No. 20-17132

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION OF
MANUFACTURERS, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. 4:20-cv-4887-JSW
The Hon. James S. White

DEFENDANTS-APPELLANTS' EXCERPTS OF RECORD
Volume 2 of 6
ER 26–150

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	Case No. 4:20-cv-4887-JSW **NOTICE OF APPEAL** Judge: Hon. Jeffrey S. White

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Defendants hereby appeal from the Court's Order entered October 1, 2020 (ECF No. 87), in the above-captioned case to the United States Court of Appeals for the Ninth Circuit.

Dated: October 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020, I electronically transmitted the foregoing document to the Clerk's Office using the U.S. District Court for the Northern District of California's Electronic Document Filing System (ECF), which will serve a copy of this document upon all counsel of record.

By: *<u>/s/ Joshua S. Press</u>*
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable JEFFREY S. WHITE, Judge

NATIONAL ASSOCIATION OF MANUFACTURERS, ET AL.,	)	
Plaintiffs,	)	NO. C-20-4887 JSW
VS.	)	FRIDAY, SEPTEMBER 11, 2020
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,	)	OAKLAND, CALIFORNIA
	)	**MOTION FOR PRELIMINARY INJUNCTION**
Defendants.	)	

REPORTER'S TRANSCRIPT OF ZOOM PROCEEDINGS

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Reported By:
Diane E. Skillman, CSR 4909, RPR, FCRR
Official Court Reporter

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1 Friday, September 11, 2020 8:55 a.m.
2 P R O C E E D I N G S
3 o0o
4 **THE CLERK:** Good morning. Court is now in session.
5 The Honorable Jeffrey S. White presiding.
6 Calling case number CV-20-4887 National Association of
7 Manufacturers, et al. versus the United States Department of
8 Homeland Security.
9 Counsel, please state your appearances.
10 **MR. HUGHES:** Good morning. My name is Paul Hughes,
11 and I represent all the plaintiffs in this action.
12 **THE COURT:** Good morning.
13 **MR. PRESS:** Good morning. My name is Joshua Press.
14 I'm from the Department of Justice, and I represent the
15 defendants in this case.
16 **THE COURT:** Good morning, counsel.
17 So before we get started, first of all, I want to make
18 sure that the plaintiff, Mr. Hughes, did you receive the
19 Court's questions for this hearing?
20 **MR. HUGHES:** Yes, Your Honor, I did receive the
21 Court's questions.
22 **THE COURT:** And Mr. Press?
23 **MR. PRESS:** Yes, Your Honor.
24 **THE COURT:** Very well. Okay.
25 What I am going to do now is, I'm going to -- I would like

1 to put this matter in context by making a statement for the
2 record, which is just an introduction. It doesn't require any
3 response on counsel's part, but I think it's important given
4 the importance of the issues that we face today to make this
5 statement.
6 So, we find ourselves in the unique moment in history at
7 the intersection of multiple crises. The Court holds this
8 hearing by videoconference as a worldwide health crisis
9 imperils the lives of so many. The view from the Court is a
10 sky filled with smoke and ash from early wildfires which have
11 created conditions that are nearly unsustainable for human
12 existence. The courthouse itself is the target of anger from
13 citizens protesting systems of injustice and some
14 counter-protestors who seek to take advantage of the lawful
15 expression with unlawful violence.
16 During the pandemic and attendant circumstances, this
17 country has suffered a severe economic downturn, creating a
18 state of emergency in housing, employment, education, and
19 access to basic services. Although at its very foundation,
20 this is a nation made up of immigrants, the Legislature has
21 been stymied in any efforts to reform areas of what may no
22 longer be effective immigration policy and the Executive has
23 stepped into this context with unbridled aggression.
24 However, even in a state of emergency, we have a
25 democratic system based on law and the balance of powers.

1 Moreover, this carefully constructed system is ever more
2 essential in the cascading set of emergencies -- in this
3 cascading set of emergencies. The American legal tradition is
4 founded upon a set of constantly changing facts but stabilized
5 by the slow and deliberate evolution of precedent. In its
6 role as the third branch of this uniquely American system of
7 government, this Court has a duty to examine facts and
8 precedents and to deliberate carefully within the urgent
9 context which brings us to this place.
10 On June 22nd, 2020, the President of the United States
11 issued Presidential Proclamation 10052 which suspends entire
12 visa categories for three sets of nonimmigrant work visas for
13 a period lasting until December 31, 2020, and with discretion
14 to be continued quote, "as necessary," unquote. The
15 Proclamation is entitled *Suspension of Entry of Immigrants and*
16 *Nonimmigrants Who Present a Risk to the United States Labor*
17 *Market During the Economic Recovery Following the 2019 Novel*
18 *Coronavirus Outbreak.* The stated purpose of the Proclamation
19 is to eliminate the threat of taking jobs from native-born
20 Americans who may find themselves without employment during
21 the quote, "extraordinary economic disruptions caused by the
22 COVID-19 outbreak."
23 The three visa categories at issue here provide for (1),
24 intracompany transfers to noncitizens employed by American
25 businesses; and (2), highly-skilled workers coming to America

1 temporarily to perform services in a specialty occupation for
2 which they are uniquely qualified; and (3), cultural exchange
3 visitors in a variety of work-study programs nationwide.
4 The scant record of the Proclamation's passage provides
5 that it was intended to free up jobs for native Americans or,
6 in the words of a senior administration official, to quote,
7 "clear out this work space for Americans," unquote.
8 Plaintiffs are associations representing thousands of American
9 businesses of all sizes and sectors. They seek a preliminary
10 injunction of this Proclamation on the basis that it does not
11 comport with facts or law. Five amicus groups have been
12 permitted to file briefs to contribute their positions on the
13 record and the legal precedent. The United States Department
14 of Homeland Security, represented by the Department of
15 Justice, argues that the Court should not grant this
16 extraordinary remedy based on a disagreement with the
17 Executive Branch's judgment on how best to ameliorate the
18 American unemployment rate in a time of national emergency.
19 In its effort to fulfill its constitutional obligation,
20 the task before this Court is two-fold: (1), is the factual
21 premise of this Proclamation supported by the evidentiary
22 record; and (2), is the legal basis for this Proclamation
23 supported by law.
24 What I plan on doing, counsel, is I will read each of the
25 questions issued earlier this week into the record and will

1 allow the parties sufficient time to respond.
2 I just want to add that the -- I know that counsel has
3 provided the Court with additional authorities since the
4 issuance of the questions, and of course those will become
5 important in responding to some of the questions. If you wish
6 to use those authorities in your remarks or in your response
7 to the Court's questions, feel free to do so.
8 For those of you -- neither of counsel here may have
9 participated in hearings before this Court. When the Court
10 issues questions, as it usually does and as it did in this
11 case, the metes and bounds of the hearing are based upon the
12 questions that I asked. In other words, there's no hidden
13 agenda. I read your briefs. I read your authorities, and
14 even the most recently submitted ones. And I had these
15 questions based upon -- even after reading your papers.
16 So you don't need to -- so if I don't mention a particular
17 topic, it doesn't mean that I have made up my mind on the
18 topic or that I've missed it; it's just that I have all the
19 information I need based upon your briefings.
20 So no secret agendas. I may occasionally move away from
21 the pre-existing questions and give what's called a -- what I
22 call familiarly pop quiz questions that weren't on the
23 take-home exam. If they come up, I'm sure you gentlemen will
24 be very able to respond.
25 Now, it's clear -- it is sometimes clear to the Court or

1 often clear to the Court who the question should be posed to
2 first. And, again, there's no -- the Court calls on one side
3 or the other. There's no hidden agenda or any burden imposed
4 by virtue of the way I do it. Then I will give the other side
5 a chance to respond, and we'll go back and forth without
6 repetition until the Court feels as if it has its answers.
7 And you may feel, just because I say does the government or
8 does the plaintiff -- do the plaintiffs have anything else,
9 doesn't necessarily mean, you know, that there is anything
10 else. It's just giving you the opportunity to do so.
11 What I'm going to do now is, I'm going to read the
12 questions into the record even though they were filed in the
13 electronic court filing system so we will have it before us.
14 And especially because there is a lot of public interest in
15 this important case, there may be numerous people who have not
16 read them.
17 Question Number 1 reads the following: Presidential
18 Proclamation 10052 provides that quote, "under the
19 extraordinary circumstances of the economic contraction
20 resulting from the COVID-19 outbreak, certain nonimmigrant
21 visa programs authorizing such employment pose an unusual
22 threat to the employment of American workers."
23 What is the Department of Homeland Security -- I'll call
24 them DHS's best argument that the record that they have
25 provided to the Court supports this factual premise for the

1 Proclamation?
2 And I'm going to ask the -- as I -- the question says,
3 please provide the Court with specific factual citations in
4 the record. And so I'll start with the defendants and then
5 move on to plaintiff, and then we will, as we go forward, I
6 will add in the subtext, paragraphs A and B. If you wish to
7 address those in your response, feeling it necessary, that's
8 okay, too, just let us know that you're doing that.
9 Let me start with Mr. Press.
10 **MR. PRESS:** Thank you, Your Honor. Good morning.
11 So, we thought a lot about these questions, and thank you
12 for giving them to us beforehand. I think that we want to
13 clarify a little bit here that the record in this case is a
14 little strange because you have asked for a record that would
15 support the Proclamation. But under *Franklin v. Massachusetts*
16 and other cases, including *Trump v. Hawaii*, the Proclamation
17 itself does not have to be supported by a record.
18 If you look at 8 U.S.C. 1182(f), really the text is
19 remarkably clear but concise in the sense of all that the
20 President actually needs to make is a finding. And in this
21 case, the President has consulted with the Secretaries of
22 Labor, Homeland Security.
23 I think where the rubber will meet the road and what
24 plaintiffs' counsel has provided in terms of a record actually
25 is more of a record with respect to the Department of State.

1 It's sort of -- he swapped in, in ECF 69-3, with his reply
2 brief, he swapped in the record that was supplied to the
3 District of Columbia's court in the *Gomez* case that both of us
4 brought to Your Honor's attention yesterday.
5 But I do want to be clear that the Proclamation itself
6 doesn't have to be supported by a record at all. And you've
7 had proclamations issued under 1182(f) that are as concise as
8 one sentence by President Clinton in the '90s against the
9 Sudanese Nationals.
10 So that's just one thing that I would like to sort of make
11 very clear from the start because this is not a normal APA
12 case in the sense of you cannot bring an APA challenge to
13 executive action under 1182(f). The Proclamation itself has
14 been officially delegated from Congress to the President as
15 to -- all he needs to do is make a finding to affect an entry
16 ban, as it were.
17 So, it's clear, as Your Honor noted from the start, that
18 many, many people, millions of people have lost their jobs
19 during the pandemic and more people are applying for the same
20 jobs, or whatever jobs are left right now. I think we've
21 lost, I think, initially there was 17 million to 20 million
22 job loss. Some of that has rebounded, but I believe -- I was
23 reading yesterday there are 10 million jobs that are still
24 lost.
25 That's really not a great rebound if we are looking for an

1 actual heavy dent in the unemployment rate which the
2 unemployment reports, I think reported by the Department of
3 Labor yesterday, are still high, higher than were expected.
4 So this is an extraordinary time in our country's history,
5 as Your Honor noted. It is a declared national emergency even
6 though it is not required under 1182(f). But I think that the
7 finding the President made in both Proclamation 10014 and
8 10052 is amply supported as Judge Mehta himself ruled last
9 week in the *Gomez* case that both counsel have brought to Your
10 Honor's attention.
11 **THE COURT:** Let me ask you this, counsel, which is --
12 just so the record is clear and properly framed.
13 Is the -- I understand that the partial answer to your
14 question is that I asked the wrong question because -- or
15 makes the supposition that there needs to be some sort of a
16 factual or evidentiary record that's not required, but just so
17 the record is clear, is -- does the Government concede that in
18 the record before the Court on this motion, the preliminary
19 injunction, there is no such evidence even if you argued there
20 didn't need to be?
21 **MR. PRESS:** Actually we don't make that sort of
22 concession, Your Honor. And the reason why is, I think it's
23 unchallenged in this case that millions of U.S. workers, not
24 just Americans, but U.S. workers, which would include the
25 immigrant population that's already in the United States and

1 working, have lost their jobs. And it's really as simple as
2 the law of supply and demand that undergirds the Proclamation
3 in this case, which is to say, if you bring in more people,
4 that will create further scarcity for the already scarce jobs
5 that are currently on the job market right now. That is in
6 the record, I think, in all of the statistics.
7 Really, plaintiffs' argument is built on they disagree
8 with that economic proposition, which I understand, and it's
9 more laissez faire, more libertarian, but it is not for them
10 to make that call and it's not for the judiciary to substitute
11 their judgment in economics just as it was not in the *Trump v.*
12 *Hawaii* context when it came to vetting procedures and
13 protocols that the President wanted to be put in place.
14 **THE COURT:** Mr. Press, let me ask you a question. I
15 understand your answer.
16 What is the finding? Is it the -- just in the
17 Proclamation itself? And can you -- actually, can you give
18 the Court an actual cite to the record of where is this --
19 where do I find this finding that you say the President made?
20 **MR. PRESS:** Well, in both Proclamations the President
21 discusses specifically the job losses themselves. And that
22 would be at ECF 69-3 -- themselves.
23 Are you looking for a pin cite?
24 **THE COURT:** Yeah. So I guess what I hear you saying
25 is, the finding that you say the President made is actually in

1 10052, correct?

2 **MR. PRESS:** Well, it is in 10014 and 10052 as an

3 extension of 10052 -- I'm sorry, 10014.

4 **THE COURT:** Is there a way that you can give me a pin

5 cite? I want to just look when I go back to deliberate. I

6 mean, is it just -- so, first of all, it's in the -- first of

7 all, the answer to my first question, what is the finding; is

8 it just in the Proclamation? The answer is yes.

9 **MR. PRESS:** Yes.

10 **THE COURT:** Okay. The second part is, what is the --

11 can you give me -- maybe even read it, it's not very long --

12 exactly what you're contending is the finding.

13 **MR. PRESS:** Well, it's at ECF 69-3, ECF page 10 of

14 that document. And it -- I will read it if you would like.

15 It's in the Federal Register as well, within Proclamation

16 10052.

17 **THE COURT:** Read slowly please. When we read, we

18 tend to go really fast. Ms. Skillman, the court reporter,

19 righteously goes a little coocoo, as the Court does.

20 **MR. PRESS:** Thank you for that. I appreciate that,

21 especially since we are doing this via video conference.

22 Quote, "As I described in Proclamation 10014, excess

23 labor supply is particularly harmful to workers at

24 the margin between employment and unemployment; those

25 who are typically quote, 'last in,' unquote, during

1 an economic expansion and quote, 'first out,'
2 unquote, during an economic contraction. In recent
3 years, these workers have been disproportionately
4 represented by historically disadvantaged groups,
5 including African Americans and other minorities,
6 those without a college degree, and Americans with
7 disabilities.
8 In the administration of our Nation's immigration
9 system, we must remain mindful of the impact of
10 foreign workers on the United States labor market,
11 particularly in the current extraordinary environment
12 of high domestic unemployment and depressed demand
13 for labor. Historically, when recovering from
14 economic shocks that cause significant contractions
15 in productivity, recoveries in employment lag behind
16 improvements in economic activity. This predictive
17 outcome demonstrates that, assuming the conclusion of
18 the economic contraction, the United States economy
19 will likely require several months to return to
20 pre-contraction economic output, and additional
21 months to restore stable labor demand. In light of
22 the above, I have determined that the entry, through
23 December 31, 2020, of certain aliens as immigrants
24 and nonimmigrants would be detrimental to the
25 interests of the United States," unquote.

