

No. 20-17132

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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NATIONAL ASSOCIATION OF MANUFACTURERS, ET AL.,

*Plaintiffs-Appellees,*

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,

*Defendants-Appellants.*

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On Appeal From the United States District Court  
for the Northern District of California

Case No. 20-cv-4887  
Hon. Jeffrey S. White

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**BRIEF OF LEADING COMPANIES AND BUSINESS ORGANIZATIONS  
AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amici curiae* make the following disclosures:

*Amici* are corporations, trade associations, and other organizations focused on the business community. They represent a broad range of sectors of the U.S. economy. Collectively, they have hundreds of thousands of employees and members across the country and represent hundreds of billions of dollars in annual economic activity. *Amici* have extensive experience with employment-based visas, including the H-1B, H-2B, and L-1 programs recently suspended by the President; they include some of the greatest beneficiaries of those programs.

Each of the following *amici* states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock: Alliance of Business Immigration Lawyers; Amazon.com, Inc.; Apple Inc.; Autodesk, Inc.; Box, Inc.; BSA Business Software Alliance, Inc. d/b/a BSA | The Software Alliance; Facebook, Inc.; FWD.us Education Fund; Georgia Chamber of Commerce; Hewlett Packard Enterprise Company; Intel Corp.; Kickstarter, PBC; Metro Atlanta Chamber; Microsoft Corporation; Netflix, Inc.; North Texas Commission; Plaid Inc.; Reddit, Inc.; salesforce.com, inc.; SAP SE; Shutterstock, Inc.; Texas Association of Business; Twitter, Inc.; Upwork Inc.; Vail Valley Partnership; Workday, Inc.; Zillow Group, Inc.

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*Amicus* LinkedIn Corporation states that it is a wholly owned subsidiary of Microsoft Corp., a publicly traded company.

*Amicus* PayPal, Inc. states that it is a wholly owned subsidiary of PayPal Holdings, Inc.

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*Amicus* Semiconductor Industry Association (SIA) states that it is not a corporation, it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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*Amicus* Splunk, Inc. states that it has no parent company and that according to SEC filings, T. Rowe Price, a publicly traded company, holds more than 10% of its outstanding shares.

*Amicus* SurveyMonkey Inc. states that it is wholly owned by SVMK Inc., a publicly traded company. No other entity, stockholder or affiliate owns more than 10% of SurveyMonkey Inc.

*Amicus* Uber Technologies, Inc. states that is a publicly held corporation with no parent company. Based solely on filings made on February 14, 2020 by SB Cayman 2 Ltd. with the U.S. Securities and Exchange Commission (“SEC”) regarding beneficial ownership, SB Cayman 2 Ltd., a private company, beneficially owns more than 10% of Uber’s outstanding stock. SB Cayman 2 Ltd. is an affiliate of Softbank Group Corp., a publicly held corporation. Based solely on SEC filings regarding beneficial ownership of Uber’s stock, Uber is unaware of any other publicly held corporation that beneficially owns more than 10% of Uber’s outstanding stock.

*Amicus* VMware, Inc. states that it is majority owned through a series of entities including VMW Holdco LLC, EMC Corporation, Dell Inc., Denali Intermediate Inc., and Dell Technologies Inc. The lone publicly traded corporation owning 10% or more of VMware, Inc. is Dell Technologies Inc.

### INTEREST OF *AMICI CURIAE*\*

*Amici* are corporations, trade associations, and other organizations focused on the business community. A full list of *amici* is set forth in the attached Appendix. They represent a broad range of sectors of the U.S. economy. Collectively, they have hundreds of thousands of employees and members across the country and represent hundreds of billions of dollars in annual economic activity. *Amici* have extensive experience with employment-based visas, including the H-1B, H-2B, and L-1 programs recently suspended by the President; they include some of the greatest beneficiaries of those programs. They have experienced firsthand the benefits of these programs for their companies, their employees, and the U.S. economy more broadly. Based on that experience and knowledge, they submit this brief to highlight the serious economic impact of suspending these programs and the ongoing and irreparable harms that result from doing so.

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\* Defendants-Appellants and Plaintiffs-Appellees have consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their members contributed any money that was intended to fund preparing and submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

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## INTRODUCTION

For decades, U.S. businesses have welcomed thousands of highly-skilled and motivated workers from abroad to work temporarily in the United States through nonimmigrant visa programs established by Congress. These initiatives, including the H-1B, H-2B, and L-1 visa programs, help drive American growth and innovation by attracting the world’s best talent—including engineers, doctors, bankers, biomedical researchers, software developers, and tech executives—at a time when the global contest to attract skilled workers is increasingly competitive. The programs have been an unequivocal success, earning praise from presidents of both political parties. They are widely understood as benefitting not only U.S. companies and the foreign workers they employ, but also domestic wage earners, families, communities, and the American economy more broadly.

