-year-old mandamus case, *Telecommunications Research & Action Center v. Federal Communications Commission*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). JA55-60; JA122-126. It is time for this Court to overrule past precedents applying *TRAC* to § 706(1) actions. Applying the *TRAC* framework to § 706(1) actions is fundamentally flawed, as it is contrary to the text of the APA. Moreover, the deference *TRAC* provides to agencies is no longer appropriate after the Supreme

Court's repudiation of the leading case that had enshrined deference to agencies as a guiding principle. This Court should reverse and hold that *TRAC* is not the appropriate framework for evaluating unreasonable delays under the APA. The *TRAC* factors vest too much unreviewable power in government agencies, reduce agency accountability, undermine Congress's statutory regime and public trust in agencies, and cause untoward, real-world harm to individuals subject to regulation. And even if *TRAC* were the correct framework, it should not be applied at the pleading stage.

ARGUMENT

I. *TRAC* SHOULD NOT GOVERN APA § 706(1) CLAIMS AT ALL, AS THE FRAMEWORK IS CONTRARY TO THE APA AND OTHERWISE FUNDAMENTALLY FLAWED

Although the requirements to compel agency action under APA § 706(1) and mandamus differ, courts have wrongly held both types of actions to the same legal standard. For reasons described below, the D.C. Circuit should not apply *TRAC* to § 706(1) claims and reverse the ruling below.

In applying the *TRAC* framework to § 706(1) unreasonable delay claims, courts wrongly conflate mandamus and § 706(1) claims. The case in which the *TRAC* framework originated is a 40-year-old case predicated on a mandamus action, not § 706(1). And that framework "suffers from vagueness" and is "hardly ironclad." *TRAC*, 750 F.2d at 80. Although mandamus and § 706(1) claims seek

similar relief, they are distinct means of compelling agency action, subject to differing standards.[1] And the standard for a writ of mandamus is a higher bar for a plaintiff than a § 706(1) claim.

To compel agency action under the Mandamus Act, 28 U.S.C. § 1361, a plaintiff must establish that: (1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear, nondiscretionary duty to perform the act in question; and (3) no other adequate remedy is available. *American Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). Even when these three requirements are met, "a court may grant relief only when it finds 'compelling … equitable grounds'" such as establishing that the "agency's delay is *so egregious*" to warrant a mandamus. *TRAC*, 750 F.2d at 79 (emphasis added). This discretion sets mandamus apart from § 706(1). Since mandamus is limited to "extraordinary circumstances," *Will v. United States*, 389 U.S. 90, 108 (1967) (Black, J., concurring), even unreasonable acts may not suffice. Grover & Platt, *Agency Delay and the Courts*, 77 Admin. L. Rev. --- (forthcoming Dec. 2025) (manuscript p.72 (differentiating between mandamus and § 706(1) actions)), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5173042; *see also In re National Nurses United*,

[1] While some courts have considered the actions to be "intertwined," *e.g.*, *In re Louisiana Public Service Commission*, 58 F.4th 191, 193 (5th Cir. 2023), the case law has not focused on the textual difference between the relevant standards.

47 F.4th 746, 752-753 (D.C. Cir. 2022) (stating that even when all elements for a mandamus are met, the court "consider[s] whether judicial intervention would be appropriate").

On the other hand, to compel agency action under § 706(1), the plaintiff must establish that the agency in question: (1) has failed to "take an action that is *both* discrete *and* mandatory" and (2) has unreasonably delayed in performing such duty. *See Center for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 21 (D.D.C. 2017). Unlike mandamus's discretionary nature, if agency action is unreasonably delayed, 5 U.S.C. § 706(1) instructs that "reviewing court[s] shall … compel agency action." *Id.* This Court has recognized the word "shall" typically "imposes a mandatory obligation." *National Nurses United*, 47 F.4th at 754 (quoting *LO Shippers Action Comm. v. Interstate Comm. Comm'n*, 857 F.2d 802, 806 (D.C. Cir. 1988) (quotation marks omitted)).

