[ORAL ARGUMENT JANUARY 14, 2021]

No. 20-5292

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOMINGO ARREGUIN GOMEZ, et al.,
Plaintiffs-Appellants,

v.

DONALD J. TRUMP, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Case No. 20-cv-1491 (Mehta, J.)

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellees hereby submit the following Certificate as to Parties, Rulings, and Related Cases.

A. Parties and Amici

Appellants, who were the Plaintiffs in the district court, are: Nazif Alam; Carmen Ligia Vidal Pimentel; Juan Carlos Rosario Lebron; Daniel Chibundu Nwankwo; Claudio Alejandro Sarniguet Jimenez; Angela Sinon; Loida Phelps; Nancy Abarca; Fatma Bushati; Jodi Lynn Karpes; Shyam Sundar Koirala; Aja Tamamu Mariama Kinteh; Iwundu épouse Kouadio Ijeoma Golden; Aya Nakamura; 3Q Digital; Superior Scape Inc.; Shipco Transport, Inc.; ASSE International; EurAuPair International; Domingo Arreguin Gomez; Mirna S.; Vicenta S.; Mohamed Saleh; Farangis Kurbonova; SEIU Healthcare (CIR); and PowerTrunk, Inc.[*]

Appellees, who were the Defendants in the district court, are: Donald J. Trump; William Barr; the United States Department of State; Michael Pompeo; Chad Wolf; and the United States Department of Homeland Security.

The following *amici curiae* appeared in the district court:

Local Governments and Local Elected Officials (Los Angeles, California; Albany, New York; Albuquerque, New Mexico; Alexandria, Virginia; Atlanta, Georgia; Austin, Texas; Berkeley, California; Chelsea, Massachusetts; Chicago, Illinois; Contra Costa County, California; Denver, Colorado; Detroit, Michigan; Durham, North Carolina; Hartford, Connecticut; Houston, Texas; Iowa City, Iowa; New York, New

[*] Plaintiffs Domingo Arreguin Gomez; Mirna S.; Vicenta S.; Mohamed Saleh; Farangis Kurbonova, SEIU Healthcare (CIR); and PowerTrunk, Inc. have filed notices of dismissal.

York; Oakland, California; Philadelphia, Pennsylvania; Phoenix, Arizona; Pittsburgh, Pennsylvania; Sacramento, California; Saint Paul, Minnesota; Salinas, California; Seattle, Washington; Somerville, Massachusetts; and West Hollywood, California)

Leading Companies and Business Organizations (Adobe Inc., Alliance of Business Immigration Lawyers, Amazon.com, Inc., Apple Inc., Atlassian, Inc., Autodesk, Inc.; Bates White, LLC; Box, Inc.; Bloomberg L.P.; BSA Business Software Alliance, Inc. d/b/a BSA | The Software Alliance; Consumer Technology Association; Denver Metro Chamber of Commerce; Dropbox, Inc.; Facebook, Inc.; FWD.us Education Fund; GitHub, Inc.; Google LLC; Hewlett Packard Enterprise Company; HP Inc.; HR Policy Association; Information Technology Industry Council; Institute of International Bankers; Intel Corp.; Internet Association; Juniper Networks, Inc.; LinkedIn Corporation; Metro Atlanta Chamber; Microsoft Corporation; Netflix, Inc.; New Imagitas, Inc.; North Texas Commission; Partnership for a New American Economy Research Fund; PayPal, Inc.; Plaid Inc.; Postmates Inc.; Reddit, Inc.; salesforce.com, inc.; SAP SE; Semiconductor Industry Association (SIA); ServiceNow, Inc.; Shutterstock, Inc.; Silicon Valley Bank; Society for Human Resource Management (SHRM); Splunk Inc.; Spotify USA Inc.; Square, Inc.; SurveyMonkey Inc.; Twitter, Inc.; Uber Technologies, Inc.; Upwork Inc.; Vail Valley Partnership; VMware, Inc.; Workday, Inc.; Xylem Inc.; and Zillow Group, Inc.)

The States of California, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin, and the District of Columbia

Society for Human Resource Management

Worldwide Employee Relocation Council

Charles Kuck, Gregory Siskind, and Joanna Main Bailey

Immigration Law Professors (Deborah Anker, Sabrineh Ardalan, David Baluarte, Lenni B. Benson, Jennifer Chacon, Gabriel Chin, Marisa S. Cianciarulo, Alina Das, Jill E. Family, Niels W. Frenzen, Maryellen Fullerton, Denise Gilman, Lindsay Harris, Elizabeth Keyes, Annie Lai, Peter Margulies, M. Isabel Medina, Jennifer Moore, Michael A. Olivas, Bijal Shah, Maureen A. Sweeney, Shoba Sivaprasad Wadhia, and Michael J. Wishnie)

B. Rulings Under Review

The ruling under review (issued by Judge Mehta) is the memorandum opinion and order of September 4, 2020. JA673-756.

The memorandum opinion and order has not yet been published, but the September 4, 2020 memorandum opinion and order is available on Westlaw at 2020 WL 5367010 (D.D.C. Sept. 4, 2020).

C. Related Cases

This case has not previously been before this Court or any court other than the district court. In the district court this case was partially consolidated with *Panda v. Pompeo*, No. 20-cv-1907 (D.D.C.). *See* Dkt. 79. That case is pending on appeal before this Court in *Panda v. Pompeo*, No. 20-5284 (D.C. Cir.). In addition, the district court consolidated this case with three other cases: *Mohammed v. Pompeo*, No. 1:20-cv-1856 (D.D.C.), *Aker v. Trump*, No. 1:20-cv-1926 (D.D.C.), and *Fonjong v. Trump*, No. 1:20-cv-2128 (D.D.C.). *See* JA8, Minute Order Aug. 7, 2020. Subsequent to issuing the order

challenged by this appeal, the district court consolidated this case with *Kennedy v. Trump*, No. 20-cv-02639 (D.D.C.). *See Kennedy*, No. 20-cv-02639, Minute Order Oct. 10, 2020 (D.D.C.).

Respectfully submitted,

/s/ James J. Wen
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GLOSSARY

APA	Administrative Procedure Act
JA	Joint Appendix
Br.	Brief for Appellant
INA	Immigration and Nationality Act

INTRODUCTION

This Court should affirm the district court's partial denial of Plaintiffs' motion to preliminarily enjoin the entirety of two important and timely Presidential Proclamations that protect and aid American workers in the face of the economic damages inflicted by the COVID-19 pandemic. *See* Presidential Proclamation 10014, *The 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. 22, 2020); 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). All of the preliminary injunction factors strongly disfavored injunctive relief.

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 Proclamations 10014 and 10052, which temporarily suspend the entry of certain aliens as immigrants and certain nonimmigrant workers to the United States while the Nation responds to the economic harms caused by the devastating COVID-19 pandemic. The President found that entry of these foreign nationals 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.

Plaintiffs moved for a preliminary injunction, requesting, *inter alia*, that the court set aside the Proclamations as unlawful. They alleged, as relevant here, that the Proclamations are *ultra vires* because they fail to satisfy the entry suspension's statutory requirements and violate the separation of powers. Alternatively, they argued that if section 1182(f) authorizes the Proclamations it violates the nondelegation doctrine because it contains no substantive guide or limit on the President's authority.

The district court correctly denied Plaintiffs' motion, concluding that Proclamations 10014 and 10052 satisfied the requirements of 8 U.S.C. § 1182(f), did not run afoul of separation of powers, that section 1182(f) is a lawful, "comprehensive delegation" to the President by Congress, and that the remaining equitable factors weigh against injunctive relief. Plaintiffs now challenge that denial.

This Court should affirm. To start, Plaintiffs' claims are foreclosed by the separation-of-powers principles underlying the doctrine of consular nonreviewability, which bars judicial review of the political branches' determination to exclude aliens abroad. While the district court concluded otherwise, relying largely on nonbinding decisions for the proposition that nonreviewability applies only to affirmative visa determinations, it was mistaken because this narrow view of the doctrine is inconsistent with Supreme Court precedent and overlooks separation-of-powers concerns. Here, Plaintiffs' claims squarely challenge executive branch policies that result in their exclusion and thus are barred by nonreviewability.

