No. 20-17132

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. 4:20-cv-4887-JSW
The Hon. James S. White

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INTRODUCTION

This Court should vacate the district court's preliminary injunction of an important and timely Presidential Proclamation that protects and aids American workers in the face of the economic damage inflicted by the COVID-19 pandemic. *See Presidential Proclamation 10052, 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. 38,263 (Jun. 25, 2020). The preliminary-injunction order rests on serious errors of law and damages the interests of the United States and the public.

Under the Immigration and Nationality Act (INA), the President has broad authority to temporarily suspend the entry of any class of aliens upon a finding "that entry of such aliens would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f); *see also id.* § 1185(a)(1). Exercising that authority, the President issued Proclamation 10052, which temporarily suspends entry into the United States of certain nonimmigrant workers while the Nation responds to the economic harms caused by the devastating COVID-19 pandemic. The President found that entry of these nonimmigrant workers at this time would be detrimental to the interests of the United States "under the extraordinary circumstances of the economic contraction resulting from the COVID-19 outbreak" because their entry "poses a risk of displacing and disadvantaging United States workers during the current [economic] recovery." 85 Fed. Reg. at 38,263.

Despite the broad authority conferred on the President and his sound findings, the district court preliminarily enjoined Proclamation 10052 for several categories of nonimmigrant foreign workers. *See* Excerpts of Record (ER) 25. The court concluded that Plaintiffs—four trade associations whose members employ H-1B, H-2B, or L nonimmigrant workers, and one company that sponsors J-1 nonimmigrant cultural-exchange workers—are likely to succeed on their claim that the Proclamation exceeds the authority conferred by the INA, that Plaintiffs demonstrated irreparable harm, and that the equities favor an injunction. ER 6-24. The court therefore barred the Government from applying Proclamation 10052 to the Plaintiffs and their members as to H-1B, H-2B, L, or certain J visas. ER 25.

The district court's decision rests on serious errors of law and should be rejected.

The INA plainly authorizes Proclamation 10052. Under the INA, "[w]henever the President finds that the entry of ... any class of aliens into the United States would be detrimental to the interests of the United States, he may ... suspend entry of ... any class of aliens ... or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court explained that the "sole prerequisite" to exercise this authority is a Presidential finding that the entry of the covered aliens would be detrimental to the interests of the United States. *Id.* at 2408. Proclamation 10052 satisfies this requirement. In issuing the Proclamation, the President expressly found that the entry of foreign workers covered by the Proclamation "would be detrimental to the

interests of the United States." 85 Fed. Reg. 38,264. The President's finding was based on a review of nonimmigrant labor-certification programs by the Secretary of Labor and nonimmigrant visa programs by the Secretary of Homeland Security, who, in turn, "found that the present admission of workers within several nonimmigrant visa categories . . . poses a risk of displacing and disadvantaging United States workers during the current recovery." *Id.* at 38,263. The President therefore suspended entry of the enumerated nonimmigrant visa categories through December 31, 2020. *Id.* at 38,264-65. The Proclamation thus satisfied the "sole prerequisite" set forth in the statute, 138 S. Ct. at 2408, and was a lawful exercise of Presidential authority.

The district court gave three reasons for concluding otherwise. Each lacks merit. First, the district court reasoned that the President lacks authority under the INA to suspend entry based on "a purely domestic" concern, such as "loss of employment during a national pandemic." ER 12, ER 10-15. But there is no basis for such a foreign-domestic distinction: section 1182(f)'s text does not make or imply any such distinction, but rather speaks only of restricting entry of aliens "detrimental to the United States." 8 U.S.C. § 1182(f). And that distinction is unsound anyway, because the entry of foreign nationals from abroad necessarily encompasses both foreign and domestic concerns. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). Second, the district court reasoned that the President lacks the authority to suspend entry of "categories of workers" because doing so would "eviscerate" portions of the INA creating visas for those categories of workers, and, the district

court reasoned, section 1182(f) does not allow such evisceration. ER 15, ER 15-18. But the Supreme Court held in *Hawaii* that section 1182(f) grants the President "'ample power' to impose entry restrictions in addition to those elsewhere enumerated in the INA" and rejected the argument that other provisions of the INA should be read to impose implicit limits on the President's authority to suspend entry under section 1182(f). *Hawaii*, 138 S. Ct. at 2408 (quoting *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187 (1993)). The Proclamation here imposes "entry restrictions in addition to" those already established in the INA, *id.*; as the Supreme Court explained, section 1182(f) allows additional restrictions—it is not an "eviscerat[ion]" of any part of the INA. Third, the district court reasoned that the President's findings were not sufficient to justify the Proclamation's temporary suspension of entry. ER 18-21. But the findings are plainly adequate under the lenient standard embodied in section 1182(f). Here again, the district court's ruling conflicts with *Hawaii*, which rejected a "searching inquiry into the persuasiveness of the President's justifications" for suspending entry as "inconsistent with the broad statutory text and the deference traditionally accorded to the President in this sphere." 138 S. Ct. at 2409.

The remaining injunctive factors weigh strongly against the district court's injunction. The injunction harms the public interest by preventing the President from reducing foreign competition for certain categories of labor in the face of great harm to U.S. workers and during the continuing economic uncertainty. *See* 85 Fed. Reg. at 38,263-64. And, the injunction cuts at the heart of the President's broad authority

over the entry of foreign nationals at a time when that authority is essential to combatting the COVID-19 pandemic and helping American workers. Finally, Plaintiffs failed to demonstrate irreparable harm because they alleged only monetary injuries and did not provide any evidence that such injuries would force them out of business.

This Court should reject the district court's decision and vacate the preliminary-injunction order.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. *See* ER 964. The district court issued a preliminary-injunction order on October 1, 2020. ER 1-25. The Government filed a timely notice of appeal on October 29, 2020. ER 26-28. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court erred in entering a preliminary injunction for the benefit of Plaintiffs, enjoining Presidential Proclamation 10052 as to H-1B, H-2B, L, and certain J-1 nonimmigrant workers, on the ground that the President exceeded his authority under 8 U.S.C. § 1182(f) and the other injunctive factors supported Plaintiffs.

STATEMENT OF THE CASE

I. Legal and Factual Background.

The Constitution confers broad authority on the President to exclude aliens from the United States. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542

(1950). And Congress has, in 8 U.S.C. § 1182(f), accorded the President broad discretionary authority to suspend or restrict the entry of aliens or classes of foreign nationals:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). Section 1185(a)(1) further grants the President authority to adopt "reasonable rules, regulations, and orders" governing the entry or removal of aliens, "subject to such limitations and exceptions as [he] may prescribe." *Id.* § 1185(a)(1).

The 2019 Novel Coronavirus (COVID-19) has caused a pandemic that presents extraordinary challenges for countries around the world, including the United States. Among other things, the pandemic has significantly affected the State Department's ability to operate its embassies and consulates overseas. Thus, on March 20, 2020, the State Department announced that it would "temporarily suspend routine visa services at all U.S. Embassies and Consulates," but that "emergency and mission critical visa services" would continue as resources allow." U.S. Department of State–Bureau of Consular Affairs, Suspension of Routine Visa Services, https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html (last visited Nov. 13, 2020). While visa operations were suspended, consular posts operated at a limited capacity, providing mission-critical or emergency services. *Id.* Immigrant visa services considered "mission critical" included services

for spouses of U.S. citizens, unmarried children of U.S. citizens, adopted children of U.S. citizens, Afghan and Iraqi Special Immigrants, and medical professionals. *Id.*

On April 22, 2020, the President exercised his authority under 8 U.S.C. §§ 1182(f) and 1185(a) to issue Presidential Proclamation 10014. That Proclamation temporarily suspended "entry into the United States of aliens as immigrants" who did not already have a valid immigrant visas or travel document. *See* Presidential Proclamation 10014, *Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 Fed. Reg. 23,441 (Apr. 27, 2020). The President provided three justifications for this suspension of entry: (1) to address the damage to the economy, especially the significant unemployment, caused by the COVID-19 pandemic; (2) to allow consular officers to focus their limited resources on providing necessary services to American citizens abroad; and (3) to avoid the strain on our healthcare resources during the pandemic.