On June 22, 2020, President Trump signed Proclamation 10052 (the “Proclamation”), which suspends—through the end of the year and as long thereafter as he deems “necessary”—issuance of new nonimmigrant visas throughout the legal immigration system, including the H-1B, H-2B, and L-1 programs. The stated ground for the indefinite suspension is that entry of nonimmigrant workers at this time is “detrimental to the interests of the United States” given “economic disruptions caused by the COVID-19 outbreak” and a purported lack of “alternative means to protect unemployed Americans from the threat of competition for scarce

jobs.” According to the Administration’s own estimates, the President’s actions, if fully implemented, would have prevented more than half a million work-authorized individuals from coming to the United States by year’s end. And experts estimate that the Proclamation would have prevented roughly 20,000 employers from filling positions this year alone.

These policies were undertaken as a purported exercise of the President’s authority under 8 U.S.C. § 1182(f), which requires, at the threshold, a “find[ing]” that his actions serve “the interests of the United States.” While Section 1182(f) affords great deference to the President “in the context of international affairs and national security,” “his power is more circumscribed when he addresses a purely domestic economic issue.” *Doe #1 v. Trump*, 957 F.3d 1050, 1067 (9th Cir. 2020) (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018)). As this Court recently explained in a related context, the provision does not provide “limitless power to deny visas to immigrants.” *Id.* at 1065.

*Amici* submit that the Proclamation’s indiscriminate and sudden suspension of nonimmigrant visa programs, including the H-1B program for highly-skilled individuals and L-1 program for intracompany transfers, fundamentally disservices the interests of the United States by stifling the ability of U.S. businesses to attract the world’s best talent, drive innovation, and further American economic prosperity. The Proclamation essentially nullifies a carefully balanced and congressionally

approved framework for legal immigration, “raising serious questions as to whether the President has effectively rewritten provisions of the INA.” *Doe #1*, 957 F.3d at 1067. And because it “was issued with virtually no factual findings,” with “minimal reasoning,” *id.*, and against the weight of authority demonstrating the benefits of these programs, it cannot support a “find[ing]” that the suspension serves “the interests of the United States.” 8 U.S.C. § 1182(f). Quite the opposite, “the Proclamation completely disregards both economic reality and the preexisting statutory framework”—indeed, it “abruptly changed the scope of [U.S.] immigration policy” “without any consideration of the impact on American firms and their business planning.” *Nat’l Ass’n of Mfrs. (NAM) v. U. S. Dep’t of Homeland Sec.*, — F. Supp. 3d —, 2020 WL 5847503, at \*13 (N.D. Cal. Oct. 1, 2020) (granting limited injunction against the Proclamation).

Global competitors in Canada, China, and India, among others, are pouncing at the opportunity to attract well-trained, innovative individuals. And American businesses are scrambling to adjust, hiring needed talent to work in locations outside our nation’s borders. The Proclamation did not consider these costs. And the Proclamation was based on the false assumption that the suspension would protect domestic workers. In fact, *amici* and American businesses more broadly will continue to be irreparably damaged by the Proclamation, to the detriment of their

workers and customers, the broader economy, and the future of American innovation and leadership.

## **ARGUMENT**

### **I. The Suspended Visa Programs Have A Well-Established And Documented Track Record Of Benefiting The U.S. Economy.**

Congress enacted and refined the H-1B, H-2B, and L-1 visa programs, recognizing that they would benefit the U.S. economy. Study after study and expert after expert have confirmed as much: these programs have driven innovation, increased employment, and fueled economic growth, with scant evidence of detrimental effects on domestic employees. And *amici*'s real-world experiences reinforce the conclusions of these many academic and governmental analyses.<sup>1</sup>

#### **A. The H-1B program for specialty occupations boosts the U.S. economy.**

The H-1B program provides temporary visas and employment authorization for “specialty” occupations, conditioned on Department of Labor certification of a Labor Condition Application. *See* 8 C.F.R. § 214.2(h). Since its establishment in 1952, the H-1 visa classification has allowed U.S. employers to hire professionals born outside the country. Since 1990, this category has been subject to numerical

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<sup>1</sup> *See, e.g.*, Letter from 324 Employers and Trade, Industry, and Higher Education Associations and Groups Across the American Economy Focused on the High-skilled Workforce to President Donald J. Trump, Secretary of State Michael Pompeo, Secretary of Labor Eugene Scalia, and Acting Secretary of Homeland Security Chad Wolf (May 21, 2020), <https://bit.ly/3fuKvLd>.

limits and a labor condition application and has been designated the “H-1B visa.” Today it is most commonly associated with the science, technology, engineering, and mathematics (STEM) disciplines. The modern economy increasingly depends on complex information technology and management of vast troves of data. Accordingly, American companies across many sectors and areas of the country employ H-1B visa holders in many capacities, including as operation research analysts, software engineers, database architects, system analysts, and scientists directly engaged in research and development of all types.<sup>2</sup> These individuals are central to the daily operation and continued growth of American businesses across industries. And research overwhelmingly shows that these “H-1B visa holders do not adversely affect U.S. workers” but rather benefit them, as the H-1B program “*increases* innovation, productivity and profits at H-1B employers and boosts total productivity and innovation in the United States,” as well as “employment among other workers in an occupation.”<sup>3</sup>

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<sup>2</sup> See, e.g., American Immigration Council, *The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy* (Apr. 2020), <https://bit.ly/2EViDmZ> at 6 (noting diversity of occupations and geographic areas).

