ORAL ARGUMENT NOT YET SCHEDULED
No. 20-5292

In the United States Court of Appeals
For the District of Columbia Circuit

DOMINGO ARREGUIN GOMEZ, ET AL.,
Appellants,

v.

DONALD J. TRUMP, ET AL.,
Appellees.

On Appeal from the U.S. District Court
for the District of Columbia
Case No. 20-cv-1491 (Mehta, J.)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. ***Parties and Amici.*** Plaintiffs in *Gomez v. Trump*, No. 20-cv-1419 (D.D.C), are: Nazif Alam; Carmen Ligia Vidal Pimentel; Juan Carlos Rosario Lebron; Daniel Chibundu Nwankwo; Claudio Alejandro Sarniguet Jimenez; Angela Sinon; Loida Phelps; Nancy Abarca; Fatma Bushati; Jodi Lynn Karpes; Shyam Sundar Koirala; Aja Tamamu Mariama Kinteh; Iwundu épouse Kouadio Ijeoma Golden; Aya Nakamura; 3Q Digital; Superior Scape Inc.; Shipco Transport, Inc.; ASSE International; EurAuPair International; Domingo Arreguin Gomez; Mirna S.; Vicenta S.; Mohamed Saleh; Farangis Kurbonova; SEIU Healthcare (CIR); and PowerTrunk, Inc.*

Defendants in *Gomez v. Trump*, No. 20-cv-1419 (D.D.C) are: Donald J. Trump; William Barr; the United States Department of State; Michael Pompeo; Chad Wolf; and the United States Department of Homeland Security.

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

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

Immigration Reform Law Institute

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All Plaintiffs in *Gomez v. Trump*, except Domingo Arreguin Gomez, Mirna S., Vicenta S., Mohamed Saleh, Farangis Kurbonova, SEIU Healthcare (CIR), and PowerTrunk, Inc., are Appellants in this Court.

All Defendants in *Gomez v. Trump* are Appellees in this Court.

No *amici curiae* have yet appeared in this Court.

This case is consolidated in the district court with *Mohammed v. Pompeo*, No. 20-cv-1856; *Aker v. Trump*, No. 20-cv-1926; *Fonjong v. Trump*, No. 20-cv-2128, *Panda v. Wolf*, No. 20-cv-1907, and *Kennedy v. Trump*, No. 20-cv-2639. Those cases involve several hundred individual plaintiffs who are not involved in this appeal.

2. ***Ruling Under Review.*** The ruling under review is the Memorandum Opinion and Order of the U.S. District Court for the District of Columbia (Mehta, J.), filed September 4, 2020, in *Gomez v. Trump*, No. 20-cv-1419, granting in part and denying in part plaintiffs-appellants' motion for a preliminary injunction, reproduced at JA672-756. The memorandum decision is not yet reported, but is available at 2020 WL 5367010 (D.D.C. 2020).

3. ***Related Cases.*** This case has not previously been before this Court or any court other than the U.S. District Court for the District of Columbia.

This case is consolidated in the district court with *Mohammed v. Pompeo*, No. 20-cv-1856; *Aker v. Trump*, No. 20-cv-1926; *Fonjong v. Trump*, No. 20-cv-2128, *Panda v. Wolf*, No. 20-cv-1907, and *Kennedy v. Trump*, No. 20-cv-2639.

This case is related to *Panda v. Wolf*, No. 20-5284, pending before this Court.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Circuit Rule 26.1, plaintiffs-appellants hereby state as follows:

3Q Digital is a digital marketing agency. It has no parent company, and no publicly-held company has a 10% or greater ownership interest.

ASSE International is a nonprofit public benefit organization that administers exchange programs for individuals on J-1 nonimmigrant visas. It has no parent company, and no publicly-held company has a 10% or greater ownership interest.

EurAuPair International is a nonprofit public benefit organization that administers an exchange visitor program for au pairs using J-1 nonimmigrant visas. It has no parent company, and no publicly-held company has a 10% or greater ownership interest.

Shipco Transport, Inc. is a shipping and logistics company. It is wholly owned by SSNYC Inc., which is wholly owned by Shipco Transport Holding A/S, which is wholly owned by Scan-Group A/S, which is wholly owned by A.S. Scan Holding A/S, which is privately held. No publicly held company has a 10% or greater ownership interest in any of these entities.

Superior Scape Inc. is a landscaping company. It has no parent company, and no publicly-held company has a 10% or greater ownership interest.

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GLOSSARY

APA	Administrative Procedure Act
DHS	Department of Homeland Security
FAM	Foreign Affairs Manual (https://fam.state.gov)
INA	Immigration and Nationality Act

PRELIMINARY STATEMENT

This appeal arises from an order of the district court (Mehta, J.) denying in relevant part Plaintiffs' motion for a preliminary injunction against Presidential Proclamations 10014 and 10052. These Proclamations prohibit entry into the United States of virtually all immigrants (individuals seeking to become lawful permanent residents) as well as many nonimmigrants who are authorized to live and work in this country on a temporary basis. The Proclamations' ostensible purpose is to shield U.S. workers against purported "excess labor supply" in the wake of the economic slowdown that followed the pandemic.

But the Proclamations' effect is more nearly the opposite. Many groups affected by the entry bans—including children, students, and workers who are *prohibited by law* from competing with U.S. workers—*cannot* contribute to any "excess labor supply." And the uncontested record establishes—*the Government has not disputed*—that the fundamental premise underpinning the Proclamations is *factually false*. Immigrants and nonimmigrant workers do not "take" Americans' jobs—they create demand and spark innovation, growing the economy and generating opportunities for others.

The Proclamations are unlawful. The statute under which the President issued the Proclamations, 8 U.S.C. § 1182(f), expressly requires the President to "find[]" that individuals covered by an entry suspension are "detrimental" to U.S. interests. This means, unambiguously, that the President must make rational determinations that support his proclamations. He cannot rely on mere conjecture, and he cannot "find[]" a fact that simply is not true. He could not ban immigration based on a demonstrably false assertion that immigrants are exceptionally prone to crime. And he likewise cannot lawfully base the Proclamations here on the baseless and provably false claim that entry of noncitizens harms the labor market—particularly given that the entry suspension affects many people who *cannot* compete for jobs against U.S. workers. This case is not like *Trump v. Hawaii* (*Hawaii III*), 138 S. Ct. 2392 (2018), where the Supreme Court reviewed and upheld a prior proclamation—the findings there had been based upon a "worldwide, multi-agency review," and they rationally supported the President's policy choices in the field of national security and foreign relations. The purported "find[ings]" here do no such thing.

Nor are the Proclamations consistent with the broader Immigration and Nationality Act ("INA"). Congress has comprehensively legislated upon the question whether to impose labor-related restrictions on who may enter the country. Section 1182(f) does not allow the President to override those legislative judgments. He may *supplement* congressional limitations on entry, but he is not permitted to rewrite them wholesale. Yet the Proclamations do just that, erasing Congress's carefully crafted scheme and supplanting it with the President's own preferred immigration policy. This too is contrary to law.

If § 1182(f) does not require rational findings, and does not require the President to act consistent with the INA, then it violates the nondelegation doctrine—at least as applied to the sphere of domestic economic regulation. The statute contains no substantive guide or limit on the President's authority, and it therefore fails to provide the requisite boundaries for the exercise of congressionally delegated power. The Court should avoid this conclusion by construing the statute in accordance with the plain meaning of its language and with the rest of the INA. But if the Court determines that no such construction is possible, the President's invocation of the statute here must be held unconstitutional.

For substantially these reasons, a court in the Ninth Circuit has already enjoined Proclamation 10052 as it applies to certain nonimmigrant workers. *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Homeland Sec.* (*NAM*), 2020 WL 5847503 (N.D. Cal. Oct. 1, 2020). This Court should follow that court's well-reasoned decision, and should direct entry of a preliminary injunction to avert the ongoing, severe, and irreparable harms that Plaintiffs are currently suffering. The Proclamations are forcing the separation of husbands and wives, parents and children. They are threatening the viability of U.S. companies that are unable to bring in vital workers. And they are depriving diversity-visa lottery winners of the once-in-a-lifetime, limited-time opportunity to immigrate to the United States. These injuries cannot be remedied by a judgment entered at a later date. An injunction is necessary *now*—and there is no public-interest or equitable reason to refuse one.

The district court erred in refusing an injunction. Its order should be reversed.

JURISDICTION

The district court has jurisdiction under 28 U.S.C. §§ 1331, 1343.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

The district court entered its order on September 4, 2020, and Plaintiffs filed their notice of appeal on September 24, 2020. JA1218.

STATEMENT OF ISSUES

1. Whether Presidential Proclamations 10014 and 10052 are invalid because they:

   (a) fail the requirement in 8 U.S.C. § 1182(f) to be supported by a "find[ing] that the entry of [the affected foreign nationals] would be detrimental to the interests of the United States"; and/or

   (b) violate the separation of powers by overriding other provisions of the INA; and/or

   (c) rest on an invalid delegation of legislative power to the President.

2. Whether this Court should issue an injunction prohibiting enforcement of the Proclamations, or in the alternative should direct the district court to issue a preliminary injunction forthwith on remand, where the uncontested record conclusively establishes that Plaintiffs are

suffering irreparable harm and that no public interest or other equitable consideration weighs against an injunction.

STATUTORY PROVISION INVOLVED

8 U.S.C. § 1182(f) provides:

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

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

A foreign national seeking admission into the United States must generally obtain a visa from the State Department. He or she may then use the visa to lawfully enter the country at a port of entry. *See generally Hawaii III*, 138 S. Ct. at 2414-15 (explaining "basic distinction" between visa issuance and entry "that runs throughout the INA"). Visas are categorized as "immigrant" and "nonimmigrant" visas.