The President provided specific findings to support each of these justifications. The President explained that "national unemployment claims reach[ed] historic levels," with "more than 22 million Americans ... fil[ing] for unemployment" between March 13, 2020 and April 11, 2020. The President "determined that, without intervention, the United States faces a protracted economic recovery with persistently high unemployment if labor supply outpaces labor demand," and that excess "labor supply affects all workers and potential workers, but it is particularly harmful to workers at the margin between employment and unemployment," because they are

"likely to bear the burden of excess labor supply disproportionately." *Id.* The President explained that those employment-based visa categories that contain a labor-certification requirement "cannot adequately capture the status of the labor market today" because that certification was issued "long before the visa is granted." *Id.* at 23,442. Accordingly, the "[e]xisting immigrant visa processing protections are inadequate for recovery from the COVID-19 outbreak." *Id.* at 23,441. The President also explained that the Proclamation helps "conserve critical State Department resources so that consular officers may continue to provide services to United States citizens abroad," including through the "ongoing evacuation of many Americans stranded overseas." *Id.* at 23,441.

Based on these findings, the President suspended entry into the United States, for 60 days, of intending immigrants abroad who did not already have a valid immigrant visa or travel document as of the effective date of the Proclamation—April 22, 2020. *Id.* at 23,442-43. The Proclamation is subject to specified exceptions, including that "any alien whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or other respective designees," is eligible to seek entry. *Id.* at 23,443. The Proclamation further directed that "[w]ithin 30 days of the effective date of his proclamation, the Secretary of Labor and the Secretary of Homeland Security, in consultation with the Secretary of State, shall review nonimmigrant programs and shall recommend ... other measures appropriate to stimulate the United States economy and ensure the prioritization, hiring, and employment of United States workers." *Id.*

On June 22, 2020, the President signed Proclamation 10052, which modified and extended Proclamation 10014 to also suspend the entry of certain nonimmigrant workers through December 31, 2020. *See* Proclamation 10052, *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. 38,263 (Jun. 25, 2020). Again exercising his authority under 8 U.S.C. §§ 1182(f) and 1185(a), the President "determined that the entry, through December 31, 2020, of certain aliens as immigrants and nonimmigrants would be detrimental to the interests of the United States." 85 Fed. Reg. at 38,263. In relevant part, the Proclamation suspended the entry of foreign nationals seeking entry pursuant to H-1B, H-2B, L, and certain J nonimmigrant visa programs, unless they are eligible for an exception, including a national-interest exception. *Id.* at 38,264-65. The H-1B visa category enables employers in the United States to temporarily hire qualified foreign professionals in "specialty occupation[s]" requiring "theoretical and practical application of a body of highly specialized knowledge" and a "bachelor's or higher degree." ER 4 (citing 8 U.S.C. §§ 1184(i)(1), 1101(a)(15)(H)(i)(b)). The H-2B visa category enables employers in the United States to temporarily hire foreign nationals "to perform ... temporary service of labor" in non-specialized, non-agricultural sectors, "if unemployed persons capable of performing such service or labor cannot be found in this country." ER 5 (citing 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *see also* 8 C.F.R. § 214.2(h)(6)). The L visa category allows multinational corporations to sponsor visas for temporary intra-company transfers to the United States. ER 4; *see* 8 U.S.C. § 1101(a)(15)(L). Finally,

the J visa category allows approved applicants to participate in 15 different categories of work- and study-based cultural-exchange visitor programs, including as trainees, teachers, au pairs, and foreign students in summer work programs. ER 5 (citing 8 U.S.C. § 1101(a)(15)(J); 22 C.F.R. §§ 62.1, 62.4)).

The President explained that the "unemployment rate in the United States nearly quadrupled between February and May of 2020—producing some of the most extreme unemployment ever recorded by the Bureau of Labor Statistics," and that, despite a recent decline in unemployment, "millions of Americans remain out of work." 85 Fed. Reg. at 38,263. The President announced that the Secretaries of Labor and Homeland Security had reviewed nonimmigrant programs and "found that the present admission of workers within several nonimmigrant visa categories also poses a risk of displacing and disadvantaging United States workers during the current recovery." *Id.* at 38,263. The President explained that "American workers compete against foreign nationals for jobs in every sector of our economy, including against millions of aliens who enter the United States to perform temporary work," and that "[t]emporary workers are often accompanied by their spouses and children, many of whom also compete against American workers." *Id.* The President acknowledged that under "ordinary circumstances, properly administered temporary worker programs can provide benefits to the economy," but explained that "under the extraordinary circumstances of the economic contraction resulting from the COVID-19 outbreak, certain nonimmigrant visa programs authorizing such employment pose an unusual threat to the employment of American workers." *Id.* Specifically, the President

explained that "between February and April of 2020, more than 17 million United States jobs were lost in industries which employers are seeking to fill worker positions tied to H-2B nonimmigrant visas," and "more than 20 million United States workers lost their jobs in key industries where employers are currently requesting H-1B and L workers to fill positions." *Id.* at 38,263-64. The President further observed that "the May unemployment rate for young Americans, who compete with certain J nonimmigrant visa applicants, has been particularly high." *Id.* at 38,264. He concluded that the "entry of additional workers through the H-1B, H-2B, J, and L nonimmigrant visa programs, therefore, presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID-19 outbreak." *Id.* As he had in Proclamation 10014, the President explained that "[h]istorically, when recovering from economic shocks that cause significant contractions in productivity, recoveries in employment lag behind improvements in economic activity." *Id.*

Like Proclamation 10014, Proclamation 10052 has exceptions, including an exception for individuals whose entry into the United States would be in the national interest, as determined by the Secretaries of State and Homeland Security, or their respective designees. *See* 85 Fed. Reg. at 38,265.

On July 14, 2020, the State Department provided public guidance advising, "U.S. Embassies and Consulates are beginning a phased resumption of routine visa services." U.S. Dep't of State, Phased Resumption of Routine Visa Services, https://travel.state.gov/content/travel/en/News/visas-news/phased-resumption-

routine-visa-services.html (last visited Nov. 13, 2020). This guidance explained that routine visa services will resume on a post-by-post basis—"as conditions improve, our missions will begin providing additional services, culminating eventually in a complete resumption of routine visa services." *Id.*

On August 12, 2020, the State Department updated language on its website that explains national-interest exceptions to Proclamations 10014 and 10052 that may be available for certain nonimmigrant workers in H-1B, H-2B, L, and J visa categories. *See* https://travel.state.gov/content/travel/en/News/visas-news/exceptions-to-p-p-10014-10052-suspending-entry-of-immigrants-non-immigrants-presenting-risk-to-us-labor-market-during-economic-recovery.html (last visited Nov. 13, 2020). The guidance provides "a non-exclusive list of the types of travel that may be considered to be in the national interest" and is "based on determinations made by the Assistant Secretary of State for Consular Affairs, exercising the authority delegated to him by the Secretary of State under Section 2(b)(iv) of [Proclamation] 10014 and 3(b)(iv) of [Proclamation] 10052." *Id.* The guidance provides that applicants "who are subject to any of these Proclamations, but who believe they may qualify for a national interest exception or other exception, should follow the instructions on the nearest U.S. Embassy or Consulate's website regarding procedures necessary to request an emergency appointment and should provide specific details as to why they believe they may qualify for an exception." *Id.* The guidance also clarifies that "[w]hile a visa applicant subject to one or more Proclamations might meet an exception, the applicant must first be approved for an

emergency appointment request and a final determination regarding visa eligibility will be made at the time of visa interview." And, acknowledging the ongoing limitations of U.S. consular operations around the world due to the pandemic, the State Department clarifies "that U.S. Embassies and Consulates may only be able to offer limited visa services due to the COVID-19 pandemic, in which case they may not be able to accommodate [a request for a national-interest exception] unless the proposed travel is deemed emergency or mission critical." *Id.*