The six factors laid out in *TRAC* were originally meant to determine whether an agency's delay is "*so egregious*" to warrant a mandamus. 750 F.2d at 79 (emphasis added). However, by its plain language, an "unreasonable" delay, as required in § 706(1) actions, is necessarily a more lenient test. "Unreasonable" delays constitute delays that are "excessive in amount or degree."[2] Meanwhile,

[2] Oxford English Dictionary, https://www.oed.com/dictionary/unreasonable_adj?tl=true (last visited July 28, 2025).

"egregious" delays are those which are "[c]onspicuously bad or wrong."[3] "Egregious" also has been defined as "extraordinary in some bad way" or "flagrant."[4] These are not mere linguistic differences. One can easily imagine a delay that is in context "excessive" but not "conspicuously wrong." Such a delay would pass the mandamus standard but fail the APA standard. Put another way, wrongful delays clearly lie along a spectrum, and all points on the spectrum are not the same.

Despite the differing standards, and despite *TRAC* itself having been a mandamus action, this Court has "routinely applied the [*TRAC*] framework to assess claims that agency action has been unreasonably delayed." *Afghan & Iraqi Allies v. Blinken*, 103 F.4th 807, 815 (D.C. Cir. 2024) (quotation marks omitted). Lower courts have done the same. *See, e.g.*, *Ahmed v. Blinken*, 759 F. Supp. 3d 1, 11 (D.D.C. 2024) (stating that "claims under the APA and the Mandamus Act share the same standards for obtaining relief" despite later acknowledging that a mandamus requires inquiry into whether a delay is "egregious"). However, this precedent can be "set aside" upon a showing that it is "fundamentally flawed because … it failed to … enforce plain and unambiguous statutory language."

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[3] Oxford English Dictionary, https://www.oed.com/dictionary/egregious_adj (last visited July 28, 2025).

[4] Dictionary.com, https://www.dictionary.com/browse/egregious (last visited July 28, 2025).

Chambers v. District of Columbia, 35 F.4th 870, 879-880 (D.C. Cir. 2022) (quoting *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 184 (2020) (quotation marks omitted)).

For instance, in *Allegheny Defense Project v. Federal Energy Regulatory Commission*, this Court overturned precedent that "elevated policy concerns … over the plain statutory text" and permitted the Federal Energy Regulatory Commission (the "Commission") to "eliminate [the] statutorily prescribed consequence of its inaction—and, in doing so, stave off judicial review." 964 F.3d 1, 3, 17 (D.C. Cir. 2020). There, section 717r(a) of the Natural Gas Act (15 U.S.C. § 717r(a), the "statute") required an aggrieved party to file an application for rehearing with the Commission before obtaining judicial review. *Id.* at 4. The statute provided four sets of actions the Commission needed to take within 30 days. *Id.* at 4-5. In the absence of one of these actions, the application is considered denied, which allows the aggrieved parties to seek relief in federal court. *Id.* at 5. Prior D.C. Circuit precedent permitted the Commission to issue tolling orders for "an open-ended period of time," which prevented an application from being considered denied, thus foreclosing the opportunity for judicial review. *Id.* at 6. In *Allegheny*, however, this Court acknowledged that such orders were not one of the explicit sets of actions to fend off judicial review. *Id.* at 17. Moreover, this Court recognized that "[t]he use of these tolling orders has real-world

consequences. In practice, they can prevent aggrieved parties from obtaining timely judicial review of the Commission's decision." *Id.* at 10. This Court determined that the prior precedent was "fundamentally flawed" and should be overturned because it failed to "'enforce the plain and unambiguous statutory language,'" *Id.* at 18 (quoting *Intel*, 589 U.S. at 185), out of "concerns about [the] 'administrative and judicial problems'" that might result. *Id.* at 17 (quoting *California Co. v. Federal Power Comm'n*, 411 F.2d 720 (D.C. Cir. 1969) (per curiam)).

