No. 19-36020

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, *et al.*,

Plaintiffs-Appellees,

v.

DONALD TRUMP, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon
No. 3:19-cv-01743-SI
Hon. Michael H. Simon

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

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GROUNDS FOR REHEARING *EN BANC*

This case warrants rehearing *en banc* because the majority opinion conflicts with a binding published order of a prior panel, there is clear disagreement among the judges of this Court on the issues it presents, and it involves questions of exceptional and national importance.

1. There is a direct and irreconcilable conflict between the panel's published opinion on the merits, referred to herein as "*Doe III*" and reproduced in the Appendix (cited as "A1-53"), and the published and precedential order issued by the stay panel, *Doe #1 v. Trump*, 957 F.3d 1050 (9th Cir. 2020) ("*Doe II*"). *Doe II* held Presidential Proclamation No. 9945 (the "Proclamation") to be an invalid exercise of executive power because it conflicts with the Violence Against Women Act ("VAWA"), Affordable Care Act ("ACA"), and Immigration & Naturalization Act ("INA"), and therefore declined to stay the district court's preliminary injunction. *Doe III* "re-examin[ed] the merits of the issues afresh," A14, found the Proclamation to be within the scope of the President's power, and therefore vacated the preliminary injunction.

2. To date, there is an evenly split disagreement between the circuit's judges on these issues. The *Doe II* majority (Chief Judge Thomas and Judge Berzon) and the *Doe III* dissenter (Judge Tashima) agree that the President lacks power to impose the Proclamation, in contravention of federal statute. The *Doe III*

majority (Judges Collins and Bybee) and *Doe II* dissenter (Judge Bress) concluded that the President's power does encompass the Proclamation. Both *Doe II* and *Doe III* are published decisions, subject to citation as circuit precedent. *See Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015); General Order 6.3(g)(3)(ii); Ninth Circuit Rules 36-1, 36-2, 36-5. Only the *en banc* Court can resolve these irreconcilable disagreements.

3. These issues are of pressing, national importance. The case deals with the immigration framework which occupies special nationwide importance. *Cf. E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 857 (9th Cir. 2020). That is especially true here because this case deals with the scope of INA § 212(f) (codified at 8 U.S.C. § 1182(f)), which grants the President the authority to suspend the entry of a class or classes of noncitizens under certain circumstances. There are serious questions about the scope of the President's delegated authority under § 212(f) and the circumstances under which presidential action exceeds that authority, *see, e.g., Trump v. Hawaii*, 138 S. Ct. 2392 (2018), particularly when (as here) the action contradicts and overrides existing statutes.

BACKGROUND

The INA establishes a comprehensive system of immigration and naturalization. To obtain a visa, applicants must demonstrate their eligibility for admission. *See* 8 U.S.C. §§ 1182(a), 1361(a). Congress crafted specific "grounds

of inadmissibility" in § 212. *See* 8 U.S.C. § 1182; *Arizona v. United States*, 567 U.S. 387, 395 (2012). In § 212(f), Congress delegated authority to the President to suspend "the entry of all aliens or any class of aliens as immigrants or nonimmigrants," if she "finds that the entry of [those aliens or classes of aliens] into the United States would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). The Supreme Court has interpreted § 212(f) broadly, but has also assumed a crucial limitation—it cannot be used to "override" other statutes. *Hawaii*, 138 S. Ct. at 2411.

The Proclamation, issued on October 4, 2019 (effective November 3, 2019), bars immigrants who satisfy the INA's statutory visa requirements but cannot prove they will be covered by "approved" health insurance within 30 days of entering the United States, or have the "financial resources" to pay for "reasonably foreseeable" medical costs. SER 281-82. Its stated purpose is to protect the country's "healthcare system" and "taxpayers" from the burden of "uncompensated care costs," and to alleviate the strain of those costs on "Federal and State government budgets." SER 281.