On the merits, the district court correctly concluded that Plaintiffs' claims fail. As the district court recognized, the INA plainly authorizes Proclamations 10014 and

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 of 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. The Proclamations satisfy this requirement. In issuing the Proclamations, the President expressly found that the entry of foreign workers covered by the Proclamations "would be detrimental to the interests of the United States." 85 Fed. Reg. at 23,442 (Proclamation 10014); *id.* at 38,264 (Proclamation 10052). In Proclamation 10014, this finding was based on, *inter alia*, the President's conclusion that "without intervention, the United States faces a potentially protracted economic recovery with persistently high unemployment if labor supply outpaces labor demand." *Id.* at 23,441. The President's finding in Proclamation 10052 was based on a review of nonimmigrant visa 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 ... 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. As the district court recognized, "[t]hese findings are more than adequate," and Plaintiffs' demands "far exceed[] what the Court in *Trump v. Hawaii* required for a valid presidential 'finding.'" JA712. The Proclamations,

therefore, satisfied the "sole prerequisite" set forth in the statute, 138 S. Ct. at 2408, and are a lawful exercise of Presidential authority.

The district court also correctly acknowledged that there was no separation of powers conflict because the President may impose entry restrictions in addition to those elsewhere enumerated in the INA pursuant to section 1182(f), and that the Proclamations did not expressly override any provision of immigration law. Additionally, the district court's rejection of Plaintiffs' nondelegation challenge fully accords with the Supreme Court's ruling that section 1182(f) is a comprehensive delegation of the President's authority.

Finally, the district court correctly concluded that the remaining preliminary injunction factors strongly weigh against granting relief. Because Plaintiffs will not succeed on their *ultra vires* challenge, there is no basis for any relief that would prevent the Proclamations from barring Plaintiffs' entry. Moreover, the balance of the equities and public interest weigh decisively against judicial interference into the Executive's exercise of authority to suspend aliens' entry into the United States, especially where the Proclamations were issued to ameliorate severe, ongoing harm to the United States labor market.

For these reasons, the Court should affirm the district court's order.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's subject-matter jurisdiction under 28 U.S.C. § 1331. Am. Compl. ¶ 12 (Dkt. 46). On September 4, 2020, the district court issued a memorandum opinion and order granting in part and denying in part Plaintiffs'

preliminary-injunction motion, JA672-756. Plaintiffs filed a timely notice of appeal. Dkt. 139. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). *See U.S. v. Western Electric Co.*, 46 F.3d 1198, 1201 n.3 (D.C. Cir. 1995).

STATEMENT OF THE ISSUES

Whether the district court abused its discretion by denying in part Plaintiffs' preliminary-injunction motion asking the court to enjoin Presidential Proclamations 10014 and 10052 and the State Department's implementation of them, when Plaintiffs' claims are foreclosed by the doctrine of nonreviewability; the district court correctly concluded that Presidential Proclamations 10014 and 10052 are lawful exercises of the President's authority under 8 U.S.C. § 1182(f); and the district court correctly concluded that considerations of harm and the public interest did not favor injunctive relief?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. Legal and Factual Background.

The Constitution confers inherent 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 in 8 U.S.C. § 1182(f) Congress accorded the President broad discretion to suspend or restrict the entry of aliens or classes of aliens:

> 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 broad 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." 8 U.S.C. § 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. The United States government has taken significant steps to respond to the pandemic, stem the spread of the virus, and protect its citizens and employees both at home and abroad. The pandemic has significantly affected the State Department's ability to operate its embassies and consulates. Thus, on March 20, 2020, State announced that it would "temporarily suspend routine visa services at all U.S. Embassies and Consulates," but noted that "emergency and mission critical visa services" would continue as "local conditions and 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. 30, 2020).

While routine visa services were suspended, consular posts operated at limited capacity, providing mission-critical or emergency services. *Id.* Immigrant visa services considered "mission critical" included, among other things, services for spouses of U.S. citizens, unmarried children of U.S. citizens, and adopted children of U.S. citizens, Afghan and Iraqi Special Immigrants, and medical professionals. *See* U.S. Department

of State–Bureau of Consular Affairs, Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak, https://travel.state.gov/content/travel/en/News/visas-news/Proclamation-Suspending-Entry-of-Immigrants-Who-Present-Risk-to-the-US-labor-market.html (last visited Nov. 30, 2020).

On April 22, 2020, the President exercised his authority under 8 U.S.C. §§ 1182(f) and 1185(a) to issue 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 suspending 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. *Id.* at 23,441-42.

The President provided 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" in the period between March 13, 2020 and April 11, 2020. *Id.* at 23,441. 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.* Moreover, in "recent years, these workers have been disproportionately represented by historically disadvantaged groups, including African Americans and other minorities, those without a college degree, and the disabled." *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. Thus, 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," and that the Proclamation would help reduce the "strain on the finite limits of our healthcare system." *Id.* at 23,441-42.

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 23, 2020. *Id.* at 23,442-43. The Proclamation 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 and suspended the entry of certain categories of nonimmigrant workers through December 31, 2020. *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 (June 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." *Id.* The Proclamation thus suspended the entry of foreign nationals seeking entry pursuant to H-1B, H-2B, L, and certain J nonimmigrant visas, 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." JA538 (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 or labor" in non-specialized, non-agricultural sectors, "if unemployed persons capable of performing such service or labor cannot be found in this country." JA540 (citing 8 U.S.C. § 1101(a)(15)(H)(ii)(b)). The L visa category allows for temporary intra-company transfers to the United States by certain senior employees of multinational corporations. JA542; *see* 8 U.S.C. § 1101(a)(15)(L). And 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. JA541 (citing 8 U.S.C. § 1101(a)(15)(J); 22 C.F.R. §§ 62.1, 62.4)).

The President explained 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 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 despite a recent decline in unemployment "millions of Americans remain out of work." *Id.* 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.* 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.* He acknowledged that under "ordinary circumstances, properly administered temporary worker programs can provide benefits to the economy," and 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.* The President observed 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.* The President therefore suspended entry for those categories of

workers. Like Proclamations 10014, Proclamation 10052 contained exceptions to the suspension of entry, including an exception for those whose entry into the United States would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees. *See* 85 Fed. Reg. 38,265. The Secretaries of State and Homeland Security are tasked with implementing the Proclamations as applied to visas and entry, respectively, though consular officers are directed to determine, "in their discretion, whether an immigrant has established his or her eligibility for an exception" to the Proclamations. *Id.* at 23,443 § 3.

On July 14, 2020, State provided public guidance advising that "U.S. Embassies and Consulates are beginning a phased resumption of routine visa services." U.S. Department of State–Bureau of Consular Affairs, 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. 30, 2020). The guidance explained: "The resumption of routine visa services … will occur on a post-by-post basis," as "post-specific 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 Presidential 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. 30, 2020). The guidance provides "a non-exclusive list of the types of travel that may be considered to be in the national interest," and it 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" Proclamations 10014 and 10052. *Id.* The guidance indicates 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 COVID-19 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.

Plaintiffs are nine family-based immigrant visa sponsors, consisting of citizens and lawful permanent residents, who are petitioning on behalf of foreign family

members; seven employers or organizations sponsoring individuals for H-1B, H-2B, J, and L visas; and seven diversity visa selectees for FY 2020. On July 17, 2020, Plaintiffs filed an amended putative class-action complaint, Dkt. 46, followed by their operative, second amended complaint on August 23, 2020, challenging Proclamations 10014 and 10052 as well as various agency actions, *see* JA518-620. On August 7, the district court consolidated this action with three other cases. JA8.

Plaintiffs' eleven-count second amended complaint alleges that Proclamations 10014 and 10052, along with various agency actions implementing the Proclamations, violate their statutory and constitutional rights. As relevant to this appeal, Plaintiffs sought a preliminary injunction, arguing that the Proclamations are *ultra vires*, that they violate the separation of powers, and that the statutory authority for the Proclamations, 8 U.S.C. § 1182(f), violates the nondelegation doctrine. Plaintiffs further argued that the State Department's refusal to process visa applications and issue visas for individuals ("the No Visa Policy," JA685) barred from entering the United States under the Proclamations violates the APA, and that the State Department's actions constituted unreasonable delay or unlawful withholding adjudication of Plaintiffs' visa applications. Plaintiffs also challenged the State Department's COVID-19 guidance, claiming that the decision not to treat the diversity visa lottery winners as "mission critical" cases violated the APA.

On September 4, 2020, the district court granted in part and denied in part Plaintiffs' preliminary-injunction motion. JA672-756. The district court concluded that the doctrine of consular nonreviewability did not bar Plaintiffs' claims because the

doctrine did not apply to Plaintiffs' challenge to consular officers' decisions not to process their visa applications under the Proclamations. JA705-06.