<sup>3</sup> Madeline Zavodny, *The Impact of H-1B Visa Holders On The U.S. Workforce*, National Foundation for American Policy, NFAP Policy Brief (May 2020), <https://bit.ly/3gyJkf0> at 1–2 (citing and summarizing studies).

That is to say, “[a]rguments that [these] highly skilled, temporary foreign workers are freezing out [U.S.-born] workers are rebutted by the best available empirical evidence.”<sup>4</sup> Contrary to the Proclamation’s premise, unemployment rates are very low for jobs that use large numbers of H-1B visas—like STEM occupations—signaling that labor demands for these positions already exceeds the supply.<sup>5</sup> The data further reveal that “H-1B workers complement U.S. workers, fill employment gaps in many STEM occupations, and expand job opportunities for all.”<sup>6</sup> Modeling of a modest expansion of the program projected the creation of more than 1 million new jobs over 25 years,<sup>7</sup> while modeling of its elimination projected a marked reduction in GDP.<sup>8</sup> Further, “[o]verwhelming evidence shows that H-1B

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<sup>4</sup> American Immigration Council, *supra* note 2, at 4 (surveying studies).

<sup>5</sup> National Foundation for American Policy, *Analysis of Employment Data for Computer Occupations*, NFAP Policy Brief (May 2020), <https://bit.ly/2PugvEA>.

<sup>6</sup> American Immigration Council, *supra* note 2 (citing studies); *see also* May 21, 2020 Letter by 324 Signatories, *supra* note 1 at app. 2-4 (citing studies).

<sup>7</sup> Frederick R. Treyz, Corey Stottlemeyer, & Rod Motamedi, *Key Components of Immigration Reform: An Analysis of the Economic Effects of Creating a Pathway to Legal Status, Expanding High-Skilled Visas, and Reforming Lesser-Skilled Visas* at 1, Regional Economic Models, Inc. (2013), <https://bit.ly/31myL8C>.

<sup>8</sup> Michael E. Waugh, *Firm Dynamics and Immigration: The Case of High-Skilled Immigration* at 29, Nat’l Bureau of Econ. Research (Working Paper No. 23387, 2017), <https://bit.ly/3fAXURY>.

workers do not drive down wages of [U.S.-born] workers”—and indeed may lead to *increased* wages for employees in the United States.<sup>9</sup>

**B. The H-2B program for nonagricultural workers also serves an essential role in the economy.**

The H-2B program covers temporary nonagricultural workers, and is often used in the landscaping, hospitality, forestry, and food processing industries to meet seasonal demand.<sup>10</sup> By law, an H-2B visa can be issued *only* when the United States Department of Labor determines that “qualified workers in the United States are not available and that the alien’s employment will not adversely affect wages and working conditions of similarly employed United States workers.” 8 C.F.R. § 214.2(h)(6)(iv)(A); *see also* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (limiting such visas to when “unemployed persons capable of performing such service or labor cannot be found in this country”).

Like the H-1B program, the H-2B program is linked to increased employment for domestic workers and increased economic activity. One study found that “100 H-2B workers results in an additional 464 jobs” for US workers.<sup>11</sup> An April 2020

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<sup>9</sup> American Immigration Council, *supra* note 2, at 3.

<sup>10</sup> United States Government Accountability Office (GAO), *H-2B VISAS: Additional Steps Needed to Meet Employers’ Hiring Needs and Protect U.S. Workers* at 11–12 (Apr. 2020), <https://bit.ly/3i94y3y>.

<sup>11</sup> Madeline Zavodny, *Immigration and American Jobs* at 11, American Enterprise Institute for Public Policy Research & Partnership For a New American Economy (Dec. 2011), <https://bit.ly/3a3xaZ9>; *see also* Madeline Zavodny & Tamar Jacoby,

study by the Government Accountability Office (GAO) similarly found a positive correlation between H-2B workers and economic activity. According to the GAO, “employers reported shutting down operations in the absence of H-2B workers,” explaining that “barriers to finding U.S. workers [for the same positions] included remote location and seasonality of the work.”<sup>12</sup> “Most” of the interviewed employers said their business planning was negatively affected by uncertainty about the availability of H-2B visas, a consideration of relevance to the current executive action; 12 of 14 employers studied who were unable to obtain requested visas saw decreased revenues; and companies supplying those employers similarly saw their own sales decrease when H-2B workers were unavailable.<sup>13</sup> The GAO analyses also revealed that “counties with H-2B employers generally had lower unemployment rates and higher weekly wages than those without H-2B employers.”<sup>14</sup>

Indeed, this past spring, the Executive Branch itself recognized the importance of the H-2B program in responding to the COVID-19 pandemic. On May 14, 2020, the Department of Homeland Security issued a temporary final rule to allow *more* flexibility in hiring or extending the employment of H-2B visa holders

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*The Economic Impact of H-2B Workers*, U.S. Chamber of Commerce & ImmigrationWorks USA (2010), <https://bit.ly/39YlkQ4>.