Plaintiffs, on behalf of themselves and all others similarly situated, filed this lawsuit on October 30, 2019, alleging that the Proclamation is *ultra vires* and exceeds the President's power, in violation of separation of powers principles, the Due Process Clause, the Equal Protection Clause, and the Administrative

Procedure Act. ER 363-69. The district court on November 26, 2019 issued an order preliminarily "enjoining Defendants from taking any action to implement or enforce" the Proclamation. ER 48.

Defendants filed a notice of appeal to this Court on December 4, 2019, as well as an "Emergency Motion for an Administrative Stay" and an "Urgent Motion for a Stay Pending Appeal" arguing that the district court had incorrectly assessed the merits of Plaintiffs' claims. (Dkt. 2.) After briefing, the motions panel issued a published order that denied an administrative stay. *Doe #1 v. Trump*, 944 F.3d 1222 (9th Cir. 2019) ("*Doe I*"). Judge Bress dissented. *Id.* at 1224 (Bress, J., dissenting).

On January 9, 2020, the motions panel heard argument on Appellants' motion for administrative stay. (Dkt. 28.) The panel denied the motion by published order on May 4, 2020. *Doe II*, 957 F.3d at 1056. Chief Judge Thomas, writing for the majority, concluded "the government has made no showing at all" that the Proclamation was consistent with statutory limitations on the President's power. *Id.* at 1062. "Congress has enacted the VAWA amendments specifically to enable the subject immigrants to qualify for admission and visas," and "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Id. Doe II* also concluded that the Proclamation overrode the ACA because "[d]espite Congress's clear intent to extend these tax credits to legal

immigrants, the Proclamation explicitly excludes such 'subsidized plans' from the list of approved health insurance plans." *Id.* at 1063.

As for Plaintiffs' arguments that the Proclamation violated the INA itself, *Doe II* stated that it would "leave a complete analysis of these claims to the merits panel," but explicitly *did* address "several of these claims ... in light of the serious questions on the merits Plaintiffs raise." *Id.* at 1064. *Doe II* emphasized that the public-charge provision "requires that all of the specified factors" (which do not include health insurance) "should be considered in determining whether an applicant should be deemed a financial burden and consequently inadmissible." *Id.* Despite this mandate, "[t]he Proclamation eviscerates the statutory scheme by making the acquisition of designated forms of health insurance the sole consideration of whether an applicant should be excluded from consideration for a family visa," and so "[a]ny argument contending that the Proclamation complements the public charge statutory scheme is therefore incorrect." *Id.*

After oral argument, the merits panel issued an opinion on December 31, 2020 reversing the preliminary injunction. *See* A1-2. *Doe III* tacitly acknowledged that *Doe II* had rejected the government's identical arguments, but stated that the majority "d[id] not view [*Doe II*] as precluding us from re-examining the merits of the issues afresh." A14. After "hold[ing] that the Proclamation comports with the textual limitations of § 212(f)," the majority concluded—directly contrary to the

stay panel—that the Proclamation also did not override any statute, and was thus valid. A26–31.

First, while recognizing that Congress explicitly extended tax credits to immigrants to make health insurance more affordable, *Doe III* nevertheless concluded the Proclamation did not "'expressly override' this feature of the ACA, because the two provisions operate in different spheres." A29 (citation omitted). Second, though conceding there "is undoubtedly some overlap between the INA's exclusion of those 'likely ... to become a public charge,' and the Proclamation's exclusion of those who 'will financially burden the United States healthcare system,'" *Doe III* concluded there was no conflict because the Proclamation "merely creates an additional, separate ground for inadmissibility." A32–33. Third, the majority similarly concluded that the Proclamation did not override the VAWA amendments either, "because an alien who satisfies VAWA's eligibility requirements is *still* exempt from the INA's public charge" ground for inadmissibility, even though inadmissible under the Proclamation. A34–35.