1 **THE COURT:** Okay. So I understand your position.
2 And do you have anything more to add?
3 I understand, to reframe your position, that it is not for
4 the Third Branch, for the Judicial Branch to -- and we will
5 get into -- I'll use the term "second-guess" but that kind of
6 segues into A, part A, the President, and the President he --
7 do you concede that he was required to make such a finding --
8 **MR. PRESS:** Yes.
9 **THE COURT:** Yes, okay.
10 So you are saying that could be really quite minimal, and
11 then basically that finding is pretty much, for these
12 purposes, binding on a District Court; correct?
13 **MR. PRESS:** Well, on any court, including the Supreme
14 Court.
15 And the reason why I am saying that is because these exact
16 same arguments were made in *Trump v. Hawaii*. Chief Justice
17 Roberts' opinion in that case flagged the brevity of most of
18 the proclamations that had been reviewed in -- under 1182(f)
19 prior to that. Noted that some were as short as two
20 sentences, one sentence, and that what had occurred in
21 Proclamation 9645 within that case, was not ever meant to be
22 set as a floor because it was extremely robust and
23 unprecedented with the amount of detail that the findings
24 actually included within that case.
25 So you were correct -- this is not meant to be a jab at

1 Your Honor or any other District Court or Article III, this is
2 really just more a matter of in -- immigration system, which
3 the Supreme Court has noted multiple times, is regularly tied
4 into foreign affairs; that it is really difficult for the
5 judiciary to actually be able to make these sorts of
6 judgments. And then it's particularly certain in times of
7 this one, when we are in a national emergency, we are facing
8 extraordinary economic considerations and burdens upon
9 millions of U.S. workers, and all the President actually needs
10 to do is make a finding.
11 Now, I think that finding is relatively undisputed and
12 would easily pass any sort of standard that you like to
13 provide if you wanted to or insisted upon doing that, but I
14 think *Trump v. Hawaii* does make it very clear that courts are
15 not to second guess and make their own policy judgments.
16 Fundamentally that is what plaintiffs and amici really
17 disagree with; they are making a policy argument --
18 **THE COURT:** Let me stop --
19 **MR. PRESS:** -- that the President has it wrong.
20 **THE COURT:** Let me interrupt you because I think I
21 understand your position. I want to move on to get the
22 Plaintiffs' position. And I guess I should sort of, you know,
23 start, you know, before I hear from you, Mr. Hughes, to ask
24 whether you are swimming upstream on this point given the
25 citation to *Hawaii*. Even Judge Mehta in the *Gomez* case seems

1 to say, you know, a very minimalist finding is all that is
2 necessary.
3 So what's your best argument, putting aside for the moment
4 my Section A about, okay, what if -- okay. Let's assume the
5 Government is corrected. What if the President was just flat
6 out wrong and is absolutely belied by the record, not because
7 the President did anything, you know, deceptive, it's just
8 maybe there's facts that he didn't know or facts that came out
9 later.
10 So what's your best argument on that particular point?
11 **MR. HUGHES:** Thank you, Your Honor. I will go right
12 to that.
13 If I could, I would like to respond to Mr. Press's
14 argument about the laws of supply and demand after we address
15 that.
16 But to start with Your Honor's direct question about *Trump*
17 *v. Hawaii*. I think the --
18 **THE COURT:** And also *Gomez*. Because Judge Mehta
19 seems to, you know, take that head on and seems to agree with
20 the Government's position.
21 So go forward.
22 **MR. HUGHES:** Yes, Your Honor.
23 I think the place to begin is the Ninth Circuit's recent
24 decision after *Trump v. Hawaii* in *Doe #1*, which Judge Mehta in
25 *Gomez* says he expressly disagrees with; that he found the

1 dissenting opinion in *Doe #1* more persuasive than the majority
2 opinion.
3 So in *Doe #1*, the Ninth Circuit did indicate that if there
4 is the use of 1182 power with quote, "virtually no factual
5 findings" or quote "minimal reasoning," the Court I think
6 strongly indicated that that would not satisfy the requirement
7 of a finding.
8 I think Mr. Press agrees that the President has to make a
9 finding under 1182(f). And what *Doe #1* indicates is for that
10 statutory requirement to have meaning, for it to have
11 substantive actual meaning, there at least has to be some
12 degree of content to it. And *Doe #1* sets what that minimal
13 floor is. Again, if there's virtually no factual findings or
14 minimal reasoning, that won't suffice.
15 I think it might be helpful for a second to turn to *Trump*
16 *v. Hawaii* in particular to address what the Supreme Court
17 evaluated. And there's a very substantial distinction between
18 this Proclamation and what the Supreme Court found satisfied
19 the requirements -- the finding requirement 1182(f) in *Trump*
20 *v. Hawaii*.
21 So what the Court looked at in that Proclamation, 9645, it
22 explained in great detail how the President arrived at the
23 factual findings and the basis for those. It talked about how
24 the agencies, DHS and State, created a baseline to determine
25 the information that was needed to vet individuals coming into

1 the United States.
2 There was three components: Identity management
3 information about how foreign countries use and evaluate
4 passports; how they track lost or stolen passports; the extent
5 to which those foreign countries disclose information to the
6 United States, including criminal history, suspected terrorist
7 links, travel document examples, manifests of passengers and
8 airlines' crews coming to the United States; and then various
9 data the United States has about security risks as to whether
10 a foreign state is a known or potential terrorist safe haven.
11 DHS evaluated these three baselines against all the
12 countries in the world. It found 16 countries deficient, 31
13 at risk. After this, the Proclamation explained the State
14 Department undertook a 50-day period where it negotiated with
15 foreign governments to try to get them to provide this
16 information; many governments did. After this, DHS Secretary
17 recommended that eight countries were still deficient.
18 The President adopted those findings but with very
19 specific granular findings because of those eight countries,
20 there were different entry bans that were imposed based on the
21 findings the President issued.
22 So, for example, with respect to Venezuela, the entry ban
23 only applied to certain Government officials because those --
24 that's where the deficiencies were found. Somalia, only
25 certain immigrants, enhanced screening for nonimmigrants.

1 Chad, Libya and Yemen --

2 **COURT REPORTER:** Excuse me --

3 **MR. HUGHES:** -- the partial restriction --

4 **COURT REPORTER:** Excuse me, counsel. Can you slow

5 down, please.

6 **MR. HUGHES:** Yes, ma'am, I'll slow down. My

7 apologies.

8 Somalia, the ban only applied to certain immigrants and

9 enhanced screening for nonimmigrants who would come to the

10 United States.

11 **THE COURT:** Counsel, I read all that. I know that.

12 I appreciate that.

13 Mr. Press read, at the Court's -- the finding such as it

14 is by the President in the text of the Proclamation itself,

15 and I guess it sort of segues a little bit into substantive

16 questions and we'll get into those in full.

17 By the way, for either side, if you feel we've covered

18 something because of the give and take of our dialogue, then

19 you can say we already covered that, or I will say that.

20 What is the standard? Is there a standard? So Mr. Press

21 says, well, it could be like one sentence, you know,

22 minimalist. You say no, no, no, no, to the extent the

23 Government is relying on *Doe v. Hawaii* (sic) in that case, you

24 know, by the facts of that case there were more extensive --

25 there was a more extensive evidentiary record.

1 So what is the standard that the Court imposes to judge
2 the compliance of -- by the President or the adequacy of the
3 finding?
4 Could you kind of move to that? I don't want to cut you
5 off, but I did read the case and I know it's quite clear that
6 there were extensive -- there was an extensive evidentiary
7 record, both in the public wheel as well as, you know, in the
8 Proclamation record.
9 So what is your response to that?
10 **MR. HUGHES:** Your Honor, I think there are two
11 different ways the Court could approach what the appropriate
12 standard to adopt is, and I think plaintiffs would prevail
13 under either.
14 The first would be establishing what the minimum baseline
15 floor is. That's the language I read from *Doe #1* about if
16 there are virtually no factual findings or minimal reasoning,
17 that will not suffice. I think that is sufficient to address
18 this case.
19 But if the Court wishes to adopt the more universal
20 standard to reach the full metes and bounds of where we think
21 Section 1182(f) should occur, then I think we look to the text
22 of 1182(f). And what it requires is the President to find, it
23 makes the President act as a fact finder. We understand this
24 as a common law term that requires the President to engage in
25 reasoned orderly decision making.

1 I think a good place to look for this is *Department of*
2 *Commerce versus New York*, the census case that requires,
3 quote, "a rational connection between the facts found and the
4 choice made."
5 Let me indicate, I know that this is a standard that is
6 often invoked in APA cases, and we're not arguing that this is
7 an APA claim, but I think it's very important to recognize,
8 this is not a standard that is unique or tethered to the APA.
9 It long predated the APA for decades before the APA. It is
10 actually just a standard about what does normal ordered
11 reasoned Government decision making require when the
12 Government is acting in a fact-finder capacity.
13 We think that is the full standard. But, again, we don't
14 think we need to establish that here for the Court to find
15 that this particular Proclamation doesn't even meet the most
16 minimal standard adopted in *Doe #1*.
17 **THE COURT:** Let me segue back to the Government, and
18 I'll give you a brief chance, if you need -- if the Government
19 feels, Mr. Press, that you have covered this, fine, you can
20 respond, but I would also like to weave in Section A, which
21 is, you know -- I'll read the question as I said I would.
22 What is DHS's response to the extensive record provided by
23 the plaintiffs and four sets of amici that the evidence and
24 the facts do not support the stated intention of the
25 President?

1 And then I will add, because I think it is related
2 substantively, what is the Plaintiffs' response to the amicus
3 brief and citation to evidence provided by U.S. tech workers
4 that unemployment -- I'll get to that next. That is
5 plaintiff. I just want to do A.
6 The question is, I understand that Judge Mehta in the
7 *Gomez* case said, you know, it's not appropriate to weigh
8 contradictory evidence and it is not the Court's job to say,
9 okay, the President's made a proclamation, but the entire
10 record belies the entire basis of that Proclamation or the
11 finding, excuse me. That's not our job.
12 I understand that. And that's, you know, I have to decide
13 to what extent I agree with that, and I am going to follow
14 what is essentially nonbinding authority on this Court. What
15 is binding, of course, is the Ninth Circuit decision in the
16 *Doe* case.
17 So what's your -- both your reply to the plaintiffs and
18 also your reply or response to question part 1a?
19 **MR. PRESS:** Well, Your Honor, the first thing I want
20 to note about *Doe #1 v. Trump* was really that was in the
21 context of a motion to stay the injunction, not necessarily a
22 substantive finding in itself. It was really more a balancing
23 of whether the Government had met its burden. And then the
24 majority of that -- the reasoning there in the majority
25 opinion dealt much more in the context of the Government did

1 not meet its burden because there was no irreparable injury.
2 There were monetary harms being alleged.
3 That is not necessarily the best footing, I believe, to
4 interpret *Trump v. Hawaii*, which actually discusses why the
5 judiciary, as Your Honor previously referred to, is not in the
6 best position to make these types of calls because -- even in
7 the admission of -- and exclusion of foreign nationals because
8 those decisions quote, "may implicate relations with foreign
9 powers or involve classifications defined in the light of
10 changing political and economic circumstances. And, thus,
11 such judgments are frequently of a character more appropriate
12 to either the legislative or the executive."
13 And that's --
14 **THE COURT:** Let me go back to something you said. I
15 don't want to lose this thought.
16 You were talking about *Doe #1*, and you talked about the
17 Ninth Circuit's -- the procedural context, that it was simply
18 a stay issue. But, essentially, didn't in *Doe #1*, the
19 decision, the written decision, or the opinion of the District
20 Court was affirmed, at least at the preliminary injunction
21 stage; isn't that correct? And the District Court did have
22 some things to say that are a little bit more expansive than
23 the way you characterize the Ninth Circuit's decision.
24 **MR. PRESS:** We would disagree with that conclusion.
25 And the reason why I say that is because just last week the

1 appeal of the preliminary injunction argument was held. And
2 that -- that is where the preliminary injunction will be
3 either affirmed or denied, as it were and -- reversed, rather.
4 And Your Honor is slightly incorrect in terms of the
5 procedural posture. All that was at issue in the Ninth
6 Circuit decision was whether to stay the injunction, which is
7 even more extraordinary than the extraordinary relief
8 plaintiffs are seeking here, even though both should be
9 exceedingly rare.
10 So that just substantively, I think, sort of curtails the
11 impact of what Mr. Hughes was saying to Your Honor. It's not
12 necessarily the opinion doesn't say those things; we submit
13 that Proclamations 10014 and 10052 pass that standard given
14 what the Supreme Court said in *Trump v. Hawaii*, just as I was
15 reading back to Your Honor, with respect to the
16 extraordinarily challenging and changing economic
17 circumstances we are going through right now.
18 No one would deny that really at the -- what would seem
19 like in a matter of weeks, a very healthy economy suddenly
20 turn into an absolute crisis that we are confronting here in
21 terms of the employment of U.S. workers.
22 **THE COURT:** What is the status of the injunction
23 appeal, do you know? Is there -- do you have a sense of when
24 you expect a ruling?
25 **MR. PRESS:** I don't have that --

1 **THE COURT:** Were you told by the Court? I know they
2 don't often give you that luxury of saying, hey, we will get
3 back to you guys in three days. They haven't told you that?
4 **MR. PRESS:** They did not. And I think it would be
5 foolish for me to try to predict the rapidity.
6 But I do know that -- I mean, really, many of the same
7 core legal questions about how expansive 1182(f) actually is
8 and what are the minimal floors with respect to the findings
9 that the President needs to make, those are all up before the
10 Ninth Circuit right now.
11 **THE COURT:** All right. Basically, if I may
12 recharacterize your response to Section A, is that, A, you
13 say, even with the purportedly extensive record provided by
14 the plaintiffs, the President's Proclamation does have a
15 rational basis. And even if you disagree that it does, it's
16 not up to this Court to adjudicate essentially who is right
17 and who is wrong.
18 **MR. PRESS:** So that is, in a nutshell, well put. But
19 I think if you look at *Trump v. Hawaii*, they really did -- if
20 you are looking -- if you are absolutely looking for a
21 standard of review that courts can use here, I think you can
22 look to *Trump v. Hawaii*, which actually got into the guts of
23 this in operation.
24 And it did it two-fold: It did, as Your Honor suggested,
25 with respect to standard rational basis review, which, if we

1 are talking about economic rational basis review, I think all
2 of us understand that courts have gotten in a lot of trouble
3 in the past when they have done searching economic rational
4 basis review or anything above rational basis review.
5 And the other standard would be the *Kleindienst v. Mandel*
6 facially legitimate and bona fide standard, which the Supreme
7 Court also said that Proclamation 9645 easily passed under --
8 in *Trump v. Hawaii*.
9 **THE COURT:** All right. Let me go back to you,
10 Mr. Hughes, to get your response to the Government's position
11 with respect to 1a and any other aspect of what Mr. Press just
12 argued.
13 **MR. HUGHES:** Yes, Your Honor, of course.
14 So to begin, as we described earlier, we think *Trump v.*
15 *Hawaii* has been described by *Doe #1*, and I think the Court
16 understands our argument to that end.
17 Let me respond very specifically to the essential argument
18 that Mr. Press made in his opening remarks and I think just
19 came back to, which I think he's suggesting is at the core
20 rationale or core finding -- I'm not even sure the finding is
21 expressed, but perhaps implicit, and that's the argument that
22 Mr. Press has called the supply and demand contention about
23 the general labor market, and that that is the underlying
24 finding that has been made.
25 I think an important place to start is, the Proclamation

1 itself on the face of it is inconsistent with that notion of a
2 broadly fungible labor market. As the Court noted in, I
3 believe, question Number 4, on the face of the Proclamation
4 there are exceptions for certain categories of workers.
5 For example, those in the food supply industry as well as
6 those who are providing medical services in response to
7 COVID-19. Now, I know this is a basic point, but the question
8 is, why are there these exceptions if there are many
9 individuals who are suffering unemployment as a result of
10 COVID-19?
11 And the straightforward answer is, employment is not
12 fungible. Somebody who is unemployed in one particular
13 position does not mean that they have the skill set to satisfy
14 other jobs that need to be taken, such as in the medical
15 profession, food service industry, whatnot. That is expressed
16 on the face of the Proclamation.
17 I don't think the Proclamation can legitimately rest on
18 this notion that there is broad fungibility because the
19 Proclamation itself recognizes that there's not broad
20 fungibility.
21 **THE COURT:** Let me interrupt you here -- I just did
22 interrupt you. When I say that, it's kind of silly because I
23 have already done that, but I want to focus on it.
24 Just to kind of frame, you know, if one were writing an
25 order or an opinion, what would the headnote be? For example,

1 the question is, you know, Judge Mehta made it very clear, he
2 was very direct in saying, you know, I don't, as, you know, as
3 a Third Branch representative as a Judge, I don't get to
4 second-guess the President, I don't get to say, well, you
5 know, even what's in the record is contradictory. And even
6 more so, I don't get to, if the plaintiffs submit substantial
7 evidence saying the President was wrong, or whatever negative
8 they want to say about the basis of the Proclamation, we don't
9 get into that.
10 What would be the principle that I would say I disagree
11 or, Judge Mehta, if you were arguing on appeal, what is the
12 principle that would allow me to sort of peel back the curtain
13 and see if the emperor has any clothes?
14 **MR. HUGHES:** Your Honor, I think the principle is
15 there ultimately has to be a reasonable connection between the
16 stated problem and the action that is ultimately taken.
17 **THE COURT:** Based upon *Doe v. Hawaii*?
18 **MR. HUGHES:** Yes, Your Honor.
19 And we think there must be some finding, some basis to say
20 that individuals who would enter in the H, J, or L categories
21 actually have a trade-off. What is the basis to say that they
22 have any relationship to COVID-19 related unemployment? We
23 all recognize that there is unemployment as a result of
24 COVID-19, but it is not hitting the economy in equal measure.
25 Now, again, we don't think this is a weighing of evidence.

1 Again, we agree this would be a more difficult case for us if
2 the President had actually found legitimate bases to actually
3 connect these visa categories, and we were asking the Court to
4 discredit those findings or that evidence and credit our
5 evidence; that would be a very different case.
6 This is a case about has the President articulated any
7 basis to be able to say that there is something concrete about
8 H, J's, or L's that have any effect on the areas in the
9 economy where there's unemployment. We think that is
10 resoundingly no. The Proclamation is absolutely silent on
11 that.
12 Now, we explain further why there just couldn't be any
13 findings at that end. Take, for example, the L-1 program.
14 That is limited to individuals who worked for their company
15 for one year or more. That is the very definition of a
16 nonfungible employee, somebody who is suffering from
17 COVID-related unemployment is not going to have a year or more
18 extensive experience working for a particular employer. Just
19 not fungible.
20 In the H-2B program, for example, that program is designed
21 by its statute as well as the implementing regulations to be
22 quite dynamic to existing labor market conditions. Those
23 employers who seek to employ H-2B's must first go into the
24 market, and then once they get the labor certification, they
25 have a continuing obligation to hire any U.S. domestic workers

1 who are qualified for the position. So it's not as though it
2 is frozen in time with the prior labor certification.
3 So these programs are dynamic and responsive to the
4 current economic circumstance. And so what we think there
5 needs to be is some finding that these programs do actually
6 have some relationship to COVID-19 unemployment, and that is
7 just what is absolutely fundamentally lacking here.
8 **THE COURT:** Before I get back to the Government's
9 reply, the next question subpart is directed to plaintiffs,
10 and then I will, of course, give Mr. Press an opportunity to
11 respond.
12 What is -- 1b. What is Plaintiffs' response to the amicus
13 brief and citation to evidence provided by U.S. tech workers
14 that unemployment of quote, "computer workers," unquote, has
15 risen?
16 **MR. HUGHES:** Thank you, Your Honor.
17 And yesterday we submitted a revision to that document
18 that just provided -- it was the same numbers. It had a
19 little bit more methodology. Let me explain the methodology
20 that was also described in the original study that was
21 performed by the National Foundation for American Policy.
22 The numbers that the amicus brief cites to, the Bureau of
23 Labor Statistics, they are citing a broader category of
24 computer-related and mathematic occupations. There are 17
25 subcategories; 12 of those, I believe, are computer related

1 and five of those are mathematics related. The numbers that
2 the amicus brief cites are all of those together.
3 But what the analysis that we cited said, well, it broke
4 out the 12 subcategories that are actually computer related
5 because that's what actually relates to where H-1B workers are
6 being employed. And they cite to DHS's own evidence which
7 documents with granular detail which professions H-1B workers
8 are being used.
9 Just as a broader analogy, if you, for example, take a BLS
10 category, and I am just hypothesizing here but said,
11 unemployment in the airline and the hotel sectors. Well, if
12 the question was, what's the unemployment in the airline
13 sector, you have to do a more granular analysis and look at
14 the jobs that are actually in the airline sector and subtract
15 out the jobs that are in the hotel sector.
16 The analysis that was provided used the same data and it
17 just subtracted out the mathematics-related jobs because
18 that's not where the H-1B workers are employed, and it focused
19 on the computer-related jobs because that's where they are
20 employed.
21 So that's the distinction between the numbers and why the
22 numbers that were provided were -- were correct.
23 **THE COURT:** Mr. Press, I'll hear any response or
24 reply you wish to make to what Mr. Hughes has argued.
25 **MR. PRESS:** Thank you, Your Honor.