Like the precedent overturned by *Allegheny*, current precedent applying *TRAC* to § 706(1) actions allows agencies to avoid judicial review, causing real-world harm, and is fundamentally flawed. First, by conflating "egregious" with "unreasonable," the APA's statutory language is not given its "ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Not only does this impermissibly raise the standard for § 706(1) actions counter to the APA's plain language, it does so by "elevat[ing] policy concerns … over the plain statutory text." *Allegheny*, 964 F.3d at 17. This is especially true in the immigration context where courts prioritize concerns about the potential line jumping and "judicial reordering" that would result from compelling agency action over whether the delay itself is in fact unreasonable. JA59; JA125. Second, conflating mandamus and § 706(1) claims runs afoul of Congress's intent, as "the APA neither

incorporates nor alludes to the mandamus writ," nor its higher standard of egregious delay. *South Carolina v. United States*, 907 F.3d 742, 758 (4th Cir. 2018). Third, in applying *TRAC* in the APA context, some courts allow agencies to disregard explicit statutory timetables, finding the timeline for agency action set by Congress to be just one factor in the analysis and not itself dispositive. *See, e.g.*, *Western Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1174 (D.C. Cir. 2000) ("As we first indicated in [*TRAC*], the specificity of the statutory timetable is merely one of six factors we consider when determining whether a protestant is entitled to relief from the agency's delay."). Deferring to an agency that has greatly exceeded a timeline established by Congress tips the balance too far against congressional intent and too far in favor of administrative agency discretion. For example, applying *TRAC* to § 706(1) actions in the immigration context, such as here, ignores Congress's determination that "the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application." 8 U.S.C. § 1571(b). Indeed, in *Afghan & Iraqi Allies*, 103 F.4th at 817, this Court acknowledged that "[e]ven when a statutory timeline is clearly precatory, like one establishing a 'sense of Congress' for when the processing of visa applications 'should' be completed, we have still treated the deadline as a 'ruler against which the agency's progress must be measured' … [that] should play an important role in assessing the reasonableness

of the government's pace of adjudication." Yet here, in *Haeri Mehneh*, the court upheld a 16-month delay[5] as not unreasonable, and in *Motevali*, the court upheld a 17-month delay.[6] And as of the filing of this brief, Plaintiff-Appellant Motevaly Alamouti has been waiting 22 months with no update. This Court should go a step further and recognize that a framework minimizing the relevance of Congress's stated timeline, and upholding delays substantially in excess of that timeline, cannot be reconciled with the statute.

Applying the *TRAC* framework to § 706(1) actions is also fundamentally unsound from a policy perspective, contributing to the increasing distrust of government agencies. *See infra*, Section II. "Quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans." *Potomac Elec. Power Co. v. Interstate Com. Comm'n*, 702 F.2d 1026, 1034 (D.C. Cir. 1983). But "[*s*]*tare decisis* principles do not require [this Court] to continue down the wrong path." *Allegheny*, 964 F.3d at 18. For these reasons, precedents applying *TRAC* to

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[5] As measured from the last agency action to the filing of the complaint. JA56. By the date of the order, however, approximately 23 months had passed with no agency action on Mr. Nejat's visa application. JA44.

[6] As measured from the last agency action to the date of the order. JA124. The lower courts differed in how they measured agency delay. *Compare* JA56 *with* JA124.

§ 706(1) actions are fundamentally flawed, and this Court should reverse the ruling below.

II. *TRAC*'S UNWARRANTED DEFERENCE TO AGENCIES UNDERMINES AGENCY ACCOUNTABILITY

TRAC's framework results in excessive deference to agencies, which is a result no longer acceptable—if it ever was—after *Loper*. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). This deference, in turn, undermines agency accountability. Given the intervening Supreme Court precedent, this Court should overrule past precedents applying *TRAC* to § 706(1) actions.

