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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JOHN DOE #1; JUAN RAMON MORALES; JANE DOE #2; JANE DOE #3; IRIS ANGELINA CASTRO; BLAKE DOE; BRENDA VILLARRUEL; and LATINO NETWORK,

Plaintiffs,

v.

DONALD TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of the Department of Homeland Security; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, in his official capacity as Secretary of the Department of Health and Human Services; U.S. DEPARTMENT OF STATE; MICHAEL POMPEO, in his official capacity as Secretary of State; and UNITED STATES OF AMERICA,

Defendants.

CASE NO. 3:19-cv-01743-SI

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

The "Presidential Proclamation on the Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System" ("the Proclamation" or "PP 9945") is a straightforward effort by the President to ensure that immigrants traveling to our shores have a plan for carrying health insurance once they arrive in the United States so as to avoid unnecessarily burdening the healthcare system. Many different types of healthcare plans qualify as "approved health insurance," and there is no merit to Plaintiffs' contention that intending immigrants will be unable to demonstrate that they will be covered by approved health insurance, as defined in the Proclamation, within 30 days of entering the United States, or that they possess the financial resources to pay for reasonably foreseeable medical costs. Indeed, one method to satisfy the Proclamation is to show an intention to obtain one of various types of insurance under the Affordable Care Act (ACA), which are familiar and readily available types of insurance coverage. Many other types of health insurance available to intending immigrants—such as travel insurance or temporary coverage—also qualify. Alternatively, an immigrant visa applicant can meet the requirements of the Proclamation by showing that she is healthy and has no reasonably foreseeable medical costs.

With respect to Plaintiffs' legal challenge, the Proclamation falls comfortably within the President's sweeping authority under 8 U.S.C. § 1182(f), and serves a purpose—ensuring health coverage for new immigrants—the importance of which is well-established and on which there is a broad national consensus. There can be no question that the Proclamation is consistent with the Supreme Court's recent ruling in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), and enjoining it would be directly contrary to the guidance the Supreme Court provided in that decision.

Moreover, because implementation of the Proclamation has been enjoined, the promulgation of further guidance on how consular officers apply the Proclamation was never

finalized and has been halted. Many of Plaintiffs' claims regarding the impact of the Proclamation would prove untrue if the Proclamation went into force. The Proclamation does not require that ACA insurance be purchased before coming to the United States. Instead, a consular officer would determine whether the immigrant "has a plan to obtain health insurance within 30 days" given that "many forms of health insurance cannot be secured prior to establishing a U.S. residence." *See* Ex. 1, Marwaha Decl., Ex. A at ¶ 7. Consular officers make similar judgments about the intent of immigrants seeking to come to the United States in a wide range of contexts, and are well situated to make the same assessment here. Establishing an ability to pay reasonably foreseeable medical costs would be evaluated "based on an applicant's current medical state" and based on medical forms applicants are already required to submit. *Id*. Further, the Proclamation will not separate children from their parents. Minors are not subject to the Proclamation, unless they are already together with a parent who is also subject to the Proclamation. And the categories of visas that reunite children with parents, or vice versa, are generally exempted from the Proclamation. There is no justification to halt the Proclamation prior to its going into effect.

Plaintiffs raise a variety of challenges in their Complaint, but in their Motion for a Preliminary Injunction, they make only three assertions: that the Proclamation and its implementation violates (1) the Immigration and Nationality Act (INA) public charge statutory ground of inadmissibility, (2) various Administrative Procedure Act (APA) procedural and substantive requirements, and (3) the Due Process Clause. In spite of filing suit on behalf of a relief organization that operates in a single county and seven individuals, and without regard to established class actions rules, Plaintiffs ask this court to issue a nationwide preliminary injunction "preventing Defendants and their agents from implementing or enforcing the proclamation." Plaintiffs' Motion for a Preliminary Injunction (PI Mot.), ECF No 46 at 43.

Defendants respectfully ask this Court to deny Plaintiffs' motion for a preliminary injunction for the following reasons: (1) Plaintiffs cannot establish a likelihood of success on the merits of any of their claims; (2) Plaintiffs have not established that they are likely to suffer harm or, if they did, that any harm would be irreparable; and (3) Plaintiffs fail to show that the balance of equities tips in their favor or that an injunction is in the public interest.

Plaintiffs cannot challenge a Presidential Proclamation under the APA, and they have not identified any final action by the Defendant agencies that is subject to arbitrary and capricious review or any other limitation on agency action in the APA. Plaintiffs' other claims similarly lack merit. Far from contradicting congressional intent, PP 9945 is a proper exercise of the President's broad, expressly delegated authority in 8 U.S.C. § 1182(f) and § 1185(a) to impose additional restrictions on entry for any alien or class of aliens if the President finds that their admission "would be detrimental to the interests of the United States." It is also a valid exercise of the broad authority reserved to the political branches over the creation and administration of the immigration system. *Hawaii*, 138 S. Ct. at 2419. As the Supreme Court recently affirmed, this authority to regulate immigration substantially limits challenges to Presidential proclamations suspending entry like the one here. *Id*. Even for the subset of immigrant visa applicants whose visa applications are made based on their relationship to a United States citizen, and whose petitioning family members could conceivably raise constitutional challenges, the Proclamation's goal of reducing the burden the uninsured place on U.S. healthcare providers and taxpayers is indisputably a facially legitimate purpose sufficient to survive the narrow and deferential standard of review the court must apply to such claims.

II. STATEMENT OF FACTS

A. Presidential Proclamation 9945

This case arises out of Presidential Proclamation 9945, which President Trump signed on

October 4, 2019. *See* Presidential Proclamation 9945, Suspension of Entry of Immigrants Who will Financially Burden the United States Healthcare System, 84 Fed. Reg. 53991 (Oct. 9, 2019). The President issued PP 9945 to address the "substantial costs" U.S. healthcare providers and taxpayers bear "in paying for medical expenses incurred by people who lack health insurance or the ability to pay for their healthcare." *Id.* Hospitals and other healthcare providers "often administer care to the uninsured without any hope of receiving reimbursement from them," and these costs are passed on to the American people in the form of higher taxes, higher premiums, and higher fees for medical services. *Id*. Uncompensated care costs have exceeded $35 billion in each of the last 10 years, a burden that can drive hospitals into insolvency. *Id*. The uninsured also strain Federal and State government budgets through reliance on publicly funded programs, which are ultimately funded by taxpayers, and by using emergency rooms to seek remedies for a variety of non-emergency conditions. *Id*.

The challenges caused by uncompensated care are exacerbated by admitting to the United States thousands of immigrants annually who have not demonstrated any ability to pay for their healthcare costs. 84 Fed. Reg. 53991. Notably, "data show that lawful immigrants are about three times more likely than United States citizens to lack health insurance." *Id*. Continuing to allow entry into the United States of "certain immigrants who lack health insurance or the demonstrated ability to pay for their healthcare" would be detrimental to the interests of the United States, including protecting and addressing the challenges facing our healthcare system and protecting American taxpayers from the burden of uncompensated care. *Id*.

To address these challenges while still continuing the United States' "long history of welcoming immigrants who come lawfully in search of brighter futures," President Trump issued PP 9945 pursuant to 8 U.S.C. §§ 1182(f), 1185(a), and suspended, with certain exceptions, entry into the United States of immigrants who will financially burden the United States healthcare

system. 84 Fed. Reg. 53991-92. This includes immigrants who cannot satisfy a consular officer at a visa interview that they will be covered by approved health insurance, as set out in the Proclamation, within 30 days of entering the United States, or will have "the financial resources to pay for reasonably foreseeable medical costs." *Id*.

The Proclamation sets out a range of possible healthcare plans that immigrant visa applicants can use to satisfy the requirements of PP 9945. 84 Fed. Reg. 53992. Approved health insurance coverage includes the following:

> (i) an employer-sponsored plan, including a retiree plan, association health plan, and coverage provided by the Consolidated Omnibus Budget Reconciliation Act of 1985;
>
> (ii) an unsubsidized health plan offered in the individual market within a State;
>
> (iii) a short-term limited duration health policy effective for a minimum of 364 days—or until the beginning of planned, extended travel outside the United States;
>
> (iv) a catastrophic plan;
>
> (v) a family member's plan;
>
> (vi) a medical plan under chapter 55 of title 10, United States Code, including coverage under the TRICARE program;
>
> (vii) a visitor health insurance plan that provides adequate coverage for medical care for a minimum of 364 days—or until the beginning of planned, extended travel outside the United States;
>
> (viii) a medical plan under the Medicare program.

84 Fed. Reg. 53992.

Importantly, although an immigrant visa applicant can satisfy the consular officer that she is not subject to the restrictions of the Proclamation by showing that she will be "covered by approved health insurance" within 30 days of entering the United States, she does not necessarily have to establish coverage within 30 days, only that she will obtain coverage within that time period. The intending immigrant may alternatively satisfy the consular officer that she is not subject to the

restrictions of the Proclamation by showing that she has "the financial resources to pay for reasonably foreseeable medical costs." 84 Fed. Reg. 53992. If the alien plans to purchase insurance coverage after entering the United States, but the insurance will not begin within the 30-day time period, the immigrant could also show that she will be able to pay for her medical expenses during the gap in coverage. Finally, to the extent an intending immigrant purchases a particular insurance plan in advance of her entry, or shortly thereafter, nothing in the Proclamation bars her from later switching to a different plan once in the United States or applying for a plan with different coverage.

The Proclamation applies to individuals who "seek[ ] to enter the United States pursuant to an immigrant visa." 84 Fed. Reg. 53992, § 2; *id.* at 53993, § 3. It does not apply to the overwhelming majority of noncitizens who seek to enter the United States on a nonimmigrant visa, including foreign students attending American schools, temporary agricultural workers, workers performing temporary or seasonal work, fiancés of U.S. citizens, business travelers, or tourists. The Proclamation also does not apply to asylees or refugees. 84 Fed. Reg. 53993, § 2.