1 So with respect -- I'll take -- I know you might hate
2 this, I'll take the last part first and then I'll sort of
3 double back a little bit to what he was saying with respect to
4 the fungibility of jobs. Because they are related points.
5 I think -- we looked at that and what was provided by the
6 National Foundation for American Policy. They are using
7 census data. And from our perspective, they are sort of
8 getting a little persnickety with what they are picking as the
9 occupations they consider to be computer-related or
10 computer-based occupations.
11 And I do want to know -- I do want to flag, rather, that
12 month-by-month unemployment rates tend to be very volatile in
13 terms of short time spans. I think Mr. Hughes was discussing
14 airline workers, for example. Some of those jobs might have
15 existed for a couple more months after the national emergency
16 was declared in March. Many of those jobs have gone away and
17 the attrition has really taken a toll as that particular
18 industry and sector has been hit very hard. No one knows when
19 those jobs are going to come back because no one knows when
20 the demand for such services will actually come back.
21 It sort of leads me back into the fungibility of jobs. We
22 take issue with what Mr. Hughes is saying there and what amici
23 are essentially saying. These are all, at the end of the day,
24 these are economic contingents that are subject to dueling
25 statistics.

1 I think there's a saying about statistics that I don't
2 want to say for the purposes of this videoconference, but the
3 short of the matter with that is that they cannot always be
4 trusted because they can be manipulated.
5 I don't think that the millions of jobs that have been
6 lost since February of this year can be disputed or debated.
7 If Mr. Hughes wanted to write a new proclamation and he wanted
8 to select certain visa categories, I think if he were
9 confronted with the situation that all of us were confronted
10 in the Executive Branch in February and March, I'm not sure
11 that he would have done anything differently with respect to
12 discriminating or allowing, rather, H-2A workers to continue
13 to come in.
14 Because that goes to an absolute core part of the economy,
15 and that is to feed people within the United States. That was
16 an absolute emergency, especially considering that at that
17 moment, when the Proclamations were issued, there was an
18 emergent fear to the food industry and food services sector in
19 the United States. If we can't feed people, even more people
20 are going to die. That would be absurd to suggest that, well,
21 why did they get a pass. They got a pass because basically we
22 need them to stay alive.
23 Now, I don't know if the same is true with respect to
24 Intrax, for example, and the au pair services that they
25 provide. We can't -- I don't think that that really sort of

1 stands up.

2 All that is required is that it either passes the

3 *Kleindienst v. Mandel* standard or rational basis. We think

4 that the finding I read to Your Honor easily suffices to meet

5 that test.

6 **THE COURT:** Let me ask you this. What about --

7 Mr. Hughes talks about, I think it was the intra-company

8 transfer.

9 **MR. PRESS:** L-1.

10 **THE COURT:** Yeah. What is your position about that?

11 **MR. PRESS:** Well, with respect to that, I think --

12 first off, the numbers of L-1 visa holders really are

13 relatively pretty rare because you have to -- that whole

14 program involves a company reaching out to bring either an

15 extremely high upper echelon executive, or officer, or

16 president, or someone with extraordinary ability or needed

17 services to that particular company.

18 Honestly, I think that most of those affected companies

19 would involve not the type of services and sectors and jobs

20 that the President was most concerned about, but people can

21 actually sort of do those jobs remotely, is really what I am

22 getting at here. I don't see the emergency, much less

23 irreparable injury to any of the companies as to why those

24 employees cannot be brought in. I don't think there's been

25 anything in the record at all from them when it comes to the

1 L-1s.

2 **THE COURT:** All right. Mr. Hughes, anything further?

3 **MR. HUGHES:** Couple of quick responses, Your Honor.

4 I just want to identify when Mr. Press described the H-2As
5 and why, I think, in his words it would be absurd if those
6 individuals were not allowed into the country to respond to
7 the crisis, I think this is just pretty powerful evidence that
8 the Government itself recognizes that there's not fungibility
9 across jobs. It's pretty, I think, essential that certain
10 individuals have certain skills and can have certain
11 functions.

12 The visa programs that we are looking at are not general
13 all-purpose jobs for somebody to come in and have any kind of
14 job. They are for very specific targeted professions that
15 have clear limitations on the use and scope of these. And the
16 question is, where is there any linkage between the problem
17 that's been identified as well as the -- the action that
18 here's taken?

19 That's what's simply lacking. And the general statement
20 about fungibility or supply and demand is completely
21 inconsistent with what the Government's done in the face of
22 the Proclamation, Mr. Press's discussion of the H-2As.

23 I can touch on the irreparable injury of the L-1s if that
24 will help the court, but that's also described in our papers.

25 **THE COURT:** I agree.

1 I want to move to question 2 now. I say -- as I was
2 re-reading this just now, it appears we may have covered this,
3 but I want to read it into the record and see, in light of the
4 way the Court has framed this, either side has any further
5 reflection other than we have already covered this, it is *Doe*
6 *v. Hawaii* and the other cases.
7 Question 2. Plaintiffs do not contend that the
8 Proclamation must be supported by a record of findings under
9 the Administrative Procedure Act, or the APA, but rather that
10 the executive action exceeds the authority granted to the
11 President under Immigration and Naturalization Act, or INA,
12 Section 212(f). 8 United States Code Section 1182(f).
13 Section 1182(f) invoked by the President in this instance,
14 provides that quote:
15 "Whenever the President finds that the entry of any
16 aliens or of any class of aliens into the United
17 States would be detrimental to the interests of the
18 United States, he may by proclamation, and for such a
19 period as he shall deem necessary, suspend the entry
20 of all aliens or class of aliens as immigrants or
21 nonimmigrants, or impose on the entry of aliens any
22 restrictions he may deem appropriate," unquote.
23 With the exception of the statement that such a finding
24 has been made in the text of the Proclamation itself, where in
25 the record have findings based on evidence been made that

1 entry of any of these three classes of nonimmigrants would be
2 quote, "detrimental to the interests of the United States?"
3 And then I asked for factual -- please provide the Court
4 with specific factual citations to the record.
5 On what legal bases or standards are these discretionary
6 decisions to be made? By what standard does the Court
7 evaluate the evidence and the adequacy of the findings made to
8 support the Proclamation? Does the Court weigh conflicting
9 evidence in support of the Proclamation and, if so, which
10 party, if any, has the burden of proof?
11 Let me see if I can, you know, addressing you, Mr. Press,
12 basically, would you argue we have covered this? The
13 Proclamation finding is adequate. The Court doesn't get to
14 look behind it, essentially. And so, therefore, beyond what
15 you identified in the Proclamation itself, there is not
16 anything in the record further, nor need there be, nor was the
17 President required to support his proclamation by evidence and
18 findings in the record.
19 Would that be a fair characterization of the Government's
20 position?
21 **MR. PRESS:** I think that is fair. I don't want to be
22 as blunt as Your Honor, but we would note that in *Trump v.*
23 *Hawaii* -- and I hate to keep coming back to that but that's
24 really the most fulsome explanation that we have of 1182(f)
25 and these sorts of Presidential Proclamations -- that the

1 Court at page 2409 found it questionable whether the President
2 need to even explain its findings as a textual matter.
3 And then it sort of emphasized that even if some sort of
4 review would be appropriate, which I believe honestly this
5 question is getting at, he doesn't need to provide detailed
6 findings, nothing close to the detailed findings that were
7 provided in 9645, citing some of the examples I've provided to
8 Your Honor before with respect to the brevity of prior
9 Presidential Proclamations in this sphere, and then wrote
10 specifically that a more quote, "searching inquiry" into
11 findings, quote, "is inconsistent with the broad statutory
12 text and the deference traditionally afforded the President in
13 this sphere."
14 That's all at 138 S. Court 2409.
15 **THE COURT:** All right. Mr. Hughes, do you have
16 anything to add in the context of this question?
17 Obviously the Government -- although the Government did
18 not buy into the Court's broad generalization of its position,
19 which is fair, your position would be -- I guess I'm not
20 exactly clear because I think this is where aptly appropriate
21 for you, I'm kind of in the question I'm struggling about
22 let's assume you're right and you say, you know, not only are
23 there not adequate findings, but the purported findings, if
24 there are any, are contradictory to the stated purpose.
25 I guess my -- this question tries to get, okay, let's say

1 I agree that that's an appropriate inquiry, how do I do that
2 inquiry and what standards do I apply to it?
3 You can go forward.
4 **MR. HUGHES:** Your Honor, I think there are two
5 possible ways. Again, taking a page from *Doe #1*, it's just
6 the inquiry: If there's minimal reasoning and virtually no
7 factual findings, that would suffice. And we think that does.
8 I think the next step would be looking to the Department
9 of Commerce --
10 **THE COURT:** Wait. Minimal reasoning though, it's
11 sort of like scintilla -- when I do criminal case versus
12 probable cause versus reasonable suspicion, what does that
13 mean? How do I -- how do I judge whether something is minimal
14 reasoning? The number of words, or what?
15 **MR. HUGHES:** I think the standard that I would
16 suggest, Your Honor, is it within the range of reasonable
17 options.
18 And in circumstances like this, as Mr. Press says, there
19 are going to be a wide range of reasonable options that are
20 going to be available to the President. And the President
21 certainly has broad deference. But if there is a limitation
22 on judicial review, which *Doe #1* says there is, there's a
23 limitation to at least it has to be reasonable.
24 And when there's a facial contradiction between the only
25 argument that has been put forward, which is the supply and

1 demand labor economics with other aspects of the Proclamation
2 itself that, in fact, recognized there is not fungibility,
3 makes the point that one individual can't just go and perform
4 any other job, that takes it, I think, outside the range of
5 reasonable when that's the only finding that is proffered that
6 could conceivably connect the problem with the action taken of
7 banning these three categories of individuals.
8 So I think that is how we would suggest the Court
9 approaches that and connects the inconsistencies of between
10 the Government's argument and the face of the Proclamation
11 with what the standard would look for while recognizing the
12 broad deference that's due.
13 Now, I think this might get us to the Court's third
14 question, but the additional dimension that we have not
15 discussed is the appropriate deference that is due when the
16 Court or the President is addressing a domestic economic
17 problem --
18 **THE COURT:** It does segue, and I was going to have
19 Mr. Press go first, but you've got the -- sort of got the
20 rostrum now, so I'll let you go forward.
21 Question 3. In the context in which the Proclamation was
22 issued, concerning domestic policy and employment as opposed
23 to foreign relations and national security, I was going to ask
24 what is DHS's position and legal authority regarding the level
25 of deference this Court owes to the invocation of executive

1 authority under 1182(f)?
2 Now, the elephants in the room here are the *Doe* case where
3 the Court said, you know, in domestic policy -- domestic --
4 the domestics sphere as opposed to the international or the
5 national security's sphere, there is less deference. Both
6 Judge Mehta and also Judge Bress in his dissent in the *Doe*
7 case say that's just made up at out of whole cloth, there's no
8 support.
9 That's why I asked the question, putting aside that, you
10 know, it is a judge in this district, in this circuit, what is
11 the amount of deference to be given in a domestic situation --
12 in this situation, and what is your authority other than those
13 cases, which go both ways, obviously, on that issue?
14 **MR. HUGHES:** Thank you, Your Honor.
15 So to start, of course, we do have the panel decision in
16 *Doe #1*, which we, of course, think is governing here and quite
17 important. But to get to the Court's question, setting that
18 aside, why are we substantively correct about it? There's
19 less deference for two independent reasons, in our view.
20 The first is, what's the basis for the heightened
21 deference that the Court identified in *Trump v. Hawaii*? And
22 this is language that the Government pointed to in its briefs,
23 for example, where the Court talks about the President doesn't
24 have to fit all the pieces in the puzzle together in order to
25 grant weight to the presence and pair of conclusions. That's

1 a point the Government often points to.
2 *Trump v. Hawaii*, for that proposition, cited to *Holder v.*
3 *Humanitarian Law Project*. For that proposition, *Holder* cited
4 to *Zemel v. Rusk*, which ultimately cited to *Curtiss-Wright*.
5 So *Curtiss-Wright* is the seminal case that says when the
6 President is acting in a foreign relations capacity external
7 to the United States, United States generally speaks with one
8 voice; that is of the President, and the President is due to
9 heightened deference when acting in the international sphere.
10 Well, that is correct and that is what the Supreme Court,
11 of course, said in *Trump v. Hawaii*, but that's not applicable
12 in the context when we are addressing a domestic economic
13 problem. Nothing anywhere on the face of the Proclamation has
14 anything remotely to do with foreign relations of the United
15 States.
16 It is true that immigration often touches on foreign
17 relations, but as the Ninth Circuit said in *Doe #1*, just
18 because it addresses something to do with immigration, does
19 not make that act foreign facing when the act is, in fact,
20 solely justified and premised -- and based on the President's
21 views about domestic economic policy. So that's the first
22 reason.
23 The *Curtiss-Wright* deference is just not applicable here.
24 But the second is, even if we're wrong about that, I think
25 we are right, again, we will eventually say what I believe to

1 the Court's question Number 4, but if we look at *Youngstown*
2 *Steel* and Justice Jackson's seminal opinion about the
3 deference that's due the Presidential actions even when the
4 President is responding to national emergencies that have a
5 foreign relations dimension to them, *Youngstown* says, well --
6 recognizes *Curtiss-Wright*, but contextualizes *Curtiss-Wright*
7 of saying that's for the President is acting in either
8 consistent with statutory -- statutes Congress has passed or
9 is filling in the gaps where Congress has not acted.
10 But Justice Jackson says in the opinion that has now
11 gained traction and we described in our papers has been
12 adopted by the Court, that even when the President is acting
13 in foreign relations, which, again, as I said, I don't think
14 we get to, but when the President is, there's much less
15 deference that's due to the President when the President is
16 acting on top of a legislative structure and is acting
17 inconsistent with that legislative structure.
18 I know that gets to our question 4 because in that is the
19 premise that he is acting inconsistent, and we will, I'm sure,
20 talk later in the argument why we think he absolutely is by
21 effectively shutting down the H, J, and L programs, but that's
22 a second additional reason why the President's power is, as
23 Justice Jackson said, at its lowest ebb in this context.
24 So those are the twin reasons, Your Honor, why we think
25 *Doe #1* is entirely correct in saying that the deference that

1 is applied here is substantially less than the deference that
2 was applied in *Trump v. Hawaii*.
3 **THE COURT:** All right. Mr. Press?
4 **MR. PRESS:** So, I appreciate Your Honor directing
5 this question at us. We had thought, actually, a great deal
6 about this after Your Honor sent the questions yesterday
7 morning.
8 And from our perspective, this is actually directly
9 addressed by the Supreme Court multiple times. Going back to
10 1950, the Supreme Court has written that it is inherent in the
11 executive power to control the foreign affairs of the nation
12 dealing with the exclusion of aliens.
13 And *Harris Ciates* (phonetic) cited the exact same thing;
14 that any policy towards aliens is vitally and intricately
15 interwoven with contemporaneous policies in regard to the
16 conduct of foreign relations.
17 Now, I hear Mr. Hughes to say, well, this is really about
18 economics. And certainly their theory of the case is all
19 about they disagree with the President from an economic
20 perspective. I think that there are many different people and
21 many economists who disagree on all sorts of economic issues,
22 but I don't think that -- really, if this pandemic has proven
23 anything, we can just say, well, the economy of the United
24 States is an isolated thing. It should be seen in a vacuum.
25 Unemployment numbers should be seen in a vacuum. Because what

1 starts in the middle of China can cross the entire globe and
2 dramatically infect or affect, rather, the unemployment rates
3 of the United States.
4 That happens because people come into different countries,
5 they cross borders. So crossing borders creates domestic
6 economic impact. It creates all sorts of domestic impact. In
7 *Trump v. Hawaii*, for example, this precise argument was made
8 as well. Not with respect to the definiteness that Mr. Hughes
9 has given it with respect to domestic versus foreign affairs
10 because we don't think that distinction matters.
11 If you go back to -- it doesn't make any sense if you look
12 at the text -- number one, if you look at the legislative
13 debates that took place in 1952, the prior iteration of 1182
14 actually has a national emergency sort of language or
15 triggering language that is included in it.
16 This is flagged by Chief Justice Roberts in *Trump* where he
17 wrote -- concluded that that national emergency language was
18 taken away. And in the debate, at the House level, they
19 actually even said that what if we are in a period of great
20 unemployment, it is in the judgment of the committee, it is
21 advisable in such times to permit the President to say at a
22 certain time we are not going to aggregate that situation.
23 All I'm trying to say here is, that Congress went into
24 this very well aware, in stark contrast to Mr. Hughes'
25 interpretation of *Youngstown* as being something -- we're at,

1 you know, Justice Jackson's lowest ebb, we are at zenith.
2 We're not in the zone of twilight. We're not in the lowest
3 ebb.
4 Congress walked into this knowing that if the President
5 were facing an unemployment crisis, as Your Honor flagged at
6 the very beginning of this oral argument, this is the time
7 where the President has this power.
8 And even if we were going to use the *Doe #1* reasonable
9 test that Mr. Hughes was advocating before he segued into this
10 question, that's really just rational basis. I don't -- I
11 never understood there to be any sort of distinction between
12 what's reasonable and what's rational.
13 And the rational basis test, if we're dealing with
14 domestic economics, I think there was a time when courts were
15 doing more searching inquiries. Justice Holmes rejected that
16 theory, and I don't think that we want to go back to that time
17 period, at least any time soon, especially in the middle of a
18 pandemic where the unemployment rate more than doubled in a
19 matter of weeks.
20 So, that's really where we take issue with the entire
21 premise that Mr. Hughes is pushing for.
22 **THE COURT:** Mr. Hughes?
23 **MR. HUGHES:** Thank you, Your Honor.
24 I don't think the Government disagrees with our
25 demonstration that the deference is tethered to the