A. Intervening Supreme Court Precedent Warrants Reexamination of the *TRAC* Regime's Excessive Deference to Agencies

In practice, the *TRAC* framework gives too much deference to agencies, thus undermining their accountability to the public. In applying the *TRAC* factors to APA actions, courts often disregard congressional intent and give agencies "considerable deference." *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) (applying *TRAC* and finding delay was not unreasonable); *see also* Rubin, *Judicial Review of Agency Delay: The District of Columbia Circuit Moves Toward a More Deferential Standard—A Survey of Recent Cases*, 3 Admin. L.J. 725, 744 (1989) ("the [*Sierra Club*] court clearly indicated that deference to agency discretion is the paramount factor in unreasonable delay cases"). Shortly after the *TRAC* decision, scholars observed that courts were "increasingly reluctant to find

unreasonable delays" and that this Court took "an expanding view of the amount of deference that should be granted to agencies." Rubin, 3 Admin. L.J. at 729-730.

This is no longer appropriate, if it ever was, given the Supreme Court's clear message in *Loper* that the decades of granting a wide berth to agencies is over. In *Loper*, the Supreme Court repudiated *Chevron*, the leading case that had enshrined deference to agencies as a guiding principle. *Loper Bright Enters.*, 603 U.S. at 412 (overturning deference to administrative agencies' interpretation of ambiguous legal provisions previously enshrined by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). The Supreme Court clarified: "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *See Loper Bright Enters.*, 603 U.S. at 412. "The APA … codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment." *Id.* at 391-392. This recent judicial mandate that courts exercise independent judgment rather than deferring to agencies' determinations of law should apply equally to review of agency inaction. Indeed, it is noteworthy that *Chevron*, the case overturned by *Loper*, was decided the same year as *TRAC*. *See Chevron*, 467 U.S. 837; *TRAC*, 750 F.2d 70. The Supreme Court's intervening decision in

Loper[7] (which postdated this Court's decision in *Afghan & Iraqi Allies*,[8] where this Court stated that it "routinely applied the [*TRAC*] framework to assess claims that agency action has been 'unreasonably delayed'") warrants this Court's reexamination of applying *TRAC* to § 706(1) unreasonable delay claims, as *Loper* seriously "'weakened the conceptual underpinnings'" of the *TRAC* framework. *See United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012) (en banc) ("Precedents may … be abandoned where an intervening development 'ha[s] removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies'") (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). Accordingly, *Loper* empowers this Court to overrule prior precedents applying *TRAC* to § 706(1) actions.

B. The *TRAC* Factors Result in Impermissible Deference to Agencies as Applied

Turning to the factors more closely, the hexagonal *TRAC* framework instructs courts to consider the following 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

[7] *See Loper Bright Enters.*, 603 U.S. 369.

[8] *Afghan & Iraqi Allies*, 103 F.4th at 815.

> 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.

750 F.2d at 80 (citations omitted). For multiple reasons, this test is far too deferential to agencies. To start, the first factor, which considers whether the agency's timeline is governed by a "rule of reason," and the fourth factor, which considers the effect of the agency's competing priorities, *id.*, result in excessive deference to the agency as applied. While these two factors may not seem to be deferential on their face, courts often tie their analysis to the average processing time at the agency. *See, e.g.*, *Sheiner v. Mayorkas*, 2023 WL 2691580 (S.D.N.Y. Mar. 29, 2023) (finding first *TRAC* factor weighed in favor of USCIS where plaintiff's petition was within "average processing times"); *Chuttani v. U.S. Citizenship & Immig. Servs.* ("*USCIS*"), 2020 WL 7225995, at *4 (N.D. Tex. Dec. 8, 2020) ("The Court is reluctant to hold unreasonable any delay in adjudicating an … application that's less than the upper limit of [USCIS's] current estimated processing time for that particular application form and will not do so here."). And "[a] court will defer to an agency's statements that it is proceeding at an appropriate pace to fulfill its statutory duties given its other obligations." Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and*