<sup>12</sup> GAO, *supra* note 10, at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 13–14.

already in the country. 85 Fed. Reg. 28843 (May 14, 2020). Although the change was directed only at the food supply chain, DHS acknowledged that other roles filled by H-2B workers were “nonetheless critical to public health and safety, or the economic and national security and resilience of the nation’s critical infrastructure.” *Id.* at n.11. Similarly, prior to the Proclamation, the Department of State announced that it would continue to process H-2 applications at consular posts as a “national security priority,” notwithstanding the suspension of “routine” visa services as a result of COVID-19.<sup>15</sup> As the Department of State explained, this was because “the H-2 program is essential to the economy and food security of the United States and is a national security priority.”<sup>16</sup>

**C. The L-1 visa program for intracompany transfers keeps jobs in the U.S. and boosts the competitiveness of U.S. companies.**

The L-1 program allows multinational companies to temporarily transfer existing employees to the United States to perform “managerial” or “executive” functions, or functions requiring “specialized knowledge” of the company’s products, processes, or procedures. 8 U.S.C. § 1184(c)(2)(D). Congress enacted this program 50 years ago to remove restrictions on “the exchange and development of managerial personnel from other nations vital to American companies competing

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<sup>15</sup> United States Department of State, *Important Announcement on H2 Visas*, Bureau of Consular Affairs (Mar. 26, 2020), <https://bit.ly/2C0nyll>.

<sup>16</sup> *Id.*

in modern-day world trade.” H.R. Rep. No. 91-815, at 5 (1970), 1970 U.S.C.C.A.N. (84 Stat. 116) 2750, 2754. The L-1 category was visionary in allowing a firm to transfer *existing* employees to where they are needed to maximize business growth; it is a workforce relocation tool for a global economy. Or in the words of USCIS, the program ended prohibitions that “unduly restricted the transfer and development of foreign personnel vital to the interests of U.S. businesses.”<sup>17</sup> “Congress has determined that the ability to transfer company personnel with specialized knowledge is important in fostering the growth and competitiveness of U.S. businesses. Companies should be able to transfer their specialized knowledge employees to do business in an increasingly global marketplace.”<sup>18</sup>

Congress’s expectation and goal have been borne out. As one study explains, “[f]ar from displacing U.S. workers on net, allowing multinationals to bring employees into the United States from abroad prevents them from moving their entire operations abroad.”<sup>19</sup> To the same end, on May 21, 2020 (well into the COVID-19 pandemic), 324 employers and organizations who rely on high-skilled workforces wrote to the Administration to explain that the program “plays a direct

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<sup>17</sup> Memorandum from USCIS on L-1B Adjudications Policy at 2, PM-602-0111, (Aug. 17, 2015), <https://bit.ly/2PscUXI>.

<sup>18</sup> *Id.* at 15.

<sup>19</sup> David J. Bier, *The Facts About the L-1 Visa Program*, Cato at Liberty (June 10, 2020), <https://bit.ly/2EWvrtl>.

role in supporting job creation and job retention in the United States, as well as expanding U.S. advanced manufacturing, continuing U.S.-centered research and development, increasing exports from the U.S., and encouraging foreign direct investment into the U.S.”<sup>20</sup>

**II. Unless The District Court Is Affirmed And The Proclamation Continues To Be Enjoined, The Administration’s Actions Will Impose Irreparable Harm On Businesses And The Nation’s Economy.**

The Proclamation jeopardizes the benefits of nonimmigrant visa programs. Absent an injunction, roughly 20,000 U.S. employers seeking to hire foreign workers would have been impacted by year’s end.<sup>21</sup> And while the Administration suggests its actions have “clear[ed] the American job market of competition,”<sup>22</sup> no evidence supports this. In reality, based on numerous studies and the experience of *amici*, the impact on American workers, businesses, and the economy more broadly will be adverse, enduring, and irreparable.

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<sup>20</sup> May 21, 2020 Letter by 324 Signatories, *supra* note 1.

<sup>21</sup> David J. Bier, *About 20,000 U.S. Employers Are Affected by Trump’s Travel Bans This Year*, Cato at Liberty (July 16, 2020), <https://bit.ly/3i9NxGw>.

<sup>22</sup> See Ken Cuccinelli (@HomelandKen), Twitter (June 22, 2020), <https://twitter.com/HomelandKen/status/1275201179920760839>.

**A. Many leading businesses have recognized that the indefinite suspension of nonimmigrant visas threatens U.S. competitiveness, ingenuity, and growth.**

After the President announced the Proclamation, many of America’s leading companies, including many *amici*, denounced the policy as harmful to innovation and growth, particularly in light of the COVID-19 pandemic. Amazon stated that “[p]reventing high skilled professionals from entering the country and contributing to America’s economic recovery puts America’s global competitiveness at risk.”<sup>23</sup> Facebook recognized that “[h]ighly-skilled visa holders play a critical role in driving innovation,” which is “something we should encourage, not restrict.”<sup>24</sup> Uber unequivocally stated the suspension “will hurt American businesses.”<sup>25</sup> Apple CEO Tim Cook said he was “[d]eeply disappointed by [the] proclamation,” adding: “[T]his nation of immigrants has always found strength in our diversity, and hope in the enduring promise of the American Dream. There is no new prosperity without both.”<sup>26</sup> Microsoft President Brad Smith observed “[n]ow is not the time to cut our nation off

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<sup>23</sup> Jason Henry, *The Visas and The Fury*, New York Times (June 23, 2020), <https://nyti.ms/2XvR6yG>.