1 *Curtiss-Wright* view that it applies when the President is
2 acting in the context of foreign relations.
3 Now, Mr. Press attempted to justify how this Proclamation
4 could somehow be related to foreign relations, but the
5 Proclamation doesn't say that on its face. Nowhere, in
6 justifying the action taken, does the President say that this
7 is an exercise in foreign relations power.
8 The President is quite clear that this is a power that the
9 President is attempting to exercise in relationship to
10 domestic U.S. unemployment. And that's simply just not the
11 notion that it is tethered to foreign relations.
12 Further, we describe in our brief, and I won't repeat the
13 cases, but importantly Congress has -- the Supreme Court has
14 long said that immigration regulation is principally a
15 function of the legislature of Congress, and that's why it is
16 really quite critically important to respect the judgment of
17 Congress, its reasoned decisions that individuals in H's, L's,
18 and J's are, in fact, in the national interest.
19 In the current crisis, of course, everybody recognizes
20 this is a crisis. Congress has taken all sorts of
21 extraordinary actions to amend existing statutes. We can -- I
22 would be happy to provide the Court a sampling of a list, but
23 from suspending student loan payments to allowing telehealth,
24 had to go back and amend all sorts of existing statutes that
25 Congress deemed were not up to the task of either the economic

1 conditions or the health conditions confronting the nation.
2 Congress has not gone back and amended the H, J, or L
3 statutes that provides for these very important visa programs.
4 And that, again, gets to our second point as to why the
5 President is at his lowest ebb when acting in contradiction of
6 existing statutes.
7 **THE COURT:** All right. Let me go back -- before we
8 get into question Number 4, because I have enough on 3, I have
9 a question I have been sort of burning to ask the Government
10 since I read -- finished reading *Gomez* last night, which is:
11 As I understand it, the Government lost that case on the APA
12 and the judge issued a preliminary injunction.
13 So is the 10052 that we're dealing with today, is that --
14 is the Government enjoined by Judge Mehta's decision in *Gomez*
15 from enforcing that Proclamation?
16 **MR. PRESS:** Thank you for that question, Your Honor.
17 We read that opinion to be a mixed bag. And because Judge
18 Mehta was crystal clear that he was applying what -- the order
19 was meant to apply solely to diversity visa selectees for this
20 fiscal year's lottery, everyone else, including H-1B
21 employers, and all other categories of employers that are sort
22 of interwoven within this case, they did not get a preliminary
23 injunction.
24 We're not considering the Proclamation to be enjoined, and
25 Judge Mehta himself said I am not enjoining the Proclamation

1 because that's not possible under the APA because the
2 President is not an agency, as was advocated by then attorney
3 John Roberts before the Supreme Court in *Franklin v.*
4 *Massachusetts*, where he won that case.
5 Nothing has changed in the 30 years since that was
6 decided, so we did not read Judge Mehta to sort of break new
7 ground in that respect.
8 **THE COURT:** But to the extent -- well, to the extent
9 that he said, okay, I'm not going to enjoin the Proclamation,
10 the President was within his Constitutional right to make the
11 Proclamation and all the things we have been arguing. But the
12 implementation of the Proclamation, the regulations and
13 enforcement by the agencies are foreclosed because they
14 violated the APA, are you saying that with respect to that
15 piece, it doesn't, by Judge Mehta's decision, doesn't by its
16 term apply to the implementation of 10052?
17 **MR. PRESS:** Well, yes. With respect to other visa
18 categories. Because it was very clear, as in the preface of
19 the opinion, and in the irreparability aspect of harm that was
20 at play, that Judge Mehta's opinion is directed towards those
21 with an emergent need.
22 In the diversity visa context, their deadline to have
23 visas be issued to them is really less than three weeks from
24 now. And in that context, he basically said they have
25 irreparable injury, this is an emergency situation, to not

1 consider them to be emergency visa applications is
2 unreasonable under the APA. He said nothing with respect to
3 the other visa categories that would be, for example, at issue
4 in this case.
5 **THE COURT:** All right.
6 **MR. PRESS:** In fact, he said they don't have
7 irreparable injury.
8 **THE COURT:** All right. We are going to get into some
9 of his reasoning at this point, I think, with the next series
10 of questions. Let me move on to question Number 4.
11 The Proclamation includes a limitation of scope in
12 Section 3 and an exemption to enforcement in Section 4, but no
13 specific guidance on how those limitations or exemptions are
14 to be invoked or effectuated.
15 Section 3 provides a limitation in scope for aliens deemed
16 necessary to provide temporary labor or services essential to
17 the food supply chain and quote, "any alien whose entry would
18 be in the national interest as determined by the Secretary of
19 State, the Secretary of Homeland Security, or their respective
20 designees," unquote.
21 Section 4(i) provides that these same officials may
22 determine in their discretion that enforcement of the
23 Proclamation be exempted in areas critical to defense, law
24 enforcement, diplomacy, or national security of the United
25 States, for medical care or research to aid Americans

1 suffering from COVID-19, or those who are deemed necessary to
2 facilitate the immediate and continued economic recovery of
3 the United States.
4 Question A, and I'll start with the Government: On what
5 legal bases or standards are these discretionary decisions to
6 be made?
7 I'll start with you, Mr. Press.
8 **MR. PRESS:** Well, I think if we were to go through
9 APA, it would be arbitrary and capricious review.
10 I don't -- this is a little tricky, right, because what
11 you're really talking about is what the Proclamation says.
12 And then it directs his cabinet to go and do certain things.
13 You flagged in your question, and I appreciate that, with
14 respect to there are exceptions and categories. I think these
15 are discretionary determinations partially because if you look
16 at the categories, defense, law enforcement, diplomacy,
17 national security, or medical care or research with respect to
18 COVID-19, all of those are going to really health and safety
19 measures specifically.
20 So there is obviously the catch-all at the end with
21 respect to immediate and continued economic recovery, someone
22 is going to come here and say, actually, I want to start a
23 company that's going to have 10 million jobs to fill that
24 problem that you've got over there, I think we would let them
25 in. That's just me.

1 As Your Honor is noting in subsection A's question, it is
2 a discretionary determination. And discretionary
3 determinations under 701 of the APA are not subject to
4 judicial review. So, within the question itself, it sort of
5 loops back over and over again.
6 I think the best example I can give you is Your Honor's
7 case in the Marine Corps case we cited to Your Honor
8 yesterday. Now, I know the Marine Corps is different than
9 whom to admit to the United States or to exclude from the
10 United States, but it gets to what is in the best interests of
11 the United States, what is in the national interest as 1182(f)
12 is really getting at.
13 And those are discretionary determinations that are
14 precisely why in *Trump v. Hawaii* the Court did not want the
15 Judiciary to get into it because they don't have the acumen or
16 expertise.
17 And also, I want to stress that foreign relations are a
18 very fluid thing. Sometimes certain countries do things and
19 that angers us. Or we might do things back and that angers
20 them, and it could escalate. I don't want to name any
21 specific countries, but I think Your Honor has seen some of
22 the examples, we have all seen those examples when we read the
23 newspaper every morning.
24 So that's why the Judiciary is not very apt in
25 second-guessing these determinations. You could counter,

1 well, this is an economic consideration, but that actually
2 gets to precisely the same point that was in front of the
3 Congress in 1952, that was discussed in the case law,
4 including in *Trump v. Hawaii* changing economic considerations.
5 So I think that --
6 **THE COURT:** Let me ask you this: I kind of missed
7 one predicate here, which is, maybe it's implicit in your
8 question -- or in your answer, not your question.
9 So, with respect to the implementation of these exceptions
10 that I'm talking about in question Number 4, you agree that
11 those -- that implementation would be subject to the APA and
12 particularly to the arbitrary and capricious standard;
13 correct?
14 **MR. PRESS:** I don't agree because the question itself
15 admits that they're discretionary decisions that the APA does
16 not provide judicial review for.
17 If you were to apply any sort of standard, then I suppose
18 arbitrary capriciousness would be the one that you would apply
19 to the agencies but not to the Proclamation themselves.
20 And I don't think we have really seen any sort of
21 implementation that the companies or that the plaintiffs in
22 this case are actually quibbling with per se. They did cite
23 to a tweet. They have never actually presented Your Honor
24 with any sort of denied visa application at all, or anybody
25 knocking on the door trying to enter the United States.

1 **THE COURT:** Let me tell you what's a little bit
2 troubling to me.
3 It appears to the Court that these discretionary decisions
4 were determined by finely tuned legislation. Why should the
5 executive replace those legislative judgments or decisions?
6 **MR. PRESS:** So, thank you for that because that
7 really tracks right back to the same argument that was
8 rejected in *Trump v. Hawaii*. And I don't -- I'm not trying to
9 disparage Your Honor's question.
10 What I'm saying is, the exact same argument was made with
11 respect to the visa waiver program, with respect to countries
12 that are safe versus countries that are not safe.
13 In *Trump v. Hawaii*, they -- I think you all kept calling
14 it a highly articulated scheme. The exact same argument was
15 made in the *Gomez* case on this sort of same theme, but it
16 doesn't matter with respect to how the rubber meets the road;
17 it's for the Executive Branch to determine, and the
18 Proclamation itself is not really subject to APA review.
19 So --
20 **THE COURT:** So you disagree with Judge Mehta when he
21 went through a fairly exhaustive analysis with respect to
22 noncompliance by the Government with the APA in the context of
23 the Proclamations that he was considering in *Gomez*?
24 **MR. PRESS:** So we obviously -- we do disagree with
25 that aspect of the opinion on the -- and let me tell you why.

1 I think the fundamental distinction that was crucial for
2 Judge Mehta was the textual word "entry" versus visa issuance
3 that was at the core of what's going on in the diversity visa
4 context.
5 Because if those selectees don't get those visas issued to
6 them prior to September 30th, they lose their chance. And the
7 chance of being reselected in a subsequent year is vanishingly
8 small as he flagged.
9 So, in that context, what he was saying is, it violates
10 the APA to not consider them to be emergency additions --
11 **THE COURT:** Can I go back? I want to go back to
12 something really important, I think.
13 So clearly, this Proclamation contemplates enacting some
14 regulations to basically expatiate what -- and if they do, you
15 may quibble with my premise, but if they do, if such
16 regulations are required to be enacted to implement the
17 exceptions, aren't they subject to the APA?
18 **MR. PRESS:** So this -- you're correct. I want to
19 flag the answer with yes, and then if I might provide a more
20 fulsome explanation.
21 **THE COURT:** Yes.
22 **MR. PRESS:** This actually is the key to our argument
23 with respect to final agency action and whether this is
24 subject to APA review at all.
25 If you look at *Chamber of Commerce v. Whiting*, which Judge

1 Mehta cites, and we disagree with his analysis primarily on
2 the exact same point that Your Honor was making there. If
3 they promulgate rules for regulations, then obviously those
4 rules that -- you know, they have to go through procedural
5 notice and comment, or if they weren't subject to notice and
6 comment, was there an exception? Are they arbitrary and
7 capricious? Was there a final agency action, et cetera?
8 That was crucial for the DC Circuit in *Chamber of Commerce*
9 *versus Whiting* because there were rules that were promulgated.
10 There have been no rules promulgated. What we have dealt with
11 here over the -- really in the last three months are emergency
12 situation after another emergency situation, as Your Honor
13 flagged at the very beginning of this oral argument.
14 In that context, having to force them to go through notice
15 and comment, or rulemaking, sort of -- or requiring the level
16 of detail that Mr. Hughes is arguing for with respect to the
17 prior questions, cuts directly against everything that was
18 involved in *Trump v. Hawaii*.
19 I want to be clear that in *Trump v. Hawaii*, there were
20 findings and recommendations involved in the administration of
21 Proclamation 9645. So, no one said, well, those agencies
22 themselves, the findings need to be subject to APA review
23 because it was embedded within the scheme at play under the
24 Proclamation.
25 And that gets to the best comparison, *Dalton v. Specter*.

1 Senator Specter didn't like that military bases were going to
2 be closed and he said, well, that -- this is arbitrary and
3 capricious. This is irrational, unconstitutional.
4 All those arguments were rejected because it was an
5 executive order. At the end of the day, the President made
6 that call. And he could use his cabinet officials to help
7 them implement the Proclamation without running afoul of the
8 APA; that he has the authority here under the Proclamation.
9 All of this information is coming back up to the President
10 to determine whether another proclamation might be issued or
11 need to be issued on December 31st. Hopefully that's not
12 true. Hopefully the unemployment rate has recovered and we
13 can move past this. I don't know if it's going to be true.
14 I think venturing to guess what the future will hold is,
15 again, foolish. But the point is, this is a temporary measure
16 that was never meant to sort of go through the type of notice
17 and comment rulemaking that Your Honor's questions poses.
18 **THE COURT:** All right. I am sure you are busting at
19 the seams, Mr. Hughes, giving so much airtime to the
20 Government. Tell me what -- I'll throw it back in your court
21 and just respond because there's a lot in there. So go for
22 it.
23 **MR. HUGHES:** Thank you, Your Honor.
24 Just briefly, I still think it's notable that Mr. Press
25 keeps going back to foreign relations and the exigencies that

1 he said certain countries may pose. Because, again, that is
2 not this case, and I think that's an important distinction.
3 Let me get to the heart of the matter with respect to our
4 argument that this violates the existing statutory and
5 regulatory scheme. What *Trump v. Hawaii* -- and I won't go
6 through all the language because it's in our briefs --
7 **THE COURT:** When you use the term "this," we have to
8 be careful about -- I would like to know what your definition
9 of "this" is. Is "this" the implementing regulations, if any,
10 on the exceptions or something else?
11 **MR. HUGHES:** If I could start, Your Honor, most
12 fundamentally with the Proclamation broadly, and the
13 Proclamation's incompatibility with the existing statutory and
14 regulatory scheme. And I think it's highlighted then by the
15 implementation in the August 12th State Department policy that
16 came out during the course of the briefing in this case.
17 We describe this in the briefs. I won't go through all
18 the language in *Trump v. Hawaii*, but I think *Trump v. Hawaii*
19 sets up a very clear scheme where it says, the President can
20 use Section 1182(f) power -- and, again, this argument is
21 separate from our findings. Of course they have to find all
22 that, it's a separate argument -- the President can use
23 1182(f) to supplement the requirements, entry requirements
24 that exist in the relevant statute in the INA, but *Trump v.*
25 *Hawaii* recognizes the President doesn't have the power to

1 contradict the INA.
2 So it's a distinction between supplementation or
3 contradict. And *Doe #1* recently recognized this distinction
4 and said, effectively, the President can't rewrite provisions
5 of the INA.
6 I think that's the question the Court is confronted with
7 is, is this a supplementation of the INA in its regulations or
8 is this a contradiction or rewriting of them? I was thinking
9 about this for argument. I think one way to just try to
10 engage or wrestle with that analysis is to identify what's the
11 relevant characteristic that is at issue in the 1182(f)
12 Proclamation. Because I think that sheds some light as to
13 whether or not it's a supplementation or a contradiction.
14 So we looked at all of the historic examples. The
15 professor's amicus brief gave some helpful charts to show off
16 the prior uses of 1182(f), and I think they have -- all the
17 historic examples fall into one of three categories.
18 The characteristic was the individual comes from a certain
19 country. That's *Trump v. Hawaii*, and Mr. Press's discussion
20 that certain things happen in foreign relations and the
21 President has to be able to address individuals from one
22 country.
23 There are other categories, other Proclamations where the
24 criteria is somebody is a member or supporter of a certain
25 organization and the United States has to make decisions about

1 that. So it's one example. There's Proclamations about
2 individuals who are part of the military junta who supported
3 the overthrow of the Sierra Leone government. And there are
4 many other examples of that. Somebody who is supporting a
5 particular political entity or terrorist organization.
6 The third kind of criteria are behavioral; individuals who
7 support Iranian human rights abuses are subject to a
8 proclamation; individuals who engage in cyber activity that is
9 directed at the United States, they're subjected to a
10 proclamation.
11 What is -- the case about all of these Proclamations,
12 though, is they are supplementing the INA entry requirements
13 because there's nothing that is contradictory with them.
14 But if we look at what's the criteria that this
15 Proclamation is based on, the criteria here is coextensive
16 with anybody who has an H, J, or L visa. We've looked at the
17 examples, and we don't know of any prior example of
18 proclamation prior to these -- ones -- the one at issue here
19 where the President has, instead of taking some other category
20 of thing that is -- is relevant to a particular exigency and
21 has said instead said I'm going to address the category as a
22 whole, and that's where the contradiction and the rewriting
23 has come in.
24 The legislature, Congress has determined that it is in the
25 national interest for individuals to enter the United States

1 on H, J's, and L's. It's determined that it's in the national
2 interest, for example, if somebody who has worked for a year
3 or more of a company to be eligible for a L visa.
4 What this regulation -- what the Government has done
5 through the Proclamation is either wholesale barred these
6 individuals or through a costly, complicated, uncertain
7 exception process changed those requirements. So now,
8 although Congress said it was in the national interest for
9 somebody who has worked for a company for one year to be
10 eligible for a L-1 transfer visa, the national interest
11 exception has changed that to two years.
12 Congress said somebody is in the national interest if
13 they're paid a prevailing wage. The new structure that has
14 been implemented says it's 115 percent of the national way --
15 or the prevailing wage.
16 So this is an area in which I think if there's any kind of
17 abrogation or contradiction of the INA, this Proclamation must
18 be it. And so for that limitation that we think does exist
19 quite squarely on the face of *Trump v. Hawaii* to have meaning,
20 it has to be this case. Because if it is not this case, then
21 the President can rewrite any provision of the INA or
22 implementing regulation under 1182(f), and we think *Trump v.*
23 *Hawaii* is quite clear the President can't do that.
24 And if the President could, that would raise very serious
25 concerns about the dispensing power and nondelegation. The