Among intending immigrants, the Proclamation has further exceptions. Among others, the Proclamation exempts "any alien who is the child of a United States citizen or who is seeking to enter the United States pursuant to" various types of visas, including IR–2 (unmarried child under the age of 21); IR–3 (orphan adopted abroad); IR–4 (orphan to be adopted in the U.S.); IH–3 (child adopted abroad); or IH–4 (child coming into the United States to be adopted). *Id*. It exempts "any alien under the age of 18, except for any alien accompanying a parent who is also immigrating to the United States and subject to th[e] proclamation." *Id*. Thus, the Proclamation cannot result in a minor child remaining separated from a petitioning parent who is in the United States. Parents of U.S. citizens over the age of 21 who immigrate under an IR–5 visa are largely exempted, and need only demonstrate that their "healthcare will not impose a substantial burden on the United States

healthcare system." *Id*. The Proclamation does not apply to an applicant for a "Special Immigrant Visa" in the SI or SQ classifications who is a national of Afghanistan or Iraq, or his or her spouse and children. *Id*. Finally, the Proclamation exempts from its terms any alien "whose entry would further important United States law enforcement objectives, as determined by the Secretary of State or his designee based on a recommendation of the Attorney General or his designee," or "whose entry would be in the national interest, as determined by the Secretary of State or his designee on a case-by-case basis." *Id.* at 53992-93.

The Proclamation provides that an immigrant visa applicant subject to PP 9945 must "establish to the satisfaction of a consular officer" that he or she meets its requirements, and that the Secretary of State "may establish standards and procedures governing such determinations." 84 Fed. Reg. 53993. The Proclamation notes that the review a consular officer must conduct to ensure that an intending immigrant meets the requirements of PP 9945 "is separate and independent from the review and determination required by other statutes, regulations, or proclamations in determining the admissibility of an alien." *Id*. Finally, the Proclamation provides that it "shall be implemented consistent with applicable law," and that the "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." 84 Fed. Reg. 53993-94.

B. Procedural history

Defendants routinely provide information to the public describing various immigration policies and procedures that immigrant visa applicants must follow. One way the State Department provides such information is to post materials on its website. Prior to the Proclamation's effective date, the State Department posted a notification regarding the Proclamation on its website at *https://travel.state.gov/healthcare*. This notification on the State Department's website quoted from

the Proclamation and referenced other existing requirements for immigrant visa interviews and adjudications.

On October 30, 2019, the State Department issued a cable to all diplomatic and consular posts, explaining that the Proclamation would soon take effect, and describing what the State Department anticipated would be forthcoming guidance on applying the Proclamation through an update to the Foreign Affairs Manual. *See* Ex. 1, Marwaha Decl., Ex. A at ¶ 18.

Also on October 30, 2019, the State Department published in the *Federal Register* a notice of request for emergency review and approval by OMB and public comment. 84 Fed. Reg. 58199 ("Notice of Information Collection Under OMB Emergency Review: Immigrant Health Insurance Coverage"). The document first appeared on the *Federal Register* website at 8:45 a.m. ET on October 29, 2019, in an unpublished format for public inspection. The purpose of this request to OMB was to comply with the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq*., which requires an agency to obtain OMB approval to ask standardized questions of 10 or more members of the public within a 12-month period, *id*. § 3502(3) (defining "collection of information"). The State Department requested OMB approval for consular officers to ask immigrant visa applicants covered by Proclamation 9945 "whether they will be covered by health insurance in the United States within 30 days of entry," and "if so, for details relating to such insurance." 84 Fed. Reg. 58199. Pursuant to 5 C.F.R. § 1320.13, the State Department requested emergency review of the information collection so that it could satisfy the Paperwork Reduction Act before the effective date of the Proclamation. *See* OMB Office of Information and Regulatory Affairs Information Collection Request number 201910-1405-001, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201910-1405-001. On November 1, 2019, in "accordance with the Paperwork Reduction Act," OMB approved the information collection. *See* Notice of OMB Action, https://www.reginfo.gov/public/do/DownloadNOA?requestID=302106.

The following day, on November 2, 2019, this court "temporarily restrained and enjoined" Defendants "from taking any action to implement or enforce Presidential Proclamation No. 9945," ECF No. 33, Temporary Restraining Order, at 18, halting implementation of PP 9945 and preventing the State Department from issuing any additional information for consular officers on implementation of the Proclamation. *See* Ex. 1, Marwaha Decl., Ex. A at ¶ 7 ("Posts may not begin implementing P.P.9945 until we update the [Foreign Affairs Manual]").

C. Immigrant Visa Application Process

Under the Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952), an alien seeking to enter the United States from abroad generally must apply for and be issued a visa. There are two types of visas: immigrant visas, for noncitizens seeking to reside in the United States permanently, and nonimmigrant visas, for individuals seeking temporary stays in the United States. *See* 8 U.S.C. §§ 1101(a)(15), 1181(a), 1182(a)(7), 1201(a). The Proclamation only applies to the former category: "this proclamation shall apply only to aliens seeking to enter the United States pursuant to an immigrant visa." 84 Fed. Reg. 53992, § 2 (Scope of Suspension and Limitation on Entry).

Generally, before a noncitizen may apply for an immigrant visa, she must be the beneficiary of a petition from a prospective employer or a family member who is U.S. citizen or lawful permanent resident. *See generally* 8 U.S.C. § 1153. The petition must be submitted to and approved by U.S. Citizenship and Immigration Services, which forwards the approved petition to the National Visa Center (NVC). The intending immigrant must then complete NVC processing, which means she must submit the required visa application and later must schedule an in-person interview before a consular officer at a U.S. embassy or consulate. *See* 8 U.S.C. § 1202(a), (e); 22 C.F.R. § 42.62.

A consular officer then makes a determination to issue or refuse the visa application. *See* 8 U.S.C. § 1201(a)(1), (g); 22 C.F.R. §§ 42.71, 42.81(a). The applicant bears the burden to

demonstrate "to the satisfaction of the consular officer" that he or she is eligible for the visa for which he or she is applying. 8 U.S.C. § 1361. No visa "shall be issued to an alien" if "it appears to the consular officer" from the application papers "that such alien is ineligible to receive a visa" or if "the consular officer knows or has reason to believe" that the alien is ineligible. *Id.* § 1201(g); *see* 22 C.F.R. § 40.6 (explaining that the term "'reason to believe' . . . shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa"). Consular officers must accordingly make a range of predictive determinations about a visa applicant's intent. *See, e.g.*, 8 U.S.C. § 1184(b); *see also* 9 Foreign Affairs Manual (FAM) § 401.1-3 (providing guidance on applying § 1184(b) and noting that consular officers must determine whether an applicant's intent is to engage in the activities authorized by the particular visa category and determine whether someone seeking a nonimmigrant visa actually improperly intends to immigrate permanently).

The process of applying for an immigrant visa, collecting the required documentation, and scheduling a consular interview can be lengthy. *See, e.g.*, *Siwen Zhang v. Cissna*, 2019 WL 3241187, *5 (C.D. Cal. Apr. 25, 2019) (noting that district courts often find that delays of three to five years in processing visa applications are not unreasonable); *Jamal v. Johnson*, No 2:15-CV-8088-ODW (AFMx), 2016 WL 4374773, at *6 (C.D. Cal. Aug. 15, 2016) (noting that four-year delay not unreasonable); *Beyene v. Napolitano*, No. 12-CV-1149-WHA, 2012 WL 2911838, at *9 (N.D. Cal. July 13, 2012) (concluding that delay of nearly five years was not unreasonable).

If an immigrant visa is issued, and the intending immigrant is admitted to the United States on a valid immigrant visa, he or she will become a lawful permanent resident (LPR) upon admission to the U.S. Alternatively, certain categories of intending immigrants who are already in the U.S. for whom an immigrant visa is immediately available may adjust their status to LPR without leaving the United States. *See* 8 U.S.C. § 1255(a). This process is called adjustment of status and converts

the noncitizen's nonimmigrant visa or other status to LPR status. *Id*. These individuals never enter the United States pursuant to an immigrant visa and therefore are not subject to the Proclamation.

III. LEGAL STANDARD

Plaintiffs have not met their burden to demonstrate their entitlement to a preliminary injunction. A "preliminary injunction is an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008). A district court should enter a preliminary injunction only "upon a clear showing that the [movant] is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, the moving party must demonstrate (1) that it is likely to succeed on the merits of its claims; (2) that it is likely to suffer an irreparable injury in the absence of injunctive relief; (3) that the balance of equities tips in its favor; and (4) that the proposed injunction is in the public interest. *Id.* at 20.

IV. ARGUMENT

A. Plaintiffs fail to show a likelihood of success on their separation of powers and statutory claims.

1. Courts may not review non-constitutional challenges to the political branches' decisions to exclude aliens abroad.

Plaintiffs argue that they are likely to succeed on a claim that the Proclamation violates federal immigration statutes. PI Mot. at 13. However, with respect to non-constitutional claims, it is a fundamental separation-of-powers principle, long recognized by courts and Congress through the INA, that the political branches' decision to exclude aliens abroad is not judicially reviewable. 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).

Congress "may, if it sees fit, . . . authorize the courts to" review decisions to exclude aliens. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (citation omitted). And, indeed, in 8 U.S.C. § 1252, Congress established a comprehensive statutory framework for judicial review of decisions concerning an alien's ability to remain in the United States. But Congress has never, in § 1252 or any other provision of the INA, authorized review of a denial of a visa, 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 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"). Plaintiffs cannot show likelihood of success on the merits—and therefore cannot show that injunctive relief is warranted—based on statutory claims that are non-justiciable.[1]

The Supreme Court has permitted extremely limited review only where U.S. citizens claim that a visa denial burdens their own constitutional rights. *See Kleindienst v. Mandel*, 408 U.S. 753 (1972). Recognizing that limit, Plaintiffs claim that, because the Proclamation is inconsistent with the INA, it "violates Constitutional separation of powers." Mot. at 14. *Hawaii* notably does not suggest that statutory claims are reviewable on such a theory, and such a theory would contradict established law regarding when judicial review is available. Instead, the argument that the

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

Proclamation is not consistent with the provisions of the INA is a straightforward statutory claim. In any event, there is no viable "separation of powers" theory that a statutory denial of a visa to an alien abroad "burdens a citizen's own constitutional rights." *Kerry v. Din*, 135 S. Ct. 2128, 2140 (Kennedy, J., concurring).