<sup>24</sup> *Id.*

<sup>25</sup> Steven Musil, *Trump Executive Order Suspending H-1B Visas Takes Heat From Tech Giants*, CNET (June 23, 2020), <https://cnet.co/3fDtnTO>.

<sup>26</sup> See Tim Cook (@tim\_cook), Twitter (June 23, 2020), [https://twitter.com/tim\\_cook/status/1275407136256712707](https://twitter.com/tim_cook/status/1275407136256712707).

from the world’s talent or create uncertainty and anxiety.”<sup>27</sup> Google CEO Sundar Pichai, a first-generation immigrant, was similarly “[d]isappointed,” recognizing that “[i]mmigration has contributed immensely to America’s economic success” and “ma[de] it a global leader in tech.”<sup>28</sup> And PayPal CEO Dan Schulman warned that the suspension “will slow our progress as a nation” by blocking “current employees [who are] looking to bring their talents to the U.S.” and depriving American businesses of “talented individuals who are filling roles that would otherwise remain vacant.”<sup>29</sup>

*Amici* and many other leading businesses and organizations, particularly those with substantial R&D needs, share these views. They are rooted in a common understanding, informed by experience and backed by empirical research: That nonimmigrant visa programs help drive American innovation, competitiveness, and growth, and their suspension—for any amount of time—irreparably harms American workers, businesses, and the economy.

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<sup>27</sup> See Brad Smith (@BradSmi), Twitter (June 22, 2020), <https://twitter.com/BradSmi/status/1275232627453288450>.

<sup>28</sup> See Sundar Pichai (@sundarpichai), Twitter (June 22, 2020), <https://twitter.com/sundarpichai/status/1275192075214966784>.

<sup>29</sup> See Dan Schulman, LinkedIn (June 22, 2020), <https://bit.ly/2PuvYol>.

**B. The Proclamation is likely to drive talent abroad to the detriment of the U.S. economy and the benefit of its global competitors.**

Rather than “free[ing] up” positions for domestic workers,<sup>30</sup> the suspension forces many companies to create jobs outside the U.S., particularly for highly-specialized positions like those for which H-1B visa holders qualify. The vast majority of H-1B visa holders work in computer occupations.<sup>31</sup> “These jobs are simply not fungible,” *NAM*, 2020 WL 5847503, at \*13, and the U.S. labor market for these highly-specialized positions is very tight. The COVID-19 pandemic only compounds this reality by increasing the public’s reliance upon technology and employers’ need to fill tech-related positions.

The Proclamation cites increased unemployment in (unspecified) “industries where employers are currently requesting H-1B and L workers to fill positions,”<sup>32</sup> and suggests that entry of additional nonimmigrant visa workers “presents a significant threat to employment opportunities for Americans affected by the extraordinary

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<sup>30</sup> See Transcript of White House Background Press Call Concerning the June 22 Presidential Proclamation Suspending Entry of Certain Nonimmigrants (June 22, 2020), <https://perma.cc/Z9YU-MUZK> (quoting an individual who the White House described as a “senior administration official”).

<sup>31</sup> Stuart Anderson, *New Trump H-1B Visa Restrictions Will Harm Companies*, *Forbes* (June 23, 2020), <https://bit.ly/2Dhf3TQ>.

<sup>32</sup> Proclamation 10052 of June 22, 2020, Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, 85 Fed. Reg. 38263 (June 25, 2020), <https://bit.ly/2PrxbN1>.

economic disruptions caused by the COVID-19 outbreak.”<sup>33</sup> But the unemployment rate in the U.S. for individuals in computer occupations *declined* from 3% in January of this year to 2.8% in April, and further still to 2.5% in May, while the jobless rate for all other occupations more than tripled from 4.1% to 13.5%.<sup>34</sup>

The indefinite suspension of nonimmigrant visas, many of which would help fill positions in an increasingly tight high-skill labor market, will drive the search for applicants abroad.<sup>35</sup> One recent and widely-cited empirical study, for example, concluded that “increasingly stringent restrictions on H-1B visas,” like the 2004 drop in the H-1B visa cap, “direct[ly]” led to increased employment at *foreign* affiliates of U.S. multinationals.<sup>36</sup> Such restrictions drove firms to open new foreign affiliates and

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<sup>33</sup> *Id.*

<sup>34</sup> Anderson, *supra* note 31; *see also* NAM, 2020 WL 5847503, at \*13 (“The statistics regarding pandemic-related unemployment actually indicate that unemployment is concentrated in service occupations and that [a] large number of job vacancies remain in the area most affected by the ban[:] computer operations which require high-skilled workers.”).

<sup>35</sup> *See, e.g.*, Maria Abi-Habib and Karan Deep Singh, *Trump Cracks Down on Visas. Indian Firms May Benefit.*, New York Times (Oct. 2, 2020), <https://nyti.ms/32hi6Ex> (noting that “[a]lready, Indian outsourcing companies are working to cast the [Proclamation’s] new restrictions as an opportunity to” “spur[] American companies to shift even more work abroad”).