1 nondelegation argument we make here isn't just any ordinary
2 garden variety President-doesn't-have-sufficient-standards.
3 It's about can the President set aside duly enacted laws of
4 Congress.
5 We think the case law there is quite clear that the
6 President can't have that power. And we think --
7 **THE COURT:** Let me ask you, Mr. Hughes, looking at
8 the plain text of 1182(f), it says, you know -- this has to do
9 with whether this Proclamation or the actions of the President
10 contradict.
11 It says, you know, when the President finds certain
12 things, he may, by proclamation and by such -- and for such
13 period as he shall deem necessary, suspend the entry of all
14 aliens or class of aliens as immigrants or nonimmigrants or
15 impose on the entry of aliens any restrictions he may deem
16 appropriate.
17 So how is what he did contradictory to that language?
18 **MR. HUGHES:** Because what is the judgment that
19 Congress has made? Congress made the judgment that H's, J's,
20 and L's are -- admitting them is in the national interest.
21 The President has determined that they are not in the national
22 interest. That's the key distinction between supplementation
23 and contradiction.
24 The President can't use 1182(f) in order to override the
25 congressional determinations that are expressly affirmatively

1 determined. What the President can do is take areas where
2 Congress has not legislated or given the President authority
3 to supplement.
4 I think *Trump v. Hawaii* is quite clear. Because what the
5 Court did, was it addressed the arguments that the plaintiffs
6 made in that case and said there's simply no contradiction.
7 This is an area where there's a gap, the President has
8 authority, and the President is supplementing what are the
9 entry requirements.
10 **THE COURT:** I am missing something here. Then
11 what -- then what meaning would you give to the term about the
12 President being able to suspend the entry of all aliens, et
13 cetera or class, et cetera? It's basically saying he can
14 suspend them or impose any restrictions he may deem to be
15 appropriate.
16 How is that contradictory specifically to what the
17 President did here?
18 **MR. HUGHES:** Your Honor, that takes us to our third
19 argument, that if 1182(f) were understood to its full range
20 that the President could actually contradict existing
21 statutes, it would be unconstitutional if it were that
22 extraordinary.
23 We don't think it is that extraordinary because we think
24 there is a very appropriate limiting construction which the
25 Supreme Court in *Trump v. Hawaii* provided. And that's just on

1 the basic separation of powers; that when the President is
2 acting -- is implementing powers that are given to him by
3 Congress, he has to do so consistent, not just with 1182(f),
4 but with all of the other statutes that govern Government
5 action. And the --
6 **THE COURT:** As well, Mr. Hughes, just in fairness to
7 the plaintiffs, the language quote, "detrimental to the
8 interests" -- it has to be based on a finding that would be
9 quote, "detrimental to the interests of the U.S.," unquote.
10 That's also 1182(f), correct?
11 **MR. HUGHES:** Yes, Your Honor.
12 And our point is -- I understand the court's suggestion
13 that if you read 1182(f) in isolation, you would think the
14 President could, you know, do anything. But the President
15 can't do anything because the President, in exercising
16 1182(f), also has to respect all the other statutes that
17 Congress has created in the INA.
18 As I said, *Trump v. Hawaii* is absolutely consistent with
19 that, recognizing that the issue there was not a
20 contradiction. And, again, this is why we think it is very
21 important to understand this limitation on presidential
22 authority because Congress could not give the President the
23 authority to dispense with duly enacted federal statutes.
24 *Clinton v. City of New York* is quite express that that was
25 one of the evils that the founders -- the framers of the

1 Constitution sought to avoid was the Stuart Kings, back in the
2 day, could dispense with laws of Parliament that the King
3 disliked. And the framers of the Constitution expressly
4 rejected any ability to transfer to the President that kind of
5 extraordinary power.
6 So that's why we think it is entirely consistent to say,
7 yes, the powers under 1182(f) are extraordinary and they allow
8 the President to supplement areas in the INA that are either
9 silent or not addressed. But what the President cannot do is
10 directly contradict the reasoned judgment that is
11 affirmatively expressed in the duly enacted statutes.
12 When the President exercised 1182(f), it has to be
13 consistent with the guardrails that are put up in the INA, and
14 that's just fundamentally what's lacking here; the President
15 doesn't get to change the reasoned judgment of Congress.
16 **THE COURT:** Mr. Press?
17 **MR. PRESS:** This exact same argument was made in
18 virtually verbatim terms --
19 **THE COURT:** Let me ask you a question before you get
20 there.
21 So this appears to the Court to be an open-ended -- this
22 Proclamation contemplates an open-ended timeline and the
23 ability to continue the Proclamation without end; is that
24 correct?
25 The President decides, hey, we still have COVID, you know,

1 everything I said before still applies. I'm going to continue
2 this for six more months. Is it open ended in that regard?
3 **MR. PRESS:** Well, it's not necessarily open ended
4 explicitly. I mean, I think that this exact same sort of
5 issue came up in *Trump v. Hawaii*. Because that argument was
6 made. Justice Kennedy noted to Mr. Katyal it's not open
7 ended, there's a review process involved. The same sort of
8 review is involved here as sort of borne out by the evolution
9 of Proclamation 10014 into 10052.
10 I want to be clear here that, number one, plaintiffs
11 aren't even challenging any of the exceptions that are sort of
12 embedded in this fourth question that Your Honor has posed.
13 Not challenging those at all.
14 Number two, the review process is sort of just what we had
15 talked about before where they are making those
16 recommendations to the President, and he can continue them or
17 not. We don't even know if the unemployment rate will get
18 worst. I mean, hope to God it won't by December 31st, but it
19 could.
20 If that's necessarily the case, then I think what the
21 context we are talking about here, which is, again, temporary
22 nonimmigrant workers, which are here -- they don't have --
23 they are not intending to remain here, they are coming here to
24 take temporary jobs, temporary jobs that, in the President's
25 view, could otherwise go to U.S. workers who are already in

1 the United States, who already enjoy Constitutional
2 protections.
3 That sort of gets to how these work in operation, how it
4 worked in *Trump v. Hawaii*. On the supplementation point that
5 Mr. Hughes kept coming back to, he used the word "supplement
6 but cannot contradict." Mr. Katyal, before the Supreme Court
7 said, "supplement but can't supplant."
8 That's also in -- and basically joked about in Chief
9 Justice Robert's majority opinion in that where he says,
10 really -- they talk about flexible power to supplement, but
11 it's actually extremely cramped in their appeal.
12 And even in -- at oral argument there, they say, well,
13 it's residual because he has a wide berth in this area if
14 there's any sort of an emergency. We are in an emergency
15 right now. And I never heard Mr. Hughes suggest otherwise.
16 But even then, Justice Roberts, as Your Honor was pointing
17 out, fairly read the provision itself, the text, vests the
18 authority to the President to impose additional limitations,
19 not just supplement or whatever Mr. Hughes' characterization
20 it was, on entry beyond the grounds for exclusions set forth
21 in the INA.
22 I want to flag here, if you took Mr. Hughes' argument,
23 Congress has already said that they are admitting temporary
24 workers into the United States is in the national interest,
25 therefore, the President can't do anything to counterman that,

1 1182(f) is exclusionary grounds. It basically says, if you
2 are going to come here and you're going to have a negative
3 impact on the United States, we are not going to let you in.
4 We are not going to give you visas to come in because that
5 would be bad for the United States. It's a whole listing of
6 exclusionary grounds.
7 So even if somebody is the smartest person in the world
8 but we think they are going to come into the United States to
9 commit a crime, which is, by the way, a domestic concern, we
10 don't have to let them in. And that's subject to --
11 **COURT REPORTER:** Subject to what? I'm sorry.
12 **MR. PRESS:** -- subject to constant deniability and
13 that goes directly back to the facially legitimate and bona
14 fide concern if they are making a Constitutional claim and if
15 there's a United States entity that is pushing that
16 Constitutional claim.
17 We don't have a Constitutional claim here. We have
18 statutory claims. And under the statutory claim, the exact
19 same one that was made in *Trump v. Hawaii*, the Court rejected
20 Mr. Hughes' theory. And he can say, well, contradict is
21 different than supplant. I don't believe that the dictionary
22 would support that sort of fine-grain nuance. I think they
23 are saying the exact same thing.
24 And the bottom line is that the text of 1182(f) gets to
25 exactly what Your Honor was suggesting; it's additional entry

1 requirements that we need to know before we let someone in to
2 know that they are not going to have a detrimental impact to
3 the United States.
4 **THE COURT:** Let me ask you this. Going back to my
5 point about the possible openendedness of this. When
6 December 31 or December 30th comes around, the President is
7 going to decide, he's going to make another finding about,
8 okay, we need six more months because we haven't improved; is
9 that correct?
10 It's going to be the President's exercise of his
11 discretion to determine whether this is going to be continued,
12 this -- the effect of this exclusionary Proclamation, correct?
13 **MR. PRESS:** So, number one, I want to preface that
14 by -- my answer by saying I don't want to predict what the
15 President will do. I think that's pretty difficult to do from
16 a day-to-day basis.
17 Number two, your characterization --
18 **THE COURT:** I think we can stipulate to that.
19 **MR. PRESS:** Okay.
20 **THE COURT:** Okay. Go ahead.
21 **MR. PRESS:** I think, number two, your
22 characterization is essentially correct. I mean, again, it's
23 a little more blunt than I would put it. But I don't see any
24 sort of difference between that and what is -- what was
25 directly before the court in *Trump v. Hawaii*.

1 Justice Kennedy asked Mr. Katyal, well, it's not perpetual
2 per se, there's a review process every 180 days. By the way,
3 that review process has been going on since *Trump v. Hawaii*
4 was decided in June of 2018. Countries have been taken off
5 the list, countries have been added to the list according to
6 that review process.
7 So you are correct that in theory this could happen. I
8 hope that it won't because I hope things will be better,
9 obviously, but in theory that's possible, although there's no
10 Constitutional or statutory problem as interpreted by the
11 Supreme Court in *Hawaii*.
12 **THE COURT:** All right. Mr. Hughes?
13 **MR. HUGHES:** Thank you, Your Honor. Just a couple of
14 brief reactions.
15 I think it's important to note that the argument the
16 Government doesn't make because the Government can't make it,
17 which is to say that the Proclamation is consistent with the
18 H, J, and L statutes. The Government doesn't dispute that
19 there's a direct contradiction with the statutes and the
20 regulations; rather Mr. Press' argument is that the President
21 is allowed to do this under *Trump v. Hawaii*.
22 So just at the start, I think it's important to note that
23 I don't think there's any serious dispute that this is an
24 abrogation of the H, J, and L statute and implementing
25 regulations.

1 Mr. Press' argument though is that *Trump v. Hawaii*
2 rejected our position on this. I just respectfully disagree
3 with that. *Trump v. Hawaii* agreed with the legal framework of
4 the distinction between supplement or contradiction.
5 Where *Trump v. Hawaii* came to a different conclusion was
6 it said on that -- the as-applied thing, is there an actual
7 contradiction here. And the Court found that the issue in
8 *Trump v. Hawaii*, the screening requirements was an area where
9 there was a gap and there was not an affirmative statement by
10 Congress that the President's Proclamation was directly
11 contradicting; that it was an area where the President could
12 fill in the gaps.
13 That simply is not the case here. Again, the Government
14 can't make an argument to say when the L visa says one year
15 working for a company and then the Proclamation says either no
16 L visas or two years working for a company that it does
17 anything other than -- than contradict.
18 **THE COURT:** Isn't it true that that problem was
19 recognized even in the *Gomez* case and Judge Mehta's decision?
20 **MR. HUGHES:** Your Honor, I think *Doe #1* is quite
21 clear in adopting our understanding of what *Trump v. Hawaii*
22 says, where *Doe #1* appreciates the *Trump v. Hawaii* limitation
23 is, its understanding of that case is you can't effectively
24 rewrite the INA. We think that's what the Proclamation and
25 its August 12th implementation absolutely fundamentally does

1 is rewrites the INA in all the different reasons we've shown.
2 **THE COURT:** I was referring to the colloquy I had
3 with Mr. Press, which is, Judge Mehta in *Gomez* discussed and
4 recognized the issue about open-ended time for the
5 Proclamation, correct?
6 **MR. HUGHES:** Yes, Your Honor.
7 And it's hard for us to see if there's any limitation on
8 the President not overriding these visa categories how this
9 doesn't satisfy it because it's entirely open ended. There's
10 no limitation or duration of time, and as Mr. Press has
11 recognized, there's no predicting where the administration
12 will go.
13 You know, it appears this is just a wholly new immigration
14 program that has been imposed on the H, J, L statutes in a way
15 that is contradiction. We think that if there is any
16 limitation *Trump v. Hawaii* recognized that *Doe #1* certainly
17 has embraced, this has to be on the wrong side of that line.
18 **THE COURT:** I will give you the last word, Mr. Press,
19 if you wish on that.
20 **MR. PRESS:** So on that point, I really can't say it
21 better than the Supreme Court or then Judge Ginsberg in
22 *Abourezk*. I mean, this has been described as a comprehensive
23 delegation. If -- 1182(f) also reflects Congress' judgment,
24 and then Judge Ginsberg described it as a sweeping delegation
25 to the President.

1 This is not contradicting the programs. The programs are
2 still operating. USCIS is still -- the U.S. Citizenship and
3 Immigration Services is still digesting these applications.
4 It's really more a matter of no one from outside the United
5 States can enter the United States right now because of
6 temporary suspension, which is expressly contemplated by the
7 text itself of 1182(f).
8 **THE COURT:** All right.
9 Mr. Hughes, so I've come to the end of the Court's
10 questions, I believe. Any further information you want to
11 provide or argument?
12 This is not an open invitation. People before me know I
13 have what's called a vacuum theory that nature hates a vacuum
14 and lawyers do too. And given the opportunity, they will fill
15 it with talk or documents. So I'm not saying, hey, I really
16 love you guys' voices and I'd like to hear more, but is there
17 anything you would like to say reflecting on what we've talked
18 about here, sort of in a paragraph or two, kind of a wrap-up
19 that you would like to leave -- from the plaintiffs'
20 perspective, you would like to leave the Court with?
21 **MR. HUGHES:** Yes, Your Honor.
22 One additional issue, small point that we haven't
23 addressed that's responsive to Judge Mehta's decision in *Gomez*
24 and then a quick wrap-up.
25 Judge Mehta's decision in *Gomez* declines an injunction in

1 part on the suspension of visa processing. As I read Judge
2 Mehta's decision, because he found there wasn't the kind of
3 irreparable injury that was shown why, this is apart from the
4 entry bar, but as to why consulates outside the United States
5 are not processing visas. I'd just direct the Court to Marcie
6 Schneider's second declaration at paragraph 26 where she shows
7 that even dependent of when the -- lifting the Proclamation,
8 which is our first request, getting processing now is
9 absolutely essential to ensure that there is not this enormous
10 backlog.
11 And Ms. Schneider, in her declaration, details how there
12 are 350 positions that if there could be processing now,
13 individuals would enter on or around January 1st and be able
14 to have positions then, but those positions will be -- they're
15 seasonal so they will end in the middle of March. And so
16 there is very clear irreparable injury on that specific point
17 that distinguishes this case from what Judge Mehta was looking
18 at.
19 One small broader point on the J-1 programs. We discussed
20 them a little bit less. It is important to underscore how
21 this Proclamation is completely devastating that particular
22 industry of the small businesses that are -- that sponsor J-1
23 individuals coming to the United States. This is an important
24 critical part of United States' longstanding policy and they
25 are -- have effectively no revenue right now. The harms are

1 real and companies are at the dire risk of failing immediately
2 because of the Proclamation.
3 Just to step back to our broader points, Your Honor, we
4 discussed throughout, we think if there is any requirement to
5 make a finding, which we think there is, there's simply been
6 no finding that connects this to the actual visa categories at
7 issue. The Government's argument about supply and demand and
8 the fungibility of jobs is not something that can be
9 reasonably credited because it's contradicted by the
10 Proclamation itself.
11 And the President's powers under 1182(f) just don't allow
12 it to overturn Congress' considered judgments in the INA. If
13 it could, that would lead to substantial constitutional
14 problems. But we don't think 1182(f) gives that sort of
15 extraordinary extensive power to the President.
16 The limitations that are adopted in *Trump v. Hawaii* and
17 confirmed in *Doe #1* more than suffice to show that this
18 Proclamation crosses the legal limits of 1182(f) authority.
19 **THE COURT:** Thank you.
20 Any final thoughts, Mr. Press?
21 **MR. PRESS:** Just that there really hasn't been any
22 showing of irreparable injury other than detrimental economic
23 impact. We understand the companies are going to be hurt by
24 this.
25 I think in terms of the balancing the harms, if you look

1 at the millions of jobs lost to U.S. workers already in the
2 United States, they are hurting far worse than the plaintiffs
3 in this case. And simply quibbling with the President when it
4 comes to he made a bad economic call, is not close to the
5 standard of irreparable injury when you're talking about
6 monetary harm.
7 **THE COURT:** All right. Thank you very much, counsel.
8 The matter is submitted. I appreciate your making such
9 effective arguments and helping the Court under difficult
10 circumstances all around. And the Court will --
11 understands -- let me -- I guess there is one thing I want to
12 ask and I guess I will start with the plaintiffs.
13 From the plaintiffs' perspective, obviously in the *Gomez*
14 case there was some clearly definable things happening and
15 that created an exigent circumstance. So I don't like to
16 impose on counsel, much less on the Court, unnecessary
17 deadlines or stricture, so from the plaintiffs' perspective,
18 when is, you know, the coach going to turn into a pumpkin
19 here?
20 I don't mean that to be denigrating in any way, but are
21 there events that are occurring that you want the Court to
22 know about, hey, the plaintiffs want to know a decision by X
23 date because this real stuff is going to happen.
24 What's your position on that? And then I will ask the
25 Government, putting aside its argument that there is no harm

1 to anybody, but I want to find out factually what event is
2 going to happen soon from the plaintiffs' perspective.
3 **MR. HUGHES:** Thank you, Your Honor.
4 These events are all described in the declarations, but it
5 is companies that are right now losing economic opportunity,
6 which is irreparable under *East Bay* because the Government
7 does not pay damages in these cases.
8 So if the Court looks to Singing Hills right now, they've
9 described that they are trying to bring workers in to be able
10 to complete their season at the end of September, beginning of
11 October. And they have hundreds of thousands of dollars of
12 economic injury that would be absolutely irreparable.
13 Gentle Giant Moving is trying to bring its workers in that
14 have been approved. They're trying to do this as exigently as
15 possible. They have about 8 to $10 million that they estimate
16 would be in the latter half of this month and then through
17 October into November that would be irreparably injured if
18 they are not able to achieve.
19 And then looking at Intrax --
20 **THE COURT:** A lot of contradictory terms in the
21 injunction context; you're talking about money damages now.
22 **MR. HUGHES:** Well, Your Honor, that's not quite
23 correct because the injunction allows them to have -- to
24 enjoin the Government's policy for these individuals to
25 actually come into the United States, so the harm is bringing

1 these individuals in.
2 Now, that impacts them in money judgment terms, but the
3 Ninth Circuit's decision in *East Bay*, which we described this
4 in our briefs, it's crystal clear, that when you're seeking an
5 injunction against the Government where there's no opportunity
6 to be able to restore your damages from the Government on the
7 policy, that is absolutely sufficient for irreparable injury
8 in this context.
9 But let me say even beyond that, there is evidence in the
10 record of the J-1 program sponsors, we cite this in the
11 declarations and we point the Court to it, that these
12 companies are at the risk of failing, of going insolvent if
13 these -- the Proclamation continues. So the economic harms
14 are not just losses of certain amounts of money, but would be
15 to the point of businesses will be closing in the next few
16 months if the Proclamation continues because they are losing
17 the entirety of their revenue while this Proclamation is in
18 effect.
19 **THE COURT:** One other thing before I get back to
20 Mr. Press: Am I correct that we don't need to worry about the
21 issue that is raised in various Ninth Circuit decisions
22 very -- involving an area of law, national injunctions, you
23 are only asking for an injunction on behalf of your clients,
24 the plaintiffs, not a national injunction against -- as with
25 respect to any potential person within those visa classes? Is

1 that correct?