II. Procedural Background.

On July 21, Plaintiffs filed this lawsuit challenging Proclamation 10052 on two grounds. *See* ER 996-99. Plaintiffs alleged that the Proclamation exceeded the Executive Branch's authority and so constituted *ultra vires* conduct (Count I) and that the Proclamation constituted a violation of the Administrative Procedure Act (APA) (Count II). *See* ER 996-99. Plaintiffs are four trade associations whose members employ H-1B, H-2B, or L nonimmigrant workers, and one company that employs different categories of J-1 nonimmigrant cultural-exchange workers. *See* ER 962-63, 988. The National Association of Manufacturers, the U.S. Chamber of Commerce, the National Retail Federation, and Technet (the organizational Plaintiffs) allege that the Proclamation will cause economic harm and assert their unnamed members' claims of difficulty with importing temporary skilled and unskilled foreign workers into the United States. ER 983-88. Intrax, Inc. (the company Plaintiff) alleges that it has had to cease many of its J-1 exchange visitor visa programs and that the Proclamation has left it unable "to plan for the future" because "potential [visa-

beneficiary] participants are ... unwilling to sign up without assurances the Proclamation actually will be lifted." ER 988. On July 31, Plaintiffs moved to preliminarily enjoin the government from "implementing, enforcing, or otherwise carrying out" Proclamation 10052 as to Plaintiffs and their members. Specifically, they sought to prevent the government from "engaging in any action that results in the non-processing or non-issuance of applications or petitions for visas in the H, J, and L categories which, but for Presidential Proclamation 10052, would be eligible for processing and issuance." ER 539.

On October 1, 2020, the district court issued a preliminary-injunction order barring the government from applying Proclamation 10052 to any of the member-companies of the organizational Plaintiffs or to Intrax, Inc., as to H-1B, H-2B, L, or certain J visas. ER 25.

At the threshold, the court rejected the government's argument that the Proclamation is non-reviewable in light of the Executive's broad authority over the admission and exclusion of aliens, deeming this argument as "unpersuasive." ER 9 n.2.

On the merits, the court ruled that Plaintiffs are likely to succeed on their claim that "the Proclamation is beyond the President's lawful authority under Section 1182(f)." ER 10. The court gave three reasons.

First, the court ruled that the Proclamation exceeds the President's authority under section 1182(f) because the Proclamation addresses "a purely domestic economic issue—the loss of employment during a national pandemic"—rather than,

as the court thought necessary under section 1182(f), a matter of "international affairs and national security." ER 12; *see also* ER 10-15. Although the text of section 1182(f) does not distinguish between "foreign" as opposed to "domestic" concerns, the court reasoned that "there must be some measure of constraint on Presidential authority in the domestic sphere in order not to render the executive an entirely monarchical power in the immigration context, an area within clear legislative prerogative." ER 13. The court stated that any other reading of section 1182(f) would "constitute an unrestrained delegation of legislative power and would therefore be an invalid application of the statute." ER 14 n.4. Thus, the court concluded that section 1182(f) must contain a foreign-domestic distinction. ER 15. Because, in the court's view, Proclamation 10052 is "purely domestic" in nature, the court concluded that "Plaintiffs have satisfied their burden to demonstrate that they are likely to prevail on the merits or, in the alternative, have demonstrated serious questions going to the merits of their claim that the issuance of the Proclamation is invalid based on the limitation on the power to issue Presidential proclamations." ER 15.

Second, the court reasoned that "Congress did not delegate [in section 1182(f)] authority to eviscerate portions of the INA," and concluded that the Proclamation effected such an evisceration by effectively eliminating "categories of workers" who may be admitted into the country. ER 15; *see also* ER 15-18. The court stated that the Proclamation nullifies portions of the INA by "declaring invalid statutorily-established visa categories in their entirety for the remainder of this calendar year": "the Proclamation simply eliminates H-1B, H-2B, L-1, and J-1 visas and nullifies the

statutes creating those visa categories." ER 16. "[T]he President's wholesale elimination of categories of workers does not," the court believed, "supplement this legislative judgment but rather explicitly supplants it by refusing admission to all categories of foreign workers." ER 18. The court also suggested that the Proclamation might also be "legally suspect" because it has an "indeterminate end date" given that the President may choose to extend Proclamation past December 31, 2020. ER 16 n.6.

Third, the court held that the Proclamation was also invalid because the record evidence did not support the Proclamation's factual findings, and so the entry suspension based on those findings could not stand. ER 19; *see also* ER 18-21. "Although facially the President's determination appears to be a finding as required by Section 1182(f)," the court stated, "there is nothing proffered in the record that any such reviews were made by the Secretaries of Labor or Homeland Security, and 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." ER 19. The court concluded that there is "a significant mismatch of facts regarding the unemployment caused by the proliferation of the pandemic and the classes of noncitizens who are barred by the Proclamation." ER 20. Relying on material submitted by the Plaintiffs, the court reasoned that "pandemic-related unemployment" "is concentrated in service occupations and that large number of job vacancies remain in the area most affected by" the Proclamation—"computer operations." ER 20. The court also reasoned that the "Presidential finding

in the text of the Proclamation, such as it is, is not supported by any review or report proffered by Defendants." ER 21.

The court did not address Plaintiffs' claims under the APA, explaining that because it concluded that the Proclamation exceeds the President's authority, "its enforcement and implementation by Defendants" is unlawful and thus the court did not need to address the additional claim. ER 22; *see also* ER 21-22.

The court concluded that the other injunctive factors favored Plaintiffs. The court ruled that Plaintiffs have suffered, and will continue to suffer, irreparable harm without an injunction because the Proclamation limits Plaintiffs' "ability to hire and retain qualified individuals from abroad." ER 22. The court rejected the government's argument that "the hiring practices of Plaintiffs and their members were harmed by the effects of the pandemic and the suspension of processing in visas generally caused by the closures of United States consular posts worldwide," reasoning that some consulates are open but were still not processing visas. ER 23 (citing ER 488, 491-92). The court also rejected the government's argument that the existence of national-interest exceptions counsel against a conclusion that Plaintiffs demonstrated that they would likely suffer immediate irreparable harm in the absence of an injunction because "the claim that a policy does not cause harm because there are exceptions to the policy is a logical fallacy." ER 23-24. Moreover, the district stated that the costs of applying for a national-interest exception itself constitutes an irreparable injury. ER 23. The court acknowledged that "monetary injury is not normally considered irreparable," ER 22 (citations and quotations omitted), but

deemed Plaintiffs' claimed injuries to constitute irreparable harm.

Last, the court concluded that the public interest and balance of the equities favor an injunction because "it is in the public interest to respect Congressional judgments on purely domestic issues," and the "benefits of supporting American business and predictability in their governance will inure to the public." ER 24.

The government timely appealed.

SUMMARY OF THE ARGUMENT

This Court should vacate the preliminary-injunction order. That order rests on serious errors of law and inflicts profound harm on the United States and the public.

I. The district court erred in concluding that Plaintiffs are likely to prevail on the merits. ER 10-21. Plaintiffs have not even raised serious questions on the merits.

