ORAL ARGUMENT SCHEDULED JANUARY 14, 2021
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-1419 (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:

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* 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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Worldwide Employee Relocation Council

Charles Kuck, Gregory Siskind, and Joanna Main Bailey

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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.

The following *amici* have appeared before this Court:

Leading Companies and Business Organizations (Adobe Inc., Alliance of Business Immigration Lawyers, Amazon.com, Inc., Apple Inc., Atlassian, Inc., Autodesk, Inc.; Bates White, LLC; Box, Inc.; Bloomberg L.P.; BSA Business Software Alliance, Inc. d/b/a BSA | The Software Alliance; Consumer Technology Association; Denver Metro Chamber of Commerce; Dropbox, Inc.; Facebook, Inc.; FWD.us Education Fund; GitHub, Inc.; Google LLC; Hewlett Packard Enterprise Company; HP

Inc.; HR Policy Association; Information Technology Industry Council; Institute of International Bankers; Intel Corp.; Internet Association; Juniper Networks, Inc.; LinkedIn Corporation; Metro Atlanta Chamber; Microsoft Corporation; Netflix, Inc.; New Imagitas, Inc.; North Texas Commission; Partnership for a New American Economy Research Fund; PayPal, Inc.; Plaid Inc.; Postmates Inc.; Reddit, Inc.; salesforce.com, inc.; SAP SE; Semiconductor Industry Association (SIA); ServiceNow, Inc.; Shutterstock, Inc.; Silicon Valley Bank; Society for Human Resource Management (SHRM); Splunk Inc.; Spotify USA Inc.; Square, Inc.; SurveyMonkey Inc.; Twitter, Inc.; Uber Technologies, Inc.; Upwork Inc.; Vail Valley Partnership; VMware, Inc.; Workday, Inc.; Xylem Inc.; and Zillow Group, Inc.)

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

Global Labor Justice-International Labor Rights Forum

Immigration Law Professors (Sabrineh Ardalan; Dave C. Baluarte; Jennifer M. Chacón; Michael J. Churgin; Marisa S. Cianciarulo; Ingrid Eagly; Stella B. Elias; Kate Evans; Jill E. Family; Denise Gilman; Lindsay M. Harris; Elizabeth Keyes; Peter Margulies; Michael A. Olivas; Maureen A. Sweeney; Philip L. Torrey; Shoba Sivaprasad Wadhia; Michael J. Wishnie; Stephen Yale-Loehr)

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.

Appellees in this Court filed a notice of cross-appeal on October 30, 2020, which was docketed in this Court as *Gomez v. Trump*, No. 20-5332. The Court severed the cross-appeal from this lead appeal on November 12, 2020. The parties filed a stipulation to dismiss the cross-appeal on December 3, 2020.

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
INA	Immigration and Nationality Act

INTRODUCTION

The Proclamations under review are an affront to the separation of powers. Without making the "find[ing]" required by 8 U.S.C. § 1182(f), the Administration has for eight months been using the global pandemic as an excuse to replace congressional immigration policy with a conflicting scheme that suits the President's agenda. And the Government's answering brief only makes things worse: It asserts not only that the President has inherent authority to rewrite the immigration laws, but also that his decision to do so is unreviewable in any court.

These extravagant contentions are wrong. The President's actions are subject to judicial review. If he does not first satisfy the express prerequisite for an invocation of statutory authority, he may not invoke that authority. Moreover, the President cannot by proclamation rewrite the U.S. Code. And if Congress were somehow understood to have tried to grant the unbounded power that the President claims, such an unconstrained delegation of fundamentally legislative authority would violate the nondelegation doctrine.

The President's actions are unlawful, and they are causing great and irremediable harm: separating families, depriving U.S. businesses of workers that are vital to their very survival, and preventing diversity-visa lottery winners from realizing their American dreams. And as twenty-two States, the District of Columbia, and forty-one leading companies detail in their *amicus* briefs, the Proclamations are also causing serious and irreparable harm to America itself. The Proclamations should be enjoined immediately.

ARGUMENT

I. THE PROCLAMATIONS ARE SUBJECT TO JUDICIAL REVIEW.

The Government's lead argument (Br. 21-24), that "principles of nonreviewability" bar Plaintiffs' claims, is waived and wrong.

First, the Government did not raise in the district court its current, sweeping theory (Br. 21, 23) that "the political branches' decisions relating to the exclusion of aliens abroad [are] not subject to judicial review," "regardless of how the Executive decides to suspend entry."[1] The

[1] The Government asserted only the narrow "doctrine of consular nonreviewability," under which visa applicants cannot "challenge consular officers' visa determinations" (ECF 94, at 27-28). The district

Government's "argument not made in the lower tribunal is deemed forfeited," *Flynn v. CIR*, 269 F.3d 1064, 1068-69 (D.C. Cir. 2001), because "the court of appeals is not a forum in which a litigant can present legal theories that it neglected to raise in a timely manner in proceedings below." *Tomasello v. Rubin*, 167 F.3d 612, 618 n.6 (D.C. Cir. 1999); *see, e.g.*, *Bowie v. Maddox*, 642 F.3d 1122, 1129-32 (D.C. Cir. 2011) (rejecting argument that appellee failed to raise in district court).[2]