1. Immigrant Visas

An immigrant visa permits the holder to be "lawfully admitted for permanent residence." *See* 8 U.S.C. §§ 1101(a)(20), 1151(a). Two varieties are relevant here.

Family-Based Visas. Congress has long recognized that "family reunification" is "the cornerstone of U.S. immigration policy," and serves the "national interest." 136 Cong. Rec. H8629-02 (1990); *see, e.g.*, H.R. Rep. No. 82-1355 (1952). Congress has thus authorized a U.S. citizen or lawful permanent resident to "sponsor" a foreign-national relative (the "beneficiary") and his or her spouse and minor children ("derivatives") for immigrant visas. *See* 8 U.S.C. §§ 1153(a) & (d), 1154(a)(1).

Congress has considered the impact of family-based immigration on the labor market, concluding based on advice from the Nation's top economists that increased immigration benefits the U.S. economy. *See* H.R. Rep. No. 101-723, pt. 1 (1990). Although the President has sought to scale back the program (*e.g.*, JA25, JA27), Congress has not done so.

Demand for family-based visas outstrips the congressionally allocated supply, so most applicants must wait in a queue for their visa "priority date" to become "current." *See generally Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 48, 53 (2014). When the applicant reaches the front of the queue, he or she completes the visa application and attends an interview with a consular officer, who issues the visa upon finding that the applicant is eligible and merits the visa. *See* 8 U.S.C. § 1201.

Diversity Visas. Congress has determined that it is important "to promote diversity in [the] immigration system," H.R. Rep. No. 101-723, pt. 1 (1990); *see* 136 Cong. Rec. H-8629-02 (1990). To that end, Congress authorized 55,000 "diversity" immigrant visas each year for randomly selected individuals from countries with historically low levels of immigration into the United States. *See* 8 U.S.C. § 1151(e); *id.* § 1153(c)(1)(A).

The President has repeatedly pressed to eliminate this program. *See, e.g.*, JA27, JA29; JA31. Congress has not done so.

Eligible diversity visa applicants enter a visa lottery held once each fiscal year. 8 U.S.C. § 1153(c); 22 C.F.R. § 42.33. The lottery is wildly oversubscribed; there were some 14.7 million entries for 55,000 visas in the 2018 lottery. *See* JA536. A lottery winner (with his or her "derivative" spouse and minor children) completes an immigrant visa application process similar to that for family-based visa beneficiaries. *See* 8 U.S.C. §§ 1151(e), 1153(c)(1), 1153(d), 1153(e)(2), 1202(b).

A diversity visa ordinarily must issue by the end of the federal government's fiscal year (September 30) for the year in which the

applicant won the lottery. 8 U.S.C. § 1154(a)(1)(I)(ii)(II). Once the visa issues, it is normally valid for six months. *Id.* § 1201(c)(1).

2. Nonimmigrant Visas

Nonimmigrant visas authorize foreign nationals to enter the country on a temporary basis for work, study, and residence. *See* 8 U.S.C. § 1184; 8 C.F.R. §§ 214.1, 214.2. Four categories are at issue here.

H-1B Visas. The H-1B category enables U.S. employers to hire qualified foreign professionals in "specialty occupation[s]" requiring "theoretical and practical application of a body of highly specialized knowledge" (*e.g.*, technology fields). 8 U.S.C. § 1184(i)(1); *see id.* § 1101(a)(15)(H)(i)(b). Congress has limited the total number of H-1B visas to 85,000 per year. *Id.* §§ 1184(g)(1)(a), (g)(5)(C).

A statutory labor certification requirement prevents employers from using foreign workers to undercut domestic wages and working conditions. *See id.* § 1182(n)(1)(A)-(D). An employer whose workforce comprises a large percentage of H-1B workers must also certify that it has tried and failed to fill the position with a domestic worker, and that the H-1B worker does not displace a U.S. worker. *Id.* §§ 1182(n)(1)(E), (n)(1)(G), (n)(3)(A).

H-2B Visas. The H-2B program allows an employer to hire foreign nationals "to perform temporary service or labor" "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The number of such visas is capped at 66,000 per year. *Id.* § 1184(g)(1)(B).

To hire an H-2B worker, an employer must certify that it has attempted to recruit U.S. workers for the position, that no U.S. workers are available, and that the temporary employment of an H-2B worker will not adversely affect the wages or working conditions of similar U.S. workers. *See* 8 C.F.R. §§ 214.2(h)(6)(iii)(A)-(D), (6)(iv)(A); 20 C.F.R. § 655.0 *et seq*.

J Visas. Congress created the J-1 exchange visa program to develop "friendly, sympathetic, and peaceful relations between the United States and other countries of the world." *See* 8 U.S.C. §§ 1101(a)(15)(J), 22 U.S.C. § 2451, *et. seq*. Regulations establish 15 categories of exchange program eligibility, including trainees, teachers, au pairs, and summer work and travel for foreign students. 22 C.F.R. §§ 62.1, 62.4. The visa must be sponsored by one of 1,500 designated entities, which include

government agencies, academic institutions, businesses, and nonprofits. *See id.* §§ 62.3, 62.5-13, 62.15.

Participants in seasonal J visa programs may not displace U.S. workers. *See* 22 C.F.R. §§ 62.22(b)(1)(ii), (f)(2)(v), 62.32(b), (g)(4)(i), (n)(3)(ii). Congress permanently authorized the au pair program in October 1997,[1] and has considered and rejected claims that the program adversely impacts U.S. labor markets.[2] With limited exceptions, once a J visa program is over, the participant must return to his or her home country for two years before seeking another visa (immigrant or nonimmigrant). 8 U.S.C. § 1182(e).

L Visas. The L visa program allows multinational corporations to sponsor visas for temporary intracompany transfers to the United States of foreign managers and executives (L-1A visas) or employees with "specialized knowledge" about the company (L-1B visas). 8 U.S.C. § 1101(a)(15)(L). To qualify for an L visa, the foreign national must have worked abroad for the same organization in a managerial, executive, or

[1] Act of Oct. 1, 1997, Pub. L. No. 105-48 (1997).

[2] Eisenhower Exchange Fellowship Program, Pub. L. No. 101-454 § 8, 104 Stat. 1063 (1990).

specialized-knowledge capacity for at least one year. *See* 8 U.S.C. § 1101(a)(15)(L); 8 C.F.R. § 214.2(l)(1).

B. The Proclamations

President Trump signed Proclamation 10014 on April 22, 2020. JA243. Relying on 8 U.S.C. § 1182(f)'s provision allowing the President to "suspend the entry of … any class of aliens" upon a "find[ing] that the entry of [such] aliens into the United States would be detrimental to the interests of the United States," Proclamation 10014 suspended entry of all categories of immigrants. Proclamation 10014 was set to expire on June 22, 2020, but provided that it may "be continued as necessary." JA245.

The Proclamation stated that the President had "determined that the entry … of [most] immigrants would be detrimental to the interests of the United States," based on a purported "excess labor supply" resulting from a supposedly negative "impact of foreign workers on the United States labor market" during the pandemic-related economic slowdown. JA243. But the Proclamation cited no evidence or analysis to support a conclusion that family-based or diversity immigrants have any such negative impact. It noted only that lawful permanent residents are

authorized to work, while providing no basis for its suggestion that immigrants "displace[]" U.S. workers. JA243. The Proclamation also barred the entry of prospective immigrants (*e.g.*, minor children, college students, and retirees) without explaining how those individuals could reasonably be expected to join the work force during the Proclamation's term.

President Trump signed Proclamation 10052 on June 22, 2020. JA247. Asserting that Proclamation 10014's initial 60-day duration was "insufficient" for the labor market "to rebalance," the new Proclamation extended the suspension until at least December 31, 2020. JA247. It may again "be continued as necessary." JA248, 250.

Proclamation 10052 also extended the entry suspension to cover H-1B, H-2B, L, and J nonimmigrants, again until at least December 31, 2020. JA248-250.[3] It asserts that nonimmigrant workers "pose[] a risk of displacing and disadvantaging United States workers during the current recovery." JA247. The Proclamation states that pandemic-related economic conditions have led to job losses "in industries in which

[3] The President later amended Proclamation 10052 (*see* 85 Fed. Reg. 40085 (2020)), but the amendment is not material here.

employers are seeking to fill worker positions" through the H-1B, H-2B, and L visa programs. JA247-248. With respect to J visas, the Proclamation points to a high "unemployment rate for young Americans, who compete with certain J nonimmigrant visa applicants." JA248.

The Proclamation does not address the legal provisions that prevent visa-holders in these categories from competing with U.S. workers: Labor condition applications for H-1B and H-2B workers; prohibitions on displacement of U.S. workers for many J visitors; and the nature of the employment of other J and L visa holders as (for example) au pairs, executives, and specialists—positions that are not readily filled by workers already in the United States. *See* Section A.2, *supra*.

Each Proclamation contains exceptions, including one providing that neither Proclamation applies to "any alien whose entry would be in the national interest." JA244-245, 249. Without a notice-and-comment process, the State Department has promulgated detailed guidance regarding the categories of foreign nationals whose entry may be considered to be in the "national interest." *See* JA351-53.[4]

[4] Separate from the Proclamations, the State Department implemented guidance regarding consular operations during the COVID-19 pandemic.

Although the Proclamations do not by their terms suspend the *issuance* of visas, the State Department "interpreted" the Proclamations "to suspend not just entry, but also the review and adjudication of visas for applicants who are covered by the Proclamations and not subject to any of their exceptions." JA674.