2 **MR. HUGHES:** Yes, Your Honor. It's with respect to

3 our plaintiffs and the scope of their standing, which is the

4 plaintiffs in the businesses that are members of the

5 plaintiffs. That's correct. Yes, Your Honor.

6 **THE COURT:** Mr. Press, so the question really is,

7 this is not -- I understand you think there's no -- you argue

8 and believe there's no irreparable harm, but is there any

9 event that's going to occur -- well, you heard what the

10 evidence is that the plaintiffs rely on. Anything you want to

11 say in regard to the exigency of this?

12 **MR. PRESS:** So, number one, I don't know -- I want to

13 be completely as blunt as Your Honor would have it there, we

14 are not saying this is, you know, no problem at all. It's

15 just that it would not meet the standard, understanding, and

16 burden that plaintiffs are required to show before they can

17 get preliminary injunctive relief to preserve the status quo.

18 The status quo right now is that a lot of companies are at

19 risk of going under. A lot of companies have negative

20 economic impact over the last six months. It's not clear that

21 the Proclamation is the source of all of the plaintiffs or

22 organizations harms. But that's really where we are getting

23 at when we say I don't see a particular time limit on Your

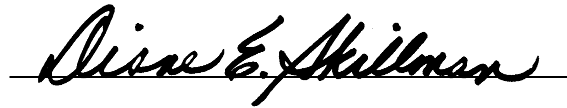
24 Honor, to sort of circle back to your actual -- the point of

25 your question.

1 I do want to flag, though, that the consular posts over
2 the world are still dealing with COVID-19, and that varies
3 from country to country. Some countries, basically regular
4 consulate processing is back. Other countries we're nowhere
5 close to that.
6 And sort of the distinction between New Zealand, which has
7 relatively very few COVID-19 cases and the State Department is
8 back at relative normal consular operations to India where
9 it's very far afield from that.
10 And I think that Your Honor needs to sort of consider that
11 when you're talking about both how far this is supposed to
12 extend as well as how this is actually supposed to operate
13 once Your Honor issues an order.
14 **THE COURT:** Let me go back to you then. Maybe this
15 is where the rubber meets the road. Again, I'm not assuming
16 that I have decided anything here.
17 What about the Government's position that it might be --
18 assuming even the Court issued an injunction and required the
19 processing of your clients' visa applications under the
20 affected programs, that it may be impossible for the
21 Government to comply because, for example, if they are from
22 India, or Pakistan, or whatever, I'm just making it up, or
23 Brazil, it just can't happen?
24 **MR. HUGHES:** So, Your Honor, we are not challenging
25 any consular-related, you know, COVID-related closures, but

1 what we've put into the record, this is in my second
2 affidavit, examples of 47 consulates around the world that are
3 currently processing nonimmigrant visas, including evidence
4 that there's processing of J visas in categories that are not
5 banned.
6 Ms. Schneider's second declaration demonstrates that for
7 Intrax has one program that is not subject to the ban. They
8 have, in the last few weeks, obtained visas in 18 different
9 consulates, and they detail that information. And then Intrax
10 very specifically connects those -- initially they had 11
11 countries and then they were able to expand that to 18
12 countries to thousands of individuals that would like to enter
13 the United States but are subject to the banned program.
14 So we have very granular evidence that connects specific
15 individuals who are associated with Intrax in countries where
16 Intrax for nonbanned programs has been able to work with those
17 consulates, and have been able to obtain visas in the last few
18 weeks. So we know there's absolute direct causation.
19 So the injunction of the Proclamation would allow visa
20 processing to resume in those 47 plus consulates with more
21 coming on line every single day as conditions evolve. We are
22 not asking -- we won't be asking the Court to, in any stretch,
23 manage consular decisions about opening or closing with
24 respect to COVID. That's a separate issue. We just know that
25 there is direct immediate harm that would be remedied by an

1 injunction stopping the Proclamation.
2 **THE COURT:** All right. Very well.
3 Thank you very much. The matter is submitted, and I
4 will -- obviously you've given me a lot to think about in
5 addition to your papers. It has been very helpful. I
6 appreciate your being so responsive to the questions. And I
7 wish all of you the best of luck, stay safe, and hopefully --
8 just as a totally off -- not off the record, nothing is off
9 the record, but I have another one of these coming up in two
10 weeks. Are either of you involved in that one? It involves
11 the fees that are being allegedly -- another proclamation
12 whereby the fees are being imposed on applicants for asylum.
13 Are either of you folks involved?
14 **MR. HUGHES:** I am not currently, Your Honor. Things
15 sometimes change, but I'm not currently.
16 **THE COURT:** Are you, Mr. Press, just out of
17 curiosity?
18 **MR. PRESS:** No, Your Honor.
19 **THE COURT:** Okay.
20 Everybody has limited bandwidth, including the Court, but
21 I don't get to say that, obviously. But I've got one coming
22 up in two weeks involving -- where Justice is involved and
23 DHS, another immigration matter. Anyway, luck of the draw, I
24 guess.
25 Thank you very much. The matter is now adjourned. Thank

1 you, gentlemen.
2 **MR. HUGHES:** Thank you, Your Honor.
3 **THE CLERK:** Court is in recess.
4
5 (Proceedings concluded at 10:49 a.m.)
6
7 **CERTIFICATE OF REPORTER**
8 I, Diane E. Skillman, Official Reporter for the
9 United States Court, Northern District of California, hereby
10 certify that the foregoing is a correct transcript from the
11 record of proceedings in the above-entitled matter.
12
13 
14 DIANE E. SKILLMAN, CSR 4909, RPR, FCRR
15 SUNDAY, NOVEMBER 1, 2020
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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ASSOCIATION OF MANUFACTURERS, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

Case No. 20-cv-04887-JSW

NOTICE OF QUESTIONS FOR HEARING ON MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. No. 31

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE OF THE FOLLOWING QUESTIONS FOR THE HEARING SCHEDULED ON SEPTEMBER 11, 2020, AT 9:00 a.m.:

The Court has reviewed the parties' briefs and, thus, does not wish to hear the parties reargue matters addressed in those briefs. The Court notes that although five amicus groups have appeared to submit briefs, none have registered to participate in the hearing.

If the parties intend to rely on legal authorities not cited in their briefs, they are ORDERED to notify the Court and opposing counsel of these authorities or citations to the record by no later than Thursday, September 10, 2020 at noon. If the parties submit such additional legal authorities, they are ORDERED to submit the citations (including the pin citations) and attach any new authority cited to their submission, but are not to include additional argument or briefing. *Cf.* N.D. Civil Local Rule 7-3(d). The parties will be given the opportunity at oral argument to explain their reliance on such authority.

United States District Court
Northern District of California

The parties shall be given 45 minutes each to address the following questions:

1. Presidential Proclamation 10052 provides that "under the extraordinary circumstances of the economic contraction resulting from the COVID-19 outbreak, certain nonimmigrant visa programs authorizing such employment pose an unusual threat to the employment of American workers." What is the Department of Homeland Security ("DHS")'s best argument that the record they have provided to the Court supports this factual premise for the Proclamation? Please provide the Court with specific factual citations in the record.

   a. What is DHS's response to the extensive record provided by Plaintiffs and four sets of amici that the evidence and the facts do not support the stated intention of the Proclamation?

   b. What is Plaintiffs' response to the amicus brief and citation to evidence provided by U.S. Tech Workers that unemployment of "computer workers" has risen?

2. Plaintiffs do not contend that the Proclamation must be supported by a record of findings under the Administrative Procedures Act ("APA"), but rather that the executive action exceeds the authority granted to the President under Immigration and Naturalization Act ("INA") Section 212(f). 8 U.S.C. Section 1182(f). Section 1182(f), invoked by the President in this instance, provides that:

> 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 class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

With the exception of the statement that such a finding has been made in the text of the Proclamation itself, where in the record have findings based on evidence been made that entry of any of these three classes of nonimmigrants would be "detrimental to the interests of the United States"? Please provide the Court with specific factual citations in the record.

On what legal bases or standards are these discretionary decisions to be made? By what standard does the Court evaluate the evidence and the adequacy of the findings made to support

the Proclamation? Does the Court weigh conflicting evidence in support of the Proclamation and, if so, which party, if any, has the burden of proof?

3. In the context in which the Proclamation was issued – concerning domestic policy and employment as opposed to foreign relations and national security – what is DHS's position and legal authority regarding the level of deference this Court owes to the invocation of executive authority under Section 1182(f)?

4. The Proclamation includes a limitation of scope in Section 3 and an exemption to enforcement in Section 4, but no specific guidance on how those limitations or exemptions are to be invoked or effectuated.

Section 3 provides a limitation in scope for aliens deemed necessary to provide temporary labor or services essential to the food supply chain and "any alien whose entry would be in the national interest as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees."

Section 4(i) provides that these same officials may determine in their discretion that enforcement of the Proclamation be exempted in areas critical to defense, law enforcement, diplomacy, or national security of the United States, for medical care or research to aid Americans suffering with COVID-19, or those who are deemed necessary to facilitate the immediate and continued economic recovery of the United States.

a. On what legal bases or standards are these discretionary decisions to be made?

b. Do the developing regulations comport with the APA and where in the record are such findings to be found?

c. Why should executive branch officials be enabled to use their discretion to make the determination of limitations or exceptions to the Proclamation when Congress has made these determinations in legislation governing nonimmigrant visa processing?

United States District Court
Northern District of California

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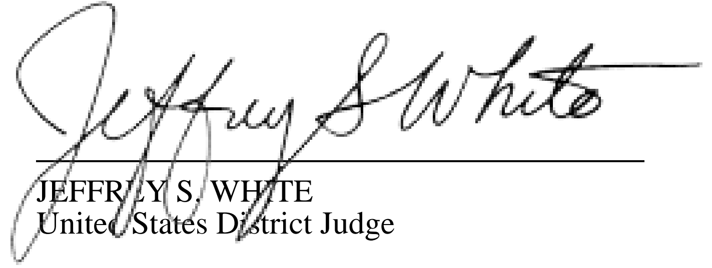
United States District Court
Northern District of California

5. Does either party have anything further they wish to address?

IT IS SO ORDERED.

Dated: September 9, 2020



JEFFREY S. WHITE
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL RETAIL FEDERATION, TECHNET, and INTRAX, INC.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES DEPARTMENT OF STATE; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security; and, MICHAEL R. POMPEO, in his official capacity as Secretary of State,

Defendants.

Case No. 4:20-cv-4887-JSW

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: September 11, 2020
Time: 9:00 a.m.
Judge: Hon. Jeffrey S. White
Ctrm.: 5

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INTRODUCTION

By design, Proclamation 10052 fundamentally reorders the labor markets, precluding American businesses from hiring hundreds of thousands of workers from abroad in the third and fourth quarters of 2020. That policy irreparably injures plaintiffs, which include associations that represent a broad cross-section of the American economy. The Proclamation exceeds the President's powers under Section 212(f) because it directly conflicts with congressional judgments embedded in the INA: Congress specified that certain guest worker programs are in the national interest, but, for more than six months, the Proclamation nullifies those statutes. And, in so doing, the Proclamation fails to make a reasonable finding, which the Ninth Circuit holds is requisite for the use of Section 212(f) to address a domestic problem. These limitations are essential to ensure that Section 212(f) effects a bounded—and thus constitutional—delegation of authority to the Executive. Further, in implementing the Proclamation, the State Department has crafted two new policies: It has imposed substantial new visa eligibility requirements in its August 12 Guidance, and it has suspended visa processing. These policies, which reflect decisionmaking independent of the Proclamation, violate the APA. For all these reasons, an injunction is imperative.

ARGUMENT

I. PLAINTIFFS HAVE STANDING.

As explained in our opening motion (at 20-24), and as substantiated by nine declarations (*see* Dkt. 31), the Proclamation's implementation imposes redressable injuries on Plaintiffs and members of the Plaintiff associations. The government's rejoinders each fail.

As to the Plaintiff associations, the government asserts (at 7) that they "have failed to provide any sort of declaration regarding the vague descriptions of member-harm alleged in the Complaint."[1] That conclusory contention is inscrutable given that the U.S. Chamber and the NAM each submitted its own declaration (Baselice Decl.; Hall Decl.), along with seven declarations from individual member companies describing their harms in detail.

The government next makes (at 7) a single-sentence argument regarding germaneness,

[1] The government curiously disputes (at 6-7) whether the associations have organizational standing. Although they have diverted resources to address member harms caused by the Proclamation (*see*, *e.g.*, Baselice Decl. ¶ 8), our motion (at 20) focused on associational standing.

1 contending that the associations have not "alleged that they have any organizational interest relat-
2 ed to immigration." But the declaration from Jonathan Baselice, Executive Director of *Immigra-*
3 *tion Policy* for plaintiff U.S. Chamber, identifies that "[p]art of the U.S. Chamber's mission is
4 advocating for its members' abilities to bring the world's best and brightest to America to foster
5 innovation and economic growth," which businesses do via the L, H, and J visa programs.
6 Baselice Decl. ¶¶ 1, 4-7. Likewise, "[p]art of the NAM's mission is advocating for its members'
7 abilities to access global talent." Hall Decl. ¶ 5; *see also* Compl. ¶¶ 18-22.

8 *Third*, the government argues (at 7) that plaintiff Intrax has "merely alleged a generalized
9 economic harm that is not specifically tied to the Proclamation." That assertion too is impossible
10 to square with the 43-paragraph declaration Intrax submitted, which explains in detail how "the
11 Proclamation is the sole reason that thousands of participants in cultural exchange programs
12 sponsored by Intrax cannot enter the country." *See* Schneider Decl. ¶ 8. The immediate harm to
13 Intrax—total economic devastation caused by the shuttering of five of its six J-1 programs (*id.*
14 ¶¶ 6, 29-30)—is evidenced by Intrax having to furlough 30 to 50% of its staff and impose steep
15 pay cuts on those who remain. *Id.* ¶ 31. This is a specific harm, not some "generalized" grievance.

16 **II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.**

17 **A. The Proclamation is beyond the President's lawful authority.**

18 The Proclamation is unlawful because it "nullif[ies] Congress's considered judgments"
19 enacted in the INA (*Hawaii v. Trump*, 878 F.3d 662, 685 (9th Cir. 2017) (*Hawaii II*)) (*see* Mot. 6-
20 11); it fails Section 212(f)'s "find[ing]" requirement (Mot. 11-15); and, absent the meaningful
21 limitations Plaintiffs assert, Section 212(f) would present serious constitutional questions about
22 whether it is an invalid delegation of legislative power to the Executive (Mot. 15-17).

23 The government begins (at 8-13) by attacking the validity of our APA cause of action. *See*
24 Opp. 8-13. Although these objections fail (*see* pages 8-11, *infra*), our first claim is independent of
25 the APA in any event: It is a freestanding, equitable cause of action to enjoin unlawful govern-
26 ment behavior. Compl. ¶¶ 164-171 ("Count I . . . Ultra Vires Conduct"). It is black-letter law that
27 "[e]quitable actions to enjoin *ultra vires* official conduct do not depend upon the availability of a
28 statutory cause of action." *Sierra Club v. Trump*, 963 F.3d 874, 890-891 (9th Cir. 2020) (quoting

1 *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015)); *see also id.* at 891
2 ("When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his
3 authority," and "[t]he passage of the APA has not altered this presumption."); *Trudeau v. Fed.*
4 *Trade Comm'n*, 456 F.3d 178, 190 (D.C. Cir. 2006) ("[J]udicial review is available when an
5 agency acts *ultra vires*, even if a statutory cause of action is lacking.") (quotation marks omitted).