Finally, *Doe III* rejected the district court's conclusion that § 212(f) would violate the nondelegation doctrine if construed to allow the President to shape domestic policy through entry restrictions: "[I]t makes no difference whether the additional entry restrictions are imposed under § 212(f) based on assertedly domestic policy concerns," because "all additional restrictions under § 212(f) ... are

ultimately based on" what could be characterized as domestic policy concerns. A36.

Judge Tashima dissented. A39. First, Judge Tashima rejected the conclusion that the Proclamation did not conflict with the ACA, because Plaintiffs had shown "that the Proclamation is inconsistent with, and antagonistic to, any reasonable understanding of congressional intent underlying the ACA." A46. Furthermore, Judge Tashima agreed with *Doe II* "that the Proclamation overrides the public charge rule and the [VAWA] amendments to that rule." A46. The Proclamation, he reasoned, would allow the President "to effectively displace Congress's own judgment about when aliens should be denied admission for financial reasons." A48. Instead, quoting *Doe II*, he opined that "'[t]he Proclamation eviscerates the statutory scheme by making the acquisition of designated forms of health insurance the sole consideration'" of financial eligibility—overriding the statutory multifactor scheme. A48.

Judge Tashima also expressed "grave doubts about whether the Proclamation falls within the President's authority under § 212(f)," because it "'likely would negatively affect approximately 60% of all immigrant visa applicants.'" A50 (quoting *Doe II*, 957 F.3d at 1060). "I am not aware," he observed, "of any instance in which a President has invoked his authority under § 212 to work such a profound transformation of immigration law." A51.

Furthermore, Judge Tashima agreed with *Doe II* that it was relevant that the Proclamation "does not address 'national security risks'"—critical in *Hawaii*—but rather "'deals with a purely domestic economic problem: uncompensated healthcare costs in the United States.'" A51–52. On this basis, Judge Tashima concluded the Proclamation's "sweeping, legislative nature" exceeded the President's § 212(f) authority. A50.

ARGUMENT

I. THE PANEL DECISION CONFLICTS WITH THE MOTIONS PANEL'S PUBLISHED ORDER.

This case presents a square disagreement among this Circuit's judges as to the scope of presidential authority to exclude immigrants under § 212(f). The motions panel majority, along with Judge Tashima, held that § 212(f) does not authorize unilaterally excluding immigrants so as to override Congress's legislative judgment with respect to domestic policy. The merits panel majority, along with Judge Bress, concluded that the President's § 212(f) power is far more sweeping—and may be used as the President's own solution to "domestic policy concerns." A36.

This disagreement produces significant uncertainty as to Ninth Circuit law on the scope of § 212(f), as the merits opinion and stay order create inconsistent circuit precedent. *See Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015) ("a motions panel's published opinion binds future panels the same as does a merits

panel's published opinion"); 9th Cir. R. 36-5 (order designated for publication "may be used for any purpose for which an opinion may be used").[1] This case thus presents not only a fundamental disagreement among the judges of this Circuit, but also a square conflict between two circuit precedents. *En banc* rehearing is therefore necessary. Fed. R. App. 35(a)(1); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1124 (9th Cir. 2006) (*en banc*).

The conflict between these decisions is undeniable. *Doe III* acknowledged that it was "re-examining the merits of the issues afresh," A14, and in doing so reached a decision directly contrary to the ruling of the motions panel.

1. First, *Doe II* and *Doe III*'s INA holdings cannot be reconciled. *Hawaii* assumed that INA § 212(f) "does not allow the President to *expressly override*