Inaction, 26 Va. Envtl. L.J. 461, 483 (2008). This deference was evident in the cases below. In *Motevali*, for example, in assessing the first and second factors, the court stated: "the Defendants have not provided a rule of reason, but the factors still weigh in their favor." JA124. This deference is also evident when courts, like the district courts below, assess the reasonableness of agency delay by simply referencing prior cases where delays were upheld. *See* JA56-57; JA124-125. This is hardly a thorough analysis and creates a self-fulfilling regime where one delay begets, and justifies, another. Likewise, judging the appropriateness of a delay in a given case by comparison to the average agency processing times rewards agency inaction and is not meaningful, independent review. Rather, it is circular and self-fulfilling, finding that delay is not unreasonable so long as it is typical. And it effectively abdicates the court's duty to independently determine the law. *See Loper Bright Enters.*, 603 U.S. at 421 (Gorsuch, J., concurring). Agencies have little incentive to move expeditiously if they know that the measuring stick for unreasonable delay is their own inaction. This is no theoretical concern. Rather, there has been a cycle of longer agency delays and an increasingly high bar to find unreasonable delays. To give one example, from 2017 to 2025, USCIS's median processing time for an I-601A (Provisional Unlawful Presence Waiver) increased approximately 600%, from 4.6 months to 30.9 months. *See* USCIS, *Historical National Median Processing Time (in Months) for All USCIS Offices for Select*

Forms by Fiscal Year, Fiscal Year 2014 to 2019, https://egov.uscis.gov/processing-times/historic-pt-2 (last visited July 28, 2025); USCIS, *Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year, Fiscal Year 2020 (up to May 31, 2025)*, https://egov.uscis.gov/processing-times/historic-pt (last visited July 28, 2025).

Furthermore, this case demonstrates that the fourth factor—the effect of expediting delayed action on agency activities of a higher or competing priority—makes it nearly impossible to compel agency action as applied. The *Haeri Mehneh* court noted this factor "carries the greatest weight in many cases." JA58 (citing *Sawahreh v. U.S. Dep't of State*, 630 F. Supp. 3d 155, 161, 163 (D.D.C. 2022) (quoting *Milligan v. Pompeo*, 502 F. Supp. 3d 302, 319 (D.D.C. 2020)). The court found it weighed in Defendants' favor where "Defendants assert[ed] that prioritizing Plaintiffs' visa application could divert resources from other similar cases."[9] JA58 n.8. And in *Motevali*, the court dismissed Plaintiffs' allegation that the State Department does not resolve administrative processing requests on a first-in-first-out basis, concluding that even if so, "an order from this Court compelling a decision on Mr. [Motevaly] Alamouti's visa application would 'inevitably entail a judicial reordering of the Department's priorities.'" JA125 (citing

[9] It is not clear to *amicus* that the court was correct to consider at the pleadings stage this fact asserted by the Defendants in their Motion to Dismiss.

Niyomwungere v. Blinken, 2024 WL 5075827, at *5 (D.D.C. Dec. 11, 2024) (quoting *Khazaei v. Blinken*, 2023 WL 6065095, at *7 (D.D.C. Sept. 18, 2023)). If this is the standard, plaintiffs will rarely obtain relief. *Afghan & Iraqi Allies*, 103 F.4th at 819 (acknowledging "agency resources are always limited").

Meanwhile, *TRAC* factors that tend to favor plaintiffs—for example, factors three, whether health and welfare are at stake, and five, which considers the interests prejudiced by the delay—are frequently collapsed into one factor and not given adequate weight. In *Motevali*, considering factors three and five together, the court noted Plaintiffs-Appellants' "'extreme emotional and psychological harm'" experienced, as well as the "uncertainty of their family's future." JA126. In *Haeri Mehneh*, the court also considered factors three and five together, acknowledging the psychological, emotional, and financial harm felt by Plaintiffs-Appellants. JA57-58. Nonetheless, it held that other factors controlled. JA60. "Deference appears to override the concerns identified in *TRAC* and essentially renders many of the factors outlined in *TRAC* meaningless. The consequences of delay to private parties no longer seem particularly relevant to the analysis." Rubin, 3 Admin. L.J. at 725. Despite the harms caused by delays in immigrant application adjudications, as discussed in Section III below, courts routinely uphold *yearslong* delays for USCIS applications. *See, e.g.*, *Mohammad v. Blinken*, 548 F. Supp. 3d 159, 168-169 (D.D.C. 2021) (dismissing concerns of family