To start, there is no basis for a court to exercise judicial review over a non-constitutional challenge, like this lawsuit, to the political branches' decisions to exclude aliens. The Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Accordingly, "[t]he conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based" are "wholly outside the power" of courts to control. *Id.* at 796. The district court should have rejected injunctive relief on this

ground alone, and its perfunctory rejection of this argument, ER 9 n.2, was improper.

On the merits, Proclamation 10052 is a lawful exercise of the President's broad authority under 8 U.S.C. § 1182(f). Under this section, "[w]henever the President finds that the entry of ... any class of aliens into the United States would be detrimental to the interests of the United States, he may ... suspend entry of ... any class of aliens ... or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). The "sole prerequisite" to exercise this statutory authority is for the President to find that the entry of an alien would be detrimental to the interests of the United States. *Trump v. Hawaii,* 138 S. Ct. 2392, 2408 (2018). The President made that finding here: he concluded that "the entry into the United States of persons" described in Proclamation 10052 "would be detrimental to the interests of the United States" because they would present "a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID-19 outbreak." *See* 85 Fed. Reg. 38,264. Based on that finding, the President suspended entry of several categories of nonimmigrant workers through December 31, 2020. Given the President's finding, that suspension of entry was lawful and the district court had no basis to enjoin it. The district court's contrary view (ER 10-21) misconstrues section 1182(f)'s clear text, departs from the Supreme Court's decision in *Hawaii*, and improperly second-guesses the President's factual findings.

II. The district court also erred in concluding that the remaining injunctive factors support a preliminary injunction. ER 22-24. The injunction inflicts severe

damage on the United States and the public: the Proclamation seeks to protect and aid U.S. workers during a pandemic by temporarily suspending the entry into the United States of foreign workers who would consume scarce jobs when U.S. workers harmed by the pandemic need them the most. The injunction also conflicts with the law and therefore otherwise damages the public interest. Plaintiffs' alleged injuries, by contrast, amount to non-irreparable claims of monetary harm or harms that are attributable to the pandemic rather than to the Proclamation. And the Proclamation's targeted approach—allowing for national-interest waivers—limits any claimed harms to Plaintiffs, making clear that the injunctive factors strongly favor leaving the Proclamation in full effect.

STANDARD OF REVIEW

A "preliminary injunction is an extraordinary and drastic remedy," *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008), that should be granted only "upon a clear showing that the [movant] is entitled to such relief," *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, the moving party must show (1) that it is likely to succeed on the merits of its claims; (2) that it is likely to suffer an irreparable injury in the absence of injunctive relief; (3) that the balance of equities tips in its favor; and (4) that the proposed injunction is in the public interest. *Id.* at 20.

The grant of a preliminary injunction is reviewed for abuse of discretion, but "the district court's interpretation of the underlying legal principles is subject to de novo review and a district court abuses its discretion when it makes an error of law."

E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 989 (9th Cir. 2006) (punctuation omitted).

ARGUMENT

I. This Court Should Vacate The Preliminary Injunction Because Plaintiffs Are Unlikely To Succeed On The Merits Of Their Claims.

A. The District Court Should Not Have Reviewed the Proclamation at All Because Courts May Not Review Non-Constitutional Challenges to the Political Branches' Decisions to Exclude Aliens

This claim is barred at the outset by principles of non-reviewability. The district court's perfunctory dismissal of this argument, ER 9 n.2, is unsound.

For non-constitutional claims by U.S. citizens or any claims asserted by aliens abroad, it is a fundamental and long-recognized separation-of-powers principle that the political branches' decision to exclude aliens abroad is not subject to judicial review. The Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)); *Doe v. Trump*, 957 F.3d 1050, 1071 (9th Cir. 2020) (Bress, J., dissenting) (in this area the President is "operating at the apex of his constitutional mandate"). Accordingly, "[t]he conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based" are "wholly outside the power" of courts to control. *Fiallo*, 430 U.S. at 796

(citation omitted). Outside of a narrow exception for certain constitutional claims brought by U.S. resident plaintiffs—because exclusion is "a fundamental act of sovereignty" by the political branches and noncitizens have no "claim of right" to enter the United States—courts may not review decisions to exclude aliens "unless expressly authorized by law." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950). Congress has established a comprehensive statutory framework for judicial review of decisions concerning an alien's ability to remain in the United States. *See* 8 U.S.C. § 1252. But Congress has never, in section 1252 or any other provision of the INA, authorized review of a visa denial—and in fact has expressly rejected a cause of action to seek judicial review of visa denials. *See* 6 U.S.C. § 236(f) (no "private right of action" to challenge decision "to grant or deny a visa"); *see also Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (denial of visa to alien abroad "is not subject to judicial review ... unless Congress says otherwise"). Accordingly, any statutory claim challenging the exclusion of aliens is non-justiciable.[1]

Under these principles, Plaintiffs' claims are barred from judicial review. Plaintiffs seek judicial review of the Executive Branch's exercise of power clearly provided by Congress to govern the entry of foreign nationals. *See Fiallo*, 430 U.S. at 796. Specifically, Plaintiffs assert two claims: that "the Proclamation is in excess of

[1] The Supreme Court did not find it necessary to address these limits on judicial review in *Hawaii* and instead "assume[d] without deciding that plaintiffs' statutory claims [were] reviewable," because, "even assuming that some form of review is appropriate," the challenges to the entry restrictions at issue in that case failed on the merits. 138 S. Ct. at 2407, 2409-11.

the President's authority under" the INA and that "implementation of the Proclamation by Defendant departments and secretaries violates the requirements of the APA." ER 996, 998; *see also* ER 996-99). Both of these claims seek judicial review of the Executive Branch's determination denying admission of certain classes of nonimmigrant workers into the United States. That determination —made pursuant to express congressional authority—is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," and such "matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades*, 342 U.S. 588-89. It does not matter that Plaintiffs here purport to challenge a "policy" rather than individual visa adjudications. *See Hawaii*, 138 S. Ct. at 2420 ("asking only *whether the policy* is facially legitimate and bona fide" and noting how, if the answer to that question is yes, it "would put an end to our review" (emphasis added)); ER 514 (making this point). Regardless of how Plaintiffs frame the issue, because they challenge the "terms and conditions upon which [aliens] may come to this country," the nonreviewability principles set forth above bar review. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *see Allen v. Milas*, 896 F.3d 1094, 1104 (9th Cir. 2018) (recognizing that "the power to exclude or expel aliens, as a matter affecting international relations and national security, is vested in the Executive and Legislative branches of government." (quotation marks omitted)).

In district court, the government argued that review of the decision to grant or refuse a visa was not reviewable. ER 513 (citing *Saavedra Bruno*, 197 F.3d at 1160).

The district court did not directly address this argument other than to state that any argument that this case is not justiciable is "unpersuasive." ER 9 n.2. To be sure, not every case that touches on foreign affairs or national security is non-justiciable, *id.*, but this misses the point. Proclamation 10052 is not subject to judicial review because Plaintiffs are asserting a non-constitutional challenge to the Executive's decision to exclude aliens. *See Fiallo*, 430 U.S. at 796. The district court's opinion does not address this contention. The Court can vacate the injunction on this ground alone.

B. Proclamation 10052 is a Lawful Exercise of the President's Broad Authority under 8 U.S.C. § 1182(f)

The district court erred in ruling that Plaintiffs demonstrated a substantial likelihood of success on the merits on their claim that Proclamation 10052 exceeds Presidential authority. ER 10-21. The Proclamation is a lawful exercise of the President's authority.