At the threshold, the court observed that Plaintiffs are not permitted to challenge the wisdom of these restrictions, and that "[t]he scope of judicial review is circumscribed." JA717. On the merits, the district court ruled that the Proclamations are not *ultra vires* because Congress has afforded the President the authority under section 1182(f) to impose restrictions on the entry of foreign nationals beyond the restrictions that appear elsewhere in the INA. JA711-15. In particular, the district court relied on the Supreme Court's analysis in *Hawaii* and rejected Plaintiffs' arguments challenging the President's findings in the Proclamations. In *Hawaii*, the Supreme Court rejected the plaintiffs' challenge to factual findings underpinning a Presidential Proclamation barring entry of persons from particular countries posing potential national security threats, instructing 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." 138 S. Ct. at 2408. Here, the district court recognized that "Plaintiffs' demand for a 'rational justification' and a 'rational investigation' far exceeds what ... *Trump v. Hawaii* required for a valid presidential 'finding.'" JA712. Additionally, the district court rejected Plaintiffs' argument that *Hawaii* is inapplicable because the present proclamations arise in the purported "domestic" context. JA713 ("To start, the foreign/domestic distinction advocated by Plaintiffs finds no support in the statutory text" or in Supreme Court case law). Addressing Plaintiffs' challenges to the sufficiency

of the President's findings, the district court reviewed the Proclamations and determined that "[t]hese findings are more than adequate" and "[t]hey are in fact more detailed than those contained in past [section] 1182(f) proclamations identified ... in *Trump v. Hawaii*." JA716.

Next, the district court rejected Plaintiffs' argument that the Proclamations violate the separation of powers by purportedly rewriting Congress' "carefully prescribed" visa eligibility requirements, concluding that "[t]he Proclamations at issue in this case do not 'expressly override' any 'particular provision' of the INA." JA718, 720. The district court reasoned that while the Proclamations restrict entry for individuals with various immigrant and nonimmigrant visa classifications, "[t]hose classifications are not abolished," and "[p]resumably, their full admission will resume once the labor market recovers and the surplus labor concerns identified in the Proclamations are ameliorated." JA720. The district court concluded that "even now, certain categories of immigrants and nonimmigrants are eligible for admission if they can satisfy an exception set forth in the Proclamations[,]"which further "demonstrate[s] that the Proclamations do not 'expressly override' any 'particular' provision of the INA." *Id.*

The district court also rejected Plaintiffs' contention that section 1182(f) unconstitutionally delegates powers to the President that are exclusively reserved to the legislative branch. JA723-35. The district court ruled that the nondelegation doctrine "presents no constitutional constraint on the presidential action challenged here," because "the language of [section] 1182(f), according to the Supreme Court, provides a

'comprehensive delegation' of authority to the President, and its text is 'clear.'" JA724. The district court emphasized that section 1182(f) contains sufficient textual limits, which "include the requirement that the President make a 'find[ing]'; identify a 'class of aliens' whose entry is restricted; and 'suspend' such entry for a fixed period of time or until resolution of a triggering condition." JA724 (alterations in original).

Although the district court rejected Plaintiffs' challenge to the lawfulness of the Proclamations, the district court preliminarily enjoined the State Department's implementation of the Proclamations, limited to the diversity visa plaintiffs. JA755. The diversity visa plaintiffs challenged the State Department's decision—reflecting its longstanding practice—not to process their visa applications while their ability to enter the United States was suspended by the President's orders. The district court disagreed with the State Department's reasoning for declining to process and issue those visas, and found that—for the diversity-visa plaintiffs alone—it was appropriate to order the State Department to process and issue those visas so that, in case the Proclamations are lifted or expire and the diversity-visa plaintiffs later gain permission to enter the United States, the diversity-visa plaintiffs would not permanently lose their opportunity to immigrate. *See* JA746-47. Notably, the district court did not order the government to allow the diversity-visa plaintiffs to enter the United States.[2]

[2] The district court found that the diversity-visa plaintiffs could show irreparable harm because their eligibility for a diversity visa lasts only to the last day of the fiscal year, then they "permanently lose their opportunity to immigrate to the United States through the diversity visa program." JA746. The court enjoined the defendants from enforcing the No-Visa-Policy to the diversity visa plaintiffs. JA755. On September 30, the court amended its preliminary-injunction order to grant in part the diversity visa plaintiffs' request for supplemental relief by ordering the State Department to reserve 9,095 diversity visas for distribution to diversity visa applicant plaintiffs past the end of the fiscal year, after resolution of the merits of plaintiffs' claims. Defendants have appealed aspects of these orders; that cross-appeal is docketed as case number

Turning to the other plaintiffs—applicants for immigrant and nonimmigrant visa categories unrelated to the diversity visa program—the district court concluded that those plaintiffs could not demonstrate irreparable injury for their APA claims challenging the No-Visa Policy because "their asserted irreparable harms cannot be remedied by granting relief on their APA claims." JA749. The court explained that the plaintiffs would still be subject to the Proclamations' ban on entry and their harms "would continue to flow from the Proclamations' ban on entry, even if [it] were to grant relief on these Plaintiffs' challenges to Defendant's No-Visa Policy." *Id.* The court also concluded that the "public interest factor also does not support these Plaintiffs" because "[i]ssuing injunctive relief that could be construed to mean that the State Department must issue visas to people who have no immediate prospect for entering the country could create substantial havoc and confusion." JA749-50.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying Plaintiffs' request for a preliminary injunction. Plaintiffs failed to make the required showing they are likely to succeed on the merits of their claims, that they have suffered irreparable harm, and that the balance of equities and public interest favor injunctive relief. This Court should affirm.

I. The district court correctly held that Plaintiffs are unlikely to succeed on the merits of their claim that Proclamations 10014 and 10052 are unlawful. This Court

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20-5332. Dkt. 167. Plaintiffs moved to sever that appeal from this case, and this Court granted the motion on November 12, 2020.

can affirm on the threshold ground that Plaintiffs' claims are foreclosed by the doctrine of nonreviewability, which bars judicial review of the political branches determination to exclude aliens abroad. Plaintiffs' claims challenge just such action: the President's determination in Proclamations 10014 and 10052 that aliens should not be permitted to enter the country, and the State Department's practice of not processing visas for those barred by the Proclamations.

If the Court reaches the merits, it should conclude that the district court correctly ruled for the government. As the district court concluded, Plaintiffs' *ultra vires* claim fails on the merits because the Proclamations are lawful exercises of the President's broad discretion to exclude aliens using his inherent authority and that delegated by Congress in 8 U.S.C. §§ 1182(f) and 1185(a). The Supreme Court has held that the sole prerequisite to exercise of the comprehensive delegation in section 1182(f) is that the President find that entry of the covered aliens would be detrimental to the interests of the United States. Here, the President made specific findings about the detrimental impact of allowing entry to aliens when unemployment rates are historically high and the economy is suffering the effects of the COVID-19 pandemic. Section 1182(f) requires no more: the Proclamations are lawful. Moreover, the district court also correctly rejected Plaintiffs' separation-of-powers claim, concluding that the Proclamations do not expressly override any particular provision of the INA. Indeed, the Supreme Court has held that the President may impose restrictions in addition to those elsewhere enumerated in the INA. Furthermore, the district court correctly ruled that section 1182(f) is not an unconstitutional delegation of legislative authority, since

the Supreme Court has already determined that section 1182(f) is a comprehensive delegation of authority to the President.

II. The district court did not abuse its discretion in concluding the remaining preliminary injunction factors did not favor granting an injunction. The court reasonably concluded that Plaintiffs failed to demonstrate their alleged harms could be remedied by an injunction in their favor on their APA claims because those claims cannot invalidate the Proclamations' bar on their entry. Similarly, the district court did not err in concluding that the balance of the equities and public interest weigh against granting an injunction because Congress explicitly charged the Executive with administering and enforcing all immigration laws and provided broad authority to regulate the entry of aliens under section 1182(f) and 1185(a) .Moreover, any injunction would frustrate the Proclamations' purposes of ameliorating harm to American workers in the labor market that has been dramatically damaged by the pandemic's effects

STANDARD OF REVIEW

This Court reviews for abuse of discretion the district court's balancing of the preliminary injunction factors and ultimate decision to deny such relief. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Questions of law underlying the district court's decision are reviewed de novo. *Abdullah v. Obama*, 753 F.3d 193, 197-98 (D.C. Cir. 2014).

ARGUMENT

I. The Court Should Affirm Because Plaintiffs Are Unlikely to Succeed on the Merits of Their Claims for Preliminary Injunctive Relief.

A. This Court Should Affirm the Denial of a Preliminary Injunction on the Threshold Ground of Nonreviewability.

Plaintiffs' claims are barred at the outset by principles of nonreviewability. The district court's rejection of those arguments, JA705-06, 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' decisions relating to the exclusion of 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)). 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 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.[3]

Under these principles, Plaintiffs' claims are barred from judicial review. Plaintiffs seek judicial review of the Executive Branch's exercise of power clearly provided to it by Congress to govern the entry of foreign nationals. *See Fiallo*, 430 U.S. at 796. Plaintiffs seek judicial review of the Executive Branch's decision to temporarily deny entry to of certain classes of foreign nationals. Br. 1-4, 5-6, 21-24, 67. 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 v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). 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

[3] 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.

noting how, if the answer to that question is yes, it "would put an end to our review" (emphasis added)). 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. *Mandel*, 408 U.S. at 766; *Saavedra Bruno*, 197 F.3d at 1160 (collecting cases) ("[T]his court and other federal courts have adhered to the view that consular visa determinations are not subject to judicial review.").