6 **1.** The Proclamation exceeds the powers granted by Section 212(f) because it attempts to
7 "expressly override particular provisions of the INA." *Trump v. Hawaii*, 138 S. Ct. 2392, 2411
8 (2018) (*Hawaii III*). Notably, the government does not dispute our showing (Mot. 6-11) that the
9 Proclamation would "nullify numerous specific provisions" of the INA. *Hawaii II*, 878 F.3d at
10 687. *Cf*. Opp. 14-16. Nor could it: Congress has unmistakably determined that the H-1B, H-2B,
11 L-1, and J-1 visa programs, with all their finely titrated protections for American workers, are in
12 the national interest. The Proclamation, however, effectively abrogates these programs and the
13 statutes that authorize them. The Proclamation thus declares, in conflict with congressional judg-
14 ment, that these very programs are adverse to the national interest.[2] But, as the Ninth Circuit has
15 held (and the Supreme Court has assumed), Section 212(f) does not permit the President to take a
16 red pen to the U.S. Code, displacing Congress's considered policy judgments. *See Hawaii II*, 878
17 F.3d at 685 ("[T]he Executive may not exercise [its Section 212(f)] power in a manner that con-
18 flicts with the INA."); *Doe #1 v. Trump*, 957 F.3d 1050, 1067 (9th Cir. 2020) ("reliance on
19 § 1182(f)" would be misplaced if "the President has effectively rewritten provisions of the INA").

20 Rather than take issue with our showing that the Proclamation conflicts with the INA, the
21 government insists instead (at 14) that the Supreme Court in *Hawaii* "rejected this same argu-
22 ment," and that the President's power is unbounded. But, quite to the contrary, the Court "as-
23 sume[d] that [Section] 1182(f) does *not* allow the President to expressly override particular provi-
24 sions of the INA." *Hawaii III*, 138 S. Ct. at 2411 (emphasis added); *id*. at 2412 (accepting that the

25 [2] In the INA, Congress extended the H-1B visa program to "fashion model[s]." 8 U.S.C.
26 § 1101(a)(47)(H)(i)(b). In light of the statute, the President could not deem fashions models ad-
verse to the national interest and bar their entry pursuant to Section 212(f). But the Proclamation
27 does precisely that for the visa categories. For example, although the Fulbright-Hays Act of 1961
(Pub. L. No. 87-256, 75 Stat. 527), determined that specific cultural exchange programs, includ-
28 ing for "trainee[s]" (8 U.S.C. § 1101(a)(47)(J)), are in the national interest, the Proclamation re-
jects that conclusion and nullifies that statute.

President would "exceed[] his authority under § 1182(f)" if he were to impose an entry restriction that "contradict[s] . . . another provision of the INA."). That is our argument here as well.

Hawaii III rested on the Court's determination that there was no "conflict between the statute and the Proclamation." 138 S. Ct. at 2411. At issue was the Visa Waiver Program which established entry criteria for nationals of some low-risk countries; that program "did not implicitly foreclose the Executive from imposing tighter restrictions on nationals of certain high-risk countries." *Id*. at 2412; *id.* at 2421 n.6 (same). Rather, the Proclamation was either consistent with the INA, or it filled in gaps where the INA was silent. *Id*. at 2411-2412.

Here, however, there is just such a "contradiction with another provision of the INA" that renders the Proclamation unlawful. *Hawaii III*, 138 S. Ct. at 2411. Through affirmative and comprehensive visa programs, Congress declared that certain categories of nonimmigrant workers are in the national interest and *may* enter the United States. The Proclamation, by contrast, would undo this judgment and abolish large swaths of the programs established by Congress.[3]

This answers the government's straw-man characterization of our argument: "that a President is not permitted to restrict the entry of foreign temporary workers under § 1182(f) simply because they might be otherwise admissible." Opp. 14-15. By its nature, Section 212(f) authorizes the President to bar the entry of a noncitizen who would "be otherwise admissible." But use of that power must either be consistent with statute—or, at most, span a statutory gap. What the President may not do is "eviscerate[] the statutory scheme" by reversing legislatively enacted policy. *Doe #1*, 957 F.3d at 1064. *See Hawaii III*, 138 S. Ct. at 2411; *Hawaii II*, 878 F.3d at 685.

2. Further, the Proclamation flunks the statutory requirement that the President must "find[]" that the entry of individuals "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). As we showed (Mot. 11 n.7), the text obligates the President to connect evidence with a conclusion regarding the national interest. Here, however, the Proclamation lacks a reasonable relationship between the stated problem and the action taken: It bars entry to individu-

[3] The government identifies (at 15 n.2) Section 212(f) proclamations that were *consistent* with statute, and not diametrically opposed. Similarly, the President's authority to "suspend entry from particular foreign states in response to an epidemic confined to a single region" (*Hawaii III*, 138 S. Ct. at 2415; *cf.* Opp. 16), does not conflict with any statute. *See* 8 U.S.C. § 1182(a)(1)(A) (inadmissibility ground relating to "a communicable disease of public health significance").

als who are either already prohibited from working, or who work in occupations—especially computer occupations—for which unemployment remains low; it fails to rebut the economic evidence presented during consideration of the Proclamation that nonimmigrant workers are a net positive to both the economy and to the employment prospects of American workers; and it does not consider the important reliance interests undercut by the abrupt entry ban. *See* Mot. 11-15.

As to the first of these points, the government offers not a word in defense: It does not make *any* contention that the bans are a reasonable means for advancing the national interest. *See* Opp. 16-17. The government has therefore waived any argument as to the merits of this point. *See, e.g.*, *In re Polycom, Inc.*, 78 F. Supp. 3d 1006, 1014 n.6 (N.D. Cal. 2015) (waiver).

Instead, the government simply asserts that "[t]hese arguments are doomed by *Hawaii*," suggesting that "litigants are not permitted to 'challenge' a Presidential entry-suspension order 'based on their perception of its effectiveness and wisdom.'" Opp. 16 (quoting *Hawaii III*, 138 S. Ct. at 2421). But, as we already explained, the Ninth Circuit has held that this unquestioning deference to the President does not extend beyond matters of national security and foreign relations: "[W]hile the 'President may adopt a preventive measure in the context of international affairs and national security,' and he is then 'not required to conclusively link all of the pieces in the puzzle before courts grant weight to his empirical conclusions,' his power is more circumscribed when he addresses a purely domestic economic issue." *Doe #1*, 957 F.3d at 1067 (quoting *Hawaii III*, 138 S. Ct. at 2409) (citations omitted; alterations incorporated). That is so even when the means chosen to effectuate a domestic policy result—here, reduced unemployment—is a restriction on immigration. *See id.* ("We reject the government's argument that the Proclamation implicates the President's foreign affairs powers simply because the Proclamation affects immigrants.").[4]

We therefore explained that "[i]t is . . . the law of this Circuit that Section 212(f) requires 'find[ings] that support the conclusion that admission of the excluded aliens would be detrimental,' and that courts are competent to adjudicate" this issue. Mot. 11 (quoting *Hawaii II*, 878

[4] The analysis in *Doe #1* is not, as the government suggests (Opp. 16 n.4), dicta. There, the Court performed the multi-factor *Nken* analysis, of which "[t]he second most important . . . factor" is the likelihood of success on the merits. *Doe #1*, 957 F.3d at 1062. The Ninth Circuit's legal analysis regarding the merits is, at least, an alternative holding. *Id.* at 1064.

1 F.3d at 693); *see Doe #1*, 957 F.3d at 1067. The government has no response.

2 The government's objections to our demonstration that the Proclamation fails to grapple
3 with economic evidence and reliance interests are in the same vein: The government does not re-
4 but our claims; rather, it asserts that it should be exempted from scrutiny. *See* Opp. 18. But if Sec-
5 tion 212(f)'s "find[ings]" requirement necessitates reasoned decisionmaking—and the Ninth Cir-
6 cuit holds that it does (*see Hawaii II*, 878 F.3d at 693; *Doe #1*, 957 F.3d at 1066-1067)—then
7 these fundamental elements of reasonable governmental action apply. Mot. 14-15.[5]

8 **3.** The Court should identify these meaningful limitations on the scope of Section 212(f)
9 authority to ensure that it constitutionally delegates authority to the Executive. Mot. 15-16.[6]

10 In response, the government makes the expansive assertion that the President has the in-
11 herent power to exclude noncitizens as he sees fit, *independent* of Congress's delegation of au-
12 thority in Section 212(f). *See* Opp. 13, 19-20 (citing *United States ex rel. Knauff v. Shaughnessy*,
13 338 U.S. 537, 542 (1950)). But the Ninth Circuit has already rejected this broad reading of
14 *Knauff*: "We conclude that the President lacks independent constitutional authority to issue the
15 Proclamation, as control over the entry of aliens is a power within the exclusive province of Con-
16 gress." *Hawaii II*, 878 F.3d at 697; *see also id.* at 698 ("While the Supreme Court's earlier juris-
17 prudence contained some ambiguities on the division of power between Congress and the Execu-
18 tive on immigration, the Court has more recently repeatedly recognized congressional control
19 over immigration policies.") (citing *Chadha, Fiallo,* and *Galvan*).[7] Far from overruling this hold-

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21 [5] *See, e.g.*, *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (when the govern-
ment "changes course, as DHS did here, it must be cognizant that longstanding policies may have
22 engendered serious reliance interests that must be taken into account."); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (reasoned decisionmaking requires "a rational connec-
23 tion between the facts found and the choice made").

[6] Although the Court's plurality opinion in *Gundy v. United States*, 139 S. Ct. 2116, 2121
24 (2019), identified other seemingly broad grants of authority that have been upheld against non-
delegation challenges, those cases turned on just such a limiting construction based on the statuto-
25 ry context and purpose. *See N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932) ("It is
a mistaken assumption that [the statutory 'public interest' standard] is a mere general reference to
26 the public welfare without any standard to guide determinations."); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (statutory "public interest" standard "is not to be inter-
27 preted as setting up a standard so indefinite as to confer an unlimited power").

[7] The Supreme Court has repeatedly held that the President's role in immigration is to imple-
28 ment the policies that *Congress* has established through statute—not to be a law unto himself. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) ("[T]hat the formation of [immigration] policies is en-

1 ing in *Hawaii III*, the Supreme Court engaged in painstaking analysis of whether the President's
2 action was in fact authorized by Section 212(f) (*Hawaii III*, 138 S. Ct. at 2407-2415)—all of
3 which would have been unnecessary if, as Justice Thomas alone would have held, the President
4 holds exclusion power independent of congressional authorization (*id.* at 2424 (Thomas, J., con-
5 curring) (citing *Knauff*)). The Ninth Circuit's *Hawaii II* holding continues to bind the Court.[8]

6 Even if *Knauff* were as broad as the government claims, it still does not authorize the
7 Proclamation, which contradicts Congress's policy judgments embedded in statutes. *See* pages 3-
8 4, *supra*. As Justice Jackson's seminal *Youngstown* opinion makes clear, there is a critical differ-
9 ence between a presidential action that is either authorized by, or at least compatible with, Con-
10 gressional enactments, on the one hand; and "measures incompatible with the expressed or im-
11 plied will of Congress," on the other. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579,
12 635-638 (1952) (Jackson, J., concurring); *see, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 524 (2008)
13 ("Justice Jackson's familiar tripartite scheme [from *Youngstown*] provides the accepted frame-
14 work for evaluating executive action in this area."); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576
15 U.S. 1, 10 (2015). When the President's actions fall into this latter category, "his power is at its
16 lowest ebb." *Youngstown*, 343 U.S. at 637; *see also id.* at 637-638 ("Courts can sustain exclusive
17 Presidential control in such a case only by disabling the Congress from acting upon the subject.").

18 Indeed, Justice Jackson's *Youngstown* opinion explicitly rejected the *Curtiss-Wright* line
19 of cases—of which *Knauff* is a part[9]—as authority for a presidential power to override congres-
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21 trusted exclusively to Congress has become about as firmly imbedded in the legislative and judi-
cial tissues of our body politic as any aspect of our government."); *INS v. Chadha*, 462 U.S. 919,
22 940 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to
question."); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("This Court has repeatedly emphasized that
23 over no conceivable subject is the legislative power of Congress more complete than it is over the
admission of aliens."); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) ("The power to
24 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.").

25 [8] *See, e.g.*, *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1041 (9th Cir. 2010) (ex-
plaining that "reversal on one merits ground may leave the decisions reached on other grounds
26 intact" as binding precedent); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991)
(distinguishing "[a] decision . . . *reversed* on other grounds" from "a decision that has been *vacat-
27 ed*[,] [which] has no precedential authority"). At the very least, *Hawaii II* is entitled to strong per-
suasive authority as the Ninth Circuit's most recent, uncontradicted statement.

28 [9] *Knauff*, 338 U.S. at 542, cited *Curtiss-Wright* for the assertion that "[t]he exclusion of aliens
. . . is inherent in the executive power to control the foreign affairs of the nation." *Knauff*'s other

1 sional statutes in the area of foreign affairs. The *Curtiss-Wright* case, Justice Jackson explained,
2 "intimated that the President might act in external affairs *without* congressional authority, but not
3 that he might act *contrary* to an Act of Congress." *Youngstown*, 343 U.S. at 635 n.2 (Jackson, J.,
4 concurring) (emphases added). That is, the foreign affairs context is no exception to the funda-
5 mental principle that the President has no constitutional power to simply set aside statutes as he
6 sees fit. *See*, *e.g.*, *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 525 (1838) ("[V]esting in the
7 President a dispensing power"—that is, "clothing the President with a power to control the legis-
8 lation of Congress"—"has no countenance for its support in any part of the constitution.").

9 *Knauff* therefore provides no authority for the government's claim of inherent presidential
10 power to enact the Proclamation at issue here, which simply sets aside duly enacted sections of
11 the INA. *See* pages 2-4, *supra*. For the same reasons, it fails to support the government's claim
12 that foreign-affairs statutes are immune from non-delegation challenge: Whatever the continued
13 relevance of *Knauff*'s statements on this point generally,[10] it is clear that *no* act of Congress may
14 constitutionally "give[] the President the unilateral power to change the text of duly enacted stat-
15 utes." *Clinton v. City of New York*, 524 U.S. 417, 447 (1998); *see also id.* at 465 (Scalia, J., dis-
16 senting) (agreeing that "the doctrine of unconstitutional delegation . . . may [impose] much more
17 severe" "limits" upon statutes that purport to authorize the Executive to set aside laws than upon
18 run-of-the-mill delegations of power to "augment[]" existing statutes). But that is just what Sec-
19 tion 212(f) *must* do, if it is to provide any support for the Proclamation here.

20 **B. Defendants' implementation of the Proclamation violates the APA.**

21 The Court should also preliminarily enjoin the Defendants' implementation of the Proc-
22 lamation because their actions violate the APA. The government responds (at 10-11) that the
23 agencies are immune from APA scrutiny when they "merely [carry] out directives of the Presi-
24 dent," who is not an "agency" subject to the APA. Opp. 10-11. Here, however, the agencies have
25 done far more than "carry out his decision." Opp. 11. In putative service of the Proclamation, they
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27 citation for this proposition was *Fong Yue Ting*, which held no such thing. *See* page 7 n.7, *supra*.

28 [10] *But cf. Doe #1 v. Trump*, 418 F. Supp. 3d 573, 589-593 (D. Or. 2019) (discussing *Knauff* at length, distinguishing it, and holding that Section 212(f)—unlike the "much narrower delegation of authority" at issue in *Knauff*—is an unconstitutional delegation of legislative power).

have created two new policies that reflect decisionmaking by the agency, not the President. Both policies are final agency actions, and both violate the APA.

1. In the Guidance issued on August 12, 2020—relied on by the government (*see* Opp. 21-22)—the State Department has adopted substantial new eligibility criteria through the implementation of the national-interest exceptions identified in Proclamation 10052. 2d Hughes Decl. Ex. 1. From the Proclamation's use of the term "national interest," the State Department has created a detailed, multipart policy exceeding 3,000 words in length.[11]

Ninth Circuit precedent establishes that *this* policy is reviewable pursuant to the APA because it creates, along with the Proclamation, the "operative rule of decision." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1271 (9th Cir. 2020). This new policy does not reflect *presidential* decisionmaking; nothing in the Proclamation provides for the dozens of policy judgments embedded within this new policy. This agency action, moreover, is "final," because it "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). This inquiry is "pragmatic and flexible," looking to the decision's "actual effects." *Gill v. U.S. Dep't of Justice*, 913 F.3d 1179, 1184 (9th Cir. 2019). Self-claimed "informal guideline[s]" often constitutes final agency action. *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 47-48 (D.C. Cir. 2000) (collecting cases). That is the case here: The August 12 Guidance adopts reticulated standards—found nowhere else in immigration law—to govern issuance of the visas in the covered categories, resulting in immediate legal consequences.

This policy is contrary to law because it conflicts with the visa requirements adopted by the INA and its implementing regulations, and nothing in Section 212(f) authorizes it. Mot. 6-11. As just one example, the INA obligates an L-1 visa applicant to have worked for her company for one year (8 U.S.C. § 1101(a)(47)(*l*)); the August 12 policy changes that eligibility criterion, setting it to two years or more. 2d Hughes Decl., Ex. 1.[12] Because this new policy conflicts with ex-

[11] Because the State Department issued this Guidance long after we filed the Complaint, it is not addressed there. *But see* Compl. ¶ 178. In the event that the Court believes necessary, Plaintiffs conditionally request leave to amend the Complaint to conform it to this new development.

[12] The State Department's new eligibility criteria conflict with existing statutes and regulations

1 isting statutory and regulatory regimes (Mot. 6-11)—to say nothing of its failure to make a rea-
2 sonable connection between the stated problem and the policy chosen (*id.* at 12-14), and its de-
3 struction of reliance interests (*id.* at 14-15)—it violates core APA safeguards.