Second, the Government is incorrect on the substance. Courts routinely decide the merits of challenges to executive immigration policies that do not implicate particular visa decisions. *See, e.g.*, *Hawaii III*, 138 S. Ct. at 2407; *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *Hawaii v. Trump* (*Hawaii I*), 859 F.3d 741 (9th Cir. 2017); *Hawaii v. Trump* (*Hawaii II*), 878 F.3d 662 (9th Cir. 2017); *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Homeland Sec.* (*NAM*), 2020 WL 5847503 (N.D. Cal. Oct. 1, 2020); *Vulupala v. Barr*, 438 F. Supp. 3d 93 (D.D.C. 2020); *Doe v. Trump*, 418 F. Supp. 3d 573 (D. Or. 2019); *P.K. v. Tillerson*, 302 F. Supp. 3d 1

court soundly rejected that argument because Plaintiffs' claims do not challenge any such determination. JA705-06 (collecting cases).

[2] This issue is not jurisdictional. *Trump v. Hawaii* (*Hawaii III*), 138 S. Ct. 2392, 2407 (2018).

(D.D.C. 2017). If the Government were correct, all of these cases would have been dismissed at the outset.

"Executive action under legislatively delegated authority" like the Proclamations "is *always* subject to check by the terms of the legislation … and if that authority is exceeded it is open to judicial review." *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (emphasis added); *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (approving injunction against enforcement of an executive order). The Government's cases do not refute this principle. They instead say that the courts generally may not second-guess the "policy choices" reflected in *Congress's* "immigration *legislation*." *Fiallo v. Bell*, 430 U.S. 787, 793-94 (1977) (emphasis added); *see Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (rejecting claim that a *statute* was so "unreasonabl[e]" as to violate due process). Plaintiffs are not challenging the wisdom or reasonableness of legislative "policy choices"—they are seeking to *enforce* Congressional policy reflected in the INA.

The Government also cites *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999). But those

cases hold that courts will not entertain *post hoc* challenges to immigration officers' exercise of "the *discretion* entrusted to [them] by Congress" when "exclud[ing] a *given* alien." *Knauff*, 338 U.S. at 543-44 (emphases added); *see Kleindienst*, 408 U.S. at 770; *Saavedra Bruno*, 197 F.3d at 1158 & n.2. Plaintiffs do not raise any such challenge. And this Court has held that limitations on judicial review in the immigration sphere "ha[ve] no application" where the plaintiff "do[es] not challenge a particular determination in a particular case of matters which Congress has left to executive discretion." *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985).

Nor, contrary to the Government's mischaracterization (Br. 22-23), do Plaintiffs' claims violate "separation-of-powers principles" by challenging "the Executive Branch's exercise of power clearly provided to it by Congress." Rather, Plaintiffs seek to *vindicate* the separation of powers by rebuffing Executive overreach and enforcing the limitations that Congress placed on the President's delegated power.

The Government is also wrong in asserting (Br. 22, 24) that 8 U.S.C. § 1252 and 6 U.S.C. § 236(f) somehow foreclose judicial review. Those statutes say nothing about review of entry-suspension orders, and do not

displace the federal courts' equitable authority to enjoin "violations of federal law by federal officials." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015); *accord Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-89 (1952).

Finally, the Government cites (Br. 24) two out-of-Circuit district-court orders to suggest that consular nonreviewability applies prior to a consular visa determination. But that position is contrary to this Court's holdings. *See Saavedra Bruno*, 197 F.3d at 1159 (doctrine applies only to individualized "decision" by a "consular official[]" to "issue or withhold a visa"); JA706 (district court explaining same); *Bricklayers*, 761 F.2d at 801 (similar). The Government's position also conflicts with *Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997), and with an unbroken line of district-court decisions in this Circuit. *E.g.*, *Vulupala*, 438 F. Supp. 3d at 98; *P.K.*, 302 F. Supp. 3d at 11. The Government provides no good reason to reverse course.

II. DEFENDANTS FAIL TO REHABILITATE THE UNLAWFUL PROCLAMATIONS.

A. The Proclamations Fail The Statutory Findings Prerequisite.

1. The Court should not abdicate judicial review of § 1182(f)'s sole prerequisite.

The principal question presented is one of statutory construction: What is the significance of § 1182(f)'s textual prerequisite that the President "find[]" that entry of specified foreign nationals "would be detrimental to the interests of the United States"?

Plaintiffs explained (Br. 29-33) that the plain meaning is that the President cannot invoke § 1182(f) based on opinion or guesswork or factually false assertion. He must make a rational determination based on actual facts. That is what "finds" means, that is what Congress intended when it wrote "finds" in place of "deems," and that is how Congress has employed the word "finds" in textually analogous statutes. Such a requirement "counteract[s] substantive openendedness with procedural strictness," *Zedner v. United States*, 547 U.S. 489, 508-09 (2006), ensuring that a delegee does not misuse broad authority by requiring a decision based on more than "rough justice," *United States v. Bikundi*, 926 F.3d 761, 776-77 (D.C. Cir. 2019) (citation omitted). Indeed,

this is "the only plausible interpretation" of a statute like § 1182(f). *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 514-15 (1990).