The district court erred when it concluded that nonreviewability "does not foreclose review of [Plaintiffs'] claims" because they "challenge the State Department's refusal to review and adjudicate their pending visa applications or issue or reissue a visa due to the Proclamations." JA706. The district court relied on district-court and out-of-circuit cases that decline to apply consular nonreviewability when a claim relates to an individual visa adjudication and there has not been a decision by a consular officer. JA705-06 (citing, *e.g.*, *Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997); *Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 114 (D.D.C. 2020)). The district court failed to account for the separation-of-powers principles underlying nonreviewability and their application to Executive Branch policies regarding the exclusion of aliens. The doctrine of "consular nonreviewability" reflects the context in which these principles most often arise: challenges to visa-denial decisions by consular officers. But the principle underlying the doctrine—that policies concerning the exclusion of aliens abroad are entrusted to the political branches—applies regardless of how the Executive decides to suspend entry to an alien abroad. Other courts have correctly adopted this approach.

See Al Naham v. U.S. Dep't of State, No. 14-cv-9974, 2015 WL 3457448, at *3 (S.D.N.Y. June 1, 2015) (applying nonreviewability "where a plaintiff seeks to compel an official to simply adjudicate a visa application."); *see also Abdo v. Tillerson*, No. 17-7519, 2019 WL 464819, *3-4 (S.D.N.Y. Feb. 5, 2019) (collecting cases).

The district court also suggested that Plaintiffs may have "a statutory cause of action under the INA" for their *ultra vires* challenge to the Proclamations, and so (the court suggested) the INA would override background principles of nonreviewability. JA707. But the nonreviewability principle is embodied in the INA. Congress established a comprehensive statutory framework for judicial review of decisions concerning aliens' ability to enter or remain in the United States, but that review is available only to aliens who are physically present in the United States. *Saavedra Bruno*, 197 F.3d at 1161-63. Neither 8 U.S.C. § 1252 nor any other provision of the INA provides for judicial review of the denial of a visa or delay in adjudicating a visa for an alien abroad, or of the suspension of entry to an alien abroad, or of a determination that such alien is inadmissible. *Saavedra Bruno*, 197 F.3d at 1157-62. The INA's jurisdictional regime thus undermines the district court's rejection of nonreviewability here. Regardless of the substance of Plaintiffs' *ultra vires* claims, the doctrine of nonreviewability applies, and the Court should uphold the district court's denial of Plaintiffs' preliminary injunction on this ground alone.

B. Proclamations 10014 and 10052 are Lawful Exercises of the President's Broad Authority under 8 U.S.C. § 1182(f).

If the Court reaches the merits of Plaintiffs' *ultra vires* claim, it should affirm because the district court correctly ruled that Proclamations 10014 and 10052 are lawful

exercises of the President's broad discretion to exclude aliens using his inherent power and that delegated by Congress in 8 U.S.C. §§ 1182(f) & 1185(a). JA710-725.

"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 this "comprehensive delegation" of authority 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) (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, Proclamations 10014 and 10052 are lawful exercises of the President's authority. In issuing these Proclamations, 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; 85 Fed. Reg. 23,442. And the President set forth his reasoning in detail in the Proclamations.

Proclamation 10014 sets out the President's reasons for finding that entry of certain intending immigrants would be detrimental to the United States during the economic recovery following the COVID-19 pandemic, with the goal of increasing access to the labor market for American workers, particularly those who are "at the margin between employment and unemployment." 85 Fed. Reg. 23,441. The President also explained that immigrants, upon admission as lawful permanent residents, are immediately eligible "to compete for almost any job," and thus "already disadvantaged and unemployed Americans" are left unprotected "from the threat of competition for scare jobs from new lawful permanent residents." *Id.*

In Proclamation 10052, 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.* The President then made specific findings related to H-1B and L 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 findings are 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.[4]

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.

Applying these principles, the district court correctly concluded that Proclamations 10014 and 10052 are lawful exercises of the President's authority. Relying on *Hawaii*, the court recognized that section 1182(f) grants the President

[4] For this reason, Plaintiffs are wrong to suggest that there was no "multi-agency review" here, and that distinguishes this case from *Hawaii*. Br. 42.

"ample power" to impose entry restrictions in addition to those enumerated elsewhere in the INA. JA721 (citing, *inter alia*, 138 S. Ct. 2404). Thus, any contention that the President exceeded his authority in imposing restrictions in addition to those contained in the INA failed. JA721-22. The court further explained that the Plaintiffs cannot succeed on their challenge to the sufficiency of the President's findings because Proclamation 10014 details how "excess labor supply affects all workers and potential workers," JA 715 (citing 85 Fed. Reg. 23,441), and Proclamation 10052 details the job losses in industries in which employers seek to fill positions with H-1B, H-2B, and L. JA716 (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*." JA716 (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). As a result, the Proclamations do not exceed the President's authority under section 1182(f).

Plaintiffs contend that Proclamations 10014 and 10052 are unlawful for three reasons. Br. 25-60. None of these three reasons withstand scrutiny.

First, Plaintiffs challenge the sufficiency of the Presidential findings contained in the Proclamations. Br. 25 ("The Proclamations Do Not Satisfy The Statutory Findings Prerequisite"); Br. 25-49. Plaintiffs concede that "the bases of the proclamations" are in the Proclamations "themselves," Br. 34, but nonetheless argue that these findings are not "rational" and that, as a result, the Proclamations will not be effective in accomplishing their goals, Br. 25-26 ("The plain meaning of th[e] statutory text is that

the President must *rationally* identify a detriment that *supports* his decision to suspend entry.") (emphasis in original and cleaned up).

The Supreme Court has expressly held, however, that it is improper to "challenge" a Presidential entry-suspension order based on "perception of its effectiveness and wisdom." *Hawaii*, 138 S. Ct. at 2421 (citations and quotations omitted); *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"). Rather, 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. And *Hawaii* is in full accord with long-established authority that Presidential findings of fact are not subject to judicial review. *Dalton*, 511 U.S. at 476; *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").

In the face of this Supreme Court authority, Plaintiffs cite several cases discussing the statutory finding requirements in other contexts that are clearly not applicable here. For example, Plaintiffs discuss the requirement for federal district courts to make "findings" for granting ends-of-justice continuances under the Speedy Trial Act. Br. 31-32 (citing *Zedner v. United States*, 547 U.S. 489, 508-09 (2006) and *United States v. Bikundi*, 926 F.3d 761, 776-77 (D.C. Cir. 2019)). Plaintiffs also discuss the Medicaid statute's

requirement for States to find "reasonable and adequate" hospital reimbursement rates. Br. 32-33 (citing *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 514-15 (1990); *Temple Univ. v. White*, 941 F.2d 201, 208-09 (3d Cir. 1991); and *AMISUB v. Colo. Dep't of Pub. Servs.*, 879 F.2d 789, 796 (10th Cir. 1989)). None of these examples address Presidential findings of fact or suggest that the sufficiency of findings under section 1182(f) are subject to judicial review. *See* Br. 31-33. While Plaintiffs' cited cases involve statutes that direct district courts and States to make various findings sufficient for judicial review, such a "searching inquiry" into the President's findings would be "inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Hawaii*, 138 S. Ct. at 2408-09.

Plaintiffs also argue that this case is distinguishable from *Hawaii*, because this case purportedly involves "purely domestic affairs." *See* Br. 26-28 (arguing that section 1182(f) contains an implicit distinction Proclamations motivated by domestic as opposed to foreign concerns). There is no sound legal basis for the view that Section 1182(f) embodies a foreign-domestic distinction. The statutory text does not make or imply any such distinction. Rather, as the district court correctly recognized, the statutory text "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." JA713. Nothing in section 1182(f) is limited to a particular subset of harms or concerns. *See Hawaii*, 138 S. Ct. at 2413, 2415 (recognizing that a health emergency might be an appropriate basis for suspending entry under section 1182(f)).[5] And it

[5] 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).

"would be bizarre if [section] 1182(f) reflected a foreign/domestic limitation that appears nowhere in the text or structure of the INA." *Doe #1 v. Trump*, 957 F.3d 1050, 1092 (9th Cir. 2020) (Bress, J., dissenting).