2. The Proclamation is a lawful exercise of the President's authority to suspend or restrict entry of aliens abroad.

Even if Plaintiffs' statutory claims were reviewable, PP 9945 is a valid exercise of the broad authority Congress granted the President in 8 U.S.C. § 1182(f) to suspend entry of aliens based on his determination that their entry would be detrimental to the national interest. Section 1182(f) provides in pertinent part:

> 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 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) additionally makes it "unlawful" for an 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." 8 U.S.C. § 1185(a)(1). This provision permits the President to regulate and place limitations on entry even without a finding of detriment to the national interest. *Id*.

Section 1182(f) "exudes deference to the President in every clause," and in that statute Congress "entrusts to the President the decisions whether and when to suspend entry," "whose entry to suspend," "for how long," and "on what conditions." *Hawaii*, 138 S. Ct. at 2408. Here, the President lawfully exercised this authority after "find[ing] that the unrestricted immigrant entry into the United States" of "thousands of aliens who have not demonstrated any ability to pay for their healthcare costs" "would . . . be detrimental to the interests of the United States, and that their entry

should be subject to certain restrictions, limitations, and exceptions." 84 Fed. Reg. 53991; *see also Hawaii,* 138 S. Ct. at 2408 (explaining that the "sole prerequisite" to this "comprehensive delegation" is that the President find that entry of the covered aliens would be detrimental to the interests of the United States). Although the President is not required to justify or explain his finding—*see id.* at 2400-01—the Proclamation sets out in detail the President's reasons for finding that entry of the immigrant visa applicants covered by PP 9945 would be detrimental to the interests of the United States, with the simple goal being to ensure that intending immigrants entering the country carry a minimum level of health insurance to reduce uncovered healthcare costs borne by healthcare providers and public programs. *See* 84 Fed. Reg. 53991. When, as here, the President "acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

Plaintiffs argue that "the power to regulate the admission of immigrants lies with Congress." PI Mot. at 15. But this argument disregards the reality that Congress expressly entrusted the President to make these determinations in Sections 1182(f) and 1185(a)(1). Those statutes in turn recognize that the President's authority to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *see Hawaii*, 138 S. Ct. at 2424 (Thomas, J., concurring). Against this backdrop of the President's constitutional authority over foreign affairs and an express delegation of authority from Congress to place conditions on aliens seeking visas to enter the United States, PP 9945 is a quintessential exercise of the President's power at its peak. *See Youngstown*, 343 U.S. at 635-37.

3. The Proclamation is a lawful exercise of the President's authority to expand the grounds of inadmissibility beyond those already listed in the INA.

Plaintiffs next argue that the Proclamation conflicts with the statutory ground of inadmissibility in 8 U.S.C. § 1182(a)(4) for individuals who are likely to become a public charge. PI Mot. at 15. They contend that Congress has directly spoken to the factors to be considered when evaluating whether entry can be denied on the basis that an intending immigrant is likely to become a financial burden on the United States, that Congress required a "totality of the circumstances" approach, and that it did not list health insurance among the factors to be considered in this approach. *Id*. at 15-16. But Plaintiffs' premise that the President lacks authority to expand the inadmissibility grounds in the INA fundamentally misunderstands the purpose and scope of § 1182(f), and, in any event there is no express conflict between the Proclamation and § 1182(a)(4).

Section 1182(f) vests authority in the President to impose additional limitations on entry beyond those that are already grounds for inadmissibility under the INA. The Supreme Court made this clear in *Hawaii*, explaining that: "[W]e have previously observed that § 1182(f) vests the President with 'ample power' to impose entry restrictions *in addition* to those elsewhere enumerated in the INA." *Hawaii*, 138 S. Ct. at 2408 (emphasis added) (quoting *Sale v. Haitian Ctrs. Council, Inc*, 509 U.S. 155, 187 (1993)); *see also Abourezk v. Reagan*, 785 F.2d 1043, 1049, n.2 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 1 (1987) (describing the "sweeping proclamation power" in § 1182(f) as enabling the President to supplement the other grounds of inadmissibility in the INA). Section 1182(f) plainly permits the President to expand on grounds of inadmissibility, particularly where the President has identified an additional threat to the national interest (such as the growing burden on taxpayers from the healthcare costs of the uninsured) that he believes Congress did not adequately address or may not have considered. In any event, Congress's decision to enact particular grounds of inadmissibility such as the public charge provision does not limit the

President's authority under 8 U.S.C. § 1182(f) to find that aliens who are not otherwise determined to be inadmissible under § 1182(a) would, if allowed to enter, be a detriment to the United States. This is the purpose of § 1182(f): to permit the President to suspend or restrict the entry of aliens that Congress did not otherwise bar as inadmissible. *Hawaii*, 138 S. Ct. at 2412.

In *Hawaii*, the Supreme Court unanimously rejected an argument virtually identical to the one Plaintiffs raise here. There, plaintiffs argued that an earlier proclamation, Proclamation No. 9645, exceeded the President's authority because it addressed national-security concerns that Congress had already considered and sought to remedy by enacting the Visa Waiver Program Improvement and Terrorist Travel Prevention Act, and by requiring individualized assessments of inadmissibility on criminal or security related bases. *Hawaii*, 138 S. Ct. at 2410-12. Plaintiffs argued that Proclamation No. 9645 would override the individual vetting system Congress had established. *Id*. The Court rejected these arguments because Proclamation No. 9645 did not "expressly override particular provisions of the INA." *Id.* at 2411. The Court refused to sanction a "cramped" reading of the President's authority under § 1182(f) based on plaintiffs' attempt to identify implicit limits on the President's authority in other provisions of the INA. *Id.* at 2412. Instead, the Court said that § 1182(f) gives the President authority to impose additional limitations on entry, and cited to previous decisions reaching the same conclusion. *Id.*

In *Sale*, the Court held that it is "perfectly clear that 8 U.S.C. § 1182(f)" grants the President "ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Sale*, 509 U.S. at 187-88. This is true even though Congress specifically provided migrants with a statutory right to seek asylum if they reach our shores. *Id.* The *Hawaii* Court also cited *Abourezk*, which addressed whether a provision of the INA permitted exclusion of an alien whose *presence or entry* would be detrimental to public welfare, or whether the provision specifically required a finding that the alien would engage in activities *after entry* that

might be detrimental. *Abourezk*, 785 F.2d at 1053. The court in that case noted that, even if it were to find that Congress had not permitted exclusion of aliens solely on the basis that their "mere entry would threaten" the country's interests, "the Executive would not be helpless" because he still "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.'" *Id*. n.2. Thus, the Executive's authority in § 1182(f) to suspend entry of certain classes of aliens "preserve[s] the President's potency in this area" regardless of "the formulation Congress adopted" for inadmissibility in the INA. *Id*.

It is thus not uncommon for Presidential proclamations to address threats to the national interest by adding restrictions on entry that are similar but not identical to grounds of admissibility established by Congress. For example, Presidential Proclamation 8342 bars entry of foreign government officials responsible for failing to combat human trafficking, 74 Fed. Reg. 4093 (Jan. 22, 2009), even though Congress separately made human traffickers inadmissible. *See* 8 U.S.C. § 1182(a)(2)(H); *compare also* 8 U.S.C. § 1182(a)(3)(E) (inadmissibility for genocide, Nazi persecution, and acts of torture or extrajudicial killings), *with* Proclamation No. 8697, 76 Fed. Reg. 49277 (Aug. 9, 2011) (covering persons participating in violence based on race, religion, and similar grounds or who participated in war crimes, crimes against humanity, and serious violations of human rights), *and* Proclamation No. 7452, 66 Fed. Reg. 34775 (June 29, 2001) (covering persons responsible for wartime atrocities); 8 U.S.C. § 1182(a)(2) (setting out specific grounds of inadmissibility based criminal conduct), *with* Proclamation No. 7750, 69 Fed. Reg. 2287 (Jan. 12, 2004) (covering persons engaged in or benefitting from corruption).

Consistent with this long line of authority, PP 9945 complements the existing provisions of the INA and establishes an additional bar to entry based on a different threat to the national interest that the President has identified, and the need for intending immigrants to have a plan for

reasonably foreseeable healthcare costs once they arrive in the United States. Nothing in PP 9945 alters the public charge analysis contemplated by 8 U.S.C. § 1182(a)(4). Consular officers must still determine whether an intending immigrant is inadmissible under 8 U.S.C. § 1182(a)(4) irrespective of the Proclamation. *See* 84 Fed. Reg. 53993 ("The review required by [the Proclamation] is separate and independent from the review and determination required by other statutes, regulations, or proclamations in determining the admissibility of an alien."). The Proclamation merely requires a distinct, additional analysis to ensure intending immigrants plan for reasonably foreseeable medical costs once in the United States, whether by proving to the consular officer's satisfaction that she will be covered by approved health insurance within 30 days or that she possesses the financial resources to pay for any reasonably foreseeable healthcare costs.

Notably, the Proclamation explicitly addresses risks to the national interest that would not be covered by the public charge grounds, such as uncompensated healthcare costs borne by private healthcare providers. *See* 84 Fed. Reg. 53991. Failure to pay medical bills to these providers is detrimental to the interests of the United States, as it strains healthcare providers and increases the burden on taxpayers who reimburse hospitals for a portion of their uncompensated costs. *Id*. The Proclamation thus precludes entry of an immigrant who would undermine the interests of United States taxpayers and healthcare providers regardless of whether he or she would be inadmissible on public charge grounds. The Proclamation also serves the purpose of ensuring that intending immigrants have a plan to address their healthcare needs promptly upon arrival—a purpose consistent with the public charge provision and for which there is a strong public interest.