C. The Proceedings Below

1. The Complaint

On July 17, 2020, Plaintiffs filed an amended class-action complaint challenging the Proclamations on behalf of three categories of Plaintiffs: (1) sponsors of family-based immigrant visas; (2) diversity visa lottery winners; and (3) sponsors of employment-based nonimmigrant visas. ECF 46.[5] Plaintiffs filed the operative Second Amended Complaint

See JA254-255. The guidance "suspend[ed] all routine … visa services" but authorized the continued provision of "mission-critical and emergency visa services." *Id.*; *see* JA431 ("Mission-critical immigrant visa categories include applicants who may be eligible for an exception under these presidential proclamations."). The State Department began a phased resumption of visa services on July 15. JA277-281.

[5] Citations to "ECF" refer to filings on the district court docket.

on August 23, 2020. JA518.[6] The district court consolidated this action with four others. *See* Minute Order (Aug. 7, 2020); ECF 79.

The family-based visa Plaintiffs are U.S. citizens and lawful permanent residents who have petitioned for visas for their spouses, parents, children, and siblings. JA33-43, JA107-13, JA130-39, JA169-72, JA185-89, JA190-97, JA212-19. The beneficiaries have reached the front of their respective visa queues (*see supra* p. 7), and likely would be granted visas and permitted to enter the country but for the Proclamations. Among these Plaintiffs are a mother with a newborn son who is separated from her husband and her child's father (JA190-193), a father separated from two minor daughters who no longer have a capable caretaker (JA130-131, 138), and a mother separated from her adult son who is her only caretaker (JA214-217).

The diversity visa Plaintiffs were all selected in the 2020 diversity visa lottery. *See* JA44-52, 87-92, 114-119, 120-125, 126-129, 140-145.

[6] This suit was originally filed as a challenge to Proclamation 10014 on behalf of sponsors of 20-year-olds seeking family-based visas, who were at risk of losing their visa eligibility upon turning 21. *See* ECF 1. The district court denied these plaintiffs' motion for a temporary restraining order on mootness and ripeness grounds that are inapplicable to the present Plaintiffs. ECF 41.

Each of these Plaintiffs was at the time of the complaint immediately eligible for a diversity visa. *See id.* They had made concrete plans to immigrate, in some cases by selling property or forgoing investments. *See id.* But the Proclamations prevented them from completing the process.

The nonimmigrant visa plaintiffs sponsor employment-based nonimmigrant visas. 3Q Digital sponsors H-1B visas and is seeking such a visa to bring a vital employee to the United States from Singapore. JA199. ASSE International and EurAuPair International are nonprofit organizations that administer J visa foreign-exchange and au pair programs; the Proclamations have halted these programs and deprived ASSE and EurAuPair of millions of dollars in revenue, which will force them to close entirely by early 2021. JA64-77. Shipco Transport is a multinational shipping company that is seeking an L visa for an executive whom it wishes to transfer to the United States to serve as the Finance Director for its Americas Region. JA93-106. Superior Scape is a landscaping company that relies on H-2B seasonal workers; without such workers, it will be unable to meet its contractual obligations—causing irreparable reputational and financial damage, and putting the company at risk of shutting down. JA146-153.

2. The Preliminary Injunction Motion

Plaintiffs moved for a preliminary injunction, challenging the Proclamations as well as the State Department's policies concerning visa processing. *See* ECF 53, 66. Plaintiffs concurrently moved to certify several classes corresponding to the different categories of visa-seekers affected by the Proclamations. ECF 52.

The district court granted the preliminary injunction in part and denied it in part. JA672-756. The court found Plaintiffs' claims justiciable (JA694-701, 705-709), but granted relief only under the APA, and only with respect to the diversity visa Plaintiffs. Specifically, the court ruled that the State Department's policy of refusing to process visa applications is arbitrary, capricious, and unlawful, and that it had resulted in unreasonable delay in the processing of diversity visa applications. *See* JA736-737, 739, 742-745. The court found that the diversity visa Plaintiffs would suffer irreparable harm if they did not receive their visas by the September 30 deadline, and that the Government had identified no public interest to outweigh the diversity visa Plaintiffs' interests in obtaining their visas. JA746-748.

Pursuant to these rulings, the district court ordered Defendants "to expeditiously process and adjudicate" diversity visas before the September 30 deadline. JA755. Defendants processed and granted the six named diversity visa Plaintiffs' visas before September 30, along with about 3,000 other diversity visas. While these Plaintiffs have thus received their visas, the Proclamations prevent them from entering the country. Their visas will expire in March 2021.[7]

The district court denied relief from the State Department's no-visa policy with respect to the other Plaintiffs. The court reasoned that, unlike the diversity visa Plaintiffs, the other Plaintiffs did not face an imminent visa-issuance deadline, and that the irreparable-harm and public-interest factors did not favor granting relief to those individuals. JA748-750.

The district court also denied all relief with respect to the Proclamations themselves.

[7] On September 30, the district court certified a class of diversity visa lottery winners, and directed Defendants to reserve 9,095 diversity visas to be issued to class members upon final adjudication of Plaintiffs' claims. ECF 151; *see P.K. v. Tillerson*, 302 F. Supp. 3d 1, 10 (D.D.C. 2017).

First, the court rejected Plaintiffs' argument that the Proclamations fail the requirement in 8 U.S.C. § 1182(f) to make a "find[ing] that the entry of [the affected foreign nationals] would be detrimental to the interests of the United States." JA710-718. Plaintiffs had argued that the Proclamations' "underlying premise" is "that the U.S. jobs market is a zero-sum game in which foreign workers displace U.S. workers upon arrival" (JA716) and had explained that this premise is unsupported. But even though the Supreme Court has identified the obligation to make a "find[ing]" as "[t]he sole prerequisite set forth in [the statute]," *Hawaii III*, 138 S. Ct. at 2408, the district court ruled that this required "find[ing]" need not be rational, and need not be supported by evidence. JA711. Thus, in the district court's view, it did not matter that Plaintiffs had made an uncontested showing that the Proclamations' "find[ings]" are irrational and even factually false. JA717-718.

Second, the district court rejected Plaintiffs' argument that the Proclamations violate the separation of powers by overriding Congress's determinations regarding admission of immigrants and nonimmigrant workers. JA725. The court ruled that because the Proclamations do not

on their face permanently "abolish[]" any visa classifications, they do not impermissibly conflict with the INA. JA720.

Third, the district court rejected Plaintiffs' argument that if the President's § 1182(f) authority is not limited by the "find[ings]" requirement or the rest of the INA, the statute violates the nondelegation doctrine for want of "an intelligible principle to guide the delegee's use of discretion." *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality). The court ruled that § 1182(f)'s "textual limits"—the "find[ings]" prerequisite (which the court had declared to be functionally unenforceable) and the requirements to "suspend" entry only temporarily for an identified "class of aliens"—were enough to keep the delegations within constitutional bounds. JA723-725.

SUMMARY OF ARGUMENT

I. The district court erred in concluding that the Proclamations are not likely invalid, for three separate reasons.

First, § 1182(f) requires the President to "find[] that the entry of [specified noncitizens] into the United States would be detrimental to the interests of the United States" before he may issue a proclamation suspending their entry. The plain meaning of this prerequisite is that the

President must make a rational determination to support any entry suspension. But the President made no such "find[ing]" here.

The Proclamations purport to be motivated by "excess labor supply" resulting from the pandemic-related economic slowdown, but large portions of the populations affected by the entry suspension would not contribute to that excess were they admitted: Children, students, and retirees do not work, and Congress has already imposed limitations on nonimmigrant visas that prevent noncitizen workers from competing with U.S. workers for jobs.

More broadly, the Proclamations contain no support for their premise that noncitizens somehow "take" Americans' jobs. In fact, the unassailable record shows that immigrants and nonimmigrant workers *contribute* to the economy, *improving* job opportunities for all U.S. residents. The Proclamations' premise is thus not only made up; it is factually false. The President cannot have "found" something that is both untrue and unsupported by any evidence, so he has failed to satisfy § 1182(f)'s lone prerequisite. And with the statute unsatisfied, the Proclamations are invalid.

Second, the Proclamations violate the separation of powers by rewriting vast portions of the INA. Congress has already decided, through extensive deliberation taking place over decades, whether and to what extent noncitizen admission should be based on labor-market considerations. The Proclamations unlawfully override those determinations, supplanting Congress's handiwork with a new immigration code drafted by the Administration alone. Section 1182(f) does not give the President such legislative authority. He may use the power granted to him only if he does so *consistent* with Congress's determinations as set forth in the INA. The Proclamations here fail this test.

Third, if neither the "findings" requirement nor Congress's determinations constrain the President's authority, then these applications of § 1182(f) violate the nondelegation doctrine. Under the district court's interpretation, the statute supplies no guidance for or limitation on the President's entry-suspension power—as construed, the statute apparently allows the President to write a new immigration code on a blank slate. Such an unbounded delegation of fundamentally legislative authority is unconstitutional. The Court should adopt a

statutory construction that avoids this problem—but, if it cannot do so, the Proclamations must be invalidated at least insofar as they pertain to domestic matters allocated to Congress, and beyond the President's direct constitutional authority.

II. Because the Proclamations are likely invalid, the district court should have enjoined them. Plaintiffs are suffering immense and irreparable harm from their and their beneficiaries' inability to enter the country: Families are being separated, businesses are at risk of total failure for want of workers, and diversity-visa recipients are being deprived (perhaps permanently) of their opportunity to immigrate to this country. There is no countervailing public interest in keeping the Proclamations in place. The record on these points is one-sided and overwhelming. This Court should enter an injunction against the Proclamations' enforcement, or at minimum should direct the district court to do so upon remand.