"The exclusion of aliens is a fundamental act of sovereignty" that is grounded in the legislative power and also "inherent in the executive power to control the foreign affairs of the nation." *Knauff*, 338 U.S. at 542. Congress, in enacting 8 U.S.C. § 1182(f), recognized the President's authority to suspend entry of foreign nationals. Section 1182(f) provides that "[w]henever the President finds that the entry of ... any class of aliens into the United States would be detrimental to the interests of the United States, he may ... suspend entry of ... any class of aliens ... or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f); *see also id.* § 1185(a)(1) ("[I]t shall be unlawful ... for any alien to ... enter ... the United

States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe."). In *Trump v. Hawaii*, the Supreme Court explained that the "sole prerequisite" to exercise of this "comprehensive delegation" is that the President find that entry of the covered aliens would be detrimental to the interests of the United States. 138 S. Ct. at 2408 (explaining that section 1182(f) "exudes deference to the President in every clause" and "entrusts to the President the decisions whether and when to suspend entry," "whose entry to suspend," "for how long," and "on what conditions"); *see also Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (R.B. Ginsburg, J.) (the President "may act pursuant to section 1182(f) to suspend or restrict 'the entry of any aliens or any class of aliens' whose presence here he finds 'would be detrimental to the best interests of the United States'"). The Court added that section 1182(f) does not permit litigants to "challenge" a Presidential entry-suspension order "based on their perception of its effectiveness and wisdom," because Congress did not permit courts to substitute their own assessments "for the Executive's predictive judgments on such matters, all of which are delicate, complex, and involve large elements of prophecy." *Hawaii*, 138 S. Ct. at 2421 (citations and quotations omitted); *see also id.* at 2409 (rejecting a "searching inquiry into the President's judgment"). Whether the President's chosen method of addressing a perceived risk to the national interest "is justified from a policy perspective" is irrelevant, because he need not "conclusively link all of the pieces in the puzzle before courts grant weight to his empirical conclusions." *Id.* at 2409 (citations omitted). The Supreme Court's holding in *Hawaii*

is consistent with a long line of decisions holding that judicial inquiry into the reasoning of a Presidential Proclamation "would amount to a clear invasion of the legislative and executive domains." *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371, 380 (1940); *see Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 165 (1993) ("[t]he wisdom of the policy choices" reflected in Presidential Proclamations are not "matter[s] for our consideration").

Under these longstanding principles, Proclamation 10052 is a lawful exercise of the President's authority. In issuing the Proclamation, the President made the sole finding required by sections 1182(f) and 1185(a)(1): he expressly found "that the entry into the United States of persons" described in the Proclamation "would be detrimental to the interests of the United States." 85 Fed. Reg. at 38,264. And the President set forth his reasoning in detail in the Proclamation. The President found that since "March 2020, United States businesses and their workers have faced extensive disruptions while undertaking certain public health measures necessary to flatten the curve of COVID-19 and reduce the spread," and the "unemployment rate in the United States nearly quadrupled between February and May of 2020—producing some of the most extreme unemployment ever recorded by the Bureau of Labor Statistics," and, despite a recent decline in unemployment, "millions of Americans remain out of work." *Id.* at 38,263. He explained that "American workers compete against foreign nationals for jobs in every sector of our economy, including against millions of aliens who enter the United States to perform temporary work," and that "[t]emporary workers are often accompanied by their spouses and children,

many of whom also compete against American workers." *Id.* The President acknowledged that under "ordinary circumstances, properly administered temporary worker programs can provide benefits to the economy," but concluded that "under the extraordinary circumstances of the economic contraction resulting from the COVID-19 outbreak, certain nonimmigrant visa programs authorizing such employment pose an unusual threat to the employment of American workers." *Id.* And he then made specific findings related to H-1B visas applicants: that "between February and April of 2020 ... more than 20 million United States workers lost their jobs in key industries where employers are currently requesting H-1B and L workers to fill positions." *Id.* at 38,264. He concluded that the "entry of additional workers through the H-1B, H-2B, J, and L nonimmigrant visa programs, therefore, presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID-19 outbreak." *Id.* The President's finding was based on, among other things, a review of nonimmigrant programs by the Secretary of Labor and the Secretary of Homeland Security that "found that the present admission of workers within several nonimmigrant visa categories also poses a risk of displacing and disadvantaging United States workers during the current recovery." *Id.* at 38,263. These findings easily satisfy the principles laid out in *Hawaii*, because they set forth the basis for the President's conclusion that entry of the enumerated workers "would be detrimental to the national interest." 138 S. Ct. at 2408. The Proclamation thus lawfully suspends, through December 31, 2020, the entry of the categories of workers at issue. 85 Fed. Reg. at 38,264-65.

Applying these principles, the only other court to address the lawfulness of Proclamation 10052 concluded that Proclamation 10052 is a lawful exercise of the President's authority under section 1182(f). *Gomez v. Trump*, — F. Supp. 3d —, 2020 WL 5367010, at *21 (D.D.C. Sep. 4, 2020), *amended in part by* — F. Supp. 3d —, 2020 WL 5886855 (D.D.C. Sep. 14, 2020) (denying plaintiffs' request to enjoin the Proclamation on the ground that the Proclamation exceeded the President's authority under section 1182(f)). Relying on *Hawaii*, the *Gomez* court recognized that section1182(f) grants the President "ample power" to impose entry restrictions in addition to those enumerated elsewhere in the INA. *Id.* at *18 (citing 138 S. Ct. 2404). Thus, any contention that the President exceeded his authority in imposing restrictions in addition to those contained in the INA necessarily failed. *Id.* The *Gomez* court further explained that the plaintiffs in that case could not succeed on their challenge to the sufficiency of the President's findings because the Proclamation details the job losses in industries in which employers seek to fill positions with H-1B, H-2B, and L workers and explains that certain J nonimmigrant visa applicants "compete for jobs with young Americans, whose job prospects have been hit particularly hard during the pandemic." *Id.* at *20 (citing 85 Fed. Reg. 38,263-64). These findings by the President "are more than adequate" and are "more detailed than those contained in past 1182(f) proclamations identified by the Court in *Trump v. Hawaii*." *Id.* at *21 (referencing 138 S. Ct. 2409); *see Hawaii*, 138 S. Ct. at 2409 (observing that previous proclamations had contained as few as one and five sentences of justification for entry restrictions). So Proclamation 10052 does not

exceed the President's authority under section 1182(f).

The district court here concluded, on three grounds, that the Proclamation exceeds the President's authority under section 1182(f). ER 10-21. None of the district court's reasons withstands scrutiny.

First, the district court reasoned that the President lacks authority under section 1182(f) to address "a purely domestic economic issue," and that the Proclamation addresses only such an issue—"loss of employment during a national pandemic." ER 12; *see also* ER 10-15. There is no sound legal basis for the view that section 1182(f) embodies a foreign-domestic distinction and allows the President to address only purportedly foreign issues. The statutory text does not make or imply any such distinction. Rather, it "simply speaks in terms of restricting entry of aliens 'detrimental to the United States,'" without limiting that detriment "to a particular sphere, foreign or domestic." *Gomez*, 2020 WL 5367010, at *19. Nothing in section 1182(f) is limited to a particular subset of harms or concerns. *See Hawaii*, at 2413, 2415 (recognizing that a health emergency might be an appropriate basis for suspending entry under section 1182(f)). And the grounds for exclusion in section 1182(a) include many that involve "domestic" concerns. *See, e.g.*, 8 U.S.C. § 1182(a)(5) (aliens who would disrupt domestic labor markets or wages). Presidents have accordingly exercised this authority to exclude foreign nationals to advance "domestic" interests. *See, e.g.*, Executive Order No. 12807, 57 Fed. Reg. 23,133 (1992) (aimed at the "serious problem of persons attempting" to enter the U.S. "illegally" and "without necessary documentation"); Proclamation No. 4865, 46 Fed.