Sale and *Abourezk* illustrate an additional point about the President's authority under 8 U.S.C. § 1182(f) and § 1185(a): the President's broad authority to suspend entry of certain classes of aliens or impose entry restrictions is not limited to cases involving national security. *Sale*, 509 U.S. at 160-61 (describing Proclamation No. 4865, which was based on a finding that "the

continuing illegal migration by sea of large numbers of undocumented aliens" was "a serious national problem detrimental to the interests of the United States"); *Abourezk*, 785 F.2d at 1049 n.2 (noting that the President has the authority to bar an alien "whose mere entry" would be detrimental to the interests of the United States). A finding of potential detriment to U.S. interests is all that is required by the text of § 1182(f), which makes no mention of national security.

4. The INA does not contain a broad "financial burden" exemption for victims of crime.

Plaintiffs argue that the Proclamation conflicts with 8 U.S.C. § 1182(a)(4)(E), which exempts victims of certain crimes, and their relatives, from the public charge ground of inadmissibility. PI Mot. at 19. But, in addition to the fact that Plaintiffs here lack standing to make this claim, neither § 1182(a)(4)(E), nor any other provision in the INA speaks to a broad "financial burden" exemption, and § 1182(a)(4)(E) certainly does not prevent the President from exercising his authority under § 1182(f) to suspend the entry of aliens who might otherwise be admissible.

First, Plaintiffs do not allege in their complaint that any of the named Plaintiffs or their family members fall under one of the categories of individuals exempted from the public charge ground of inadmissibility or that the Latino Network has any organizational injury with respect to that inadmissibility ground. Compl. ¶¶ 14-21, 213-14. Accordingly, the impact of the Proclamation on those categories of individuals is not at issue in this case, and Plaintiffs here lack standing to assert a conflict between the Proclamation and Section 1182(a)(4)(E). *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("For all relief sought, there must be a litigant with standing" as "standing is not dispensed in gross").[2]

[2] It is unsurprising that there is no named Plaintiff in these categories because the Proclamation has an extremely limited potential impact on the categories of individuals exempted from the public charge ground of inadmissibility. Generally, an individual seeking U-1 nonimmigrant status is already in the United States because she must have been a victim of a crime

Additionally, even if Plaintiffs were in these categories of individuals, that would not justify the sweeping injunction that Plaintiffs seek in their motion. As explained above, although Congress might enact particular conditions for, or exceptions to, a ground of inadmissibility, these limitations do not cabin the President's § 1182(f) authority to suspend entry, *even when* suspending entry of a similar group of aliens. *Hawaii*, 138 S. Ct. at 2410-12. Here the Proclamation addresses a distinct harm caused by uncompensated healthcare and ensures that intending immigrants have a plan with respect to their healthcare coverage. The President can address this interest in a different way from how Congress chose to address potential inadmissibility as a public charge with respect to those individuals seeking to follow to join their LPR family members who adjusted to LPR status from U nonimmigrant status or VAWA self-petitioners. Indeed, while various inadmissibility grounds or limits on adjustment of status may be waived, *see, e.g.*, 8 U.S.C. §§ 1182(d)(4), (11), (12), (h), there is no waiver of the application of § 1182(f).

B. Plaintiffs fail to show a likelihood of success on their APA claims.

1. Presidential action is not cognizable under the APA.

Plaintiffs argue the Proclamation, if implemented, would be arbitrary and capricious and would violate the APA in various other ways. PI Mot. at 20. Plaintiffs cannot succeed on this claim.

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under U.S. law or within the United States or its territories. *See* 8 U.S.C. § 1101(a)(15)(U)(i)(IV); Compl. ¶ 89 ("many such eligible family members will already have entered the United States with a derivative U visa"). Further, family members abroad who receive derivative U visas under § 1101(a)(15)(U)(ii) receive a nonimmigrant visa, not an immigrant visa, and therefore are not covered by the Proclamation. Compl. ¶ 89; *see also* 8 U.S.C. § 1101(a)(15). And a person who already has a principal or derivative U visa and seeks to adjust her status to that of a lawful permanent resident is neither subject to the Proclamation, because she already is in the United States, nor is she exempt from the public charge ground of inadmissibility, *see id*. § 1182(a)(4)(E) (exempting from the public charge ground of inadmissibility applicants for "nonimmigrant status under section 1101(a)(15)(U)"). Moreover, as Plaintiffs acknowledge, VAWA petitioners also generally are within the United States, and only a narrow class can seek relief from outside the United States. *See* Compl. ¶ 88 (petition abroad limited to spouses of U.S. government employees or armed services, or when qualifying mistreatment occurred within the United States).

The APA provides a cause of action for "[a] person suffering a legal wrong because of agency action." 5 U.S.C. § 702. However, the President is not an agency and his actions are not subject to APA review. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (holding that Congress did not expressly allow for review of the President's actions in the APA so "his actions are not subject to its requirements"). Plaintiffs' Complaint and preliminary injunction motion are targeted at the Proclamation, not any agency action that could conceivably be reviewable under the APA. The preliminary relief they seek is an order "preventing Defendants . . . from *implementing or enforcing the Proclamation*." PI Mot. at 43 (emphasis added); *see* Compl. at 96 (seeking injunction preventing defendants from "implementing or enforcing any part of the Proclamation" and a declaration that the "Proclamation is . . . unlawful and void"). Because they are seeking to enjoin the Proclamation, their claim cannot be based on APA rules or standards. *See East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 770 (9th Cir. 2018).

The converse is also true. To the extent Plaintiffs target various State Department pronouncements—the web posting, the "Notice of Information Collection," or any guidance—they cannot obtain the relief they seek in their motion under the APA, an injunction against implementing the Proclamation itself. Thus, while prevailing on an APA claim might limit the ability of the State Department to provide additional guidance to consular officers, it will not alter consular officers' responsibility to follow the Proclamation in making admissibility determinations. As the Ninth Circuit has explained, "[t]he scope of our review [under the APA] . . . is limited to 'agency action,' and the President is not an 'agency.'" *East Bay Sanctuary Covenant*, 932 F.3d at 770. "Accordingly, the President's 'actions are not subject to [APA] requirements." *Id*. A Presidential Proclamation issued under 8 U.S.C. § 1182(f) is not agency action that is reviewable under the APA. *Id*.

Plaintiffs cannot state a claim under the APA because the APA does not permit review of

action "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), such as action under 8 U.S.C. § 1182(f) and § 1185(a)(1), which "exude[ ] deference" to the President and "foreclose the application of any meaningful judicial standard of review." *Webster v. Doe*, 486 U.S. 592, 600 (1998). Moreover, to the extent that Plaintiffs challenge the President's actions as ultimately implemented through consular officers' individualized visa determinations, the APA also does not permit review of such decisions (as described more fully in section 3 below). The Proclamation further provides no privately enforceable rights. The Proclamation expressly states that it "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 or any of its agencies. 84 Fed. Reg. 53994, § 6(c).

Plaintiffs therefore cannot succeed on their claims because they lack an APA cause of action to challenge the Presidential Proclamation.

2. Plaintiffs cannot avoid the barriers to APA review by challenging agency implementation of the Proclamation.

Plaintiffs try to avoid the barriers to judicial review by arguing they are not challenging the Proclamation itself, but rather the implementation of PP 9945 by federal agencies. PI Mot. at 21. Plaintiffs first point to a notification regarding the Proclamation that the State Department posted on its website. *Id*. But this notification merely quoted from the Proclamation and referenced other existing requirements for visa interviews and adjudications. Plaintiffs contend that "[t]he Proclamation is not self-executing" and that it was only "with their website announcement that DOS placed new burdens on visa applicants" to satisfy the Proclamation. *Id*. at 21-22. There is no support for this argument. The Proclamation *is* self-executing. The Proclamation permits, but does not require, the Secretary of State to establish standards and procedures governing consular determinations on whether an immigrant visa applicant has satisfied the requirements of PP 9945.

84 Fed. Reg. 53993, § 3. It contains no mandatory language requiring the Secretary to issue regulations or take any other action before the Proclamation takes effect. *Id*. And even without further guidance, consular officers would be charged with applying the Proclamation's restrictions on entry when adjudicating visa applications.[3]

When the President suspends entry of certain aliens under § 1182(f) and § 1185(a)(1) in this manner, without requiring any further action by the State Department or any other federal agency, the suspension or entry restrictions go into effect on the date set out in the Proclamation. The State Department is not required by the INA or the Proclamation to take additional preparatory steps to implement the restrictions. When consular officers ask visa applicants questions or collect information, as they normally do at the consular interviews required for an immigrant visa, they are merely collecting the information necessary to determine whether a particular alien qualifies for a visa and is not otherwise inadmissible—including whether the alien fits the class of aliens identified by the President as subject to an entry suspension that has already taken place. There is no final agency action or decision by the State Department here that could be subject to review under the APA. The only action and source of law is the Presidential Proclamation issued pursuant to § 1182(f) and § 1185(a)(1). Agency implementation of a Presidential proclamation under § 1182(f) is not a final agency action because the source of authority for any agency action pursuant to a proclamation is the proclamation itself, which is not subject to the APA. Thus, private parties may not privately enforce compliance with a Presidential Proclamation or executive order. *See, e.g., Facchiano Constr Co. v. U.S. Dep't of Labor*, 987 F.2d 206, 210 (3rd Cir. 1993) ("Generally, there is no private right of action to enforce obligations imposed on executive branch officials by

[3] This is not unlike if Congress were to enact a new ground of inadmissibility by statute. Consular officers would be charged with applying the new inadmissibility ground regardless of whether the State Department decided to issue guidance to consular officers or promulgate regulations.

executive orders."); *Chai v. Carroll*, 48 F.3d 1331, 1338 (4th Cir. 1995) (same); *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975) (same).