STANDARD OF REVIEW

The district court's denial of a preliminary injunction is reviewed for abuse of discretion. *Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007). The district court's factual determinations are reviewed for

clear error, *id.*, but its "[l]egal conclusions—including whether the movant has established irreparable harm—are reviewed de novo." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). A district court necessarily abuses its discretion if it denies a preliminary injunction based on an error of law. *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2 (2014).

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY FAILING TO HOLD THE PROCLAMATIONS UNLAWFUL.

The district court denied Plaintiffs' motion for a preliminary injunction based on its conclusion (JA754) that Plaintiffs are unlikely to succeed on the merits of their challenges to the Proclamations. Each of the district court's legal determinations is incorrect.

A. The Proclamations Do Not Satisfy The Statutory Findings Prerequisite.

First, the district court wrongly concluded (JA711-717) that the President satisfied "[t]he sole prerequisite set forth in" § 1182(f), *Hawaii III*, 138 S. Ct. at 2408, which is to "find[]" that entry of specified foreign nationals "would be detrimental to the interests of the United States," 8 U.S.C. § 1182(f). The plain meaning of that statutory text is that the

President must *rationally* identify a detriment that *supports* his decision to suspend entry. The President made no such "find[ing]" here.

1. A § 1182(f) entry suspension must be rationally supported by a "find[ing]" that entry of foreign nationals would harm the national interest.

The district court erred by construing § 1182(f) to require such broad deference to the President that he is not required to issue a rational "find[ing]" that actually supports his entry suspension. Contrary to the district court's interpretation, § 1182(f)'s "find[ings]" prerequisite "requires that the President's findings *support* the conclusion" that the admission of the excluded noncitizens "would be harmful to the national interest." *Hawaii v. Trump* (*Hawaii I*), 859 F.3d 741, 770 (9th Cir. 2017) (emphasis added), *vacated as moot*, 138 S. Ct. 377 (2017). And where, as here, the President bases a proclamation on purported "find[ings]" that do *not* support such a conclusion, his action is invalid. *See Doe v. Trump*, 957 F.3d 1050, 1067 (9th Cir. 2020); *Hawaii I*, 859 F.3d at 770; *NAM,* 2020 WL 5847503, at *11-13.

The Supreme Court's decision in *Hawaii III* does not require a contrary construction of the statute, at least where (as in this case) the Proclamations and "find[ings]" relate only to domestic economic concerns.

For one thing, the Court reached and considered the merits of the plaintiffs' challenge to the President's "find[ings]" in that case—ruling against the plaintiffs because the President had made "extensive findings" that rationally supported the restrictions at issue. *See* 138 S. Ct. at 2404-05, 2408-09.

It is true that the Court stated that "when the President adopts 'a preventive measure … *in the context of international affairs and national security*,' he is 'not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions.'" *Id.* at 2409 (quoting *Holder v. Humanitarian Law Project,* 561 U.S. 1, 35 (2010); emphasis added). But the Court applied that exceptionally deferential standard because the case arose in the context of foreign affairs and national security. The *Humanitarian Law Project* decision on which the Supreme Court relied was not about presidential power or § 1182(f), but specifically concerned national security (namely, the prohibition on material support for terrorism). *See* 561 U.S. at 9. And the Court has never held that the deferential standard applicable in national-security matters also applies in purely domestic affairs. To the contrary, the fact that the Court tied its statement in *Hawaii III* that the President was

"not required to conclusively link all of the pieces in the puzzle" to "the context of international affairs and national security" implies that different rules apply in other contexts.

The Ninth Circuit held as much in a post-*Hawaii III* decision refusing to stay an injunction against a § 1182(f) proclamation prohibiting entry of individuals who lacked certain health-care coverage—a matter of domestic affairs rather than of national security. *See Doe*, 957 F.3d at 1067. As the court explained, when the President acts on "domestic economic matters," the "national security and foreign affairs justifications" for extreme judicial deference "disappear," such that the President's "power is more circumscribed." *Id.* Thus, in the domestic context, § 1182(f)'s "find[ings]" requirement is not satisfied in this context by a Proclamation that is "issued with virtually no factual findings, minimal reasoning, and an extremely limited window for public comment." *Id.*; *see NAM*, 2020 WL 5847503, at *15. (granting limited injunction against Proclamation 10052 for similar reasons). An entry suspension in the domestic-economic sphere must be supported by *rational* findings that support the President's decision.

2. The statutory text and purpose confirm that § 1182(f) requires a rational "find[ing]."

The Ninth Circuit's reading of § 1182(f) aligns with the statute's plain meaning. The word "finds" demands rationality—one cannot "find" something that is either factually false or made up out of whole cloth.[8] And "find" contrasts with words like "deem," which contemplate that conjecture may be sufficient.[9]

Congress understood this distinction, and used both "finds" and "deem" in § 1182(f): After the President "*finds*" a detriment, he may suspend entry "for such period as he shall *deem* necessary," or may "impose…any restrictions he may *deem* to be appropriate" (emphases added). As the legislative history confirms, "[t]he use of the word 'find' was deliberate. Congress used 'find' rather than 'deem' … so that the President would be required to 'base his [decision] on some fact,' not on mere 'opinion' or 'guesses.'" *Hawaii v. Trump* (*Hawaii II*), 878 F.3d 662,

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[8] *See, e.g.*, Finding of Fact, *Black's Law Dictionary* (11th ed. 2019) ("finding of fact" is "[a] determination by a judge, jury, or administrative agency of a fact *supported by the evidence in the record*") (emphasis added); *United States v. Halliburton Co.*, 954 F.3d 307, 310 (D.C. Cir. 2020) (where a "word is 'undefined in [the] statute, we give the term its ordinary meaning'") (citation omitted).

[9] *See, e.g.*, Deem, *Black's Law Dictionary*, *supra* ("To consider, think, or judge.").

692-93 (9th Cir. 2017) (quoting 87 Cong. Rec. 5051 (1941)), *rev'd on other grounds*, 138 S. Ct. 2392 (2018).

Congress would have used "deems" in § 1182(f)'s first clause if that were what it meant. *See Ford v. Mabus*, 629 F.3d 198, 206 (D.C. Cir. 2010) ("where [Congress] uses different language in different provisions of the same statute, we must give effect to those differences"). Or Congress could have omitted the "[w]henever the President finds" clause entirely, if it had meant the President's authority to be unfettered. It did neither.

Congress's reason for selecting "finds" is evident. Section 1182(f) confers extremely broad entry-suspension power, with no substantive restrictions on its exercise. Congress may have thought that such a capacious grant of authority was appropriate; it may have made sense to confer discretion on the President to respond swiftly to unforeseen events. The "find[ings]" requirement guards against improvident exercise of that broad power, by mandating that the President supply a rational justification—not "mere 'opinion' or 'guesses,'" *Hawaii II*, 878 F.3d at 692-693 (citation omitted)—before suspending the entry of

foreign nationals who would otherwise be admitted into the United States.

It is not uncommon for Congress to employ such a gateway "findings" requirement to ensure that an otherwise broad grant of discretion is invoked only in appropriate situations. For example, in the Speedy Trial Act, Congress concluded that it could not "rigidly structure[]" the "ends of justice" exception to statutory time limits without unduly constraining the scope of the exception. *See Zedner v. United States*, 547 U.S. 489, 508-09 (2006). Congress therefore required the district courts to make "*findings* that the ends of justice served by [granting a continuance] outweigh the best interest of the public and the defendant in a speedy trial" before excluding the continuance from time computations. 18 U.S.C. § 3161(h)(7)(A) (emphasis added). The "findings" requirement "counteract[s] substantive openendedness with procedural strictness," *Zedner*, 547 U.S. at 508-09, requiring the courts to "'seriously weigh[] the benefits'" and to make more than "mere reference to 'some rough justice basis'" before granting a continuance, *United States v. Bikundi*, 926 F.3d 761, 776-77 (D.C. Cir. 2019) (citation omitted). This is

true even though the ultimate "substantive balancing" is left to the district courts' discretion. *Id.*

Similarly in the Medicaid statute, Congress did not prescribe how to determine hospital reimbursement rates, but gave each State discretion to set rates "which the State *finds* … are reasonable and adequate to meet the costs which must be incurred by … [healthcare] facilities." 42 U.S.C. § 1396a(a)(13)(A) (emphasis added). Interpreting this language, the Supreme Court held that "*the only plausible interpretation* of the [statute] is that by requiring a State to *find* that its rates are reasonable and adequate, the statute imposes the concomitant obligation to adopt reasonable and adequate rates." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 514-15 (1990) (first emphasis added). A contrary interpretation "would make little sense." *Id.* at 513-14; *see also, e.g.*, *Temple Univ. v. White*, 941 F.2d 201, 208-09 (3d Cir. 1991) ("finds" required State to "gather[] information" and perform "empirical analysis"); *AMISUB v. Colo. Dep't of Pub. Servs.*, 879 F.2d 789, 796 (10th Cir. 1989) ("plain language" of "finds" obligated State to "identify and determine" reasonable rates).

Section 1182(f) reflects the same structure. It confers broad substantive power and leaves the "substantive balancing" to the President, *see Bikundi*, 926 F.3d at 776-77, but it "counteract[s] [that] substantive openendedness with procedural strictness," *Zedner*, 547 U.S. at 508-09. The requirement that the President must "*find*[]" that entry of the covered noncitizens "would be detrimental to the interests of the United States" before he may suspend entry, 8 U.S.C. § 1182(f) (emphasis added), thus obligates him to offer more than a mere "rough justice basis" for his decisions, *Bikundi*, 926 F.3d at 776-77. His findings must be rational, and they must support his exercise of the vast power granted to him.[10]

3. The district court's contrary interpretation is incorrect.

The district court did not engage § 1182(f)'s text, history, or purpose. The court outright *rejected* "Plaintiffs' demand for a 'rational justification,'" asserting that such a requirement "far exceeds what the

[10] The district court criticized Plaintiffs' reliance on the above case law (JA714-715), but looking to "other statutes similarly framed" is an ordinary and appropriate tool of ascertaining the "plain meaning" of a statute. *United States v. Ohio Oil Co.*, 234 U.S. 548, 560 (1914); *see, e.g.*, *Hamilton v. Lanning*, 560 U.S. 505, 514 (2010) (interpreting statutory term "projected" by reference to its usage "in many federal statutes").