<sup>36</sup> Britta Glennon, *How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H-JB Program* at 24, University of Pennsylvania, Wharton School (Paper No. 3547655, Feb. 21 2020), <https://bit.ly/39XDscO>; *see also* William W. Olney & Dario Pozzoli, *The Impact of Immigration on Firm-Level Offshoring*, Dept. of Economics, Williams College (June 13, 2019), <https://bit.ly/3a36loa>.

to increase employment at existing foreign locations, with the strongest effect “among R&D-intensive firms.”<sup>37</sup> Crucially, in response to prior curbs on nonimmigrant visas, U.S. multinationals not only increased the absolute *levels* but also the *share* of their total foreign employment, primarily to three countries: Canada, with its close proximity and more flexible high-skilled immigration policies, as well as India and China, which are rich in high-skilled human capital.<sup>38</sup> As the study cautions, any policies ostensibly seeking to mitigate unemployment among Americans should consider that policies aimed at reducing immigration have the unintended consequence of encouraging firms to move jobs abroad.<sup>39</sup> Of course, that hardly “protect[s] unemployed Americans from the threat of competition for scarce jobs,” as the Proclamation professes to do.<sup>40</sup>

This is straightforward: Diverting skilled workers overseas deprives the U.S. of critical talent needed to sustain growth and drive innovation. And the need for these skills is all the more acute due to the COVID-19 pandemic. If these highly specialized workers cannot come to the United States, employers will be forced to employ them overseas—often along with other supporting employees and resources—or else give

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<sup>37</sup> Glennon, *supra* note 36, at 25.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 24–26.

<sup>40</sup> Proclamation 10052, *supra* note 32.

up that function altogether, harming their business.

One especially problematic spillover is the disruption of U.S.-based R&D activities across the manufacturing, biomedical, semiconductor, and many other sectors. The United States performs one-quarter of global STEM R&D, the largest percentage for any nation, and the share of R&D performed in the U.S. has been on the rise in the past decade.<sup>41</sup> 73% of all development research in the U.S. is performed by private-sector businesses, with 80% of that research performed by U.S. *multinational* firms well-situated to send high-skilled jobs abroad to triage ongoing harms that the H- and L-visa suspensions are causing.<sup>42</sup> “From a nationalistic perspective, this is problematic; if skilled foreign-born workers are at a U.S. firm’s foreign affiliate instead of in the U.S., the innovative spillovers that they generate will go to another country instead.”<sup>43</sup> And as other leading economists have observed, “[l]ost technological and productivity growth in the US could mean increased growth elsewhere.”<sup>44</sup>

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<sup>41</sup> Mark Boroush, *Research and Development: U.S. Trends and International Comparisons*, National Science Foundation (Jan. 15, 2020), <https://bit.ly/2Puq8mK>.

<sup>42</sup> *Id.* at 7–8, 16, 33–38.

<sup>43</sup> Glennon, *supra* note 36, at 25.

<sup>44</sup> Giovanni Peri & Chad Sparber, *Presidential Executive Actions Halting High Skilled Immigration Hurt the US Economy*, U.C. Davis Global Migration Center (July 2020), <https://bit.ly/2DAAS0q>.

Predictably, other countries are poised to benefit from the U.S.’s wholesale suspension of nonimmigrant visas. As Box, Inc. CEO Aaron Levie warned, when “you restrict immigration, the jobs still get created, just somewhere else.”<sup>45</sup> One Fortune 100 CEO put a finer point on it, suggesting the Proclamation “may be a Canadian Jobs Creation Act. You can go to Toronto and hire people there and work quite effectively.”<sup>46</sup> Indeed, Twitter’s Canadian chairman, Patrick Pichette, offered his own message to H-1B seekers: “[J]ust look to the North, where we welcome you (and your family) with open arms.”<sup>47</sup> And the CEO of a major Ottawa-based ecommerce platform similarly urged individuals affected by the suspension to “consider coming to Canada instead.”<sup>48</sup>

The CEO of a leading consulting firm explained that instead of rescinding offers to those affected by the new H-1B and L-1 visa rules, the firm will “by necessity . . . move them to other countries, probably Canada.”<sup>49</sup> Similarly, one Berlin-based online realtor had “raised a total of \$15 million in venture capital funding” to “hire up

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<sup>45</sup> See Aaron Levie (@levie), Twitter (June 22, 2020), <https://twitter.com/levie/status/1275194199822856192>.

<sup>46</sup> Andrew Edgecliffe-Johnson, *U.S. Companies Say Visa Rules Are Jobs Boon for Canada*, Financial Times (June 26, 2020), <https://perma.cc/MP7G-ZSKB>.

<sup>47</sup> See Patrick Pichette (@pichette), Twitter (June 22, 2020), <https://twitter.com/pichette/status/1275257776835608576>.

<sup>48</sup> See Tobi Lutke (@tobi), Twitter (June 23, 2020), <https://twitter.com/tobi/status/1275406372411146245>.