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[1] This Court has elsewhere questioned the precedential force of a motions panel's published decision. *See E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1263 n.3 (9th Cir. 2020) ("A merits panel cannot be simultaneously bound by the motions panel's opinion—because it is law of the circuit—and not bound by the opinion—because it is not law of the case."); *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1078-79 (9th Cir. 2020) ("Because *East Bay Sanctuary Covenant* was a decision by a motions panel on an emergency stay motion, we are not obligated to follow it as binding precedent."). And individual judges of this Court have expressed divergent views on the topic. *See id.* at 1284 (Fernandez, J., concurring in the result) ("I believe that we are bound by the published decision [of the motions panel]"); *Sierra Club v. Trump*, 963 F.3d 874, 903 n.5 (9th Cir. 2020) (Collins, J., dissenting) ("Although the motions panel decision is a precedent, it remains subject to reconsideration by this court until we issue our mandate."). To the extent there is uncertainty in this Court's precedents as to the precedential force of a published motions ruling, that is yet further reason to rehear this case *en banc*.

particular provisions of the INA," and stated that such a conflict would exist where "Congress has stepped into the space and solved the exact problem" addressed by the Proclamation. 138 S. Ct. at 2411, 2412. Though *Doe III* concedes this exception to § 212(f), the majority's standard for invoking it would render this important limitation meaningless.

Doe III observed that "there is undoubtedly some overlap" between the public-charge provision "and the Proclamation's exclusion of those who 'will financially burden the United States healthcare system,'" and recognized that the INA mandates a holistic, "totality-of-the-circumstances" approach for determining whether an immigrant had sufficient financial resources. A31–32. Nevertheless, *Doe III* held that there was no conflict between the INA and the Proclamation because "the Proclamation merely creates an additional, separate ground for inadmissibility" independent of the multifactor public-charge analysis. A33.

By contrast, *Doe II* held the Proclamation does "override" the public charge provision, which explicitly "requires that *all* of the specified factors [listed in § 212(a)(4)(B)] should be considered in determining whether an applicant should be deemed a financial burden and consequently inadmissible." 957 F.3d at 1064 (citing 8 U.S.C. § 1182(a)(4)(B)) (emphasis added). As the motions panel explained, with the INA's public charge provision, Congress enumerated specific factors that "are to be considered 'at a minimum.'" *Id.* (quoting *City & Cty. of S.F.*

v. USCIS, 944 F.3d 773, 972 (9th Cir. 2019)). The Proclamation, on the other hand, overrides the public charge provision with a single consideration for whether a foreign national has the necessary financial resources to immigrate. Thus, *Doe II* correctly held, "[t]he Proclamation's health insurance requirement supplants the discretion afforded to consular officers in § 1182(a)(4)(B)." *Id.*

In sum, *Doe II* determined that the Proclamation "eviscerates" Congress's solution and inserts the President's own preferred approach in its place. *Id.* at 1064. *Doe III*, on the other hand, adopted the precise conclusion that *Doe II* said was "incorrect." *Compare id.* at 1064 ("Any argument contending that the Proclamation complements the public charge statutory scheme is therefore incorrect."), *with Doe III*, A33 ("[T]he Proclamation merely creates an additional, separate ground for inadmissibility.").

2. Similarly, *Doe II* and *Doe III* conflict on the question of whether the Proclamation overrides VAWA. Under that statute, Congress ensured that immigrants need not satisfy the public charge ground of inadmissibility if they are "relatives of victims of violent crimes, such as felony assault, sexual assault, incest, kidnapping, or human trafficking." *Doe II*, 957 F.3d at 1062 (citing 8 U.S.C. § 1101(a)(15)(U)(iii)). The Proclamation overrides Congress' intent because it imposes a one-factor bar to admission that even the majority panel in *Doe* III found overlaps with the public charge inadmissibility. A33.

Despite this overlap, *Doe III* found no irreconcilable conflict for VAWA immigrants. "The Proclamation does nothing to override the VAWA amendments, because an alien who satisfies VAWA's eligibility requirement is *still* exempt from the INA's public charge provision." A34–35. Thus, notwithstanding Congress's explicit provision that such immigrants *not* be denied admission for lack of resources, the Proclamation denies admission to these same immigrants for lack of resources. A34.