The Government does not contest this analysis; § 1182(f)'s text is unambiguous. Instead, the Government misstates Plaintiffs' position.

First, in asserting (Br. 30) that "Presidential findings of fact are not subject to judicial review," the Government misconstrues Plaintiffs' argument: The claim is not that the Proclamations' purported "findings" are *incorrect*, but that they are not "findings" *at all* under the ordinary meaning of that term—they are at best conjectures, or guesses.

To the extent that the Government argues that *any* Proclamation containing the word "find" will *ipso facto* satisfy § 1182(f), even if the purported "findings" are irrational nonsense, it is wrong. That construction conflicts with the meaning of "finds," and turns the sole prerequisite that Congress imposed in § 1182(f) into a dead letter—"contraven[ing] 'the longstanding canon … that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous.'" *U.S. ex rel. Schweizer v. Oce N.V.*, 677 F.3d 1228, 1234 (D.C. Cir. 2012) (citations omitted). Such a rule would also violate *Chadha*'s admonition that executive action "is *always* subject to check by

the terms of the legislation" and accordingly is always "open to judicial review." 462 U.S. at 953 n.16.

The Government's cases (Br. 30) do not suggest that the Proclamations are unreviewable. The statute in *Dalton v. Specter*, 511 U.S. 462 (1994), "d[id] not at all limit the President's discretion" to approve or to disapprove a Commission's recommendations regarding military base closures. *Id.* at 476. The President's exercise of such discretion was unreviewable, *id.* at 477—but the Court indicated that "claims that the President has violated a statutory mandate" remain subject to review. *Id.* at 474. Here, Congress *rejected* the boundless discretion that the President possessed in *Dalton*—it *mandated* that the President must make particular "find[ings]" before invoking § 1182(f). *See* Plaintiffs Br. 29-30. The President's compliance with that mandate is reviewable.

The decision in *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940), is also inapposite. It dealt with a statute under which, after an investigation, the Tariff Commission recommended (and the President approved) a tariff increase to equalize the costs of producing Japanese clams vis-à-vis American clams. *Id.* at 376-77. A clam importer

challenged the method (namely, the currency exchange rate) by which the Commission and the President had found that a tariff increase was necessary. *Id.* at 377. The Supreme Court held that this challenge went to the Executive's "discretion" regarding how to equalize costs, which was not a "question of law" subject to review. *Id.* at 380.

Bush is irrelevant, because the clam importer could not argue that the Executive had made *no finding at all*. Unlike the President in this case, the Tariff Commission did not *guess* about the need for a rate increase. Nor did the Commission do the *opposite* of what the evidence indicated—it did not look at data showing that equalizing costs necessitated a tariff increase, and then proceed to *lower* the rate. Instead, the Commission undertook a months-long investigation (under the prerequisite "procedure prescribed by Congress") before making a reasoned recommendation that comported with the evidence. *Id.* at 376-77, 380. The rule in *Bush* is inapplicable here: Plaintiffs' claim is that the President did *not* satisfy § 1182(f)'s prerequisite.

Second, the Government misconstrues Plaintiffs' claim in suggesting (Br. 30) that the challenge goes to the Proclamations' "effectiveness and wisdom" (quoting *Hawaii III*, 138 S. Ct. at 2421).

Review of the antecedent question *whether* the President made "find[ings]" within § 1182(f)'s meaning does not entail second-guessing the President's response to facts properly found. (The President did not properly find any facts in this case.)

Hawaii III makes this distinction clear. The quotation regarding "effectiveness and wisdom" is from the Court's discussion of the plaintiffs' *constitutional* attack on the proclamation in that case. The Court reached that claim only *after* deciding the merits of the plaintiffs' challenge to the President's compliance with the "find[ings]" prerequisite (138 S. Ct. at 2408-09). Similarly in *Sale* (cited in Gov't Br. 26, 30), the Court considered and decided whether the proclamation violated the INA or the United States' treaty obligations. *See generally* 509 U.S. at 170-87. Plaintiffs here likewise seek review of whether the Proclamations fail § 1182(f)'s sole prerequisite.

Third, the Government misrepresents Plaintiffs' position in asserting (Br. 34) that they "urg[e] a 'searching inquiry' … into the Proclamations' validity." Plaintiffs explained (Br. 37-38) that judicial review can and does exist *without* being "searching." No "searching"

review is necessary to invalidate the Proclamations—their putative "findings" do not withstand even brief contact with economic reality.