<sup>49</sup> Edgecliffe-Johnson, *supra* note 46.

to 50 American workers in its New Jersey and California offices.”<sup>50</sup> But due to the Proclamation, it is considering moving their “North American headquarters to Toronto.”<sup>51</sup>

At the same time, global competitors are aggressively updating their immigration systems to attract skilled workers. For example, the UK fast-tracks visas for scientists and “plans to overhaul its immigration system to lower barriers for skilled workers.”<sup>52</sup> Australia launched a Global Talent program that recruits highly-skilled workers worldwide.<sup>53</sup> France has introduced the French Tech Visa, “a simplified, fast-track scheme for non-EU startup employees, founders and investors to obtain a [French] residence permit.”<sup>54</sup> These countries realize, as one of China’s leading venture capitalists put it, that “while the US is driving talent away, it is the perfect time for us to race to bring them back.”<sup>55</sup>

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<sup>50</sup> Shelly Banjo, *Trump’s Visa Ban Is Already Hurting Some Tech Job Growth*, Bloomberg (July 6, 2020), <https://bloom.bg/3ibD7pJ>.

<sup>51</sup> *Id.*

<sup>52</sup> Zachary Arnold & Tina Huang, *The US Is Turning Away the World’s Best Minds—And This Time, They May Not Come Back*, MIT Technology Review (July 14, 2020), <https://bit.ly/33vmLEw>.

<sup>53</sup> *Id.*

<sup>54</sup> French Tech Visa, <https://bit.ly/30ti6Ro>.

<sup>55</sup> Arnold & Huang, *supra* note 52.

**C. The sudden suspension of nonimmigrant visas is harming U.S. businesses and workers in ways that will have lasting impacts.**

The Proclamation is based on the assumption that nonimmigrant visa programs “pose an unusual threat to the employment of American workers.”<sup>56</sup> That is simply wrong.

One prominent economic analysis found that between 1990 and 2010, a 1 percentage point increase in the “foreign STEM share of a city’s total employment” —“made possible by the H-1B visa program”—increased the wage growth of U.S.-born college-educated labor by 7–8 percentage points and the wage growth of non-college-educated U.S.-born workers by 3–4 percentage points.<sup>57</sup> A key reason for this result is the skillset complementarity between domestic and foreign-born workers.<sup>58</sup>

On the flip side, the notion that *curbing* H-1B inflows somehow helps domestic workers finds little support. When polled in 2017, not a *single* member of the University of Chicago’s IGM Economic Experts Panel—which includes over 40 leading economists from Harvard, Yale, Princeton, MIT, Stanford, and Berkeley—agreed with the following proposition: “If the U.S. significantly lowers the number of H-1B visas now, employment for American workers will rise materially over the next

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<sup>56</sup> Proclamation 10052, *supra* note 32.

<sup>57</sup> Giovanni Peri, Kevin Shih, & Chad Sparber, *STEM Workers, HJB Visas, and Productivity in US Cities*, 33 J. Labor Econ. S225, S252 (2015), <https://bit.ly/3abRAQ1>.

<sup>58</sup> *See id.* at S245, S247–48.

four years.”<sup>59</sup> And yet the Proclamation adopts this false assumption as its core premise. Indeed, it goes a step further, suggesting that, aside from the suspension, little “alternative means” exist to avoid a “potentially protracted economic recovery with persistently high unemployment.”<sup>60</sup> In reality—and contrary to the Proclamation’s stated goal of “protect[ing] unemployed Americans from the threat of competition” purportedly posed by would-be visa holders<sup>61</sup>—research suggests curbing H-1B visas *depresses* domestic wages, with “low-skilled workers [harmed] in particular.”<sup>62</sup>

Specifically, an economic study modeling the “complete elimination” of the H-1B visa program found “essentially zero” change to wages for high-skilled Americans in year one and a relatively “sharp[]” near-term drop for low-skilled wages.<sup>63</sup> The model also found a corresponding drop in GDP, beginning with a 0.13% drop in year

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<sup>59</sup> 81% percent of the participants disagreed with the proposition and the remaining 19% were uncertain. *See* IMG Forum, *High-Skilled Immigrant Visas*, University of Chicago Booth (Feb. 14, 2017), <https://bit.ly/3gxUIYI>.

<sup>60</sup> Proclamation 10052, *supra* note 32.

<sup>61</sup> *Id.*

<sup>62</sup> Waugh, *supra* note 8, at 3, 31; *see also* *NAM*, 2020 WL 5847503, at \*13 (record contained “no reports of any sort that a specific determination was made that nonimmigrant visa applicants had any deleterious effect on the United States economy or American citizens’ employment rates”).