Plaintiffs cannot avoid the barriers to judicial review of their challenge—which is really a challenge to the Proclamation itself—by claiming to only challenge a notification regarding the Proclamation that the State Department posted on its website. Had the State Department not provided any notification on its website, the Proclamation's suspension of entry still would have gone into effect. Of the many proclamations issued by Presidents in past administrations, Plaintiffs have not identified a single case where any court has found that a Presidential proclamation is subject to arbitrary-and-capricious review. All Presidential proclamations require some sort of implementation by agencies, and yet no court has ever held that an agency carrying out the directives of a Presidential proclamation expose *the proclamation* to APA arbitrary-and-capricious review.[4] Adopting Plaintiffs' argument would contravene Supreme Court precedent and would be inconsistent with every prior proclamation issued under § 1182(f).

Plaintiffs next argue that the Notice of Information Collection is a final agency action subject to APA review. PI Mot. at 23-24. In doing so, they fundamentally misunderstand the nature of this Notice, which was a preliminary step in the statutorily-mandated Paperwork Reduction Act process, not a final action that could be challenged under the APA. The Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq*., generally requires an agency to obtain OMB approval to ask standardized questions of 10 or more members of the public within a 12-month period, *id*. § 3502(3) (defining "collection of information"). The agency can only collect such information once it has received

[4] *East Bay Sanctuary Covenant* is not to the contrary. In that case the court was evaluating an agency interim joint final rule, not the proclamation. 932 F.3d at 760. The court was clear that it did not have "any authority under . . . the APA to review the Proclamation." *Id*. at 770. Instead, the court reviewed the agency's "rule of decision," from which the legal consequences flowed when the agency applied the rule in asylum proceedings. *Id*. Here, Plaintiffs are challenging the entry denial that would result directly from the Proclamation and are seeking to enjoin its implementation.

OMB approval. *See* 44 U.S.C. § 3507(a)(2). Accordingly, the agency's request for approval from OMB is an intermediary step in the process of collecting information from the public; it marks neither the "consummation of the agency's decision making process" nor is it an action from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

Here, the State Department requested OMB approval for consular officers to ask immigrant visa applicants covered by Proclamation 9945 "whether they will be covered by health insurance in the United States within 30 days of entry," and "if so, for details relating to such insurance." 84 Fed. Reg. 58199. Pursuant to 5 C.F.R. § 1320.13, the State Department requested emergency review of the information collection so that it could satisfy the Paperwork Reduction Act before the effective date of the Proclamation. *See* OMB Office of Information and Regulatory Affairs Information Collection Request number 201910-1405-001, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201910-1405-001.

The Notice of Information Collection does not implement the Proclamation or provide any guidance to consular officers on how to follow the Proclamation, but is rather the first step in the process required by the PRA. The State Department simply sought approval from OMB to solicit information from the public, and did not "consummate[ ] its decision-making process" as Plaintiffs erroneously contend. PI Mot. at 23. Moreover, a Notice of Information Collection has no independent legal effect and is not a final agency action. And Plaintiffs have not alleged that OMB's approval of the PRA request is a final agency action or that it is reviewable, nor have they sued OMB or brought a challenge under the Paperwork Reduction Act, much less argued that they could do so.[5]

[5] As the Court correctly noted at the hearing on Plaintiffs' motion for a temporary restraining order, Plaintiffs' argument about the Notice of Information Collection is really an indirect attempt to seek APA review of the Proclamation itself through an unrelated action by a

Plaintiffs ultimately fail to direct their complaint against any "final agency action," as required for relief under the APA. *See* 5 U.S.C. § 704; *see also Lujan v. Nat'l Wildlife Fed'n.*, 497 U.S. 871, 890-93 (1990). Any guidance the State Department issues would merely help consular officers apply the requirements of the Proclamation itself. Those consular officers would still be required to make individual, fact-specific determinations on each immigrant visa application, so any guidance would simply inform the deliberative process that precedes a consular officer's final decision on a visa application. In other words, such guidance would not give rise to any independent "legal consequences"—only the individual consular decisions rendered pursuant to the Proclamation would. *See Bennett*, 520 U.S. at 177-78.[6]

The Supreme Court has recognized two types of agency rules: "substantive" or "legislative" rules that shift legal rights and duties, and "interpretive" rules that merely clarify or explain the operation of existing rules. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203–04 (2015); *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 620 (4th Cir. 2018) (explaining that interpretive rules "simply state what the administrative agency thinks the statute means" or provide "clarification or explanation of an *existing statute or rule*" (citation omitted)). Interpretive rules, because they do not determine rights or obligations, do not qualify as final agency action and therefore are not subject to judicial review under the APA. *Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395 (D.C. Cir. 2013) (recognizing that "interpretative rules or statements of policy generally do not qualify" as final agency action and are not subject to judicial review under the APA "because they are not finally determinative of . . .

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separate agency: "I'm tending to agree with the defendants that the administrative action in the Notice for Information Collection may be a tail wagging the dog; that the real challenge that you are making is to the October 4th Proclamation." ECF No. 34, Hearing Tr. 39:13-17.

[6] Indeed, the guidance halted by this suit would provide clarity to applicants and consular officers, and help show visa applicants how to meet the terms of the Proclamation.

issues or rights"); *see also Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019). Here, there is no basis to argue that Defendants issued any substantive or legislative rules. The agency actions Plaintiffs cite are, at most, interpretive. Plaintiffs' nebulous challenge to actions Defendants may take to notify the public about the Proclamation's requirements, provide guidance to consular officers, or otherwise ensure orderly implementation of the Proclamation, PI Mot. at 21, must fail.

So too must Plaintiffs' claim that Defendants were required to engage in formal rulemaking before the Proclamation could go into effect. PI Mot. at 29-31. Again, the Proclamation itself creates no such requirement. 84 Fed. Reg. 53993, § 3. There was no such challenge or claim in *Hawaii*, and for good reason. The Proclamation leaves it entirely to the discretion of the Secretary of State to decide whether to set out additional guidelines on how the Proclamation should be implemented. *Id*. There is no directive that the agency must go through notice and comment rulemaking. Moreover, the Ninth Circuit has held that when an agency adopts a "general statement of policy" to guide its officials in making discretionary decisions on a case-by-case basis, such guidance documents "are exempted from the notice-and-comment requirement." *Innovation Law Lab*, 924 F.3d at 509. Plaintiffs' motion focuses entirely on the requirements an agency must follow when it engages in rulemaking, PI Mot. at 29-31, but nowhere cites any basis to claim that Defendants are required to engage in formal rulemaking before the Proclamation can go into effect. Requiring notice-and-comment rulemaking before a Presidential proclamation could take effect would contradict the Supreme Court's decision in *Hawaii*, which did not accept the suggestion that there are implicit procedural limitations on the broad delegation of authority conferred on the President by the statutory text of § 1182(f). *Hawaii*, 138 S. Ct. at 2408-10.

3. The doctrine of consular nonreviewability prevents Plaintiffs from challenging consular officers' decisions on visa applications.

Even if Plaintiffs had identified a final agency action, the doctrine of consular nonreviewability recognizes that Congress has empowered consular officers with the authority to issue or refuse an application for a visa made overseas. *See* 8 U.S.C. §§ 1104(a), 1201(a), (g). A "'consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review.'" *Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008) (quoting *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986)). This rule is rooted in "'the recognition that the power to exclude or expel aliens, as a matter affecting international relations and national security, is vested in the Executive and Legislative branches of government.'" *Allen v. Milas*, 896 F.3d 1094, 1104 (9th Cir. 2018) (quoting *Ventura-Escamilla v. Immigration & Naturalization Serv.*, 647 F.2d 28, 30 (9th Cir. 1981)). Judicial intervention in decisions to exclude aliens "has been restricted to those matters the review of which has been authorized by treaty or by statute, or is required by the paramount law of the Constitution." *Ventura-Escamilla*, 647 F.2d at 30 (internal quotation omitted). "[W]here Congress entrusts discretionary visa-processing . . . in a consular officer . . . the courts cannot substitute their judgments for those of the Executive." *Allen*, 896 F.3d 1094, 1105 (citing *Mandel*, 408 U.S. at 769–70).

Plaintiffs cannot state a claim under the APA to challenge consular officers' visa determinations. First, the APA does not apply "to the extent that . . . statutes preclude judicial review," 5 U.S.C. § 701(a)(1), which is "determined not only from [the statute's] express language, but also from the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984). It is well established that the text, structure, and history of the INA all compel the "unmistakable" conclusion that "the immigration laws 'preclude judicial review' of the consular visa decisions."

Saavedra Bruno v. Albright, 197 F.3d 1153, 1160 (D.C. Cir. 1999). Congress has specifically foreclosed APA review even for aliens subject to exclusion orders present in the United States, *see Allen*, 896 F.3d at 1157-62, because allowing such suits would "give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. government as a defendant." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1966). Second, the APA leaves intact other "limitations on judicial review," 5 U.S.C. § 702(1), including the "doctrine of consular nonreviewability," which predates the passage of the APA. *Saavedra Bruno*, 197 F.3d at 1160. Thus, in *Allen*, the Ninth Circuit determined that because "review is not required by some other provision of law, such as the Constitution, the APA, or the INA, the long-standing rule foreclosing review of the merits of consular visa decisions is precisely the kind of" limitation "that forms an exception to the APA's cause of action and review provisions." *Allen*, 896 F.3d at 1105. The APA thus provides no avenue for review of consular decisions regarding visas, including visas for Plaintiffs' family members. *Id.* at 1108 (citing *Saavedra Bruno*, 197 F.3d at 1164).

C. Plaintiffs cannot succeed on their due process claims.

Plaintiffs argue that they are likely to succeed on their claim under the Due Process Clause of the Fifth Amendment that denying visas under the Proclamation to family members of Plaintiffs burdens the constitutional rights of these U.S.-citizen Plaintiffs, and therefore any such denials would violate the Due Process Clause. PI Mot. at 32-33. There is no merit to this claim.