Reg. 48,107 (1981) (suspending entry of undocumented individuals who, if allowed entry, would strain "law enforcement resources" and threaten "the welfare and safety of communities" within the United States). The foreign-domestic distinction the district court drew has no support in Supreme Court case law—which, as noted above, emphasizes the broad power conferred by section 1182(f) and the limited findings a President must make to exercise that power. *See Hawaii*, 138 S. Ct. at 2404, 2408.

In applying a foreign-domestic distinction, the district court relied on the ongoing litigation in *Doe #1 v. Trump*, 418 F. Supp. 3d 573, 592 (D. Or. 2019), *stay pending appeal denied*, 957 F.3d 1050 (9th Cir. 2020). ER 11-12, 14. In *Doe #1*, a motions panel of this Court suggested "domestic economic matters" might not be properly addressed through a Presidential proclamation under section 1182(f) because they are not "the traditional sphere[] authorized by § 1182(f): ... international affairs and national security." 957 F.3d at 1067. But the panel expressly stated that its reasoning was preliminary and that "as a motions panel, we must take care not to prejudge the merits of the appeal." 957 F.3d at 1062. On the issue of limiting proclamation authorities in "domestic economic matters," the panel stated that "we do not prejudge the resolution of the merits of this issue" but concluded only that Plaintiffs raised "sufficiently serious questions on the merits" of this claim to weigh in favor of denying a stay. Given that the *Doe #1* motions panel made plain that it did not intend to bind a future merits panel in that same appeal, this Court is certainly not bound by the preliminary reasoning in *Doe #1*.

Moreover, the preliminary reasoning of *Doe #1* is wrong. First, as explained above, section 1182(f) says nothing about such limitations, and instead states that the "sole prerequisite ... is that the President 'find' that the entry of the covered aliens 'would be detrimental to the interests of the United States.'" *Hawaii*, 138 S. Ct. at 2408 (quoting 8 U.S.C. § 1182(f)). This language does not limit the President's authority to addressing foreign affairs or national-security "interests," but he may address any "interest[ ] of the United States." 8 U.S.C. § 1182(f). Second, in reasoning that section 1182(f) had more limited application when the harm was domestic and economic, *Doe #1* relied on a prior case addressing the scope of the foreign-affairs exemption to notice-and-comment rulemaking under the APA. *See id.* (citing *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1279 (9th Cir. 2020)). But the APA—including its notice-and-comment procedures—does not apply to the President. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). And section 1182(f) has no language similar to the APA's foreign affairs exemption, 5 U.S.C. § 553(a)(1)—underscoring the mistake the *Doe #1* panel made in suggesting that these APA limitations could be applied to the section 1182(f) authority that Congress conferred on the President. *See Doe #1*, 957 F.3d at 1067 (suggesting Proclamation should not have been "issued with ... an extremely limited window for public comment").

The district court also reasoned that section 1182(f) should be read as containing an implicit foreign-domestic distinction because any other reading of section 1182(f) would "constitute an unrestrained delegation of legislative power and would therefore be an invalid application of the statute." ER 14 n.4. But in the field

of foreign affairs, Congress need not "lay down narrowly definite standards by which the President is to be governed." *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 320-22 (1936); *see also Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089 (2015) (recognizing that "Congress may grant the President substantial authority and discretion in the field of foreign affairs"). And the district court's conclusion ignores the President's inherent executive authority to exclude foreign nationals. *See Knauff*, 338 U.S. at 542; *Hawaii*, 138 S. Ct. at 2424 (Thomas, J., concurring) ("the President has *inherent* authority to exclude aliens from the country") (emphasis in original). Consistent with this view, the Supreme Court in *Knauff* rejected a nondelegation challenge to section 1182(f)'s predecessor, which authorized the President, "upon finding that the interests of the United States required it," to "impose additional restrictions and prohibitions on the entry into ... the United States during the national emergency proclaimed May 27, 1941." 338 U.S. at 541. The Court held this was not an "unconstitutional delegation[ ] of legislative power," explaining "there [wa]s no question of inappropriate delegation of legislative power involved" because "[t]he exclusion of aliens is a fundamental act of sovereignty" that "is inherent in the executive power to control the foreign affairs of the nation." *Id.* at 542. *Hawaii* similarly concluded that section 1182(f) constituted a "comprehensive delegation" of authority and rejected a rule of constitutional law that "would inhibit the flexibility" of the President "to respond to changing world conditions" pursuant to this type of comprehensive delegation. 138 S. Ct. at 2408, 2419–20. Thus, the present case does not implicate the nondelegation doctrine.

Moreover, even if there were any merit to the view that section 1182(f) embraces a foreign-domestic distinction, it would not support the district court's conclusion here. The exclusion of foreign nationals abroad does not become a "purely domestic" issue simply because the harms would occur within the United States. *See Harisiades*, 342 U.S. at 588-89 (explaining "that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations"). Section 1182(f) speaks to aliens whose entry *into* the United States would be detrimental, so the harm addressed will often occur domestically. *See Hawaii*, 138 S. Ct. at 2404 (upholding restriction on entry of individuals who could pose a threat of violence to individuals *within* the United States).

In sum, the distinction the district court drew between foreign and domestic considerations conflicts with the plain language of the statute, is contrary to Supreme Court precedent, and is unsound as a reason to invalidate the Proclamation.

Second, the district court concluded that the President lacks the authority to suspend the entry of "categories of workers" because doing so would "eviscerate" portions of the INA "by declaring invalid statutorily-established visa categories in their entirety for the remainder of this calendar year and indefinitely beyond that deadline." ER 15, 16; *see also* ER 15-18. But section 1182(f) plainly permits the President to bar entry of skilled temporary workers even though these workers may be admissible under other provisions of the INA. Indeed, in *Hawaii*, the Supreme Court rejected the exact argument on which the district court relied here—that a

Proclamation exceeded the President's authority because it addressed the national-security vetting of certain aliens that was already addressed by provisions in the INA. *See Hawaii*, 138 S. Ct. at 2408; *Abourezk*, 785 F.2d at 1049 n.2 (recognizing that the "President's sweeping proclamation power thus provides a safeguard against the danger posed by any particular case or class of cases that" are not already barred from entry). As the Supreme Court explained, section 1182(f), by its terms, grants the President "ample power to impose entry restrictions in addition to those elsewhere enumerated in the INA." 138 S. Ct. at 2408. Accordingly, the President may "impose entry restrictions [on temporary workers] in addition to those elsewhere enumerated in the INA," just as the President may impose additional restrictions on other classes of foreign nationals. *Id.* at 2408; *see also id.* at 2412. Indeed, empowering the President to impose those additional entry restrictions that would not otherwise exist in the INA is the very purpose of Sections 1182(f) and 1185(a)(1). *See id.* at 2408.[2] Moreover, although the Proclamation does *temporarily* restrict the entry of various immigrant (not at issue here) and nonimmigrant visa classifications, it does not

[2] It is not uncommon for Presidential proclamations to address threats to the national interest by adding restrictions on entry that are not identical to grounds of admissibility established by Congress. For example, in *Sale,* the President issued a proclamation directing the Coast Guard "to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they may qualify as refugees." 509 U.S. at 158; *see also id.* at 160 (discussing the proclamation). As a result, Haitian migrants were barred from even entering U.S. territorial waters even though Congress specifically provided migrants with a statutory right to seek asylum if they reached our shores. *Id.* at 187. Notwithstanding this statutory right, the Court held that it was "perfectly clear" that section 1182 grants the President ample power to establish such a blockade. *Id.*

"declar[e] invalid," ER 16, any of them or any way abolish these classifications. *See Gomez*, 2020 WL 5367010, at *22. As the D.C. district court held in rejecting a similar challenge to Proclamation 10052, "[t]he Proclamations at issue in this case do not 'expressly override' any 'particular provision' of the INA," and though they "restrict from entry various immigrant and nonimmigrant visa classifications … [t]hose classifications are not abolished." *Id.* Not only will admission of these categories resume "once the labor market recovers and the surplus labor concerns identified in the Proclamations are ameliorated," but even now, certain categories of immigrants and nonimmigrants are eligible for admission if they can satisfy an exception set forth in the Proclamation. *Id.* at 22-23.