[Supreme] Court in [*Hawaii III*] required for a valid presidential 'finding.'" JA712. But by refusing to require even bare rationality, the district court impermissibly "render[ed] the [findings] requirement[] … essentially meaningless." *Wilder*, 496 U.S. at 513-14; *see, e.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009) ("[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant").

Rather than proffer an interpretation that gives effect to the statutory text, the district court relied (JA714) on *Hawaii III*. But as discussed, that decision does not eliminate the President's express statutory obligation to make "find[ings]" to support an invocation of § 1182(f)—at least in the domestic-economic context. And the district court in any event misapprehended the Supreme Court's decision.

First, while the Supreme Court stated that it is "questionable" whether § 1182(f) requires the President "to explain [his] finding with sufficient detail to enable judicial review" (138 S. Ct. at 2409; *see* JA711-712), no such issue is presented here (or in *Hawaii III*): In each case, the President stated the bases of the proclamations in the orders themselves. The text of the proclamation in *Hawaii III* was "sufficient … to enable

judicial review," as evidenced by the fact that the Supreme Court undertook such review. *See* 138 S. Ct. at 2409. And the Proclamations here likewise disclose their purported rationale, permitting judicial review.

Second, the district court suggested that the same *level* of deference must apply in both the national-security context of *Hawaii III* and the domestic-economic context presented by the Proclamations here. JA712-714. But as discussed, the Supreme Court *distinguished* "'the context of international affairs and national security'" from other contexts, explaining that *in that setting*—where Congress's grant of authority is augmented by the President's own constitutional authority—the President "is 'not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions.'" 138 S. Ct. at 2409 (quoting *Humanitarian Law Project*, 561 U.S. at 35). *Additional* deference may apply in the foreign-relations context, but the Court did not hold or suggest that the same level of deference applies in the domestic sphere.

In rejecting this distinction, the district court noted that it is not expressly embodied in the statute. JA713. But that does not advance the

ball, because § 1182(f) does not call for *any* deference to the President's "find[ings]." Any deference is a judicial gloss on the text, and (as discussed) "the context of international affairs and national security" is a special case. *Hawaii III*, 138 S. Ct. at 2409.

Nor is it uncommon for courts to apply the same nominal standard of review with varying levels of rigor depending on context. *See, e.g.*, *Roberts v. United States*, 741 F.3d 152, 158 (D.C. Cir. 2014) (military corrections board reviewed "under an 'unusually deferential application of the 'arbitrary or capricious' standard'") (citation omitted).

On a related point, the district court suggested that the President's purported "find[ings]" constitute "policy decision[s]" that are insulated from judicial review. JA714. That is incorrect. The district court conflated the President's policy choices—which entry suspensions to adopt—with the antecedent step of making rational "find[ings]" that support his invocation of the statute. As shown below, the President has not completed the antecedent step: He did not "find[]" a detriment—he *made one up out of whole cloth*.[11]

[11] Moreover, if the exercise of § 1182(f) is a policy choice left entirely to the President, the statute presents a serious nondelegation problem when invoked to make domestic policy. *See* Point I.C, *infra*.

Third, in rejecting "a *searching* inquiry into the persuasiveness of the President's justifications" (*Hawaii III*, 138 S. Ct. at 2409 (emphasis added)), the Supreme Court did not foreclose *all* review of those justifications—it did not resolve that question because it found the findings sufficient in the case before it. *Contra* JA717. And non-"searching" forms of judicial review are common. For example, a jury's finding of fact is subject to review, but must be upheld so long as there is "a legally sufficient evidentiary basis" to support it. Fed. R. Civ. P. 50(a)(1); *see also id.* R. 52(a)(6) ("clearly erroneous" review of district court findings). A federal agency's actions are subject to APA review, but only under the "deferential" arbitrary-and-capricious standard.

Deference to another entity's findings does not mean that such findings are entirely immune from review. *See, e.g.*, *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 289 (D.C. Cir. 2015) (reversing denial of Rule 50 motion where there was not "sufficient record evidence" to support jury finding); *Sw. Power Pool, Inc. v. F.E.R.C.*, 736 F.3d 994, 999 (D.C. Cir. 2013) (similar under APA).

The same is true for § 1182(f). Judicial review of the President's "find[ings]" need not be "searching"; the choice is not between "searching"

review and none at all. Ensuring that the President has acted rationally does not impinge the President's sphere any more than a Rule 50 motion impinges the jury's sphere.

Fourth, the district court suggested that *any* government action concerning noncitizens is *inherently* a matter of foreign affairs, such that extreme deference is *always* required in immigration matters. JA713. That assertion blinks reality. Nothing in the Proclamations here even purports to touch on foreign relations. The title of each refers only to "the U.S. Labor Market" (JA243; JA247), and the Proclamations do not purport to be managing relations with other sovereigns, or transnational trade, or anything of the sort. They deal exclusively with the domestic economy.

The cases on which the district court relied (JA713) provide no support for the proposition that *any* action relating to noncitizens is necessarily a foreign-affairs matter. For instance, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), involved a predecessor statute to § 1182(f) that was expressly tied to the national emergency declared as a result of World War II. *See id.* at 540 n.1. Thus, the exclusion of the noncitizen there was undoubtedly an exercise of foreign-

affairs power. And the Court did not claim that *every* exclusion is necessarily a foreign-affairs matter. In fact, it said the converse: In stating that "[t]he right to [exclude noncitizens] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation," *id.* at 542, the Court indicated that *one* way in which the President may exercise the "executive power to control the foreign affairs of the nation" is by excluding noncitizens. It does not follow that *every* exclusion is necessarily a foreign-affairs matter, even where based on purely domestic considerations.

Other citations in the district court's opinion confirm as much: If "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations" (JA713 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952))), then the "policy toward aliens" is *distinct* from (not identical to) "contemporaneous policies in regard to … foreign relations." And if "decisions in these matters *may* implicate 'relations with foreign powers,'" *Hawaii III*, 138 S. Ct. at 2418-19 (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)) (quoted in JA713-714; emphasis added), it is also true that such decisions often *do not* implicate foreign affairs. The

Proclamations in this case fall into the latter category. The same was true in *Doe*, where the Ninth Circuit expressly "reject[ed] the government's argument that the Proclamation implicates the President's foreign affairs powers simply because the Proclamation affects immigrants." 957 F.3d at 1067; *accord NAM*, 2020 WL 5847503, at *7-9.

Finally, the district court sought to justify its abdication of review by asserting that "Congress possesses ample powers" to act as a "counterweight to Executive Branch excess." JA717. But Congress has *already* exercised those powers: It selected language designed to constrain the President. *See supra* Point I.A.2.

Adopting *new* legislation to override the President's action would require veto-proof supermajorities, and would in any event be far too unwieldy to "right th[e] wrong[s]" created by the Proclamations (*contra* JA717). Spouses and children separated from their families, companies going out of business, and diversity-visa lottery winners with expiring visas all face urgent and irreparable injuries (*see infra* Point II), which speculative future legislation cannot remedy. Only prompt judicial action can realistically provide effective relief and a check on the Executive.

4. The President made no rational "find[ing]" in either Proclamation.

Turning to the question whether these Proclamations satisfy the "sole prerequisite set forth in § 1182(f)," *Hawaii III*, 138 S. Ct. at 2400: The inquiry's contours are illustrated by the contrast between the proclamation in *Hawaii III*, which the Supreme Court upheld, and the one in *Doe*, which has been enjoined.

The proclamation in *Hawaii III* rested upon "extensive findings" based on the results of a "worldwide review" undertaken by DHS, the State Department, and "several intelligence agencies." 138 S. Ct. at 2404, 2408. Based on that review, DHS "concluded that eight countries [were] deficient in terms of their risk profile and willingness to provide requested information" to vet their citizens before their entry into the United States. *Id.* at 2404, 2406. The President "consult[ed] with multiple Cabinet members and other officials" before adopting DHS's findings and crafting "country-specific restrictions," which the Supreme Court ultimately decided were rationally related to the valid national-

security goal of ensuring that foreign nationals entering the United States do not pose security threats. *Id.* at 2405, 2408-09.[12]

The health-care proclamation in *Doe* was different. It barred immigrants from entering the United States without proof of health insurance, *see* 957 F.3d at 1057, citing alleged "uncompensated care costs," 84 Fed. Reg. 53991 (2019). But neither the proclamation nor the Government in litigation substantiated the factual premise that there is a link between uninsured immigrants and any "substantial cost[s]" to "healthcare providers and taxpayers." *Doe* 957 F.3d at 1059; *see id.* at 1067. The Ninth Circuit accordingly concluded that the Government was unlikely to succeed in showing that the proclamation satisfied § 1182(f), and it refused to stay the district court's preliminary injunction. *See id.* at 1067.

As the district court ruled in *NAM*, the Proclamations in this case are like the one in *Doe*, and unlike the one in *Hawaii III*. Indeed, the

[12] The proclamation in *Hawaii III* was the Administration's *third* attempt to shut down entry of individuals from Muslim-majority countries. Courts enjoined the prior iterations based in part on the President's failure to make "sufficient finding[s] … that the entry of the excluded [noncitizens] would be detrimental to the interests of the United States." *Hawaii I*, 859 F.3d at 770.

district court in this case acknowledged that "the findings here [are] not … supported by any evident 'worldwide, multi-agency review'" of the kind that saved the proclamation in *Hawaii III*. JA716. And in fact, the "find[ings]" here fall short of any conceivable rationality standard.

a. The Proclamations contain no "find[ing]" at all for many of the affected classes.