separation; reasoning that delay was not unreasonable because "'many others' face similarly difficult circumstances as they await adjudication of their visa applications.") (quoting *Palakuru v. Renaud*, 521 F. Supp. 3d 46, 53 (D.D.C. 2021)).

TRAC's undue deference to agencies is evidenced not only by the application of its factors, but also the overall outcomes of unreasonable delay cases. In reviewing courts of appeals decisions for cases in which a claim under § 706(1) was asserted from 1992 to 2022, scholars from the George Washington University Law School found a stark reality: "The plaintiff usually loses." Grover & Platt, 77 Admin. L. Rev. ---, *supra* (manuscript p.53) (collecting outcomes and showing § 706(1) plaintiffs in the D.C. Circuit lost in three times the number of cases they won).

This level of deference to agencies is unacceptable, especially in light of *Loper*. Allowing agencies largely unfettered reign to delay and slow-walk cases increases the likelihood that they will infringe on individual rights and liberties. As one scholar put it, "[M]uch of the injustice in our society results from the exercise of administrative discretion." Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. Rev. 2029, 2033 (2011) (citing Davis, *Discretionary Justice: A Preliminary Inquiry* 4, 25 (1969)); *see also* Tokaji, *First Amendment Equal*

Protection: On Discretion, Inequality, and Participation, 101 Mich. L. Rev. 2409, 2409-2410 (2003) ("The considerable discretion that many official decisionmakers wield raises the spectre that violations of equality norms will sometimes escape detection.").

In sum, the *TRAC* framework effectively restrains courts from finding unreasonable delay, even when a court recognizes troubling facts. The *Haeri Mehneh* court acknowledged the family's "psychological, emotional, and financial harm they have suffered due to the delay in visa adjudication." JA58. And the *Motevali* court acknowledged the family's "nightmare of living apart for years" and stated it was "troubled by the documented delays and dysfunction in the visa adjudication system." JA126. It noted that Mr. Motevali initiated the application process almost five years prior to the date of the court's order, even though the State Department advertises that the process has "no waiting period." *Id*. Still, after making these observations, the court indicated it was hampered by *TRAC*'s framework, stating: "But after analyzing the *TRAC* factors, the Court concludes that the Plaintiffs have not plausibly alleged that the Defendants' delay is unreasonable." JA127. Nonetheless, this Court can reverse, finding that the conceptual underpinnings of the *TRAC* framework—agency deference—have been seriously undermined in light of *Loper*.

III. AGENCY DELAYS CREATE REAL-WORLD HARM

Administrative agencies were created as instruments of government efficiency—"driven by a practical understanding that in our increasingly complex society … . Congress simply cannot do its job absent an ability to delegate power." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). But efficiency is not achieved through silence or inaction, or by undue judicial deference to that silence or inaction. As cautioned by Justice Thurgood Marshall, the "dangers of agency inaction are too important, too prevalent, and too multifaceted to … mandat[e] that courts cover their eyes and their reasoning power when asked to review an agency's failure to act." *Heckler v. Chaney*, 470 U.S. 821, 854-855 (1985) (Marshall, J., concurring in judgment); *Id.* at 840 (criticizing the Supreme Court's creation of a presumption against reviewability of nonenforcement decisions, and arguing that such a presumption was "at odds with rule-of law principles").