The Supreme Court has held that the Fifth Amendment generally does not apply to aliens outside the United States. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990).[7] It has also held more specifically that aliens seeking entry into the United States cannot assert constitutional

[7] The Court has held that such claims fail on the merits. *See Hawaii*, 138 S. Ct. 2392.

rights. *See, e.g., Din*, 135 S. Ct. at 2131 (opinion of Scalia, J.); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). For more than a century, the Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo,* 430 U.S. at 792; *see Harisiades v. Shaughnessy,* 342 U.S. 580, 588-589 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power."). Courts have also rejected the claim that individuals in the United States have a due process right to have their noncitizen family members receive a visa to enter and reside in the United States. *Din*, 135 S. Ct. at 2135; *Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir. 2018) ("As we have said before, the generic right to live with family is 'far removed' from the specific right to reside in the United States with non-citizen family members."); *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1022 (N.D. Cal. 2019) (dismissing plaintiffs' due process challenge to Presidential proclamation based on an alleged right to the "integrity of the family unit"). In *Hawaii*, the Court reaffirmed that, to the extent a U.S. citizen has any due process rights to assert with respect to a family member living abroad, the government provides all the process that is due by giving a statutory citation to explain a visa denial. 138 S. Ct. at 2419. Thus due process principles are generally not applicable to federal government action related to adjudication of visa applications, and even when they are, they are easily satisfied.

The Supreme Court has allowed a "circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen." *Hawaii*, 138 S. Ct. at 2419.[8] However,

[8] Plaintiffs' argument here is based on a relationship between a U.S. citizen and a visa applicant, PI Mot. at 31-33, but their class definition includes individuals whose visa applications are not based on a relationship with a U.S. citizen, *see* Compl. ¶ 215; ECF No. 44, Class Cert. Mot. at 12. To the extent Plaintiffs' claim is based on the limited review permitted for aliens in the former category by *Mandel*, it is inapplicable to the many immigrants who enter the United States

"[g]iven the authority of the political branches over admission," this exception is narrow: "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification" against the asserted constitutional interests of U.S. citizens. *Id*. (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)). While the Court in *Hawaii* acknowledged that *Mandel*'s "narrow standard of review" has particular force in cases that implicate national security concerns, this circumscribed judicial inquiry is not limited to such cases. *Hawaii*, 138 S. Ct. at 2419. The Court cited multiple opinions applying and affirming this "deferential standard of review across different contexts and constitutional claims," including cases where no national security concerns were raised. *Id*. (citing *Fiallo*, 430 U.S. at 795). In *Fiallo*, the Court "applied *Mandel* to a 'broad congressional policy' giving immigration preferences to mothers of illegitimate children," and explained that "it is not the judicial role in cases of this sort to probe and test the justifications" of immigration policies. *Id*. at 795, 799. The Court specifically rejected the argument that the Court's deferential standard of review in prior immigration cases was limited to cases involving groups of aliens "perceived to pose a grave threat to the national security." *Id*. at 796.

Plaintiffs' attempts to evade this narrow scope of review are unlikely to succeed. First, they

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annually in employment-based or diversity immigrant categories.

Moreover, the Proclamation entirely exempts intending immigrants who are children of U.S. citizens, orphans adopted abroad or to be adopted in the United States by U.S. citizens, and children adopted abroad or to be adopted in the United States by U.S. citizens pursuant to the Hague Convention. 84 Fed. Reg. 53991, § 2(iii). The Proclamation also exempts intending immigrants who are parents of U.S. citizens so long as the parent's "healthcare will not impose a substantial burden on the United States healthcare system." *Id*. § 2(iv). In fiscal year 2018, a total of 127,085 immigrant visas were issued in these child and parent categories—nearly one-quarter of all immigrant visas, including diversity and employment-based visas, issued that year. *See* U.S. Department of State, Bureau of Consular Affairs, *Classes of Immigrants Issued Visas at Foreign Service Posts: Fiscal Years 2014-2018*, *https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20-%20TableII.pdf*.

argue that the President did not exercise a delegated power in issuing the Proclamation. PI Mot. at 33. Again, *Hawaii* forecloses this argument: "Congress has delegated to the President authority to suspend or restrict the entry of aliens," including through 8 U.S.C. § 1182(f), which permits "the President to 'suspend the entry of all aliens or any class of aliens' whenever he 'finds' that their entry "would be detrimental to the interests of the United States." 138 S. Ct. at 2407. But, say Plaintiffs, even if the President was exercising delegated authority, the Proclamation "does not provide a facially legitimate, bona fide" reason because the court should look not to the justifications set out in the Proclamation itself, but rather should read into the Proclamation an "animus" towards immigrants from certain countries, including countries in the Middle East. PI Mot. at 33. Other than exempting certain Iraqis and Afghans—an exemption that is inconsistent with Plaintiffs' theory—the Proclamation does not distinguish visa applicants based on nationality, race, or ethnicity. And although Plaintiffs urge the court to assess the Proclamation based on external evidence, the Supreme Court found a similar argument unavailing in a case where there were express nationality distinctions in *Hawaii*. *Id*. at 2417, 2421. The stated purpose of the Proclamation—to reduce the "substantial costs" U.S. healthcare providers and taxpayers bear "in paying for medical expenses incurred by people who lack health insurance or the ability to pay for their healthcare," 84 Fed. Reg. 53991—is a legitimate public policy goal that is well recognized and uncontroversial.

And there is no dispute that many new immigrants lack adequate health insurance. *See* 84 Fed. Reg. 53991 ("[D]ata show that lawful immigrants are about three times more likely than United States citizens to lack health insurance."); ECF No. 54, Ku Decl. ¶ 17, Table 1 (claiming that his data shows that 23% of recent immigrants are uninsured, whereas less than 10% of U.S. citizens and long-term immigrants are uninsured). It is also plainly a facially legitimate and bona fide reason to require intending immigrants to show that they have planned for their healthcare needs and

suspend entry of individuals who do not make that showing.

Plaintiffs contend that the Proclamation nonetheless is not rationally related to its stated purpose because it may have unforeseen or unexpected consequences and may not successfully reduce the taxpayer burdens that have resulted from uncompensated care. PI Mot. 33. But this challenge to the Proclamation, based on Plaintiffs' "perception of its effectiveness and wisdom," is insufficient to allow the court—which "cannot substitute" Plaintiffs' assessment for "the Executive's predictive judgments on such matters"—to find that the Proclamation lacks a rational basis. *Hawaii*, 138 S. Ct. at 2422; *see also id.* at 2409 (rejecting a "searching inquiry into the persuasiveness of the President's justifications"). There can be little dispute that the Proclamation would encourage covered immigrants to obtain health insurance who otherwise would not have done so, and that this may have an impact on the risks the President identified from "people who lack health insurance or the ability to pay for their healthcare." 84 Fed. Reg. 53991. Whether the President's chosen method of addressing a perceived risk to the interests of the United States "is justified from a policy perspective" is irrelevant, as he need not "conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions." *Hawaii*, 138 S. Ct. at 2409 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010)).[9]

Finally, Plaintiffs argue that the Proclamation took them "by surprise, depriving them of" constitutionally required "fair notice." PI Mot. at 34-35. But the Proclamation provides a list of

[9] Plaintiffs also argue at various points in their motion that the Proclamation does not satisfy the standard set out in *Hawaii* because it does not contain sufficient "factual findings to support the entry suspension it imposes." PI Mot. n.22. The findings are sufficient here, and in any event, the Court in *Hawaii* made clear that plaintiffs cannot attack the sufficiency of the findings contained in a Presidential Proclamation. *See Hawaii*, 138 S. Ct. at 2409 (citing Proclamation No. 6958, where President Clinton explained in only "one sentence why suspending entry of members of the Sudanese government and armed forces" was in the interests of the United States, and Proclamation No. 4865, where President Reagan suspended entry of certain "undocumented aliens from the high seas" in a five-sentence explanation).

health insurance options that qualify as approved health insurance and that are readily available products in the health insurance market, including health insurance products provided across the country by the ACA. The President also set an effective date for the Proclamation that delayed the entry suspension until 30 days after it was issued. 84 Fed. Reg. 53994. Moreover, the Supreme Court in *Hawaii* definitively clarified the scope of due process rights that may apply in constitutional challenges asserted by U.S. citizens claiming an interest in the entry to the United States of noncitizens abroad. *Hawaii*, 138 S. Ct. at 2409. The Court held that "respect for the political branches' broad power over the creation and administration of the immigration system" means that "the Government need provide only a statutory citation to explain a visa denial." *Hawaii* at 2419. That is the full scope of due process rights in this area. Nothing more is required.

D. Plaintiffs fail to show irreparable injury absent injunctive relief.

Plaintiffs fail to show that they will suffer irreparable injury absent injunctive relief. Plaintiffs must demonstrate "immediate threatened harm." *See Caribbean Soup Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Merely showing a "possibility" of irreparable harm is insufficient. *See Winter*, 555 U.S. at 22.

Plaintiffs argue they will suffer irreparable injury due to what they term "family separation." But again, there is no "right to reside in the United States with non-citizen family members," *Gebhardt*, 879 F.3d at 988, and courts have held that delays of three to five years in processing of immigrant visas—which is usually a lengthy process to begin with—are reasonable, *see, e.g.*, *Siwen Zhang*, 2019 WL 3241187, *5. *See also, Yavari, et al. v. Pompeo, et al.*, No. 2:19-cv-02524 (C.D. Cal. Oct. 10, 2019) (attached as Exhibit 2). Nor have Plaintiffs established that their intending-immigrant relatives' admission into the United States (should they ultimately satisfy all the other requirements for an immigrant visa independent of the Proclamation) is either imminent or the only way for them to see their relatives. *Cf. Gebhardt*, 879 F.3d at 988. And critically, given the various

other requirements a visa applicant must satisfy, it is entirely speculative whether the Court's entry of the preliminary injunction Plaintiffs seek would result in issuance of a visa or their admission to the United States.