In this regard, the Government is wrong to suggest (*e.g.*, Br. 26) that the extraordinary deference afforded to the President in *Hawaii III* is applicable here. The proclamation in that case addressed national security (terrorism) and foreign relations. *See* 138 S. Ct. at 2403-06. As Plaintiffs explained (Br. 27-28, 35-36), *Hawaii III* made clear that it is only "'*in the context of international affairs and national security*'" that 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 (emphasis added; quoting *Holder v. Humanitarian Law Project,* 561 U.S. 1, 35 (2010)); *see id.* at 2422 ("the Executive's evaluation of the underlying facts is entitled" to "*particularly*" great weight "in the context of litigation involving sensitive and weighty interests of national security and foreign affairs") (emphasis added; citation omitted). These repeated invocations of "international affairs and national security" imply that in *other* contexts, courts need not accept purported "find[ings]" if the President cannot link the puzzle pieces. And

the Government does not identify any way in which the Proclamations in *this* case affect national security or foreign affairs.

The Government's assertion that "[t]here is no sound legal basis" for the foreign/domestic distinction (Br. 31) disregards the Supreme Court's repeated reference to foreign affairs in *Hawaii III*. To be sure, the distinction is not in § 1182(f)'s text, but the same can be said of the entire concept of deference; it is a judicial gloss on the statute. *See* Plaintiffs Br. 35-36. Both the existence and the *degree* of deference owed in a given setting are subject to judicial control and refinement—just as is frequently true in other statutory contexts. *See, e.g.*, *Roberts v. United States*, 741 F.3d 152, 158 (D.C. Cir. 2014) (applying "unusually deferential" version of "arbitrary or capricious" review).

This Court should decline the Government's invitation (Br. 32) to disagree with the post-*Hawaii III* decision in *Doe v. Trump*, 957 F.3d 1050 (9th Cir. 2020), which held that when the President acts on "domestic economic matters," the "national security and foreign affairs justifications" for extreme judicial deference "disappear." *Id.* at 1067; *see NAM*, 2020 WL 5847503, at *15. The Government asserts that "*Doe* [i]s

contrary to the Supreme Court's holding in *Hawaii*"—but *Doe* relied on *Hawaii III*'s invocation of the same distinction on which Plaintiffs rely.

This Court should likewise reject the Government's contention (Br. 32) that "the entry of foreign nationals is *always* a foreign-affairs matter." The Ninth Circuit has rightly held to the contrary. *Doe*, 957 F.3d at 1066-67; *see NAM*, 2020 WL 5847503, at *7-9. And the answering brief offers no serious rebuttal of Plaintiffs' demonstration (Br. 38-40) that the Government's position is overbroad and incorrect. The Government cites *Knauff* and *Harisiades*, but it does not refute Plaintiffs' explanation (*id.*) that those cases *support* the distinction between actions that affect foreign affairs or national security and those that do not.

Finally, the President's "broad authority" under § 1182(f) (Gov't Br. 32-33) does not justify abandoning review. To the contrary, the very breadth of that authority necessitates judicial enforcement of the "procedural strictness" (*Zedner*, 547 U.S. at 508-09) that Congress imposed when it required the President "to 'base his [decision] on some fact,' not on mere 'opinion' or 'guesses.'" *Hawaii II*, 878 F.3d at 692-93 (quoting 87 Cong. Rec. 5051 (1941)).

2. *Defendants fail to identify "find[ings]" to support the Proclamations.*

Plaintiffs explained (Br. 41-49) that the Proclamations flunk the "sole prerequisite set forth in § 1182(f)." *Hawaii III*, 138 S. Ct. at 2408; *see NAM*, 2020 WL 5847503, at *13. Defendants' responses are unpersuasive.

a. *The Proclamations contain no "find[ing]" for many affected classes.*

Defendants misconstrue (Br. 35-36) Plaintiffs' overbreadth argument. They cite *Hawaii III*, but the referenced passage addressed an argument that the proclamation there had not specified a "class" of affected foreign nationals. 138 S. Ct. at 2010. Plaintiffs' point is different: To satisfy the distinct "find[ings]" prerequisite, a proclamation must support the President's entry suspension. *See Hawaii I*, 859 F.3d at 770 ("find[ings]" prerequisite "requires that the President's findings *support* the conclusion" that admission of excluded noncitizens "would be harmful to the national interest") (emphasis added); *Doe*, 957 F.3d at 1067 (similar); *NAM,* 2020 WL 5847503, at *11-13. If the "finding" does not support the entry suspension, the President cannot have *found* "that the

entry of [the affected] class of aliens into the United States would be detrimental to [U.S.] interests," as § 1182(f) requires.[3]

For example, even if the Proclamations' false premise were true, such that *working-age* immigrants take job opportunities away from U.S. workers, there is no dispute that *other* classes of immigrants will *not* have that effect—minor children, students, and retirees will not "displace[]" U.S. workers, and will not cause the detriment identified in the Proclamations (*see* Plaintiffs Br. 43; *contra* JA243). The President therefore cannot have *found* that entry of *all* immigrants "would be detrimental to U.S. interests."