<sup>63</sup> Waugh, *supra* note 8, at 14, 27–29.

one and culminating in a 3.7% decrease over time if the policy were to stand.<sup>64</sup> Restricting high-skilled immigration is likely to have many such “unintended[] negative consequences”<sup>65</sup> and will do nothing to shield Americans from “displac[ement] and disadvantag[e] . . . during the current recovery,” as the Proclamation aims to do.<sup>66</sup>

It would be a mistake to view the Proclamation’s impact as limited to the duration of the COVID-19 crisis. While the suspension forces companies to make decisions in the short-term—such as the diversion of employment to foreign affiliates—these decisions will have irreversible long-term effects. Again, new H-1B hires or intracompany L-1 transfers that would have driven growth in the United States will instead go elsewhere, and once those decisions are made—and the corresponding hires, training, team building, and business plans are implemented in another country—there is often no turning back. The U.S. economy, and U.S. workers and employers, will suffer permanent harm, even if the President does not seek to extend the suspension beyond this year.

In a June 2020 survey of the aforementioned IGM Economic Experts Panel, a full 98% of leading economists either “agreed” or “strongly agreed” that, “[e]ven if it

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<sup>64</sup> *Id.* at 29.

<sup>65</sup> *Id.*

<sup>66</sup> Proclamation 10052, *supra* note 32.

*is temporary*, the ban on visas for skilled workers, including researchers, will weaken US leadership in STEM and R&D.”<sup>67</sup> And 93% of those same economists felt that “[s]ignificantly fewer top foreign students will be attracted to US universities as a result of increased restrictions on visas for skilled workers.”<sup>68</sup> Again, research confirms this.<sup>69</sup> By shrinking the number of foreign students who would otherwise seek to build a life in the U.S., America deprives itself of a wealth of future entrepreneurs and innovators.<sup>70</sup>

The immediate impact of the Proclamation is evident among the *amici*. Signatories play key roles in the information and communications technology sectors, and their inability to reliably secure H-1B and L-1 visas disrupts new product roll-outs, upgrades, and production efforts. These programs are all key to meeting surge capacity or R&D deadlines tied to telemedicine, work-from-home, and distance learning, all vital to the U.S. response to the COVID-19 pandemic.

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<sup>67</sup> IMG Forum, *New Visa Ban*, University of Chicago Booth (June 26, 2020), <https://bit.ly/33w8Aig>.

<sup>68</sup> *Id.*

<sup>69</sup> *See, e.g.*, Takao Kato & Chad Sparber, *Quotas and Quality, The Effect of H-1B Visa Restrictions on the Pool of Prospective Undergraduate Students from Abroad* at 2 (May 2010), <https://bit.ly/3kozGhF> (“Since foreign-student interest in a US degree is partly driven by the hope that it will improve access to the US labor market, policies reducing H-1B visas are likely to deter foreign students from pursuing tertiary American education.”).

<sup>70</sup> *See id.*

## CONCLUSION

The President’s suspension of nonimmigrant visa programs, supposedly to “protect” American workers, actually harms those workers, their employers, and the economy. Rather than shielding domestic workers from the threat of foreign competition, the Proclamation all but ensures that firms will need to hire abroad to fill highly-skilled positions, for which the domestic demand far exceeds the available supply of workers. Extensive economic research confirms that *more*, not less, nonimmigrant visas drives positive economic outcomes for U.S. workers, businesses, and the national economy.

But beyond the overwhelming data undermining the Proclamation’s purported rationale, the Administration’s actions send a fundamentally un-American message to those abroad who might otherwise have brought their skills and ingenuity to the United States. For many decades, this country has been a magnet to these talented people, who have—along with U.S.-born workers and innovators—made our economy the most dynamic in the world. The Proclamation prevents U.S. companies from attracting the world’s best and brightest, and deprives those innovative, highly-skilled individuals of opportunities to further America’s short-term recovery and long-term economic growth.

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**APPENDIX: LIST OF *AMICI***

1. Alliance of Business Immigration Lawyers
2. Amazon.com, Inc.
3. Apple Inc.
4. Atlassian, Inc.
5. Autodesk, Inc.
6. Box, Inc.
7. BSA Business Software Alliance, Inc. d/b/a BSA | The Software Alliance
8. Facebook, Inc.
9. FWD.us Education Fund
10. Georgia Chamber of Commerce
11. GitHub, Inc.
12. Hewlett Packard Enterprise Company
13. Intel Corp.
14. Kickstarter, PBC
15. LinkedIn Corporation
16. Metro Atlanta Chamber
17. Microsoft Corporation
18. Netflix, Inc.
19. North Texas Commission
20. PayPal, Inc.
21. Plaid Inc.
22. Postmates, LLC

23. Reddit, Inc.
24. salesforce.com, inc.
25. SAP SE
26. Semiconductor Industry Association (SIA)
27. Shutterstock, Inc.
28. Society for Human Resource Management (SHRM)
29. Splunk Inc.
30. SurveyMonkey Inc.
31. Texas Association of Business
32. Twitter, Inc.
33. Uber Technologies, Inc.
34. Upwork Inc.
35. Vail Valley Partnership
36. VMware, Inc.
37. Workday, Inc.
38. Zillow Group, Inc.

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I hereby certify that this brief contains 5,196 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I further certify that this brief is an *amicus* brief and complies with the word limit of Fed. R. App. P. 29(a)(5).

*/s/ Ethan D. Dettmer*

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Ethan D. Dettmer

### **CERTIFICATE OF SERVICE**

I hereby certify that on December 16, 2020, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

*/s/ Ethan D. Dettmer*

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