Even speculating, as Plaintiffs do, that the Proclamation might affect the outcome of the consular officer's adjudication of an immigrant visa application at the consular interview, for most if not all Plaintiffs, who do not have imminent consular interviews, the Proclamation will have no effect on them whatsoever while they are completing the steps ancillary to the scheduling of their interviews.[10] Plaintiffs have thus failed to make the required showing that they will face irreparable harm absent a preliminary injunction because the Court could easily resolve Plaintiffs' claims on the merits before their consular interviews.

More important, intending immigrants can cure their asserted irreparable injury by taking a simple step: making plans to obtain health insurance within thirty days of their arrival in the United States. Having insurance is likely to help those intending immigrants, not injure them. Individuals who would be able to satisfy a consular officer that they meet the requirements of the Proclamation were it allowed to go into effect similarly cannot demonstrative irreparable harm (or any harm) absent a preliminary injunction. The threat of irreparable harm Plaintiffs identify is based on the argument that all of the approved health insurance options the Proclamation provides for are "legally or practically impossible" for Plaintiffs to obtain. PI Mot. at 36. But this is not the case. The Proclamation sets out a range of approved health insurance coverage options, including:

(i) an employer-sponsored plan, including a retiree plan, association health plan, and

[10] In their Motion for Temporary Restraining Order, Plaintiffs argued that they faced irreparable harm because some Plaintiffs had consular interviews scheduled for the first week of November—the week following the TRO hearing. *See, e.g.*, ECF No. 7, Motion for Temporary Restraining Order, at 2. In their PI motion, Plaintiffs now reveal that the individuals who had been scheduled for consular interviews postponed those interviews, PI Mot. 36-37 & n.51, and that they did so before arguing for a TRO on this basis at the TRO hearing on November 2, 2019, *see* ECF No. 55, ¶ 14; ECF No. 60 ¶ 10; ECF No. 34, Hearing Tr. 18:18-25.

> coverage provided by the Consolidated Omnibus Budget Reconciliation Act of 1985;
>
> (ii) an unsubsidized health plan offered in the individual market within a State;
>
> (iii) a short-term limited duration health policy effective for a minimum of 364 days—or until the beginning of planned, extended travel outside the United States;
>
> (iv) a catastrophic plan;
>
> (v) a family member's plan;
>
> (vi) a medical plan under chapter 55 of title 10, United States Code, including coverage under the TRICARE program;
>
> (vii) a visitor health insurance plan that provides adequate coverage for medical care for a minimum of 364 days—or until the beginning of planned, extended travel outside the United States;
>
> (viii) a medical plan under the Medicare program

84 Fed. Reg. 53992.

Plaintiffs argue that many of these plans are for particular categories of immigrants and would not be available to everyone seeking an immigrant visa. PI Mot. at 7-8. For example, Plaintiffs argue that employer-sponsored plans would largely only be available to immigrants seeking to enter on employer-sponsored visas. *Id*. But the Proclamation sets out a range of possible healthcare options covering intending immigrants in different situations and an immigrant visa applicant can satisfy the requirements of the Proclamation by showing eligibility for any one of these plans, including the means to pay for premiums, and the intent to enroll within 30 days of entry. *See* Ex. 1, Marwaha Decl., Ex. A at ¶ 4.

Plaintiffs also argue that some of the listed plans are not available to immigrants until they enter the United States. *Id.* at 27. They argue that some plans offered in state marketplaces require an applicant to show "residency in that state as well as lawful presence, which would not be possible for a visa applicant to prove," and so these plans are "practically impossible to acquire

before a consular interview." *Id*. at 27-28. However, a visa applicant does not have to acquire coverage before a consular interview; she only needs to show that she will be covered within 30 days of entering the United States. *See* Ex. 1, Marwaha Decl., Ex. A at ¶ 7 ("Especially since many forms of health insurance cannot be secured prior to establishing a U.S. residence, this determination may be made in the course of the visa interview rather than through document submission."). Consular officers can evaluate the intending immigrant's plan to obtain health insurance and make a judgment regarding it, just as they evaluate the intent of aliens seeking visas in a range of circumstances. *See*, *e.g.*, 9 FAM § 401.1-3. And, although qualifying health insurance must cover healthcare costs incurred in the United States, the health insurance provider does not necessarily even need to be a U.S.-based company. *See* Ex. 1, Marwaha Decl., Ex. A at ¶ 5.

There are various resources that would allow a visa applicant to identify in advance of a consular interview possible plans she could obtain after entering the United States so that she could provide this information to the officer at the interview. *See, e.g.* www.healthcare.gov (which allows individuals to search for available healthcare options by state and to obtain information on premiums); www.healthcare.gov/apply-and-enroll/get-help-applying (individuals can ask questions, apply for coverage, compare plans, and enroll by calling the federal exchange call center, which is available 24 hours a day, seven days a week, except certain holidays, and offers language assistance services). Even if an individual needs to be a resident of a particular state before actually purchasing healthcare coverage on that state's marketplace or exchange, 42 U.S.C. § 18032(f); 45 C.F.R. § 155.305, nothing in the Proclamation bars a visa applicant from satisfying its requirements by showing a consular officer information establishing that she will be eligible to apply for an approved health insurance plan or program once inside the United States, that she has the means to pay any required premiums, and that she intends to enroll after immigrating. *See* Ex. 1, Marwaha Decl., Ex. A at ¶ 4 ("[E]ligibility for coverage under an approved health insurance plan or program,

including the means to pay for premiums, if any, for such a plan, and the intent to enroll in such a plan or program within thirty days of entry to the United States."). Ultimately, however, the visa applicants are not required to bring any documentation to their interviews, and consular officers may request documentation "only as they deem necessary." *Id*.

A visa applicant can also show that he or she has "the financial resources to pay for reasonably foreseeable medical costs." 84 Fed. Reg. 53992. For an individual with no reasonably foreseeable medical expenses, this could be easy to satisfy.[11] If a visa applicant is healthy, there would be limited anticipated medical expenses, if any. *See* Ex. 1, Marwaha Decl., Ex. A at ¶ 6 ("Given the fact that all IV applicants undergo a medical examination and most must also overcome public charge, consular adjudicators will already have sufficient medical and financial information at their disposal to determine whether or not an individual has a medical condition that will require care once in the United States and what financial resources the applicant possesses to cover the cost of that care."). Consular officers evaluate an applicant's reasonably foreseeable medical costs only based on the applicant's current medical state and "should not speculate on an applicant's potential future health." *Id.* If an applicant is healthy and has no reasonably foreseeable medical costs, the officer can conclude that the applicant meets the requirements of PP 9945 on that basis. *Id*. 3-4. To the extent there are any reasonably foreseeable costs, consular officers can also consider the financial resources of a sponsor in evaluating whether the visa applicant will be able to cover those costs. *Id.* at 3. As just discussed, evaluating an ability to pay anticipated medical expenses is similar to the kinds of predictive judgments that consular officers regularly make, and are well-equipped to make. 9 FAM § 401.1-3.

The available avenues for Plaintiffs to satisfy PP 9945 are broader than they allege, and

[11] An immigrant visa applicant is already required to undergo a medical examination as part of the visa application process. 8 U.S.C. § 1201(d); 9 Foreign Affairs Manual (FAM) § 302.2-3.

Plaintiffs do acknowledge that they have some "options" for obtaining approved health insurance consistent with the requirements of the Proclamation. PI Mot. at 8-9. Plaintiffs take issue with the scope of coverage offered by those plans. *Id*. In particular, Plaintiffs argue that visitor and STLDI plans, which they identify as "the most realistically accessible 'approved health insurance' plans" for them are less comprehensive than other health insurance options that are not specifically listed in the Proclamation. But even if an immigrant visa applicant purchases one of these plans in advance of the consular interview, her entry to the United States, or within 30 days of her arrival, nothing in the Proclamation bars her from later switching to a different plan once in the United States, or from applying for a plan with greater or different coverage at a later date. And, of course, comprehensive ACA plans qualify under the Proclamation, and the Proclamation is not causing the asserted irreparable injury by providing more flexibility and allowing a visa applicant to select a *less* comprehensive health plan. Because Plaintiffs acknowledge that they do have avenues to satisfy the requirements of the Proclamation and, for various reasons, PP 9945 may not alter the outcome of any consular interview, and because they have not established that the Court could not resolve this case on the merits before their consular interviews, they fail to show the likelihood of "immediate threatened harm" necessary to warrant injunctive relief. *Caribbean Soup Co., Inc.*, 844 F.2d at 674; *Winter*, 555 U.S. at 22 (mere "possibility" of harm insufficient). At this point, the threatened harms Plaintiffs have identified are hypothetical.[12]

[12] Plaintiffs argue that the Proclamation would affect "two-thirds of all legal immigrants, or 375,000 people." PI Mot. at 40. However, there appears to be no basis for these numbers. Plaintiffs rely on an article by the Migration Policy Institute, and every other source Plaintiffs cite relies on this same article. *See* Ex. 3, *Health Insurance Test for Green-Card Applicants Could Sharply Cut Future U.S. Legal Immigration*. But this article does not include any actual data. Nor does it reveal its methodology for determining the health-insurance status of recent immigrants, for determining what health insurance would qualify under the Proclamation, or explain how, if it all, it identified and excluded from its numbers intending immigrants who could satisfy the Proclamation by showing an ability to pay for reasonably foreseeable medical costs.

In addition, Plaintiffs have similarly failed to establish that any harm stemming from the Proclamation would be irreparable. At the end of a consular interview, the consular officer will either issue or refuse the visa. 22 C.F.R. § 42.81(a). If the officer refuses the visa application, the officer must inform the applicant orally and in writing of the provision of law under which the visa has been refused. 8 U.S.C. § 1182(b); 9 FAM § 504.11-3. For example, if a consular officer is not satisfied that the applicant is eligible for the visa and requests additional documentation consistent with 8 U.S.C. § 1202(b), the consular officer can refuse the visa under 8 U.S.C. § 1201(g), and inform the applicant of the additional information she may need to submit to establish eligibility. The applicant would then have a full year to provide the additional information and seek reconsideration of their eligibility for a visa on that same visa application. 22 C.F.R. § 42.81(e).