The district court's ruling conflicts with section 1182(f)'s plain in another way. Section 1182(f) authorizes the President to "suspend the entry of *all aliens* or any class of aliens." 8 U.S.C. § 1182(f) (emphasis added). If Congress has authorized the President to issue a proclamation that could suspend the entry of *all aliens* into the United States without nullifying the INA—despite many provisions of the INA contemplating aliens' lawful entry into the United States—then a Proclamation that merely suspends the entry of *certain classes* of nonimmigrant workers can hardly be said to nullify or "eviscerate" the INA. *Contra* ER 15-18. This is another reason why the district court erred in concluding that Proclamation 10052 exceeds the President's authority under section 1182(f).

In reaching the opposite conclusion, the district court suggested in a footnote that the Proclamation is "legally suspect" because the President might decide to

extend its termination date and, thus, in the district court's view, the Proclamation effectively has "no set end date." ER 16 n.6. This suggestion of a completely hypothetical, perpetual proclamation is unwarranted and would similarly apply to any previous Presidential proclamation (including the proclamation at issue in *Hawaii*), yet the district court did not explain why prior proclamations were lawful. Moreover, section 1182(f) "exudes deference" to the President as to "how long" and on "what conditions" restrictions on entry shall remain. *Hawaii*, 138 S. Ct. at 2408. Thus, under section 1182(f) the President is not "required to prescribe in advance a fixed end date for the entry restrictions." *Id.* at 2410 (recognizing that "not one of the 43 suspension orders issued prior to this litigation has specified a precise end date"); *see also*, *Gomez*, 2020 WL 5367010, at *23 (rejecting the argument that Proclamation 10052 is invalid because its end date can be extended).

Third, the district court concluded that the President's factual findings were not sufficiently documented outside of the Proclamation and were "not supported by any review or report proffered by Defendants," and thus the President had not made the findings that section 1182(f) requires to justify a suspension of entry. ER 21; *see also* ER 18-21. The district court relatedly ruled that the Proclamation was ineffective because, relying on statistics from Plaintiffs, there is "a significant mismatch of facts regarding the unemployment caused by the proliferation of the pandemic and the classes of noncitizens who are barred by the Proclamation." ER 20; *see also* ER 19 n.7.

The district court erred in reaching these conclusions. Nothing in section

1182(f) suggests that the President, in addition to finding that entry would be detrimental to the interests of the United States, must also provide evidence supporting this finding. *See Hawaii*, 138 S. Ct. at 2409. To the contrary, *Hawaii* expressly held that the "sole prerequisite" for suspending entry is a Presidential finding that entry would be detrimental to the interests of the United States. *Id.* at 2408. The President made that finding here. 85 Fed. Reg. at 38,264. Under binding Supreme Court precedent, that should have ended the matter. And *Hawaii* is in full accord with long-established authority that Presidential findings of fact are not subject to judicial review. *Dalton v. Specter*, 511 U.S. 462, 476 (1994); *see, e.g.*, *Bush*, 310 U.S. at 380 ("It has long been held that where Congress has authorized a public officer [such as the President] to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review").

Similarly, the district court's conclusion that there is a purported "mismatch" between the goal of the Proclamation and the means employed by the President to accomplish this goal, ER 20, provides no basis for enjoining the Proclamation. This conclusion is contrary to the Supreme Court's holding that it is improper to "challenge" a Presidential entry-suspension order based on the district court's "perception of its effectiveness and wisdom." *Hawaii*, 138 S. Ct. at 2421 (citations and quotations omitted); *see also Gomez*, 2020 WL 5367010, at *21 (explaining that regardless of how "persuasive" plaintiffs' contention that foreign workers do not

displace U.S. workers "might be in a policy forum or even in a contest under the APA, [they] do not win the day in a legal challenge to presidential action under § 1182(f)"). The Proclamation makes clear that the President made a "finding" that "the entry into the United States of persons" described in the relevant provisions "would be detrimental to the interests of the United States." 85 Fed. Reg. 38,264. Again, that is the end of the matter. *See Hawaii*, 138 S. Ct. at 2408; *Gomez*, 2020 WL 5367010, at *21 (recognizing that the Presidential findings contained in Proclamation 10052 are "more detailed than those contained in past 1182(f) proclamations identified by the Court in *Trump v. Hawaii*.").

In any event, the district court's criticism of the soundness of the policy choice here was wrong. The court concluded that there is a "mismatch" between "unemployment caused by the proliferation of the pandemic and the classes of noncitizens who are barred by the Proclamation," because "not all jobs are fungible." ER 20. But the Proclamation does not rest on the view that "all jobs are fungible." Rather, it rests on the understanding that, given the current emergency, the suspension of entry of foreign workers of certain categories will ameliorate U.S. unemployment in some measure even if there is not a perfect alignment between the categories of workers who are facing the highest levels of unemployment and the categories of foreign workers whose entry into the country is restricted. *See* 85 Fed. Reg. at 38,263-64. That is logical and it is reasonable.

* * *

In sum, the district court wrongly concluded that Plaintiffs demonstrated a

substantial likelihood of success on the merits on their claim that the Proclamation exceeds the President's authority. The injunction should be vacated.

II. The Remaining Factors Weigh Against A Preliminary Injunction.

The district court also erred in concluding that the remaining injunctive factors support injunctive relief. ER 22-24.

The preliminary injunction inflicts irreparable harm on the United States and U.S. workers. Between February and May of 2020, the unemployment rate in the United States nearly quadrupled. 85 Fed. Reg. at 38,263. A great many U.S. workers are thus out of a job: Between February and April of 2020, "more than 17 million United States jobs were lost" in sectors such as the service and hospitality industries, construction, housekeeping, landscaping, "which employers are seeking to fill worker positions tied to H-2B nonimmigrant visas," and "more than 20 million United States workers lost their jobs in key industries" such as information technology, business and finance, accounting, architecture, and engineering "where employers are currently requesting H-1B and L workers to fill positions." *Id.* at 38,263-64. And, the unemployment rate in May 2020 "for young Americans, who compete with certain J nonimmigrant visa applicants" for temporary summer jobs, childcare positions, or part-time employment "has been particularly high." *Id.* at 38,264. Under the circumstances presented by the pandemic, the admission of foreign temporary workers poses a clear risk of displacing and disadvantaging U.S. workers. *Id.* at 38,263 (recognizing the current "depressed demand for labor" and explaining that "American workers compete against foreign nationals for jobs in every sector of our

economy, including against millions of aliens who enter the United States to perform temporary work"). While under ordinary circumstances properly administered temporary worker programs may benefit the economy, "under the extraordinary circumstances of the economic contraction resulting from the COVID-19 outbreak, certain nonimmigrant visa programs authorizing such employment pose an unusual threat to the employment of American workers." *Id.* To address these harms to the American workforce, the President suspended the entry of additional workers through the H-1B, H-2B, J, and L nonimmigrant visa programs because such entry "presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID-19 outbreak." *Id.* Proclamation 10052, in short, seeks to aid U.S. workers who have lost their jobs as a result of the profound economic damage inflicted by the COVID-19 pandemic, by limiting the entry of foreign workers for a limited time and to thereby allow U.S. workers a greater chance of regaining employment. *Id.* (indicating that "excess labor supply is particularly harmful to workers at the margin between employment and unemployment—those who are typically 'last in' during an economic expansion and 'first out" during an economic contraction" and that "[i]n recent years, [those] workers have been disproportionately represented by historically disadvantaged groups, including African Americans and other minorities, those without a college degree, and Americans with disabilities."). The injunction undercuts that effort to aid U.S. workers by allowing into the United States the very "excess labor supply" that competes with U.S. workers during this period of economic contraction. *Id.*

Courts have repeatedly recognized that "a primary purpose in restricting immigration is to preserve jobs for American workers." *INS v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 195 (1991); *see also De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1274-75 (D.C. Cir. 1998) (discussing relationship between employment market and administration of immigration). Here, the injunction is contrary to the public interest because it strikes a blow against U.S. workers by preventing the Executive from carrying out its congressionally-mandated authority to regulate the admission and employment of temporary workers, 8 U.S.C. §§ 1103(a)(1), 1184(a)(1), (c)(1), and ensuring "that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland." 6 U.S.C. § 111(b)(1)(F).