Similarly, Proclamation 10052 prohibits admission of H-1B, H-2B, J, and L workers—even though the very design of those programs means that few or none of those workers actually compete for jobs with U.S. workers. Plaintiffs Br. 43-44. As *amici* explain, "the non-immigrant

[3] The plaintiffs in *Hawaii III* did not challenge the proclamation in that case on this ground. That proclamation was premised on a finding that specified foreign governments did not provide sufficient information to allow the U.S. Government to vet their nationals. 138 S. Ct. at 2408-09. Because that finding concerned the targeted governments, rather than a feature of the affected individuals, there was no argument that the finding went only to a part of the class. *Hawaii III* thus does not affect Plaintiffs' argument here.

workers who are subject to the Proclamations' bans generally do not work in professions that are most vulnerable to COVID-19-related job losses." States Br. 25-27. The President cannot have "found" that entry of *all* nonimmigrant workers would be detrimental to U.S. interests based on considerations that apply at most to a sliver of the excluded classes.[4]

b. The Proclamations' "find[ings]" are unsupported and false.

The Government does not defend the Proclamations' critical "underlying premise"—the notion "that the U.S. jobs market is a zero-sum game in which foreign workers displace U.S. workers upon arrival" (JA716). There is no rebuttal to Plaintiffs' showing (Br. 45-49) that this idea "completely disregards … economic reality." *NAM*, 2020 WL 5847503, at *13.

The Government asserts (Br. 34) that "the Proclamations rest on the ***understanding*** that … the suspension of immigrants and foreign workers of certain categories will ameliorate U.S. unemployment in some

[4] The Government mischaracterizes the issue when it states (Br. 36) that "the exclusion of intending immigrants and foreign workers may, as a practical matter, result in those aliens being unable to bring their children into the country with them." This case is not primarily about derivative children excluded as a consequence of their parents' exclusion.

measure" (emphasis added)—but that gives away the game. An "understanding" is not the same as a "find[ing]," particularly where (as here) the "understanding" is contrary to all evidence. Such an "understanding" is no more than a conjecture or an opinion or a guess—precisely what Congress *removed* from the permissible bases for entry suspension when it chose the word "finds." *Hawaii II*, 878 F.3d at 692-93.

The Government contends (Br. 35) that Plaintiffs' "'undisputed' economic observations are inapposite to the unprecedented conditions of the global pandemic." But the scare-quotes around "undisputed" are misplaced. It ***is*** undisputed in this litigation—there is no contrary record evidence—that immigrants and affected nonimmigrant workers do ***not*** threaten U.S. workers' job opportunities, but have a positive "one-for-one" impact on employment: they create new jobs "without 'crowding out' any native-born workers." JA176-177; *see* JA167; States Br. 27-31; Leading Companies Br. 21-23.

This is so notwithstanding present economic conditions. As the Cato Institute's Alex Nowrasteh attests, the Proclamations are "counterproductive to their stated goal of protecting United States workers and aiding the post-COVID economic recovery" (JA157)—both

because "immigrants and foreign-born workers *create* jobs" by "participat[ing] in the economy as consumers of goods and services" (JA166 (emphasis added)), and because "[p]reventing ... employers from filling open positions … delays their ability to expand production and create more jobs that would aid the post-COVID recovery" (JA167). Professor Giovanni Peri adds that immigrants have "higher internal mobility" than U.S. natives, enabling them to move from high-unemployment areas to lower-unemployment areas—helping to rebalance the labor market. JA181; *see* JA184. And Professor Chad Sparber explains that in the "primary comparable example," President Hoover's expulsion of Mexican workers during the Great Depression "reduc[ed] the employment of native incumbent workers and … downgrad[ed] … their skills and compensation." JA229-230; *see* JA162 (Nowrasteh; similar). As Professor Sparber concludes, it should be "expect[ed] [that] the same dynamic [will] play out in the present circumstances if the proclamations … remain in place." JA230.

If there were a single economist in the entire Executive Branch with a contrary analysis, the Government could have submitted a declaration,

and this would be a different case. But there is no such evidence in the record, nor has the Government tried to excuse its absence.

The best the Government can do is to gesture (Br. 35) toward "the INA's work restrictions"—but the Government ignores Congress's recognition that noncitizens are "crucial to maintaining American economic competitiveness *and to protect American jobs*." *E.g.*, 144 Cong. Rec. S-10877-01 (1998) (emphasis added). And assuming that the INA's *existing* work restrictions are justified (an issue not presented here), that would not support the President's purported "find[ings]" that *additional* restrictions are necessary to prevent a detriment to U.S. interests.

***

The Proclamations are not supported by the "find[ings]" that § 1182(f) requires. They are "insufficient as a matter of law," and the Proclamations therefore are invalid. *NAM*, 2020 WL 5847503, at *13.

B. The Proclamations Unlawfully Rewrite The INA.

Plaintiffs explained (Br. 49-54) that a § 1182(f) proclamation is invalid if it "overrides, contravenes, or is otherwise incompatible with any provision of the INA," *Doe*, 418 F. Supp. 3d at 594 (citing *Hawaii III*, 138 S. Ct. at 2411)—the President cannot invoke § 1182(f) where "Congress

has already spoken … on the issue," *id.* at 597, or to "revers[e] course on legislatively enacted policy," *NAM*, 2020 WL 5847503, at *11 (citations omitted). The Proclamations violate this rule, because they "rewrite[]" Congress's regulation of the impact of immigrants and nonimmigrant workers on the labor market. *Id.* at *10; *see Doe*, 957 F.3d at 1064; *Doe*, 418 F. Supp. 3d at 595-597.