As an initial matter, the Proclamations do not even purport to make "find[ings]" to justify exclusion of many of the affected groups.

With respect to immigrant visas, students such as Mr. Alam's wife (JA40) and Mr. Jiménez's son (JA110) cannot be expected to enter the labor market for the immediate future. The same is true of minor children like Mr. Lebron's daughters (JA130) and elderly retirees. No one in these groups will likely contribute to the purported problem of near-term "excess labor supply" (JA243, 248)—leaving the Proclamations with no "find[ings]" that entry of such individuals would be "detrimental to the national interest." *NAM*, 2020 WL 5847503, at *13.

The point is even clearer with regard to nonimmigrant visas. While Proclamation 10052 asserts that employment is down in "industries" in which employers are seeking H-1B, H-2B, and L workers (JA247-248), an *industry* is not the same thing as a *job*. The Proclamation does not

purport to show that these workers are hired for *jobs* that would otherwise go to U.S. workers.

In fact, the INA ensures that H-1B and H-2B workers *cannot* enter the country unless it is proven that they will not negatively impact U.S. workers. *See supra*, pp. 7-8. The Proclamations thus irrationally "bar[] entry of noncitizens who are already prevented, by statute, from competing" with U.S. citizens for jobs. *NAM*, 2020 WL 5847503, at *13.

Many J exchange visa holders are likewise prohibited from displacing U.S. workers, and many others (*e.g.*, au pairs) are employed in specialized roles. *See supra*, pp. 8-9. And Proclamation 10052 "bar[s] seasonal temporary labor even in instances in which an employer is unable to fill open positions with American workers during the pandemic," *NAM*, 2020 WL 5847503, at *13.

And, L visas are granted only for intracompany transfers of specialized and managerial employees whose roles cannot readily be filled by hiring new U.S. workers. *See supra*, p. 9.

The Proclamations do not address these overbreadth issues, leaving a "significant mismatch of facts regarding the unemployment caused by the proliferation of the pandemic and the classes of noncitizens who are

barred by the Proclamation[s]." *NAM*, 2020 WL 5847503, at *13. This mismatch, which the district court disregarded, forecloses any conclusion that the President made "find[ings]" sufficient to support his suspension of entry for *everyone* in the covered classes.

b. The Proclamations' "find[ings]" do not establish their underlying premise.

The Proclamations' putative "find[ings]" are legally inadequate for the additional reason that they supply no support for what the district court recognized as their critical "underlying premise"—the idea "that the U.S. jobs market is a zero-sum game in which foreign workers displace U.S. workers upon arrival" (JA716). Without a reasonable basis for this premise, the Proclamations collapse: If foreign nationals do *not* displace American workers, the Proclamations have no justification.

Yet as the district court in *NAM* explained, "there is no record whatsoever that the President or any federal agencies at his instruction conducted any evaluation regarding the effect on the domestic economy of banning the visas at issue here." 2020 WL 5847503, at *12. Nor are there "reports of any sort that a specific determination was made that [affected] visa applicants had any deleterious effect on the United States economy or American citizens' employment rates." *Id.*

Without such evidence, or other demonstration that the President had a rational basis for invoking § 1182(f), the President cannot have made a "find[ing]" within the statute's meaning. The Proclamations' purported "find[ings]" are thus "insufficient as a matter of law." *NAM*, 2020 WL 5847503, at *13.

c. The undisputed record establishes that the Proclamations' premise is false.

In fact, the President *actively ignored* facts showing that his premise is false. Congress has long rejected the "plainly flawed" "premise that there is a fixed number of jobs for which competition is a zero-sum game," S. Rep. No. 106-260, at 12 (Apr. 11, 2000), and has recognized that admitting noncitizens is "crucial to maintaining American economic competitiveness *and to protect American jobs*," 144 Cong. Rec. S-10877-01 (emphasis added). And *DHS itself* reached the very same conclusion earlier this year:

> DHS knows that immigrants make significant contributions to the U.S. economy…. DHS agrees that immigrants are an important source of labor in the United States and contribute to the economy. … DHS agrees that immigrants are crucial for agriculture, construction, healthcare, hospitality, almost all industries, immigrants are a source of future U.S. labor growth, [and] many immigrants are successful entrepreneurs….

85 Fed. Reg. 46788, 46798 (2020).

It is beyond dispute that immigration and nonimmigrant workers contribute to economic growth, and thus to the jobs and wages of U.S. workers. *See, e.g.*, JA83, JA177-178; JA179-180; JA226-227. Conversely, immigration restrictions *reduce* economic growth while failing to increase the employment of U.S. workers. *See, e.g.*, JA81-82, JA221.

The Proclamations' "underlying premise" (JA716) is not just false but backwards: It "completely disregards … economic reality." *NAM*, 2020 WL 5847503, at *13. The notion that there is a fixed amount of work to be done, such that adding workers to the economy would increase competition for a scarce resource, is "[o]ne of the best-known fallacies in economics," discredited for well over a century.[13] In fact, immigration has a positive "one-for-one" impact on total employment, "without 'crowding out' any native-born workers." JA176-177; *see* JA167. And "immigrants and foreign-born workers *create* jobs because they participate in the economy as consumers of goods and services." JA166 (emphasis added).

[13] *Economics A-Z Terms Beginning with L*, The Economist, https://goo.gl/BvRwKU (describing the "lump of labour fallacy"); *see* Nat'l Acad. of Scis., Eng'g., and Med., *The Economic and Fiscal Consequences of Immigration* 5-6 (The National Academies Press 2017), https://doi.org/10.17226/23550.

In particular, each "high-skilled job," such as the positions occupied by H1-B and L visa holders, "generates a 'local multiplier,' attracting other jobs rather than displacing them." JA227-228; *see* JA221-222, 230. Moreover, because many U.S. companies (including the nonimmigrant visa sponsor Plaintiffs) depend on noncitizens, the Proclamations threaten many businesses' very existence—and thus threaten to *destroy* many job opportunities in the United States. *See, e.g.*, JA149-151; 70-71, 75-76. The Proclamations will "penalize the economic recovery" (JA184), and are "counterproductive to [the] stated goal of protecting United States workers and the post-COVID economic recovery" (JA157).[14]

The record regarding the economic benefits of immigration is overwhelming. It is also one-sided. The district court acknowledged the "array of evidence showing, … contrary [to the Proclamations' premise], that new entrants to this country actually create jobs and provide overall benefits to the U.S. economy" (JA716), and it identified no contrary evidence in the record—none exists. There is no genuine factual dispute: The premise of the President's "find[ings]" is false.

[14] All of this remains true in a recession. *See* JA181. President Hoover tried a policy of reducing the foreign-born work force during the Great Depression; the policy failed. JA229-230; JA162.

An obviously and undisputedly false *assertion* cannot meet § 1182(f)'s "find[ings]" requirement. Such an unsupported and anti-factual "finding" is "insufficient as a matter of law." *NAM*, 2020 WL 5847503, at *13. The statutory prerequisite is unsatisfied, and the Proclamations are accordingly invalid.[15]

B. The Proclamations Unlawfully Rewrite The INA.

The Proclamations are independently invalid because they violate separation-of-powers principles.

"[T]hat the formulation of [policies pertaining to the entry of noncitizens] is entrusted *exclusively to Congress* has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan v. Press*, 347 U.S. 522, 531 (1954) (emphasis added). Once Congress has exercised this authority, its legislative judgment is not subject to Presidential second-guessing. "There is no provision in the Constitution that authorizes the President

[15] The Proclamations cannot be defended under 8 U.S.C. § 1185(a)(1). The power to suspend entry is conferred only in § 1182(f), and that statute's specific requirements must govern § 1185(a)(1)'s general rulemaking authority. *See, e.g.*, *RadLax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). And the Proclamations do not satisfy § 1185(a)(1)'s requirement that restrictions must be "reasonable," for reasons set forth in text.

to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998).

A § 1182(f) proclamation is therefore invalid if it "overrides, contravenes, or is otherwise incompatible with any provision of the INA." *Doe v. Trump*, 418 F. Supp. 3d 573, 594 (D. Or. 2019) (citing *Hawaii III*, 138 S. Ct. at 2411). While § 1182(f) "provides a safeguard against the danger posed by any particular case or class of cases that *is not covered* by one of the categories in [§] 1182(a)," *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (emphasis added), the statute does *not* authorize the President to suspend entry where "Congress has already spoken … on the issue" forming the basis for the President's action. *Doe*, 418 F. Supp. 3d at 597.

In *NAM*, for example, the district court concluded that Proclamation 10052 is unlawful because it "nullifies significant portions of … the INA, by declaring invalid statutorily-established visa categories in their entirety," and "rewrites the carefully delineated balance between protecting American workers and the need of American businesses to staff their operations with skilled, specialized, and temporary workers." 2020 WL 5847503, at *10. As the court observed, "pre-existing law

already" establishes protections to avoid "disadvantag[ing] American native-born workers," through a "finely reticulated statutory scheme." *Id.* "[T]he President's wholesale elimination of categories of [visas] does not supplement this legislative judgment but rather explicitly supplants it by refusing admission" to classes of foreign nationals to whom Congress has determined that entry should be granted. *Id.*

Similarly in *Doe*, the district court ruled that President's proclamation requiring immigrants to show proof of health insurance violated the separation of powers because it fell within "the purview of" an existing Congressional scheme and stood "in direct contravention to a statute passed by Congress after Congress's 'exhaustively considered,' and 'deliberate and deliberative process.'" 418 F. Supp. 3d at 595-597 (citations omitted). Denying a stay pending appeal, the Ninth Circuit agreed that the proclamation unlawfully "eviscerate[d] the statutory scheme." *Doe*, 957 F.3d at 1064.