Thus, if the Court denies the motion for a preliminary injunction and the Proclamation goes into effect, and if a consular officer were to refuse a visa under § 1201(g) on the basis that the applicant needed to provide additional documentation to demonstrate that she will be covered by approved health insurance within 30 days of entry, that applicant would have an opportunity to gather and submit that additional information and request reconsideration. The applicant could then obtain one of the many types of coverage described in the Proclamation, or provide evidence of an intent to obtain that coverage once in the United States. *See* Ex. 1, Marwaha Decl., Ex. A at ¶ 12

Plaintiffs seek a preliminary injunction based on the "widespread irreparable harm" they say these numbers represent, PI Mot. at 40, and argue that these harms are not "hypothetical or conjectural," *id.* at 36. But the article itself notes that, until the Proclamation is implemented, "it remains to be seen by how much the proclamation would cut overall immigration." It also acknowledges that there are certain types of plans that are "allowed under the proclamation," that "have been made more broadly available under the Trump administration," "have lower premiums," and would allow immigrants to meet the Proclamation's requirements. The article appears not to count these plans, however, because it assumes that these plans, which are limited in some states to three to six months, cover "too short a period to qualify under the proclamation." As discussed above, this is inaccurate, as is any speculation about the number of noncitizens who will be affected by the Proclamation if it is based on the flawed methodology laid out in this article.

(providing that applicants may overcome a visa refusal "by submitting additional evidence to convince [the consular officer] that they have or will have approved health insurance within 30 days of entry, or that they have the financial resources to pay for reasonably foreseeable medical costs in the absence of health insurance").

Thus, to the extent there is any harm in the absence of the preliminary injunction, such harm is not irreparable.

E. The balance of hardships and public interest weigh against relief.

The balance of harms and the public interest also weigh against injunctive relief here. A party seeking a preliminary injunction must demonstrate that "the balance of equities tilts in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

As explained above, the harms Plaintiffs assert are entirely speculative. They have provided no basis for the court to conclude that their claims could not be resolved on the merits before the Proclamation would have any effect on them at a future, yet unscheduled consular interview, or that the Proclamation would necessarily alter the outcome of their consular interviews. If, however, the court issues a preliminary injunction, it will allow the risks to the national interest the President identified to continue for the duration of the preliminary injunction. As set out in the Proclamation, the President issued PP 9945 to address the "substantial costs" U.S. healthcare providers and taxpayers bear "in paying for medical expenses incurred by people who lack health insurance or the ability to pay for their healthcare." 84 Fed. Reg. 53991. Hospitals and other healthcare providers "often administer care to the uninsured without any hope of receiving reimbursement from them," and these costs are passed on to the American people in the form of higher taxes, higher premiums, and higher fees for medical services. *Id*. Uncompensated care costs have exceeded $35 billion in each of the last 10 years, a burden that can drive hospitals into insolvency. *Id*. The uninsured also

strain Federal and State government budgets through reliance on publicly funded programs, which are ultimately funded by taxpayers, and by using emergency rooms to seek remedies for a variety of non-emergency conditions. *Id*.

These challenges are exacerbated by admitting to the United States thousands of immigrants annually who have not demonstrated any ability to pay for their healthcare costs. 84 Fed. Reg. 53991. Notably, "data show that lawful immigrants are about three times more likely than United States citizens to lack health insurance." *Id*. And the impact of even a preliminary injunction is permanent—once an immigrant is admitted to the United States, there can be no application of the Proclamation to that individual if the preliminary injunction is later overturned, and the chance to encourage the immigrant to obtain any necessary healthcare coverage is lost. 84 Fed. Reg. 53992.

F. Even if injunctive relief were warranted, nationwide injunctive relief is disfavored in general and is not warranted in this case.

A nationwide injunction is far broader than necessary to afford full relief to Plaintiffs. Article III demands that a remedy "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Gill*, 138 S. Ct. at 1931 (citation omitted); *see Log Cabin Republicans v. United States*, 658 F.3d 1162, 1168 (9th Cir. 2011). Bedrock rules of equity support the same requirement that injunctions be no broader than "necessary to provide complete relief to the plaintiff[]." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). This principle applies with even greater force to a preliminary injunction, which is an equitable tool designed merely to preserve the status quo during litigation. *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

Litigants in a single district seeking to dictate national policy through nationwide injunctive relief is part of a troubling pattern that is taking a growing "toll on the federal court system," *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring), and that, as a practical matter, now requires the

government to prevail in every district-court challenge to a proclamation before implementing it (whereas the challengers need only persuade one court to issue a nationwide injunction). The Ninth Circuit has expressed special concern regarding nationwide injunctions recently. Nationwide injunctions "deprive" other parties of "the right to litigate in other forums." *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018). As the Ninth Circuit has recently explained, "[t]he Supreme Court has repeatedly emphasized that nationwide injunctions have detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives." *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1030 (9th Cir. 2019); *Azar*, 911 F.3d at 583); *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (noting that nationwide injunctions unnecessarily "stymie novel legal challenges and robust debate" arising in different judicial districts). This has a particular "detrimental effect" in cases involving important or difficult questions of law "by foreclosing adjudication by a number of different courts and judges." *Califano v. Yamasaki*, 442 U.S. 682 (1979);

The Ninth Circuit has recently narrowed nationwide injunctions even in cases of facial challenges to statutes and rules. In *East Bay Sanctuary Covenant*, the Ninth Circuit narrowed a nationwide injunction of an interim final rule because the record did not establish that a narrower injunction was insufficient to remedy the "specific harm" Plaintiffs alleged. 934 F.3d at 1029-1030. In *California v. Azar*, the court narrowed a nationwide injunction to apply "only to the plaintiff states" as that would "provide complete relief to them." 911 F.3d at 584. In *City and County of San Francisco v. Trump*, the Ninth Circuit vacated a nationwide injunction when a more limited one provided plaintiffs full relief. 897 F.3d at 1244. And in *Los Angeles Haven Hospice, Inc. v. Sibelius*, 638 F.3d 644 (9th Cir. 2011), the Ninth Circuit held that a district court abused its discretion in issuing a nationwide injunction of a regulation. *Id.* at 664; *see also Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017) (narrowing an overbroad injunction); *United States Dep't of Def. v. Meinhold*, 510 U.S.

939, 939 (1993) (same).

Plaintiffs raise three arguments in favor of nationwide injunctive relief. None has merit. Plaintiffs first argue that a nationwide injunction is a necessary remedy to set aside "defective agency action" under the APA based on Defendants' failure to adhere to "the required rulemaking procedures." PI Mot. at 41-42. But here, for the reasons set out above, there is no final agency action that is governed by the APA, nor is there any requirement that Defendants engage in formal rulemaking related to the Proclamation. There is no defective agency action to be remedied. Moreover, even in APA cases, there must be a showing of harm to justify injunctive relief, and any injunction must be narrowly tailored to that harm. *See East Bay Sanctuary Covenant*, 934 F.3d at 1029. This means that, even in APA challenges to a rule or regulation, at the preliminary injunction stage any relief must be limited to the particular plaintiffs before the court. *Id*.

Second, Plaintiffs argue that "any individual and intending immigrant abroad will be harmed from the Proclamation" so "the scope of the injunction must be universal" to afford Plaintiffs full relief. PI Mot. at 42. But the court has not certified a class, so this is not a class action and the only Plaintiffs relevant to the pending motion are the seven Plaintiffs who have brought suit. Any preliminary injunction should be limited to Plaintiffs identified in the complaint.

Plaintiffs' final arguments are that national immigration policy must be uniform and that a geographically limited injunction would be difficult for consular officers to follow. PI Mot. at 42-43. But this argument has been soundly rejected by the Ninth Circuit: instead, immigration law is not a special context that escapes the Ninth Circuit's direction that injunctive relief be "narrowly tailored to remedy the specific harm shown," *City and Cty. of San Francisco*, 897 F.3d at 1244, as demonstrated by recent decisions narrowing the scope of nationwide injunctions relating to immigration. *See, e.g.*, *id.* (narrowing nationwide injunction of executive order related to sanctuary jurisdictions); *East Bay Sanctuary Covenant*, 934 F.3d at 1029 ("all injunctions—even ones

involving national policies—must be" narrowly tailored). The court should not issue an injunction at all, but if it does, injunctive relief should extend only to the named Plaintiffs.

Nationwide relief is also not warranted for the organizational plaintiff, Latino Network. First, Latino Network lacks standing here because it "lacks a judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), including "enforcement of the immigration laws." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984); *but see East Bay*, 932 F.3d at 765. Even if it could establish standing, increased expenses in assisting clients with obtaining health insurance—which presumably would benefit their clients—is not the type of irreparable injury that justifies injunctive relief at all, much less a nationwide injunction. Nor has it shown nationwide relief is warranted, particularly where it fails to show that "complete relief" could not be provided by a narrower injunction limited to any bona fide, identified clients of Latino Network who are covered by the Proclamation. *Azar*, 911 F.3d at 584; *see Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). Latino Network further has not alleged any impact beyond the geographic bounds of Multnomah County. Compl. ¶ 21 (describing Plaintiff Latino Network as a non-profit "based in Portland, Oregon" whose "organization mission" is limited to assisting "Multnomah County Latinos"). Any injunction would need to be limited to members of the Latino Network. *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1168 (assuming that plaintiff "had standing to seek . . . an injunction barring the United States from applying [the law] to Log Cabin's members")

The court should limit any injunctive relief to the specific individuals named in the complaint or actual clients of Plaintiff Latino Network who can show that they will be affected by the Proclamation.

V. CONCLUSION

For these reasons, the court should deny Plaintiffs' motion for a preliminary injunction.

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