The Government argues (Br. 36) that *Hawaii III* forecloses this claim, but ignores Plaintiffs' explanation (Br. 53) of why this is not so: The restrictions in *Hawaii III* did not *override* any part of the INA, but "support[ed]" and "promote[d] the effectiveness of" congressional policy. 138 S. Ct. at 2404-05, 2411-12. The Proclamations here have the opposite effect: they "do[] not supplement [Congress's] legislative judgment but rather explicitly supplant[]" the INA's "finely reticulated statutory scheme," impermissibly putting the President's preferred policies in place of those enacted by Congress. *NAM*, 2020 WL 5847503, at *10-11.

The Government falls back to an assertion (Br. 37) that the Proclamations do not *permanently* "abolish" any visa classifications. But even if they may eventually expire, the Proclamations have impermissibly "overrid[den]" the INA's labor-regulation scheme for more

than half a year. *Hawaii III*, 138 S. Ct. at 2411; *see NAM*, 2020 WL 5847503, at *11. The Government supplies neither logic nor authority for the proposition that the President can disregard the separation of powers to rewrite the INA so long as he only does so temporarily. To the contrary, the President has no "power to switch the Constitution on or off at will." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

In noting that "certain categories of immigrants and nonimmigrants are eligible for admission if they can satisfy an exception set forth in the Proclamation[s]" (Br. 37), the Government disregards Plaintiffs' explanation (Br. 53-54) that the exceptions illustrate the problem. The Administration has not just eliminated the affected visa categories; it has replaced the INA's admission scheme with a new one on which Congress had no input. The State Department's guidance regarding the Proclamations' "national interest" exceptions announces complicated new criteria for nonimmigrant visas (JA411-16), and directs that some 20-year-old family-based immigrants should be admitted (JA416) even though most other prospective immigrants cannot enter the country. These are acts of legislation, not execution of the laws.

Finally, the Government suggests (Br. 37) that a § 1182(f) proclamation can *never* unlawfully "'eviscerate' the INA," because the statute permits the President to "suspend the entry of *all aliens* into the United States." But the Government ignores that such a proclamation would have to be supported by a "find[ing]" broad enough to justify such an extraordinary step. And multiple cases hold precisely that a proclamation is unlawful if it overrides a part of the INA. *See Doe*, 957 F.3d at 1064; *NAM*, 2020 WL 5847503, at *10-11; *Doe*, 418 F. Supp. 3d at 595-597; *accord Hawaii III*, 138 S. Ct. at 2411. Those decisions are correct, and are fully applicable here.

C. The Proclamations Are Invalid Under The Nondelegation Doctrine.

If the President's invocation of § 1182(f) comports with the INA, then the statute violates the nondelegation doctrine. The answering brief does not defend the district court's contrary reasoning—it identifies no "intelligible principle" to guide the President's exercise of authority. As Plaintiffs demonstrated (Br. 54-59), no such principle exists.

Instead, the Government reasserts (Br. 38-39) that the entry of foreign nationals is *always* a foreign affairs matter subject to unilateral Executive control, and that the nondelegation doctrine is categorically

inapplicable. But as discussed (*supra* p. 14), immigration is *not* always a foreign-affairs issue. Here, the Proclamations address a purely domestic issue.

The Ninth Circuit has expressly "reject[ed]" the Government's position, *Doe*, 957 F.3d at 1067, and has held that "the President lacks independent constitutional authority to issue [entry-suspension] Proclamation[s], as control over the entry of aliens is a power within the exclusive province of Congress." *Hawaii II*, 878 F.3d at 697. As the district court in *Doe* explained, "the text of Article I and more than two centuries of legislative practice and judicial precedent make clear" that "the constitution vests Congress, not the President, with the power to set immigration policy." 418 F. Supp. 3d at 592. "If the fact that immigrants come from other countries inherently made their admission foreign relations subject to the President's Article II power, then all of this law would be superfluous." *Id.* at 592-93; *see NAM*, 2020 WL 5847503, at *7.

Indeed, § 1182(f) itself would be superfluous under the Government's view (Br. 38) that "the President has the inherent executive authority to exclude foreign nationals." The Supreme Court's careful analysis of § 1182(f)'s limits on the proclamation power in *Hawaii*

III would also have been unnecessary. But the Government's position garnered only a single vote. 138 S. Ct. at 2424 (Thomas, J. concurring).

The Government's position rests on a misreading of its cases. Citing *Knauff*, 338 U.S. at 542, the Government asserts (Br. 39) that § 1182(f)'s predecessor posed "no question of inappropriate delegation of legislative power," based on the notion that "[t]he exclusion of aliens … is inherent in the executive power to control the foreign affairs of the nation." But *Knauff* is not so broad: as Plaintiffs explained (Br. 38-39), the statute at issue was expressly tied to World War II, so the Court had no occasion to address Executive action to address domestic concerns.