3. Third, *Doe II* and *Doe III* reach contradictory holdings on the ACA question. The ACA created a complex, interlocking system of state markets and tax credits with the purpose of "increas[ing] the number of Americans covered by health insurance and decreas[ing] the cost of health care.'" *Doe II*, 957 F.3d at 1063 (quoting *NFIB v. Sibelius*, 132 S. Ct. 2566, 2580 (2012)). Congress specifically authorized immigrants "lawfully present" (including those who had just immigrated) to purchase insurance in a state marketplace and receive "premium tax credits to offset [associated] costs." 957 F.3d at 1063.

Doe II concluded that "[d]espite Congress's clear intent to extend these tax credits to legal immigrants" to "offset the costs of purchasing an insurance plan," the Proclamation "explicitly excludes such 'subsidized plans' from the list of approved health insurance plans" that suffice for entry, instead requiring that immigrants enroll in insurance plans Congress deemed inadequate. 957 F.3d at

1063. Thus, the Proclamation overrides Congress's carefully crafted solution to the domestic problem of health care costs: it purports to bar the admission of immigrants who would implement Congress's chosen solution (subsidized ACA plans) and to permit admission only if immigrants commit to using plans Congress rejected. What is more, the Proclamation explicitly states that its purpose is to create a new solution to the same domestic problem Congress addressed in the ACA—the "cost of health care" for Americans. *Doe II*, 957 F.3d at 1063; *NFIB*, 132 S. Ct. at 2580. For these reasons, *Doe II* concluded that the Proclamation overrides the ACA and so is invalid.

Doe III, on the other hand, took a head-in-the-sand approach to these interrelated issues, stating that "[t]he Proclamation does not 'expressly override' this feature of the ACA, because the two provisions operate in different spheres." A29 (citation omitted). "The ACA extends tax credits only to aliens who *already* are 'lawfully present in the United States," while the Proclamation applies "only to aliens seeking to enter the United States" and so "does not prevent aliens who are 'lawfully present in the United States' from purchasing subsidized insurance plans." A29–30. Declining to even acknowledge the tension between a Presidential order of exclusion of any alien adopting a subsidized healthcare plan *enacted by Congress*—and doing so to resolve the same problem of domestic healthcare costs that Congress chose to resolve in the ACA—*Doe III* broadly concluded that

"[t]here is . . . no conflict between the Proclamation and the ACA scheme." A30. Rehearing is appropriate to resolve these substantial disagreements.

4. *Doe II* and *Doe III* fundamentally disagree on the scope of the President's powers under INA § 212(f) and *Hawaii*. The *Doe III* panel believed that the Proclamation satisfied the § 212(f) requirements set forth in *Hawaii*, including the requirement that the Proclamation "be temporally limited." A25. Furthermore, *Doe III* concluded that "it makes no difference whether the additional entry restrictions are imposed under § 212(f) based on assertedly domestic policies concerns," because at a general level *any restriction* "may be characterized as reflecting 'domestic' policy concerns to a greater or lesser degree." A36–37.

To the contrary, *Doe II* concluded that the Proclamation did not satisfy § 212(f)'s temporal-limitation requirements; "[b]y the Proclamation's own terms, it does not have an endpoint." 957 F.3d at 1065. And the motions panel noted *Hawaii*'s reliance on national-security considerations. *Id.* at 1067 (quoting *Hawaii*, 138 S. Ct. at 2420). Thus, *Doe II* concluded, this Proclamation was materially different from the *Hawaii* proclamation and entitled to less deference, because this Proclamation "deals with a purely domestic economic problem." 957 F.3d at 1067.

These are far-reaching, important disagreements that will encumber this Court's review of future § 212(f) proclamations. Indeed, as Judge Tashima explained, the motions panel and the merits panel took fundamentally divergent

approaches to analyzing what measure of conflict between a President's § 212(f) Proclamation and an existing statute rises to the level of a statutory "override." A46–47. Under the *Doe III* majority's view, the President is free to "undermine" a law enacted by Congress if "it is at least *possible* to give effect to both provisions." A46. But Judge Tashima and *Doe II* concluded that a President may not use § 212(f) to implement domestic policy "inconsistent with, and antagonistic to, any reasonable understanding of congressional intent." A46. The fundamentally different and mutually exclusive views on this critical topic compel *en banc* rehearing.