In making this "foreign/domestic" distinction, Plaintiffs rely, Br. 27-28, 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), where a district court ruled that the President's use of section 1182(f) in issuing a different Presidential proclamation violated the non-delegation doctrine because the Proclamation "engage[d] in domestic policymaking, without addressing any foreign relations or national security issue or emergency." 418 F. Supp. 3d at 592. Here, the district court correctly concluded that the Ninth Circuit's tentative merits assessment in *Doe* was contrary to the Supreme Court's holding in *Hawaii*. JA714. As the district court here observed, "Plaintiffs effort to characterize the Proclamations' exclusion of aliens in purely or predominantly domestic terms ... runs headlong into Supreme Court precedent," recognizing that the entry of foreign nationals is *always* a foreign-affairs matter over which the President has independent constitutional authority. JA713 (citing *Knauff*, 338 U.S. at 542); *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"); *see* Br. 33-40. In *Hawaii*, the Supreme Court cited approvingly a number of

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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).

cases that discussed the President's broad authority in this sphere even in the absence of an explicit national security or foreign affairs goal. 138 S. Ct. at 2408 (citing *Sale*, 509 U.S. 155, and *Abourezk*, 785 F.2d 1043). This authority derives from the political branches' shared constitutional authority to exclude noncitizens. The adjudication of foreign nationals' visa applications by consular officers is necessary to protect the United States from identified harms, and thus the Proclamation fits squarely within the President's foreign affairs powers. *See, e.g.*, *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (explaining that "the department of state, having the general management of foreign relations," can be assigned the role of determining which aliens may be permitted to travel to the United States); *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 321 (1936) (distinguishing the actions of the State Department from other executive departments). Naturally, section 1182(f) speaks to aliens whose entry *into* the United States would be detrimental, so the targeted harm would 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 any event, Plaintiffs' challenge to the soundness of the policy choices made by the President is wrong and ignores the extraordinary economic circumstances that this country faces. In both Proclamations, the President expressly cited the reports by the Secretaries of Homeland Security and Labor detailing job losses caused by the COVID-19 pandemic. *See*, *e.g.*, 85 Fed. Reg. 38,264. In Proclamation 10052, the President specifically found that between February and April 2020, millions of United States jobs were lost in industries in which employers seek to fill positions with various

nonimmigrant workers. *See id.* Accordingly, the Proclamations set out the President's reasons for finding that entry of certain intending immigrants and foreign workers would be detrimental to the United States during the economic recovery following the COVID-19 pandemic, with the goal of increasing access to the labor market for American workers, particularly those who are "at the margin between employment and unemployment." 85 Fed. Reg. 23,441. Plaintiffs contend that "[w]hile Proclamation 10052 asserts that employment is down in 'industries' in which employers are seeking H-1B, H-2B, and L workers, an *industry* is not the same thing as a *job*. This Proclamation does not purport to show that these workers are hired for *jobs* that would otherwise go to U.S. workers." Br. 43 (cleaned up) (emphasis in original). But this contention ignores that the Proclamations rest on the understanding that, given the current emergency, the suspension of immigrants and 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 aliens whose entry into the country is restricted. *See* 85 Fed. Reg. at 38,263-64.

In urging a "searching inquiry" (which the *Hawaii* court found "questionable," 138 S. Ct. 2409) into the Proclamations' validity, Plaintiffs assert, "[i]t is beyond dispute that immigration and nonimmigrant workers contribute to economic growth, and thus to the jobs and wages of U.S. workers." Br. 47. This contention regarding the economic benefits of immigrants and foreign workers is unremarkable since the Proclamations acknowledge as much. For example, Proclamation 10052 states, "[u]nder ordinary

circumstances, properly administered temporary worker programs can provide benefits to the economy." 85 Fed. Reg. at 38,263. But Plaintiffs ignore that, as the Proclamation goes on to state, "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.* Thus, Plaintiffs' argument that the Proclamations' findings are false is meritless since their "undisputed" economic observations are inapposite to the unprecedented conditions of the global pandemic, warranting minimal weight to the present analysis. Moreover, Plaintiffs' repeated insistence that immigrant workers never compete for the same jobs that American citizens does not square with either Supreme Court precedent, or the entire rationale of the work visa program. *See INS v. NCIR*, 502 U.S. 183, 195 (1991) ("We have often recognized that a primary purpose in restricting immigration is to preserve jobs for American workers."). Indeed, if immigrants did not compete with American citizens for jobs, then there would be no need for the INA's work restrictions.

Plaintiffs also argue that the Proclamations contain no findings for many of the affected classes, contending the entry restrictions are overbroad. Br. 43. But they cite no authority suggesting that section 1182(f)—a sweeping provision vesting authority in the President to exclude aliens—is subject to any tailoring requirement. Indeed, in *Hawaii*, the Supreme Court rejected a similar argument. 138 S. Ct. at 2410 ("But that simply amounts to an unspoken tailoring requirement found nowhere in Congress's grant of authority to suspend entry of not only 'any class of aliens' but 'all aliens.'").

Necessarily, any statute or other measure that provides for the exclusion of intending immigrants and foreign workers may, as a practical matter, result in those aliens being unable to bring their children into the country with them. But that is certainly not a basis for finding that laws providing for an entry restriction are irrational because of potential overbreadth, especially when, as here, the Proclamations are subject to various exceptions. *See*, *e.g.*, 85 Fed. Reg. at 23,443; 85 Fed. Reg., at 38,265.

Second, Plaintiffs contend on appeal that the Proclamations violate separation-of-powers principles by "rewrit[ing] the INA." Br. 49-54. According to Plaintiffs, the Proclamations are invalid because they "unlawfully 'nullif[y] significant portions of … the INA, by declaring invalid statutorily-established visa categories in their entirety,' … and rewrite a vast and complex scheme through which 'Congress has already spoken ... on the issue of limiting ... admissibility based on the potential' effects on the labor markets." Br. 51-52 (quoting *Nat'l Ass'n of Manufacturers v. DHS*, 2020 WL 5847503, at *10 (N.D. Cal. Oct. 1, 2020), and *Doe*, 418 F. Supp. 3d at 597). Plaintiffs are wrong.

Section 1182(f) permits the President to bar entry of aliens even though these aliens may be admissible under other provisions of the INA. Indeed, in *Hawaii*, the Supreme Court rejected the argument that Plaintiffs raise 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; *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)—those provisions would serve no purpose otherwise. *See id.* at 2408.

Moreover, although the Proclamation does *temporarily* restrict the entry of various immigrant and nonimmigrant visa classifications, it does not "expressly override any of them," or abolish these classifications. JA720. As the district court recognized, 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.*

Additionally, 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* Br. 52.

For each of these reasons, this Court should affirm the district court's conclusion that the Proclamations do not improperly override the INA. JA718-22.

Third, Plaintiffs argue that the "district court's reading of [section] 1182(f) removes the[] guardrails" resulting in a violation of the nondelegation doctrine because the court "identified no 'intelligible principle to guide the delegee's use of discretion, ... leaving no 'guidance whatsoever for the exercise of discretion by the President' under [section] 1182(f)." Br. 56 (quoting *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019), and *Doe*, 418 F. Supp. 3d at 590); Br. 54-59.

This argument is also unavailing. In the field of foreign affairs, Congress need not "lay down narrowly definite standards by which the President is to be governed." *Curtiss-Wright Export Co.*, 299 U.S. at 321–22 (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 President has the 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). [6]

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

[6] Plaintiffs invoke *Galvan v. Press*, 347 U.S. 522, 531 (1954), for the proposition that immigration policy is "entrusted exclusively to Congress." Br. 49, 54. But the Court was describing Congress's role in setting procedural safeguards of due process for immigration policy. *Id.* The Court did not question or eliminate the Executive Branch's inherent authority and discretion to exclude aliens from entry into the United States, an authority the Court has recognized many times. *Knauff*, 338 U.S. at 542; *Hawaii*, 138 S. Ct. at 2424 (Thomas, J., concurring).

"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, and even if it did, as the district court, concluded the statute survives because it has an intelligible principle. JA723-25.

* * *

In sum, the district court did not abuse its discretion by rejecting Plaintiffs' bid to enjoin the Proclamations because they were properly issued pursuant to express statutory authorization and consistent with controlling Supreme Court precedent. Accordingly, this Court should affirm the order below.