The Proclamations here are invalid for the reasons identified in *NAM* and *Doe*. They unlawfully "nullif[y] significant portions of … the INA, by declaring invalid statutorily-established visa categories in their entirety," *NAM*, 2020 WL 5847503, at *10, and rewrite a vast and

complex scheme through which "Congress has already spoken … on the issue of limiting … admissibility based on the potential" effects on the labor market, *Doe*, 418 F. Supp. 3d at 597; Congress has imposed labor-protective conditions where it found them appropriate (*see, e.g.*, 8 U.S.C. §§ 1101(a)(15)(L), 1182(a)(5), (e), (n), (p), & (t), 1184(c)(2)), and has declined to impose such conditions where it did not view them as warranted—as in the cases of family-based and diversity visas.

The Proclamations cast aside these congressional judgments, "in direct contravention to a statute passed by Congress after Congress's 'exhaustively considered,' and 'deliberate and deliberative process.'" *Doe*, 418 F. Supp. 3d at 597 (citations omitted). They supplant Congress's "finely reticulated statutory scheme," *NAM*, 2020 WL 5847503, at *11, with new and equally reticulated criteria (JA248, JA409-416).

But "[t]he President simply does not have the constitutional authority to amend a statute," *Doe*, 418 F. Supp. 3d at 597 (citing *Clinton*, 524 U.S. at 438), and he cannot use § 1182(f) to "'eviscerate[] the statutory scheme' by reversing course on legislatively enacted policy," *NAM*, 2020 WL 5847503, at *11 (citations omitted), or to "rewrit[e]" the regime that Congress enacted, *Doe*, 957 F.3d at 1067.

The district court reached the contrary conclusion based on the Supreme Court's statement in *Hawaii III* that § 1182(f) provides the President power "to impose entry restrictions *in addition* to those elsewhere enumerated in the INA." JA721. But in contrast to the proclamation in *Hawaii III*, which merely *supplemented* restrictions already contained in the INA, *see* 138 S. Ct. 2404-05, 2411-12, the Proclamations here are not additive in nature. Far from filling statutory gaps, they *eliminate* virtually all immigration and *erase* whole congressionally established categories of temporary nonimmigrant admission. The Proclamations then *replace* Congress's carefully balanced legislation with a different scheme of the Administration's invention. The President's overreach directly and impermissibly conflicts with Congress's judgments on the same subject, reflected in its comprehensive occupation of the field.

The district court also asserted that the "exceptions demonstrate that the Proclamations do not 'expressly override' any 'particular' provision of the INA," because *some* "[a]liens still may travel to the United States." JA721. But the exceptions are part of the problem: They represent the President's wholesale replacement of the congressional

entry-regulation scheme. The fact that *some* noncitizens are still being admitted based on "exceptions" that the Administration created does not save the Proclamations, but illustrates that the President has unlawfully overwritten the INA.

C. If The President's Power To Suspend Entry Is Not Cabined, Section 1182(f) Is An Unconstitutional Delegation Of Domestic Legislative Authority.

If the district court were correct that § 1182(f) permits the President to issue entry-suspension proclamations based on unreviewable "find[ings]" that do not meet minimum standards of rationality, and thereby rewrite great swathes of the INA, then the statute would exceed the limits on Congress's authority to delegate legislative power to the Executive. *See Doe*, 418 F. Supp. 3d at 589-93; *NAM*, 2020 WL 5847503, at *10.

Under the nondelegation doctrine, Congress "may not transfer to another branch powers which are strictly and exclusively legislative." *Gundy*, 139 S. Ct. at 2123 (plurality) (citation omitted).[16] While Congress

[16] Regulation of who may and may not enter the country is such an "exclusively legislative" power. *E.g.*, *Galvan*, 347 U.S. at 531 ("formulation of … policies [pertaining to the entry of aliens] is entrusted *exclusively to Congress*") (emphasis added).

may enlist the aid of the other Branches, it must provide "an intelligible principle to guide the delegee's use of discretion." *Id.* A delegation is permissible only if Congress "has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of his authority.'" *Id.* at 2129 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

Correctly construed, § 1182(f) avoids this constitutional concern. Upon making an appropriate "find[ing]," reviewable for compliance with the statute, the President may suspend entry, *provided* that his proclamation does not conflict with congressional policy. He may impose entry suspensions that *supplement* existing restrictions, *see Hawaii III*, 138 S. Ct. 2404-05, 2411-12, and may impose new limitations where Congress has not legislated, *see, e.g.*, Proclamation No. 6958 (1996) (suspending entry of Sudanese officials in furtherance of United Nations Security Council Resolutions). But the President may not invoke § 1182(f) to rewrite the INA wholesale. The text and structure of the INA thus set the "boundaries of his authority," *Gundy*, 139 S. Ct. at 2123: The President may suspend entry in response to unforeseen events, yet he

must do so in a manner that is consistent with congressional determinations embodied in the INA.[17]

The district court's reading of § 1182(f) removes these guardrails, allowing the President an unrestricted tool to rewrite immigration law even where Congress has already thoroughly legislated. The court identified no "intelligible principle to guide the delegee's use of discretion," *Gundy*, 139 S. Ct. at 2123, leaving "no guidance whatsoever for the exercise of discretion by the President" under § 1182(f). *Doe*, 418 F. Supp. 3d at 590. If no such principle exists, § 1182(f) is "the type of unrestrained delegation of legislative power that the Supreme Court has invalidated." *Id.* (collecting cases); *see NAM*, 2020 WL 5847503, at *8 (similar)

The district court relied (JA72) on cases cited in *Gundy* as examples of permissibly broad delegations. But the statutes in each of those cases

[17] No nondelegation issue arose in *Hawaii III*, both because the President implemented the proclamation at issue after making findings that the Supreme Court considered adequate, and because the Supreme Court found that he acted *consistent* with congressional policy in undertaking "a preventive measure … in the context of international affairs and national security," 138 S. Ct. at 2409—a setting in which "the President has his own inherent powers under Article II," *Doe*, 418 F. Supp. 3d at 592. The President has no such inherent power in the domestic sphere in which delegation requires an intelligible principle. *See id.*

provided far more guidance than from the district court's interpretation of § 1182(f). In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), the "public interest" criterion had to be "interpreted by its context"; "[t]he 'public interest' to be served [was] the interest of the listening public in 'the larger and more effective use of radio.'" *Id.* at 216. Similarly in *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932), the Transportation Act's "public interest" criterion was not a "mere general reference to public welfare," but had to be interpreted in "direct relation to adequacy of transportation service." *Id.* at 24-25. The "fair and equitable" prices in *Yakus v. United States*, 321 U.S. 414 (1944), had to be fixed in service of Congress's goal to "prevent[] … inflation," *id.* at 423, and the "just and reasonable rates" in *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), required the commission to assure "the financial integrity of the [gas] company" while "protect[ing] consumers against exploitation," *id.* at 603-604, 610. The directive in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), to set air standards that are "requisite to protect the public health" meant that the agency was obligated to set a standard "not lower or higher than is necessary" for that purpose. *Id.* at 476.

As construed by the district court, § 1182(f) provides no similar limit on the President's authority. Under that construction, the President may suspend entry for any reason (even if that reason is irrational). He may use it to erase the admission criteria that Congress has established, and to replace those criteria with new and conflicting criteria. And nothing in the text supplies any substantive limit on the President's power. *See Doe*, 418 F. Supp. 3d at 590. The district court pointed to the requirements to "make a 'find[ing]'; identify a 'class of aliens'…; and 'suspend … entry for a fixed period of time or until resolution of a triggering condition" (JA724), but those *procedural* requirements (which are mostly toothless under the district court's interpretation) do not supply any *substantive* "general policy" for the President to pursue, *Gundy*, 139 S. Ct. at 2123. Nor do they otherwise "guide [his] use of discretion." *Id.*[18]

The Court should interpret § 1182(f) to require rational "find[ings]" and an entry suspension that comports with congressional policy, "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998); *see Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*,

[18] Identical analysis would apply to § 1182(a).

448 U.S. 607, 646 (1980) (adopting narrow statutory construction to avoid nondelegation problem). If the Court finds that it cannot adopt a limiting interpretation, nondelegation principles would still render the Proclamations invalid.

II. The Proclamations Should Be Enjoined Immediately.

Plaintiffs are likely to succeed on the merits of their claims that the Proclamations are unlawful. And the record establishes beyond doubt that the remaining factors for issuance of a preliminary injunction are satisfied.

The district court did not deny that Plaintiffs are suffering immense harm as a result of the Proclamations, but—as to the family-based and employment-based Plaintiffs—it denied injunctive relief from the State Department's policy of refusing to issue visas (*see* JA748-750*; supra* p. 19), on grounds that the Proclamations would bar those Plaintiffs from entering the country even if their visas issued. But the Proclamations are likely unlawful for the reasons just discussed, and an injunction barring their enforcement *would* redress Plaintiffs' (and proposed class

members') irreparable injuries by allowing visas to issue and permitting their recipients to enter the country.[19]

"Because the record 'compel[s] only one conclusion'" on the remaining injunction factors, "there is no reason to remand to the district court"—the appropriate disposition is for this Court to issue the injunction that the district court should have granted but for its errors of law. *League of Women Voters v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016). At minimum, the Court should direct the district court to enjoin the Proclamations forthwith. *See, e.g.*, *Pursuing America's Greatness v. F.E.C.*, 831 F.3d 500, 512 (D.C. Cir. 2016).