II. THESE ISSUES ARE OF COMPELLING AND NATIONAL IMPORTANCE.

This case, standing at the crossroads of presidential power and immigration law, further warrants *en banc* review due to its national importance. Fed. R. App. P. 35(a)(2); *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 744 (9th Cir. 2003) (en banc). In recent years, the President has asserted sweeping § 212(f) powers—including to override other federal laws and other provisions of the INA itself. Section 212(f) proclamations have been, and continue to be, the subject of important litigation before this Court, the Supreme Court, and other federal courts. *See, e.g.*, *Hawaii*, 138 S. Ct. at 2403-06; *Gomez v. Trump*, --- F. Supp. 3d ----, 2020 WL 5886855 (D.D.C. Sept. 14, 2020), *appeal filed* (D.C. Cir.); *Young v. Trump*, No. 20-cv-07183-EMC, 2020 WL 7319434 (N.D. Cal. Dec. 11, 2020)

(relying on *Doe II*); *Nat'l Ass'n of Manuf. v. DHS*, --- F. Supp. 3d ----, 2020 WL 5847503, at *8 (N.D. Cal. Oct. 1, 2020) (relying on *Doe* district court opinion and *Doe II*); *Make the Road N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 259 (S.D.N.Y. 2020) (relying on *Doe* district court opinion). Pending cases like *Make the Road* and *Gomez*—in which courts and parties have expressly relied on the *Doe* district court opinion and *Doe II* decision—will be profoundly affected by this case's resolution. *See, e.g.*, Def.'s R. 28(j) Ltr., *Gomez v. Trump*, No. 20-5292 (D.C. Cir. Jan. 4, 2021) (notifying the D.C. Circuit of *Doe III*).

Furthermore, this litigation has had and will have profound real-world impact. As *Doe II* noted, the Proclamation "would negatively affect approximately 60% of all immigrant visa applicants." 957 F.3d at 1060. This would be nothing short of a "profound transformation of immigration law," A51 (Tashima, J., dissenting). And were § 212(f) to grant such startling unilateral power to the president, little would prevent the president from running roughshod over the INA at will—as Judge Rogers recognized during argument in the D.C. Circuit's *Gomez* appeal. *See* Nadia Dreid, *DC Circ. Takes Shots At Trump Order Blocking Work Visas*, Law360 (Jan. 14, 2021), http://bit.ly/3ssf9fP ("What if he just decides today that he doesn't want any more immigrants coming into the country?"); *see also* Oral Argument at 1:30-2:10, *Doe II*, https://bit.ly/39Lwyrx (Judge Berzon asking if the president could suspend all entries by children).

Beyond the square conflict between circuit precedents, therefore, the *en banc* Court should hear this case "because these issues are obviously important," *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1063 (9th Cir. 2002) (en banc), and "substantially affect[] a rule of national application in which there is an overriding need for national uniformity," Circuit Rule 35-1. Their resolution will have far-reaching impacts on the nation's immigration statutes, on the constitutional separation of powers, and on the "approximately 60% of all immigrant visa applicants" excluded by the Proclamation, *Doe II*, 957 F.3d at 1060.

CONCLUSION

For the foregoing reasons, *en banc* rehearing should be granted.

Dated: January 19, 2021

SIDLEY AUSTIN LLP

/s/ Tacy F. Flint
Tacy F. Flint

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2021, I caused the foregoing Plaintiffs-Appellees' Petition for Rehearing En Banc to be submitted electronically via the Court's Appellate Electronic Filing System, which will automatically notify the other parties and counsel registered for electronic service.

/s/ Tacy F. Flint
Tacy F. Flint

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

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