Just as important, the Supreme Court has repeatedly rejected the Government's expansive view of Executive power. Both before and after *Knauff*, the Court has made clear that "[t]he power to exclude or to expel aliens … is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established." *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *see Chadha*, 462 U.S. at 940 ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question."); *Fiallo*, 430 U.S. at 792 ("over no conceivable subject is the legislative power of Congress

more complete than it is over the admission of aliens"); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("[T]hat the formation of [immigration] policies 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."). The Government's assertion (Br. 38 n.6) that the Supreme Court "has recognized many times" "the Executive Branch's inherent authority and discretion to exclude aliens" is supported only by citations to *Knauff*'s *dicta* and to Justice Thomas's solo concurrence in *Hawaii III*, and it flies in the face of this contrary precedent.

Because the President lacks inherent authority, a congressional delegation must abide by the usual rules of legislation—including the requirement of "an intelligible principle to guide the delegee's use of discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality). The "intelligible principle" here is that the President may suspend entry only if he acts consistent with congressional policy—including the requirement to rationally "find[]" a detriment. *See* Plaintiffs Br. 55-56. Upon making an appropriate "find[ing]," the President may adopt entry suspensions that *supplement* existing restrictions, and may impose new limitations where Congress has not

legislated—but he may not countermand congressional determinations. This is the kind of contextual statutory interpretation that the Supreme Court has repeatedly espoused to uphold broad delegations (*see* Plaintiffs Br. 57). Plaintiffs urge this Court to acknowledge and to enforce these limitations on § 1182(f) (*see id.* at 58-59). But if the Court finds itself unable to do so, the only alternative would be to invalidate the Proclamations for want of valid authorization. *See NAM*, 2020 WL 5847503, at *8.

Even if the President did have expansive inherent authority over immigration (he does not), any such "power is at its lowest ebb" where the President undertakes "measures incompatible with the expressed or implied will of Congress." *Youngstown*, 343 U.S. at 635-638 (Jackson, J., concurring). The Government cites (Br. 38) *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936), to suggest that this rule is inapplicable here, but *Youngstown* explains that this is wrong: *Curtiss-Wright* "intimated that the President might act in external affairs *without* congressional authority, but not that he might act *contrary* to an Act of Congress." 343 U.S. at 635 n.2 (Jackson, J., concurring) (emphases added). And "whether the realm is foreign or domestic, it is still the

Legislative Branch, not the Executive Branch, that makes the law." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 21 (2015). As discussed (Point I.B, *supra*) the Proclamations here are contrary to Congress's determinations.

III. The Proclamations Should Be Enjoined Immediately.

Plaintiffs are likely to succeed on the merits of at least one of their claims. And Plaintiffs have established that the remaining factors favor relief. An immediate injunction, without substantive remand, is the appropriate disposition. *See League of Women Voters v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016); *Pursuing America's Greatness v. F.E.C.*, 831 F.3d 500, 512 (D.C. Cir. 2016); Plaintiffs Br. 59-67.

This would be so even if the Court were less than certain about Plaintiffs' prospects for success on the merits, because Plaintiffs' showings on the irreparable harm and public-interest factors are so "unusually strong" that they "do[] not necessarily have to make as strong a showing" on the other factors. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009).

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

The enormous harms that Plaintiffs continue to suffer on account of the Proclamations are more than sufficient to necessitate an injunction. The evidence establishing those harms is uncontested and overwhelming: the family-based visa Plaintiffs are separated from their parents, children, and spouses (Plaintiffs Br. 61-62); the employment-based visa Plaintiffs are suffering irreparable reputational and financial injuries that may force them out of business (*id.* at 62-63); and the diversity-visa Plaintiffs are being deprived of their once-in-a-lifetime chance to immigrate (*id.* at 64-65). The Government's suggestion that the Court can affirm without even considering these harms, coupled with its baseless claims that they are somehow insufficient, must be rejected.

First, the Government points out (Br. 40-41) that Plaintiffs' "injuries all stem from the denial of entry into the United States that is a result of [the] Proclamations." But Plaintiffs' claims squarely challenge the Proclamations' denial of entry. *See* JA707-08. An order enjoining the Proclamations would remedy Plaintiffs' ongoing harms from Defendants' denial of entry.

Second, the Government asserts (Br. 41) that the Proclamations' exceptions "undermine[] Plaintiffs' argument that they will suffer an immediate irreparable harm" (citation omitted). But the Government does not suggest that any of the Plaintiffs or their beneficiaries are eligible for an exception; in fact, they have seen their exception requests refused. *See, e.g.*, JA50-51, JA89-90, JA109-10, JA122, JA128-29, JA144, JA192-93, JA218-19. Inapplicable exceptions "do[] not relieve [Plaintiffs'] irreparable injur[ies]." *NAM*, 2020 WL 5847503 at *14.