A. The Record Conclusively Establishes That Plaintiffs Are Suffering Irreparable Harm.

Plaintiffs have proven that they are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Their injuries, discussed below, are

[19] Plaintiffs' irreparable-harm showings would support an injunction even if success on the merits were less than certain. *See, e.g.*, *Davis*, 571 F.3d at 1291-92 (if a "movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor").

irreparable, "actual," and they are not only "imminent" but *ongoing*. *See League of Women Voters*, 838 F.3d at 8.

Family-Based Visa Plaintiffs. The district court observed that "the family based Plaintiffs identify vast harms stemming from being separated from their family members," and expressed "no doubt that this separation has been devastating for these Plaintiffs and their families." JA749. These are quintessential irreparable injuries:

- Mr. Alam has been separated from his wife for 2 years; she was slated to begin a course of advanced studies at Cornell University. He is devastated by their now-indefinite separation, and by her inability to complete her education. JA41-42.

- Ms. Pimentel has been living apart from her husband for 3 years. She was nine months pregnant when Plaintiffs moved for a preliminary injunction; she has since give birth to their baby boy. She desperately needs her husband's support and companionship during their son's early life. JA190-193, 195-196.

- Mr. Lebron has been separated from his minor daughters for seven years. His mother had been caring for them, but she is no longer able to meet this responsibility. Mr. Lebron needs to be reunited with his daughters so that he can properly care for them. JA138-139.

- Ms. Sinon's adult son has been stranded in the Philippines after traveling to Manila for his consular interview. Ms. Sinon is elderly and relies on her son for caretaking, and is now being deprived of both his companionship and his care. JA215-217.

- Mr. Nwankwo, Mr. Jiménez, Ms. Phelps, and Ms. Abarca have been separated from their parents, children, and grandchildren for extended periods of time, and are suffering immensely from their

inability to reunite their families. *See* JA170-171; JA110-111; JA185-188; JA33-35.

No legal remedy can compensate for Plaintiffs' ongoing loss of the opportunity to live with and to care for their close family members.[20]

Employment-Based Visa Plaintiffs. As with the family-based plaintiffs, the district court noted the employment-based visa Plaintiffs' irreparable injuries: Many of "their businesses will likely cease if they cannot continue to recruit nonimmigrant workers to fill positions." JA749.

- ASSE and EurAuPair have been prevented from operating their foreign-exchange and au pair programs, which depend on J-1 nonimmigrant visas. JA64. These organizations have been forced to refund hundreds of thousands of dollars as the result of cancelled visits, and both will be forced to cease operations due to lack of funds in early 2021 if the entry ban continues. JA70-72, 76; JA991.
- Superior Scape depends on H-2B workers to fulfill its contracts. JA147-151. Its inability to complete jobs is causing great harm to its reputation. JA149-151. The Proclamations threaten its solvency

[20] *See, e.g., Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 320 (4th Cir. 2018), ("Prolonged and indefinite separation" of families constitutes irreparable harm because it "create[s] not only temporary feelings of anxiety but also lasting strains on the most basic human relationships"), *vacated on other grounds*, 138 S. Ct. 2710 (2018); *Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1, 62 (D.D.C. 2019), *rev'd on other grounds*, 962 F.3d 612 (D.C. Cir. 2020); *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 121-23 (D.D.C. 2018).

and viability as a business; it will be forced to cease operations if no relief is granted. JA151-152.

- Shipco and 3Q Digital are being irreparably harmed as the Proclamations prevent them from bringing talented employees to the United States to oversee their U.S. businesses and to serve their U.S. clients. JA97, 101-105; JA201-202.

These actual and threatened injuries establish irreparable financial and reputational harm resulting from the entry suspension. The district court so ruled in *NAM*, concluding that the plaintiffs there had established irreparable harm including "the disruption of business operations, interference with existing employees, … the furlough or laying off of employees, substantial pay cuts, threatened loss of prospective customers, shutting down of entire programs, … and the likelihood that some businesses or cultural programs will have to cease operations altogether." 2020 WL 5847503, at *14.[21] The record here establishes similar irreparable injuries.

[21] *See also Everglades Harvesting & Hauling, Inc. v. Scalia*, 427 F. Supp. 3d 101, 115-17 (D.D.C. 2019) (finding irreparable harm from failure to issue H-2A visas; "plaintiffs would have no cause of action against [the government] to recover their lost money," and "harm to a business's reputation can constitute irreparable harm"); *Smoking Everywhere, Inc. v. U.S. F.D.A.*, 680 F. Supp. 2d 62, 77 (D.D.C.) (finding irreparable harm where "the potential for economic loss absent preliminary injunctive relief is sufficiently grave to threaten plaintiffs' very existence"), *aff'd*, 627 F.3d 891 (D.C. Cir. 2010); *Baker Elec. Coop. Inc. v. Chaske*, 28 F.3d

Diversity Visa Plaintiffs. The district court found that the diversity visa Plaintiffs "have met their burden of showing irreparable harm" by "attesting to the severe emotional, economic, educational, and personal harms that they and their families will imminently experience if … they permanently lose their opportunity to immigrate to the United States through the diversity visa program." JA746-747.

Although the district court's finding focused on the harms that these Plaintiffs would have faced if they had not *received their diversity visas* before the statutory September 30 deadline, the same considerations support a finding of irreparable harm arising from their inability to *use* the visas. Each of these Plaintiffs has sold property, foregone opportunities at home, or made other significant investments in the once-in-a-lifetime opportunity to immigrate to the United States—so in addition to causing them to miss out on that opportunity, the Proclamations are irreparably harming Plaintiffs' reasonable reliance interests. *See* JA47-52, JA122-125, JA89-91, JA115-118, JA127-129, JA141-145; *Everglades*, 427 F. Supp. 3d at 115-16 (irreparable harm from

1466, 1472-73 (8th Cir. 1994) (lost productivity constituted irreparable harm).

unrecoverable damage to reliance interests); *Doe*, 418 F. Supp. 3d at 599 (irreparable harm from diversion of resources).

Even though they have received their visas, Plaintiffs face deadlines after which they may be permanently unable to immigrate. A diversity visa is only valid for a period "not exceeding six months," 8 U.S.C. § 1201(c)(1), so Plaintiffs' visas (issued in September 2020) are valid only until March 2021. If (as expected) the President extends the Proclamations beyond their current termination date of December 31, 2020, Plaintiffs' visas could expire before they can immigrate. An injunction lifting the Proclamations' entry suspension is necessary to prevent such irreparable harm.

B. The Balance Of Equities And Public Interest Overwhelmingly Favor Immediate Injunctive Relief.

Finally, the record establishes that "the balance of the equities tips in [Plaintiffs'] favor and that an injunction is in the public interest." *Winter*, 555 U.S. at 20; *see Nken v. Holder*, 556 U.S. 418, 435 (2009) ("These factors merge when the Government is the opposing party."). Plaintiffs face irreparable injuries, and those injuries are compounded by the "indirect hardship[s] to [Plaintiffs'] friends[,] … family members," and visa beneficiaries who are unable to enter the country. *Hernandez v.*

Sessions, 872 F.3d 976, 996 (9th Cir. 2017). In contrast, there is no harm or public interest weighing against an injunction.

First, overwhelming evidence shows that the public interest that the Proclamations purport to serve—protecting U.S. workers—is not actually furthered by leaving them in place. In fact, the record establishes that the Proclamations undermine that goal, "penaliz[ing] the economic recovery." JA184; *see, e.g.*, JA167; JA81-82, 85-86. As the district court found in *NAM*, "the public interest is served by cessation of a radical change in policy that negatively affects … hundreds of thousands of American businesses of all sizes and economic sectors." 2020 WL 5847503, at *14.[22]

Second, the public has no interest in keeping the affected individuals out of the country. "[T]he public interest is seriously disserved by … family[] separation," *Pickett v. Hous. Auth. of Cook Cty.*,

[22] *Amicus* briefs filed in the district court further confirm that the Proclamations are causing serious harm to the economy and to society at large. *See, e.g.*, *Amicus* Brief of Twenty-Two States and the District of Columbia (ECF 58) at 9-15, 19-21; *Amicus* Brief of Leading Companies & Business Organizations (ECF 82) at 9-19; ECF 65-2 (Google, Spotify, and Bloomberg joining Leading Companies and Business Organizations brief); *Amicus* Brief of Twenty-Seven Local Governments (ECF 80) at 1-2; *Amicus* Brief of Human Resource Mgmt. et al. (ECF 81) at 21-25.

114 F. Supp. 3d 663, 673 (N.D. Ill. 2015), and Congress has found that admitting diversity immigrants and foreign workers is in the nation's interest. *See supra* p. 5. Moreover, "it is in the public interest to respect Congressional judgments on purely domestic issues related to immigration." *NAM*, 2020 WL 5847503, at *14.

Third, Defendants cannot claim an interest in the abstract idea of enforcing the Proclamations. Defendants "cannot suffer harm from an injunction that merely ends an unlawful practice." *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 179 (D.D.C. 2017); *see League of Women Voters*, 838 F.3d at 12 ("There is generally no public interest in the perpetuation of unlawful [government] action").

CONCLUSION

The district court's order should be reversed. This Court should enter an order enjoining enforcement of the Proclamations, or should direct the district court to do so forthwith.

Respectfully submitted,

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October 29, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 12,989 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirement of Rule 32(a)(6) because it was been prepared in a proportionately spaced typeface using Microsoft Word in Century Schoolbook 14-point type for text and footnotes.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 29, 2020, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system which will serve all counsel of record.

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