Moreover, "the public interest favors applying federal law correctly." *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011). Any order that micro-manages executive agencies' vested control over a statutory program or enjoins them from administering entry requirements they are in charge of enforcing, runs counter to the political branches' control of immigration policy. *See Saavedra Bruno*, 197 F.3d at 1159 ("the power to exclude aliens ... [is] to be exercised exclusively by the political branches of government"); *cf. Hawaii*, 138 S. Ct. at 2419-20 (noting that "'[a]ny rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,'" and thus a court's "inquiry into matters of entry" is "highly constrained" (quoting *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976))). The district court's injunction

invalidates the President's application of his congressionally mandated authority under Section 1182(f), undermines the Executive Branch's constitutional and statutory authority over immigration, and constitutes an "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013).

Plaintiffs' showing of harm does not remotely match or overcome these profound harms to U.S. workers, to the United States, and to the separation of powers.

To start, Plaintiffs' claims of harm constitute only monetary injury that is not irreparable harm at all. Plaintiffs' claimed harm stem from monetary losses sustained because of their inability to hire and bring into this country foreign workers. ER 559-61. Yet monetary injuries generally do not constitute irreparable injury. *See Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 850 (9th Cir. 1985); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). There is an exception to this general rule "where the loss threatens the very existence of the movant's business." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam); *see Potlongo v. Herff Jones, LLC*, 749 F. App'x 537, 538 (9th Cir. 2018) (rejecting claims of irreparable harm where "the record ... does not demonstrate that the loss of [the plaintiff's] business is likely"). But Plaintiffs provided no evidence establishing that any of them or their members are likely to cease operations without a preliminary injunction. *See Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) (holding that statements by a company president forecasting large losses

again in the coming year, standing alone, were insufficient evidence to demonstrate that the company "is threatened with extinction"). The district court acknowledged that a "monetary injury is not normally considered irreparable," ER 22 (citing *L.A. Mem'l Coliseum*, 634 F.2d at 1202), but it declined to apply this rule to the Plaintiffs' claims. The district court's opinion offers no explanation for why it declined to do so or why it deemed Plaintiffs' purported monetary injuries to be irreparable. On this basis alone, Plaintiffs' purported injuries does not constitute irreparable harm and the preliminary injunction should be vacated.

Beyond that point, Plaintiffs failed to establish that Proclamation 10052—rather than the COVID-19 pandemic and the harms and conditions that it caused—is the source of their claimed injuries, so an injunction of Proclamation 10052 would be warranted even if the harms that Plaintiffs identify qualified as irreparable. More than three months before Proclamation 10052 took effect, on March 20, 2020, the State Department announced that it would "temporarily suspend routine visa services at all U.S. Embassies and Consulates," and only "emergency and mission critical visa services" would continue as resources allow. U.S. Department of State–Bureau of Consular Affairs, Suspension of Routine Visa Services, https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html (last visited Nov. 13, 2020). Under this suspension of routine visa services, unless persons seeking nonimmigrant visas to enter the United States in H-1B, H-2B, L-1, or J-1 status could demonstrate an emergency or mission critical need for such a visa, U.S. consular posts worldwide were not scheduling non-essential,

nonimmigrant worker visa appointments. *See id.* It was this suspension of routine services, and not the Proclamation, that caused Plaintiffs' purported injuries. The district court rejected this argument, reasoning that some consular posts were, as a result of Proclamation 10052, not processing visas even though they were open. ER 23 (citing ER 488 (Gustafson Declaration); ER 491-92). This was error. And Plaintiffs did not attach the declarations to their preliminary-injunction motion, leaving the Government with no opportunity to respond to them in its opposition brief. *Cf. Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). It was also improper for the district court to rely on the Gustafson Declaration because this declaration relates to purported harms suffered by ASSE Int'l, Inc. and EurAuPair Int'l, Inc., two companies (who are not named parties to this action) that earlier filed a separate lawsuit challenging Proclamation 10052 in D.C. district court in which the district court found that they (along with the other plaintiffs in that action) failed to demonstrate a substantial likelihood of success on the merits or irreparable harm. *See Gomez*, 2020 WL 5367010, at *17-24, 34-36 (upholding Proclamation 10052 as lawful and finding that "the companies sponsoring nonimmigrant visa applicants" failed to demonstrate an irreparable injury because "even if the court were to grant their claims for APA relief," the foreign workers the companies seek to import "will continue to be unable to enter the country" due to the proclamation.). ASSE Int'l and EurAuPair Int'l are, thus, bound by this earlier ruling and were not free to re-litigate their request for a preliminary injunction in this action. And the declarations demonstrate that these companies have been able to bring *some* foreign workers they requested into the

country, just not *all* of the workers that they want. *See* ER 489; ER 493. But there is nothing in the record to connect this purported injury to the Proclamation itself, as opposed to the pandemic that required forced consular posts to adjust and prioritize the slow their processing of visa applications. ER 23. For this additional reason, the district court was wrong to rely on the Gustafson Declaration and wrong to find that the Proclamation irreparably harms Plaintiffs.

Finally, to the extent that Plaintiffs could claim any harms that are irreparable and attributable to the Proclamation, the Proclamation substantially limits those harms—making clear that the harms of an injunction decisively weigh against the relief that the district court ordered. On August 12, 2020, the State Department updated guidance on its website to mitigate the very problems Plaintiffs requested that the district court address through a preliminary injunction. *See* ER 137. Specifically, the State Department provided a non-exhaustive list of national-interest exceptions to Presidential Proclamations 10014 and 10052 that may be available for certain workers seeking entry into the United States in H-1B, H-2B, L-1, and J-1 nonimmigrant statuses. ER 137-50. Under this guidance, workers in these nonimmigrant visa categories may request an exception to the Proclamations in order to travel to the United States to work for their petitioning employers. ER 140-50. The district court reasoned that Plaintiffs demonstrated irreparable harm despite the existence of the national-interest exceptions because "applying for a national-interest exception in the recent Guidance is expensive, a cost that would be borne by the Plaintiff applicant." ER 23 (citing ER 494). But, as set forth above, a monetary injury

does not constitute irreparable harm. *See Colo. River Indian Tribes*, 776 F.2d at 850; *see also Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough.").

In sum, Plaintiffs failed to demonstrate that they would suffer irreparable harm without an injunction and the district court should not have ruled to the contrary.

CONCLUSION

The Court should vacate the preliminary-injunction order.

Respectfully submitted,

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Dated: November 13, 2020

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STATEMENT OF RELATED CASES
PURSUANT TO NINTH CIRCUIT RULE 28-2.6

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellants state, through counsel, that they are unaware of any case pending in this Court that presents the same or related issues as this case.

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CERTIFICATE PURSUANT TO
FED. R. APP. P. 32(A)(7)(C) AND NINTH CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached response brief is proportionately spaced, has a typeface of 14 points or more, and contains 11,858 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2020, I electronically filed the foregoing BRIEF FOR THE APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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