II. The District Court Did Not Abuse Its Discretion in Concluding that the Remaining Factors Weigh Against Injunctive Relief

The district court was correct to deny a preliminary injunction ordering the government to allow Plaintiffs to enter the United States, because they failed to meet their burden of showing irreparable harm and that an injunction would be in the public interest. JA749-50. All of the plaintiffs' allegations of irreparable harm in this appeal stem exclusively from their inability to enter the Country, allegedly leading to separation from family members and predicted business losses. *E.g.*, Br. 63-65. The

district court properly concluded that their harms could not be remedied because the Proclamations lawfully exclude them from entering the United States. Moreover, the temporary inability to enter the United States does not satisfy the requirements for obtaining a preliminary injunction, and this Court may affirm the district's court order on this ground alone.

Irreparable Harm. The district court reasonably concluded that Plaintiffs failed to demonstrate that their alleged harms—all of which arise from their inability to enter the United States—could be remedied by an injunction in their favor on their APA claims. JA748-50. That alone is reason to affirm across the board. *See Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014) (movant for preliminary relief must demonstrate that he or she is "likely to suffer irreparable harm in the absence of preliminary relief"); *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (explaining that because movants could not establish irreparable harm, the court need not address any of the other injunctive factors). Plaintiffs contend that they are suffering irreparable harm on an ongoing basis as a result of the Proclamation. Br. 54-56 (alleging that they are suffering from a purported loss of income and an inability to enter the United States to rejoin family members, resume employment, or use diversity visas before the Proclamation expires). This argument fails for four reasons.

First, as the district court concluded, Plaintiffs cannot show irreparable harm for their APA claims—which exclusively challenge the agencies' implementation of the Proclamations—because their alleged injuries all stem from the denial of entry into the United States that is a result of Proclamations 10014 and 10052, actions solely within

the statutorily designated discretion of the President. *See* JA749 (Plaintiffs "asserted irreparable harms cannot be remedied by granting relief on their APA claims" because the "harm would continue to flow from the Proclamations' ban on entry."). This distinction matters because their APA claims do not (and cannot) challenge the President's issuance of the Proclamations or exclusion pursuant to them. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). Thus, Plaintiffs cannot demonstrate that they face a harm that is both certain and actual in the absence of an injunction.

Second, Plaintiffs cannot demonstrate irreparable harm because in August 2020 the State Department published guidance on its website for exceptions to mitigate the very problems Plaintiffs wish to be addressed. The State Department provided a non-exhaustive list of national-interest exceptions to Presidential Proclamations 10014 and 10052 that may be available for persons seeking entry into the United States. *See* JA380-87. Under this guidance, nonimmigrant workers in these visa categories may request an exception to the Proclamations in order to travel to the United States to work for their petitioning employers. *See id.* The existence of these exceptions for certain urgent situations undermines Plaintiffs' argument, Br. 62-64, that they will suffer an immediate irreparable harm in the absence of an injunction. Moreover, many of Plaintiffs' purported harms are wholly unrelated to the purpose of the visa programs they fall under, most of which are meant to provide the U.S. workforce with temporary workers. Their mismatched purported irreparable harms are therefore not proper bases for seeking a preliminary injunction. *See Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994) ("[A] party moving for a preliminary injunction must necessarily establish a

relationship between the injury claimed in the party's motion and the conduct asserted in the complaint.").

Third, a preliminary injunction is an improper remedy for the financial injuries alleged here. Indeed, the "temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *see also Wis. Gas Co.*, 758 F.2d at 673-74 (affirming denial of preliminary injunctive relief because an economic loss rarely constitutes an irreparable injury). Applying this holding here, Plaintiffs' purported loss of income while the Proclamations remain in place, Br. 63, cannot constitute irreparable harm. Plaintiffs thus shift to the exception to this general rule that recognizes that a business's economic loss may be considered irreparable when the loss "threatens the very existence" of the business. Br. 62-63. But the Plaintiffs in this case have nowhere demonstrated that the Proclamations threaten their existence; rather, they simply note their difficulty in recruiting prospective workers. Br. 62. Moreover, the Plaintiffs failed to establish that the Proclamations—rather than the COVID-19 pandemic and the harms and conditions that it caused—is the source of their claimed injuries. 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. 30, 2020). Under this suspension of

routine visa services, unless persons seeking nonimmigrant temporary-work visas to enter the United States 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 Proclamations, that caused Plaintiffs' purported monetary injuries.

Fourth, Plaintiffs cannot demonstrate irreparable harm because, as a matter of law, a foreign national does not have a right to live in the country just because the foreign national's spouse or family lives here. *See Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958) (holding that no constitutional right is violated by the deportation of a spouse). "[W]hile the Constitution protects individual's right to marry and the marital relationship, these constitutional rights are not implicated when a spouse is removed or denied entry to the United States." *Singh v. Tillerson*, No. 16-cv-922, 2017 WL 423552, at *5 (D.D.C. Sept. 21, 2017); *see also Rohrbaugh v. Pompeo*, 394 F. Supp. 3d 128, 133-34 (D.D.C. 2019), *summarily aff'd*, 2020 WL 2610600 (D.C. Cir. May 15, 2020). Plaintiffs' contention that they will suffer irreparable harm in the absence of an injunction due to their temporary inability to enter the United States and rejoin family members here, Br. 61-62, is inconsistent with this longstanding principle.

Plaintiffs have specifically not sought through this appeal an order directing the government to process and issue visas that, even if issued, would not permit them to enter the United States while the Proclamations are in effect. In other words, the relief that Plaintiffs seek in this appeal is the ability to enter the United States, not to receive

visas that they "cannot use." Br. 62-65; *see* JA749 (explaining that Plaintiffs are not entitled to visas that would not permit them to enter because all of their purported harm—financial injuries to business interests and temporary physical separation from family members—would be alleviated *only* by allowing them to enter the country). Accordingly, this appeal does not present a question whether the State Department's No-Visa Policy is a permissible interpretation of the INA.[7]

In sum, the district court did not abuse its discretion in concluding that Plaintiffs failed to establish that they face immediate irreparable harm in the absence of a preliminary injunction.

Balance of the Equities & Public Interest. The balancing of equities and the public interest factors merge when the federal government is a party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The district court correctly ruled that "[i]ssuing injunctive relief that could be construed to mean that the State Department must issue visas to people who have no immediate prospect for entering the country could create substantial havoc and confusion." JA749-50. Plaintiffs' arguments to the contrary are flawed. Br. 65-67.

First, they argue that "overwhelming evidence shows that the public interest that the Proclamations purport to serve—protecting U.S. workers—is not actually

[7] The plaintiffs-appellants in *Panda v. Pompeo*, No. 20-5284 (D.C. Cir.), similarly allege harms based solely on their inability to enter the United States, so the propriety of the No-Visa Policy is not at issue there either. *See* Appellant's Brief, *Panda v. Pompeo*, No. 20-5284 at 54 (describing their harm as an "inability to return to the United States to resume employment or rejoin family members"); *id.* at 55-56 ("If this Court holds, as it should, that the district court committed legal error in ruling that [Proclamation 10052] is not likely *ultra vires*, then an injunction would redress Plaintiffs' harm by directing Defendants not to apply the Proclamation to Plaintiffs to preclude their entry into the United States.").

furthered by leaving them in place." Br. 66 (citing Plaintiffs' declarations opining on the Proclamations' possible economic impact). But this argument merely repackages Plaintiffs' challenge to the adequacy of the Proclamations' factual findings, which is foreclosed by clear Supreme Court precedent. *Supra* at 29-35. Moreover, 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 Plaintiffs' approach would be contrary to the public interest because it would strike a direct blow to 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).

Second, Plaintiffs assert that "the public has no interest in keeping the affected individuals out of the country" because such exclusion would purportedly violate congressional judgments. Br. 66-67. This attempt to repackage their merits argument fails because Congress has expressly charged the Executive with administering and enforcing all immigration laws, with broad authority to admit and regulate the employment of temporary workers with nonimmigrant status. *See* 8 U.S.C. §§ 1103(a)(1), 1184(a)(1), (c)(1). Any order that micro-manages executive agencies'

vested control over a statutory program, or that 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 injunction Plaintiffs seek would invalidate the President's application of his congressionally mandated authority under section 1182(f), undermine the Executive Branch's constitutional and statutory authority over immigration, and constitute an "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013). The district court was therefore correct in rejecting Plaintiffs' request.

Moreover, setting aside two lawful Presidential Proclamations issued to address a specific threat to the American workforce during a time of national emergency would lead to negative repercussions for the public that would be great and irreversible. As set out in the Proclamations, national unemployment claims reached "historic levels." 85 Fed. Reg. at 23,441. American workers who are already "at the margin between employment and unemployment" are "likely to bear the burden of excess labor supply disproportionately." *Id.*

Continued immigration at the normal rate during this critical time of economic recovery would threaten the ability of those American workers to secure employment. *Id.* at 23,442. The American public interest is properly served by permitting the Executive Branch to protect American workers who are suffering right now. Plaintiffs focus on economic growth and wrongly dismiss the harm to American workers who bear the burden of increased competition at a time of a glutted labor market as no good reason to restrict entry to the plaintiffs. But an injunction of these Proclamations would allow these identified harms to endure, and accordingly the district court properly declined to issue Plaintiffs' requested relief.