The unreasonable delay in adjudication for Plaintiff-Appellant Nejat's visa application is just one example of the real-world harm that agency inaction creates. Plaintiff-Appellant Haeri Mehneh is a U.S. citizen; Mr. Nejat is her husband and an Iranian national. JA18. On September 22, 2017, Ms. Haeri Mehneh began the process of bringing Mr. Nejat to the United States by filing a Form I-130. *Id.* On January 13, 2023, Mr. Nejat attended his visa interview, after which he was informed that his application would undergo administrative processing. JA19. Mr.

Nejat promptly submitted a detailed response to a questionnaire he received following his interview. *Id.* However, Mr. Nejat's visa application remained in administrative limbo, leaving the couple separated. *See* JA18-22. It was only until recently, once this case was appealed, that a decision for Mr. Nejat's visa application was made.[10]

Meanwhile, however, Plaintiff-Appellant Motevaly Alamouti remains indefinitely separated from his son as his visa application remains pending. JA84-87. Plaintiff-Appellant Motevali is a U.S. citizen who filed a Form I-130 in October 2019 on behalf of his parent, Mr. Motevaly Alamouti, an Iranian national living in Sri Lanka. JA83. On September 5, 2023, Mr. Motevaly Alamouti attended his visa interview and received an email from the Embassy asking him to submit responses to a detailed questionnaire, Form DS-5355. JA83-84. On October 23, 2023, the Embassy acknowledged receipt of the DS-5355. JA84. Since then, father and son have remained separated with no potential for reunification in sight. *Id*. This has led to psychological and financial harm, as they are forced to resort to phone calls and brief, expensive trips instead of living together as a family. JA84-87.

[10] While beyond the scope of this brief, the government "cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

The harms caused by unreasonable delays are especially stark in the immigration context, where delays can create family separation, job loss, and emotional turmoil. For instance, immigrants waiting for work permit approvals need to rely on savings, if available, to cover living costs. In the absence of a valid work permit, they risk losing their livelihood or facing deportation if they work without authorization. *See, e.g.*, Lind, *U.S. Work-Permit Backlog is Costing Immigrants Their Jobs*, Bloomberg (Mar. 15, 2022), https://www.bloomberg.com/news/articles/2022-03-15/u-s-work-permit-backlog-costing-immigrants-their-jobs. And in moments of humanitarian crisis, where speed translates to survival, delayed processing times can mean people miss their window to evacuate. *See* Bier, *CBP Should Grant Parole to Fleeing Ukrainians Using ESTA*, Cato Institute (Mar. 2, 2022), https://tinyurl.com/2bjz6jkt.

As illustrated by decisions like those below, which noted that delays upwards of five years for immigration applications are not unreasonable, e.g., JA57 (deeming a 16-month delay in *Haeri Mehneh* reasonable because other district courts held that delays spanning multiple years were not unreasonable), the *TRAC* framework is a far cry from the 180-day timeline that Congress considers appropriate. 8 U.S.C. § 1571(b). Yet, yearslong delays across various agencies have also been upheld under the *TRAC* regime. *See, e.g.*, *Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 124 (3d

Cir. 1998) (six-year delay for rulemaking under the Occupational Safety and Health Administration was not unreasonable); *In re City of Va. Beach*, 42 F.3d 881, 886 (4th Cir. 1994) (finding a four-and-a-half-year delay for approval of a water pipeline construction project was not unreasonable, despite its impact on "human health and welfare"). These delays are not without consequence.