The Government's assertion (Br. 41-42) that Plaintiffs' injuries are "unrelated to the purpose of the visa programs they fall under" is immaterial. The injuries here "stem from [Defendants'] denial of [Plaintiffs'] entry into the United States" (Gov't Br. 40), which is "the *conduct* asserted in the complaint," *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994) (emphasis added).

Third, contrary to the Government's intimation (Br. 42-43), Plaintiffs' financial harms are not "ultimately to be recovered," *Sampson v. Murray*, 415 U.S. 61, 90 (1974), because "sovereign immunity will bar recovery." *Everglades Harvesting & Hauling, Inc. v. Scalia*, 427 F. Supp. 3d 101, 115 (D.D.C. 2019).

The Government asserts (Br. 42) that Plaintiffs "have nowhere demonstrated that the Proclamations threaten their existence," but at least ASSE, EurAuPair, and Superior Scape are facing imminent closure of their businesses if their sponsored nonimmigrant workers are unable to enter the country. *See* JA70-72, JA75-76, JA147-52, JA991; Plaintiffs Br. 62-63.

While the Government cites (Br. 42) the State Department's "temporarily suspen[sion of] routine visa services" in March, it has not shown that the suspension would perpetuate Plaintiffs' injuries *in the future*. *See Alaska Dept. of Env't Conservation v. EPA*, 540 U.S. 461, 494 n.17 (2004) (burden of production falls on party with "peculiar means of knowledge"). A "phased resumption of routine visa services" began in July,[5] and Defendants do not claim that *none* of the subject visas would issue even with an injunction.[6]

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[5] U.S. Dep't of State, Phased Resumption of Routine Visa Services (updated Nov. 12, 2020), https://travel.state.gov/content/travel/en/News/visas-news/phased-resumption-routine-visa-services.html.

[6] Each of the remaining nonimmigrant visa Plaintiffs is a member of the plaintiff organizations in *NAM*. In principle, the injunction in *NAM* could provide these Plaintiffs with full relief from Proclamation 10052. But to date, none of the individually sponsored employees of the employer Plaintiffs has received a visa or been allowed to enter the country.

Fourth, it does not matter that "a foreign national does not have a right to live in the country" (Gov't Br. 43). Plaintiffs' claim is that *the Administration has exceeded its authority* by barring entry of foreign nationals who otherwise would likely qualify for admission. Federal courts can enjoin such unlawful action even if it violates no specific right. *See Youngstown*. 343 U.S. at 587; *Dalton*, 511 U.S. at 473.

Finally, contrary to the Government's suggestion (Br. 43-44) that an injunction would not remedy Plaintiffs' injuries, the district court correctly ruled that the State Department's policy of refusing to issue visas is "not in accordance with law" (JA730-36). The Government has abandoned its appeal of that ruling. Once the Proclamations' entry suspensions are enjoined, the State Department will resume processing visas—enabling Plaintiffs and their beneficiaries to enter the country.

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

The Government identifies no public interest or equitable consideration that outweighs the irreparable harms that flow from the Proclamations.

First, the Government misplaces reliance (Br. 44) on the district court's statement that an injunction requiring adjudication of visas for

"people who have no immediate prospect for entering the country could create substantial havoc and confusion" (JA749-50). Relief from the Proclamations will dispel the district court's concern.

Second, the Government contends (Br. 45) that "Supreme Court precedent" bars any "challenge to the adequacy of the Proclamations' factual findings"—but as shown (*supra* pp. 9-10), this argument relies on cases that say no such thing. And when the President's purported "findings" are challenged, they collapse. *See* Plaintiffs Br. 43-49.

The Government's contention (Br. 47) that an injunction would "threaten the ability of … American workers to secure employment" is false; its only "evidence" is Presidential *ipse dixit* that "completely disregards … economic reality." *NAM*, 2020 WL 5847503, at *13. The uncontested record evidence shows that an injunction would speed the recovery and *benefit* U.S. workers. *See supra* pp. 18-19; Plaintiffs Br. 66. *Amici* 22 States and the District of Columbia have made clear (Br. 14-30) that "the Proclamations will undermine [their] ability to forge a robust economic recovery from the damage inflicted by the COVID-19 pandemic." And as *amici* 41 Leading Companies explain, preventing U.S. companies from bringing in foreign talent, "for any amount of time[,]

irreparably harms American workers, businesses, and the economy" by causing employers to make investments and hire workers abroad—decisions from which "there is often no turning back." Br. 14, 23; *see id.* at 15-21.

Third, the Government suggests (Br. 45-46) that an injunction would "run[] counter to the political branches' control of immigration policy." That is inaccurate: the President's role is to execute the statutes through which Congress has exercised its control of immigration policy, and Plaintiffs are seeking to *vindicate* Congress's authority. It is the President who is seeking to undermine Congress, by asserting that the INA does not constrain his exercise of power.

An injunction thus would not allow any "identified harms to endure" (*contra* Gov't Br. 47), but would remedy the injuries that Defendants are inflicting on Plaintiffs—and, indeed, on the entire United States.

CONCLUSION

The district court's order should be reversed. This Court should enjoin the Proclamations, or should direct the district court to do so.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,483 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 has 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 December 11, 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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