CONCLUSION

This Court should affirm the district court's partial denial of Plaintiffs' preliminary-injunction motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,652 words, excluding the parts of the brief exempted under Rule 32(f) and D.C. Cir. Rule 32(e), according to the count of Microsoft Word.

/s/ James J. Wen
JAMES J. WEN
U.S. Department of Justice
Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause eight paper copies of this brief to be filed with the Court within two business days.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ James J. Wen
JAMES J. WEN
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8 U.S.C. § 1182. Inadmissible aliens.

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

….

(f) Suspension of entry or imposition of restrictions by President

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. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

8 U.S.C. § 1185. Travel control of citizens and aliens.

(a) Restrictions and prohibitions

Unless otherwise ordered by the President, it shall be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

….

(d) Nonadmission of certain aliens

Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

Federal Register
Vol. 85, No. 81
Monday, April 27, 2020

Presidential Documents

Title 3—

The President

Proclamation 10014 of April 22, 2020

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

By the President of the United States of America

A Proclamation

The 2019 Novel Coronavirus (COVID–19) has significantly disrupted the livelihoods of Americans. In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak), I declared that the COVID–19 outbreak in the United States constituted a national emergency, beginning March 1, 2020. Since then, the American people have united behind a policy of mitigation strategies, including social distancing, to flatten the curve of infections and reduce the spread of SARS–CoV–2, the virus that causes COVID–19. This needed behavioral shift has taken a toll on the United States economy, with national unemployment claims reaching historic levels. In the days between the national emergency declaration and April 11, 2020, more than 22 million Americans have filed for unemployment.

In the administration of our Nation's immigration system, we must be mindful of the impact of foreign workers on the United States labor market, particularly in an environment of high domestic unemployment and depressed demand for labor. We must also conserve critical State Department resources so that consular officers may continue to provide services to United States citizens abroad. Even with their ranks diminished by staffing disruptions caused by the pandemic, consular officers continue to provide assistance to United States citizens, including through the ongoing evacuation of many Americans stranded overseas.

I have determined that, without intervention, the United States faces a potentially protracted economic recovery with persistently high unemployment if labor supply outpaces labor demand. Excess labor supply affects all workers and potential workers, but it is particularly harmful to workers at the margin between employment and unemployment, who are typically ''last in'' during an economic expansion and ''first out'' during an economic contraction. In recent years, these workers have been disproportionately represented by historically disadvantaged groups, including African Americans and other minorities, those without a college degree, and the disabled. These are the workers who, at the margin between employment and unemployment, are likely to bear the burden of excess labor supply disproportionately.

Furthermore, lawful permanent residents, once admitted, are granted ''open-market'' employment authorization documents, allowing them immediate eligibility to compete for almost any job, in any sector of the economy. There is no way to protect already disadvantaged and unemployed Americans from the threat of competition for scarce jobs from new lawful permanent residents by directing those new residents to particular economic sectors with a demonstrated need not met by the existing labor supply. Existing immigrant visa processing protections are inadequate for recovery from the COVID–19 outbreak. The vast majority of immigrant visa categories do not require employers to account for displacement of United States workers.

While some employment-based visas contain a labor certification requirement, because visa issuance happens substantially after the certification is completed, the labor certification process cannot adequately capture the status of the labor market today. Moreover, introducing additional permanent residents when our healthcare resources are limited puts strain on the finite limits of our healthcare system at a time when we need to prioritize Americans and the existing immigrant population. In light of the above, I have determined that the entry, during the next 60 days, of certain aliens as immigrants would be detrimental to the interests of the United States.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act, 8 U.S.C. 1182(f) and 1185(a), and section 301 of title 3, United States Code, hereby find that the entry into the United States of persons described in section 1 of this proclamation would, except as provided for in section 2 of this proclamation, be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following:

Section 1. *Suspension and Limitation on Entry*. The entry into the United States of aliens as immigrants is hereby suspended and limited subject to section 2 of this proclamation.

Sec. 2. *Scope of Suspension and Limitation on Entry.* (a) The suspension and limitation on entry pursuant to section 1 of this proclamation shall apply only to aliens who:

(i) are outside the United States on the effective date of this proclamation;

(ii) do not have an immigrant visa that is valid on the effective date of this proclamation; and

(iii) do not have an official travel document other than a visa (such as a transportation letter, an appropriate boarding foil, or an advance parole document) that is valid on the effective date of this proclamation or issued on any date thereafter that permits him or her to travel to the United States and seek entry or admission.

(b) The suspension and limitation on entry pursuant to section 1 of this proclamation shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any alien seeking to enter the United States on an immigrant visa as a physician, nurse, or other healthcare professional; to perform medical research or other research intended to combat the spread of COVID–19; or to perform work essential to combating, recovering from, or otherwise alleviating the effects of the COVID–19 outbreak, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees; and any spouse and unmarried children under 21 years old of any such alien who are accompanying or following to join the alien;

(iii) any alien applying for a visa to enter the United States pursuant to the EB–5 Immigrant Investor Program;

(iv) any alien who is the spouse of a United States citizen;

(v) any alien who is under 21 years old and is the child of a United States citizen, or who is a prospective adoptee seeking to enter the United States pursuant to the IR–4 or IH–4 visa classifications;

(vi) any alien whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees, based on a recommendation of the Attorney General or his designee;

(vii) any member of the United States Armed Forces and any spouse and children of a member of the United States Armed Forces;

(viii) any alien seeking to enter the United States pursuant to a Special Immigrant Visa in the SI or SQ classification, subject to such conditions as the Secretary of State may impose, and any spouse and children of any such individual; or

(ix) any alien whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees.

Sec. 3. *Implementation and Enforcement.* (a) The consular officer shall determine, in his or her discretion, whether an immigrant has established his or her eligibility for an exception in section 2(b) of this proclamation. The Secretary of State shall implement this proclamation as it applies to visas pursuant to such procedures as the Secretary of State, in consultation with the Secretary of Homeland Security, may establish in the Secretary of State's discretion. The Secretary of Homeland Security shall implement this proclamation as it applies to the entry of aliens pursuant to such procedures as the Secretary of Homeland Security, in consultation with the Secretary of State, may establish in the Secretary of Homeland Security's discretion.

(b) An alien who circumvents the application of this proclamation through fraud, willful misrepresentation of a material fact, or illegal entry shall be a priority for removal by the Department of Homeland Security.

(c) Nothing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, consistent with the laws of the United States.

Sec. 4. *Termination.* This proclamation shall expire 60 days from its effective date and may be continued as necessary. Whenever appropriate, but no later than 50 days from the effective date of this proclamation, the Secretary of Homeland Security shall, in consultation with the Secretary of State and the Secretary of Labor, recommend whether I should continue or modify this proclamation.

Sec. 5. *Effective Date.* This proclamation is effective at 11:59 p.m. eastern daylight time on April 23, 2020.

Sec. 6. *Additional Measures.* Within 30 days of the effective date of this 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 to me other measures appropriate to stimulate the United States economy and ensure the prioritization, hiring, and employment of United States workers.

Sec. 7. *Severability.* It is the policy of the United States to enforce this proclamation to the maximum extent possible to advance the interests of the United States. Accordingly:

(a) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this proclamation and the application of its provisions to any other persons or circumstances shall not be affected thereby; and

(b) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements to conform with existing law and with any applicable court orders.

Sec. 8. *General Provisions.* (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

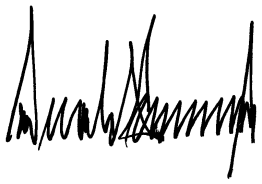
(i) the authority granted by law to an executive department or agency, or the head thereof; or,

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of April, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fourth.



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Thursday, June 25, 2020

Presidential Documents

Title 3—

The President

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

By the President of the United States of America

A Proclamation

The 2019 Novel Coronavirus (COVID–19) has significantly disrupted Americans' livelihoods. 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 of SARS–CoV–2, the virus that causes COVID–19. The overall 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. While the May rate of 13.3 percent reflects a marked decline from April, millions of Americans remain out of work.

In Proclamation 10014 of April 22, 2020 (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), I determined that, without intervention, the United States faces a potentially protracted economic recovery with persistently high unemployment if labor supply outpaces labor demand. Consequently, I suspended, for a period of 60 days, the entry of aliens as immigrants, subject to certain exceptions. As I noted, lawful permanent residents, once admitted pursuant to immigrant visas, are granted ''open-market'' employment authorization documents, allowing them immediate eligibility to compete for almost any job, in any sector of the economy. Given that 60 days is an insufficient time period for the United States labor market, still stalled with partial social distancing measures, to rebalance, and given the lack of sufficient alternative means to protect unemployed Americans from the threat of competition for scarce jobs from new lawful permanent residents, the considerations present in Proclamation 10014 remain.