For instance, the Department of Defense's ("DOD") delays in implementing an updated background check system limit the DOD's ability to ensure the trustworthiness of the government's workforce and those who support it, placing national security at risk. *See* Government Accountability Office, *Personnel Vetting: DOD Needs to Improve Management of the National Background Investigation Services Program*, No. GAO-24-107616 (June 26, 2024), https://www.gao.gov/products/gao-24-107616. Backlogs also have a negative economic impact that can stifle technological development; for instance, "backlogs in three top patent offices led to more than US$10 billion in reduced global growth each year." Scialabba et al., *Government Backlog Reduction: Five Ways Government Agencies Can Improve Services and Mission Delivery*, Deloitte Center for Government Insights (June 2019), https://www.deloitte.com/us/en/insights/industry/government-public-sector-services/government-backlog-reduction.html. Meanwhile, the backlog at the U.S. Department of Veterans Affairs leaves tens of thousands of veterans without critical financial support and medical care,

exacerbating their health challenges as they wait for their disability claims to be processed. U.S. Department of Veterans Affairs, *Veterans Benefits Administration Reports: Claims Backlog* (reporting approximately 170,000 veterans within its backlog), https://www.benefits.va.gov/reports/mmwr_va_claims_backlog.asp (last updated July 28, 2025). A more robust judicial review of agency inaction would mitigate these harms by holding agencies accountable, and in turn, spur changes at the agency level resulting in more expedient action.

IV. EVEN IF *TRAC* GOVERNED APA ACTIONS, IT SHOULD NOT BE APPLIED AT THE PLEADING STAGE

Alternatively, even if *TRAC* governs § 706(1) actions, it was premature for the district courts to apply it at the pleading stage. "A claim of unreasonable delay is necessarily fact dependent and thus sits uncomfortably at the motion to dismiss stage and should not typically be resolved at that stage." *Gonzalez v. Cuccinelli*, 985 F.3d 357, 375-376 (4th Cir. 2021) (remanding the unreasonable delay claim "for further proceedings—perhaps including limited discovery."); *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) ("Resolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court."). Given that the "*TRAC* factors … are fact-dependent inquiries that 'cannot be decided in the abstract,'" JA124, district courts across the D.C. Circuit have found that § 706(1) actions are better resolved at the summary

judgment stage. *See, e.g.*, *Al-Gharawy v. U.S. Dep't of Homeland Sec.*, 617 F. Supp. 3d 1, 17-19 (D.D.C. 2022) (concluding that "[b]ecause analysis of the *TRAC* factors typically requires the court to wade through the particular facts and circumstances of an agency's delay," doing so is "premature at the motion to dismiss stage" and "better suited to summary judgment"). On a Rule 12(b)(6) motion, the court should only consider "the facts contained in the four corners of the complaint," *National Postal Professional Nurses v. U.S. Postal Service*, 461 F. Supp. 2d 24, 28 (D.D.C. 2006), along with "any documents attached to or incorporated into the complaint," *United States ex rel. Head v. Kane Co.*, 798 F.Supp.2d 186, 193 (D.D.C. 2011). The *TRAC* test, however, requires the court to consider factors that typically lie outside of the complaint, such as competing agency priorities and average processing times, making pleading-stage resolution inappropriate.

These concerns animate this case. For instance, Plaintiffs-Appellants' complaint in *Haeri Mehneh* alleged that Security Advisory Opinion ("SAO") requests are "not addressed or resolved on a first-in-first-out basis," JA17, with supporting declarations indicating the same from an Acting Director of the Department handling such requests. JA39-40. Despite this, the district court rejected these statements, concluding that compelling agency action would place Mr. Nejat "at the head of the queue," JA58, and cause the agency to divert

resources from other cases. JA58, n.8. In doing so, the court not only considered factors outside the complaint, but also failed to draw all reasonable inferences in favor of the nonmoving parties, the Plaintiffs-Appellants, as required in a 12(b)(6) motion. *See, e.g.*, *Boone v. MountainMade Found.*, 684 F. Supp. 2d 1, 6 (D.D.C. 2010).

Should this Court find that the *TRAC* framework applies to § 706(1) actions, it should nonetheless reverse and remand for discovery and further proceedings.

CONCLUSION

For the foregoing reasons, as well as those presented by Plaintiffs-Appellants, this Court should reverse the district court's ruling and reject *TRAC* as the standard for APA § 706(1) claims.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 5,796 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Felicia H. Ellsworth
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July 28, 2025

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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