In addition, pursuant to Proclamation 10014, the Secretary of Labor and the Secretary of Homeland Security 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.

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. Temporary workers are often accompanied by their spouses and children, many of whom also compete against American workers. Under ordinary circumstances, properly administered temporary worker programs can provide benefits to the economy. But 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.

For example, between February and April of 2020, more than 17 million United States jobs were lost in industries in which employers are seeking

to fill worker positions tied to H–2B nonimmigrant visas. During this same period, 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. Also, the May unemployment rate for young Americans, who compete with certain J nonimmigrant visa applicants, has been particularly high—29.9 percent for 16–19 year olds, and 23.2 percent for the 20–24 year old group. 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.

As I described in Proclamation 10014, 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. In recent years, these workers have been disproportionately represented by historically disadvantaged groups, including African Americans and other minorities, those without a college degree, and Americans with disabilities.

In the administration of our Nation's immigration system, we must remain mindful of the impact of foreign workers on the United States labor market, particularly in the current extraordinary environment of high domestic unemployment and depressed demand for labor. Historically, when recovering from economic shocks that cause significant contractions in productivity, recoveries in employment lag behind improvements in economic activity. This predictive outcome demonstrates that, assuming the conclusion of the economic contraction, the United States economy will likely require several months to return to pre-contraction economic output, and additional months to restore stable labor demand. In light of the above, I have 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.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(f) and 1185(a)) and section 301 of title 3, United States Code, hereby find that the entry into the United States of persons described in section 1 of Proclamation 10014, except as provided in section 2 of Proclamation 10014, and persons described in section 2 of this proclamation, except as provided for in section 3 of this proclamation, would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following:

Section 1. *Continuation of Proclamation 10014.* (a) Section 4 of Proclamation 10014 is amended to read as follows:

''**Sec. 4**. *Termination.* This proclamation shall expire on December 31, 2020, and may be continued as necessary. Within 30 days of June 24, 2020, and every 60 days thereafter while this proclamation is in effect, the Secretary of Homeland Security shall, in consultation with the Secretary of State and the Secretary of Labor, recommend any modifications as may be necessary.''

(b) This section shall be effective immediately.

Sec. 2. *Suspension and Limitation on Entry.* The entry into the United States of any alien seeking entry pursuant to any of the following nonimmigrant visas is hereby suspended and limited, subject to section 3 of this proclamation:

(a) an H–1B or H–2B visa, and any alien accompanying or following to join such alien;

(b) a J visa, to the extent the alien is participating in an intern, trainee, teacher, camp counselor, au pair, or summer work travel program, and any alien accompanying or following to join such alien; and

(c) an L visa, and any alien accompanying or following to join such alien.

Sec. 3. *Scope of Suspension and Limitation on Entry.* (a) The suspension and limitation on entry pursuant to section 2 of this proclamation shall apply only to any alien who:

(i) is outside the United States on the effective date of this proclamation;

(ii) does not have a nonimmigrant visa that is valid on the effective date of this proclamation; and

(iii) does not have an official travel document other than a visa (such as a transportation letter, an appropriate boarding foil, or an advance parole document) that is valid on the effective date of this proclamation or issued on any date thereafter that permits him or her to travel to the United States and seek entry or admission.

(b) The suspension and limitation on entry pursuant to section 2 of this proclamation shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any alien who is the spouse or child, as defined in section 101(b)(1) of the INA (8 U.S.C. 1101(b)(1)), of a United States citizen;

(iii) any alien seeking to enter the United States to provide temporary labor or services essential to the United States food supply chain; and

(iv) any alien whose entry would be in the national interest as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees.

Sec. 4. *Implementation and Enforcement.* (a) The consular officer shall determine, in his or her discretion, whether a nonimmigrant has established his or her eligibility for an exception in section 3(b) of this proclamation. The Secretary of State shall implement this proclamation as it applies to visas pursuant to such procedures as the Secretary of State, in consultation with the Secretary of Homeland Security and the Secretary of Labor, may establish in the Secretary of State's discretion. The Secretary of Homeland Security shall implement this proclamation as it applies to the entry of aliens pursuant to such procedures as the Secretary of Homeland Security, in consultation with the Secretary of State, may establish in the Secretary of Homeland Security's discretion.

(i) The Secretary of State, the Secretary of Labor, and the Secretary of Homeland Security shall establish standards to define categories of aliens covered by section 3(b)(iv) of this proclamation, including those that: are critical to the defense, law enforcement, diplomacy, or national security of the United States; are involved with the provision of medical care to individuals who have contracted COVID–19 and are currently hospitalized; are involved with the provision of medical research at United States facilities to help the United States combat COVID–19; or are necessary to facilitate the immediate and continued economic recovery of the United States. The Secretary of State and the Secretary of Homeland Security shall exercise the authority under section 3(b)(iv) of this proclamation and section 2(b)(iv) of Proclamation 10014 to exempt alien children who would as a result of the suspension in section 2 of this proclamation or the suspension in section 1 of Proclamation 10014 age out of eligibility for a visa.

(ii) Aliens covered by section 3(b)(iv) of this proclamation, under the standards established in section 4(a)(i) of this proclamation, shall be identified by the Secretary of State, the Secretary of Homeland Security, or their respective designees, in his or her sole discretion.

(b) An alien who circumvents the application of this proclamation through fraud, willful misrepresentation of a material fact, or illegal entry shall be a priority for removal by the Department of Homeland Security.

(c) Nothing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal,

or protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, consistent with the laws of the United States.

Sec. 5. *Additional Measures.* (a) The Secretary of Health and Human Services, through the Director of the Centers for Disease Control and Prevention, shall, as necessary, provide guidance to the Secretary of State and the Secretary of Homeland Security for implementing measures that could reduce the risk that aliens seeking admission or entry to the United States may introduce, transmit, or spread SARS–CoV–2 within the United States.

(b) The Secretary of Labor shall, in consultation with the Secretary of Homeland Security, as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action to ensure that the presence in the United States of aliens who have been admitted or otherwise provided a benefit, or who are seeking admission or a benefit, pursuant to an EB–2 or EB–3 immigrant visa or an H–1B nonimmigrant visa does not disadvantage United States workers in violation of section 212(a)(5)(A) or (n)(1) of the INA (8 U.S.C. 1182(a)(5)(A) or (n)(1)). The Secretary of Labor shall also undertake, as appropriate, investigations pursuant to section 212(n)(2)(G)(i) of the INA (8 U.S.C. 1182(n)(2)(G)(i)).

(c) The Secretary of Homeland Security shall:

(i) take appropriate action, consistent with applicable law, in coordination with the Secretary of State, to provide that an alien should not be eligible to apply for a visa or for admission or entry into the United States or other benefit until such alien has been registered with biographical and biometric information, including but not limited to photographs, signatures, and fingerprints;

(ii) take appropriate and necessary steps, consistent with applicable law, to prevent certain aliens who have final orders of removal; who are inadmissible or deportable from the United States; or who have been arrested for, charged with, or convicted of a criminal offense in the United States, from obtaining eligibility to work in the United States; and

(iii) as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action regarding the efficient allocation of visas pursuant to section 214(g)(3) of the INA (8 U.S.C. 1184(g)(3)) and ensuring that the presence in the United States of H–1B nonimmigrants does not disadvantage United States workers.

Sec. 6. *Termination.* This proclamation shall expire on December 31, 2020, and may be continued as necessary. Within 30 days of the effective date of this proclamation and every 60 days thereafter while this proclamation is in effect, the Secretary of Homeland Security shall, in consultation with the Secretary of State and the Secretary of Labor, recommend any modifications as may be necessary.

Sec. 7. *Effective Date.* Except as provided in section 1 of this proclamation, this proclamation is effective at 12:01 a.m. eastern daylight time on June 24, 2020.

Sec. 8. *Severability.* It is the policy of the United States to enforce this proclamation to the maximum extent possible to advance the interests of the United States. Accordingly:

(a) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this proclamation and the application of its provisions to any other persons or circumstances shall not be affected thereby; and

(b) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements to conform with existing law and with any applicable court orders.

Sec. 9. *General Provisions.* (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

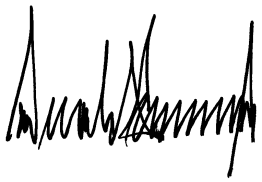
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of June, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fourth.



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