4 **2.** Separately, the State Department has instituted a moratorium on visa *processing* in the
5 banned categories—again, something that the Proclamation does not even purport to authorize.
6 Mot. 19. Because nothing in the Proclamation directs this policy, it is attributable to the agency,
7 not to the President. This agency action is similarly final: The "core question" on finality is not
8 the formality of the medium (*cf.* Opp. 11 (questioning finality of "policy by tweet")), it is "wheth-
9 er the agency has completed its decisionmaking process, and whether the result of that process is
10 one that will directly affect the parties" (*Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977,
11 982 (9th Cir. 2006))—and the government makes no suggestion that the decision not to process
12 visas during the pendency of the Proclamation's entry ban is anything other than "complete[]."[13]

13 Moreover, the government is simply wrong that noncitizens subject to a Section 212(f)
14 proclamation are statutorily ineligible for visas. *Cf.* Opp. 11-12. What the statute actually pro-
15 vides, in 8 U.S.C. § 1182(a), is that "aliens who are inadmissible *under the following para-*
16 *graphs*"—that is, the ten numbered paragraphs of subsection 1182(a), which set out various
17 grounds of inadmissibility—"are ineligible to receive visas and ineligible to be admitted to the
18 United States." 8 U.S.C. § 1182(a) (emphasis added). Section 212(f) (8 U.S.C. § 1182(f)) is not a
19

20 in several ways. To name a few: 1) Per the INA, employers must pay H-1B workers a prevailing wage (8 U.S.C. § 1184(n)(1)(A)); the Guidance criteria requires salaries at least 15% in excess of
21 the "prevailing wage." 2) The Guidance creates a new "undue financial hardship" criteria for several categories. 3) A factor for an H-1B visa is "unusual expertise," such as a "doctorate or pro-
22 fessional degree" (*id.*) which purposefully differs from the statutory definition of "specialty occupation." 8 U.S.C. § 1184(i)(3). 4) The Guidance creates a "critical infrastructure need" factor. 5)
23 The Guidance considers whether an H-2B applicant previously worked for the same employer.

Indeed, the Guidance reflects *legislative* or *regulatory* proposals the administration has long
24 contemplated. *Cf.* Stephen Miller, Briefing on Buy American, Hire American (Apr. 17, 2017), 2d Hughes Decl. Ex. 3 (describing proposed "administrative" and "legislative" reforms, including
25 "adjust[ing] the wage scale" and "giv[ing] master's degree holders a better chance of getting H1Bs"). The government cannot create a shadow INA by barring everyone under Section 212(f),
26 and then allowing "exceptions" for the applicants it preferred all along.

[13] The government filed an administrative record in parallel litigation, *Gomez v. Trump*, No. 20-
27 cv-1419 (D.D.C.). It reveals that the State Department instructed all consular posts that the Proclamation "suspended the *issuance* of nonimmigrant visas in the H-1B, H-2B, L, and J-1 catego-
28 ries" and that "[p]osts should NOT resume routine processing of these visa classifications," absent an exception. 2d Hughes Decl. Ex. 2 at 38. This is a plain State Department policy.

"paragraph[]" of subsection 1182(a), it is a separate subsection. *See, e.g.*, *id.* § 1182(b)(3) (referencing the inadmissibility grounds in "paragraph[s] (2) or (3) of subsection (a)"). Section 212(f) thus authorizes the President to "suspend the entry" of noncitizens, but it does not make those noncitizens ineligible for visas that can be used once the "suspen[sion]" expires. *Id.* § 1182(f).[14]

Hawaii III is not to the contrary. *Cf.* Opp. 11. The Supreme Court recognized "the basic distinction between admissibility determinations and visa issuance that runs throughout the INA." 138 S. Ct. at 2414. And, in stating that "Section 1182 defines the pool of individuals who are admissible to the United States," the Court was discussing Section 1182(a), clear by its reference to "health risks, criminal history, or foreign policy consequences," language the government here omits. *Id.* The Court proceeded to explain that, after an individual is issued a visa, he or she may *separately* be barred from entry by Section 212(f). *Id.* The Court did not address—and certainly did not hold—that the President may override the statutory and regulatory obligation to process and issue visas. Mot. 19. *See Vulupala v. Barr*, 438 F. Supp. 3d 93, 100 (D.D.C. 2020).[15] Unless this policy is enjoined, the Proclamation will cause harms long into 2021. *See* Mot. 24.[16]

III. THE PROCLAMATION CAUSES DIRECT AND IRREPARABLE INJURIES.

The irreparable harms are clear: The very purpose of the Proclamation is to radically alter U.S. labor markets in the third and fourth quarters of 2020; indeed, senior administration officials trumpeted those effects. Mot. 20-21. The Plaintiff associations represent hundreds of thousands of American businesses; we documented the irreparable harms to seven distinct members across all

[14] 8 U.S.C. § 1201(g) provides that no visa will issue if a noncitizen "is ineligible to receive a visa . . . under section 1182." Because noncitizens barred under a Section 212(f) proclamation are *not* "ineligible to receive a visa," this separate provision is irrelevant here.

[15] Any noncitizens issued visas but subject to the Proclamation will not actually "travel to the United States and then be denied entry." Opp. 12. Air carriers do not allow individuals ineligible to enter the United States to board their planes, on pain of being obligated to return those individuals to their countries of departure at the airline's own expense. 8 U.S.C. § 1231(c)(1), (d)(1).

[16] The doctrine of consular nonreviewability is inapplicable. *Cf.* Opp. 9-10. That doctrine pertains only to "*individual* visa denials"; it does nothing to bar challenges to "the President's promulgation of sweeping immigration policy" like the Proclamation at issue here. *Hawaii II*, 878 F.3d at 679 (emphasis altered); *see also Hawaii I*, 859 F.3d at 768-769; *cf. Hawaii III*, 138 S. Ct. at 2407 (declining to disturb these holdings); *see Motaghedhi v. Pompeo*, 436 F. Supp. 3d 1345, 1356 (E.D. Cal. 2020) ("*implementation*" of a presidential proclamation "falls outside the doctrine of consular nonreviewability"); *P.K. v. Tillerson*, 302 F. Supp. 3d 1, 11 (D.D.C. 2017) ("[T]he doctrine of consular non-reviewability does not apply where the government has not made a final visa decision."); *Nine Iraqi Allies v. Kerry*, 168 F. Supp. 3d 268, 290 (D.D.C. 2016).

visa categories. *Id*. at 21-24. The government makes three points in response, each unavailing.

First, the government contends (at 21) that Plaintiffs' injuries are caused by COVID-19 related consulate closures, not by the Proclamation. But this assertion contradicts the administration's stated rationale for the Proclamation, which is expressly premised on "[t]he entry of additional workers through the H-1B, H-2B, J, and L nonimmigrant visa programs." Proclamation, Dkt. 1-1. In issuing the Proclamation, administration officials stated that, but for this action, hundreds of thousands of individuals *would* enter the United States. *See* Hughes Decl. Exs. 2 & 4. This all occurred well after the March 20, 2020 announcement on which the government (at 21) relies. If, as the government now asserts, the Proclamation has no material effect on the entry of non-immigrants, then the justifications supplied for the Proclamation were pretextual.

Because many consulates have reopened—a fact the government seems to admit (Opp. 21 n.5)—the Proclamation has substantial impacts on Plaintiffs, just as the government intended. At least 47 U.S. consulates from around the globe have publicly stated that they are now processing non-immigrant visas. 2d Hughes Decl., Ex. 4 .[17] Plaintiff Intrax confirms that, since June 22, participants in programs unaffected by the Proclamation have obtained non-immigrant visas from U.S. consulates in Brazil, Chile, Colombia, Ecuador, El Salvador, France, Germany, Hong Kong, Iceland, Italy, Japan, Mexico, Netherlands, South Africa, South Korea, Spain, Thailand, and Turkey. 2d Schneider Decl. ¶¶ 5-6; *see also* Gustafson Decl. ¶ 4. From these countries alone, but for the Proclamation, Intrax demonstrates that it would bring in thousands of participants for its programs in the third and fourth quarters of 2020. 2d Schneider Decl. ¶¶ 8-9, 26. Microsoft has identified a specific individual in France who is barred by the Proclamation from transferring via an L-1 visas. Chen. Decl. ¶¶ 16-18. As intended, the Proclamation is irreparably injuring Plaintiffs.

Second, the government points (at 21-22) to the State Department's August 12 Guidance—issued after we filed this motion for a preliminary injunction—regarding national-interest exceptions. This argument fails right out of the gate: Applying for a national-interest exception imposes substantial costs on businesses, including money and resource diversion. 2d Schneider

[17] The *Gomez* Administrative Record contains a July 8 memorandum from the Secretary of State to all diplomatic and consular posts directing that, "[b]eginning on July 15, 2020, posts may begin a phased approach to the resumption of routine visa services." 2d Hughes Decl. Ex. 2 at 35.

1 Decl. ¶¶ 15-19, 22-23. But for the Proclamation, Plaintiffs would not be forced to bear these expenses, and these costs are irrecoverable. *Id*. Thus, *even if* the national-interest exceptions wholly gutted the Proclamation, it would still cause irreparable harm and warrant an injunction. *Cf. Chamber of Commerce of United States of Am.* v. *United States Dep't of Labor*, 885 F.3d 360, 383 (5th Cir. 2018) (an unreasonable regulation is not saved by another unreasonable regulation).

What is more, Plaintiffs' injuries stem from the intentional reconfiguration of the whole labor market, denying U.S. companies access to the hundreds of thousands of individuals that, per the administration, would enter the U.S. but for the Proclamation. *See* Mot. 20-21. If the government means to say that the State Department's August 21 Guidance has rendered the Proclamation a paper tiger, mere symbolism with no practical effect, then it should say so with clarity. The government does not so contend, because it cannot. Rather, the irreparable harms remain.

On the face of it, the August 12 Guidance effectuates a new immigration policy, substantially narrowing the range of individuals eligible for visas—all to the detriment of plaintiffs. *See* pages 11-12 & n.17, *supra*. For the businesses that operate J visa programs, the available national-interest exceptions apply to only a miniscule proportion of participants; entire programs are left without recourse to an exception. *See* 2d Schneider Decl. ¶¶ 8-14, 20-22, 24-27. The Proclamation continues to shutter the vast majority of Intrax's business, with devastating consequences. *Id.*

For the businesses that need H-2B workers, the August 12 Guidance has little effect. The only national-interest exception available to private-company H-2B workers is for "[t]ravel necessary to facilitate the immediate and continued economic recovery of the United States (e.g., those working in forestry and conservation, nonfarm animal caretakers, etc.)." *See* August 12 Guidance. Plaintiff associations include members who require H-2B workers for landscaping and moving needs, not the categories identified by the August 12 Guidance. *See* O'Gorman Decl.; Leman Decl.; Brummel Decl. Additionally, the Guidance creates requirements beyond those contained in the statute and regulations, harming businesses whose workers do not qualify.[18]

[18] If these H-2B workers are in fact exempt from the Proclamation, then the government should say so with clarity, rather than offering vague generalities. And, if these workers are exempt, the government has no plausible basis to resist an injunction, because the Proclamation would have no practical effect *other than* to injure businesses through added cost and uncertainty.

Nor does the August 12 Guidance remedy the immediate harms imposed on the businesses that employ H-1B and L workers. To the extent visas are approvable, the Guidance substantially limits eligibility by conjuring new criteria at odds with statute and regulation. *See* pages 9-10 n.12, *supra*. The government addresses (at 22) only the Amazon and Microsoft employees who traveled abroad and were then barred from returning to their American homes. This does not remedy the other harms that the Proclamation imposes on Microsoft and Amazon. Chen Decl. ¶¶ 6-31; Brown Decl. ¶¶ 8-9, 13-15. For example, the government offers no option for the French national employed with Microsoft in France, who Microsoft seeks to transfer to the United States via an L-1A visa in order to lead a new team and hire new employees. Chen Decl. ¶ 16-18. Nor does it provide a remedy for the Indian national that Microsoft hired on June 10, 2020 as a senior program manager working on Azure hardware. *Id.* ¶ 29.

Third, the government (at 23) argues that "[r]ecoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." Economic losses caused by government policies are generally, as here, not "recoverable." That is why the Ninth Circuit holds that, in cases against the government "where parties cannot typically recover monetary damages flowing from their injury … , economic harm can be considered irreparable" without any need to show imminent bankruptcy. *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020). And, yet further still, plaintiffs *did* establish imminent existential threats to member-businesses. *See* Bell Decl. ¶ 17 ("Unless the Proclamation is lifted within the next few months, Alliance Abroad will likely have to cease operations.").[19]

Finally, the State Department's policy of refusing to process or issue visas causes independent and irreparable harms. For example, if Intrax participants cannot process their J-1 visas in the fall of 2020, Intrax will lose its entire winter work travel season. 2d Schneider Decl. ¶ 26.

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[19] Although not required, the government wrongly asserts (at 23) that "Plaintiffs make no mention of any attempt to mitigate their claims of economic loss based on unfilled positions by seeking to employ U.S. workers to fill their needs." For Singing Hills, even with job losses "as a result of the COVID-19 pandemic," it has "not been able to fill many available openings" and "did not even file [its] temporary labor certification with the Department of Labor to secure H-2B workers … until July 2, 2020, well after the COVID-19 pandemic began." Leman Decl. ¶¶ 8-9. So too for Brummel Lawn & Landscape, which, today, remains unable to "fill many available openings." Brummel Decl. ¶ 7. And so too for Gentle Giant, which "still ha[s] not been able to fill many available openings" notwithstanding "the COVID-19 pandemic." O'Gorman Decl. ¶ 12.

IV. THE EQUITIES AND THE PUBLIC INTEREST FAVOR AN INJUNCTION.

The balance of the equities and public interest also favor preliminary injunctive relief. Mot. 24-25. The government's responses are unavailing. *First*, the government contends (at 24) that the public interest favors "applying federal law correctly." For reasons we have explained, that strongly favors an injunction. *Second*, our request is not that the Court "micro-manag[e]" an executive agency's administration of a statutory program (Opp. 24), but rather that the Court enjoin executive and agency action that disregards statutory duties and operates *ultra vires*. *Third*, the government complains (at 24) that we seek "relief" "in advance of a full adjudication on the merits." Well, that is the purpose of a preliminary injunction, allowed by Civil Rule 65 and the APA, 5 U.S.C. § 705. Plaintiffs request a restoration of the status quo ante, because the Proclamation is causing immediate, irreparable harm to plaintiffs and their members.[20] For its part, the government has not shown how a stay would cause it harm or be adverse to the public interest.

V. THE SCOPE OF PLAINTIFFS' REQUESTED INJUNCTION IS APPROPRIATE.

Plaintiffs request (Mot. 1) an injunction only "with respect to Plaintiffs and, with respect to the association Plaintiffs, their members." The government responds (at 24-25) that the Court should reject a "universal injunction" reaching beyond "the parties before the court." But we never requested such relief. The government does not dispute that, if the Court grants injunctive relief, it should extend to the Plaintiffs and the members of the Plaintiff associations. Indeed, "the doctrine of associational standing," long established under Article III, "recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others," allowing "a single case to vindicate the interests of all" members in the association. *Int'l Union, United Auto., Aerospace & Agr. Implement Workers v. Brock*, 477 U.S. 274, 290 (1986). The injunction requested here—limited to Plaintiffs and their members—is simply not the sort of "universal" injunction the government decries.

CONCLUSION

The Court should grant the motion for a preliminary injunction.

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[20] *Senate of the State of Cal. v. Mosbacher*, 968 F.2d 974, 978 (9th Cir. 1992) is inapposite; there, the ultimate issue was a release of information. If it was released via an injunction, the case was over. Not so here, where, if defendants ultimately prevail, the Proclamation may be restored.

Respectfully submitted,

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DATED: August 28, 2020

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2d Hughes Declaration

Exhibit 1

National Interest Exceptions to Presidential Proclamations (10014 & 10052) Suspending the Entry of Immigrants and Nonimmigrants Presenting a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak

Last Updated: August 12, 2020

On June 22, the President signed Presidential Proclamation (P.P.) 10052, which extends P.P. 10014, which suspended the entry to the United States of certain immigrant visa applicants, through December 31, 2020. P.P. 10052 also suspends the entry to the United States of certain additional foreign nationals who present a risk to the U.S. labor market during the economic recovery following the 2019 novel coronavirus outbreak. Specifically, the suspension applies to applicants for H-1B, H-2B, and L-1 visas; J-1 visa applicants participating in the intern, trainee, teacher, camp counselor, au pair, or summer work travel programs; and any spouses or children of covered applicants applying for H-4, L-2, or J-2 visas.

The Proclamation does not apply to applicants who were in the United States on the effective date of the Proclamation (June 24), or who had a valid visa in the classifications mentioned above (and plans to enter the United States on that visa), or who had another official travel document valid on the effective date of the Proclamation. If an H-1B, H-2B, L-1, or J-1 non-immigrant is not subject to the Proclamation, then neither that individual nor the individual's spouse or children will be prevented from obtaining a visa due to the Proclamation. The Department of State is committed to implementing this Proclamation in an

orderly fashion in conjunction with the Department of Homeland Security and interagency partners and in accordance with all applicable laws and regulations.

Both P.P. 10014 and 10052 include exceptions, including an exception for individuals whose travel would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees. The list below is a non-exclusive list of the types of travel that may be considered to be in the national interest, based on determinations made by the Assistant Secretary of State for Consular Affairs, exercising the authority delegated to him by the Secretary of State under Section 2(b)(iv) of P.P. 10014 and 3(b)(iv) of P.P. 10052.

Until complete resumption of routine visa services, applicants who appear to be subject to entry restrictions under P.P. 10014, P.P. 10052, and/or regional-focused Presidential Proclamations related to COVID-19 (P.P. 9984, 9992, 9993, 9996, and/ or 10041) might not be processed for a visa interview appointment unless the applicant also appears to be eligible for an exception under the applicable Proclamation(s). Applicants who are subject to any of these Proclamations, but who believe they may qualify for a national interest exception or other exception, should follow the instructions on the nearest U.S. Embassy or Consulate's website regarding procedures necessary to request an emergency appointment and should provide specific details as to why they believe they may qualify for an exception. While a visa applicant subject to one or more Proclamations might meet an exception, the applicant must first be approved for an emergency appointment request and a final determination regarding visa eligibility will be made at the time of visa interview. Please note that U.S. Embassies and Consulates may only be able to offer limited visa services due to the COVID-19 pandemic, in which case they may not be able to accommodate your request

unless the proposed travel is deemed emergency or mission critical. Prospective visa applicants should visit the website for Embassy or Consulate where they intend to apply for a visa to get updates on current operating status. Travelers who are subject to a regional COVID-19 Proclamation but who do not require a visa, such as ESTA travelers (i.e., those traveling on the Visa Waiver Program), should also follow the guidance on the nearest Embassy or Consulate's website for how to request consideration for a national interest exception.

Exceptions under P.P. 10052 for certain travel in the national interest by nonimmigrants may include the following:

H-1B applicants:

- For travel as a public health or healthcare professional, or researcher to alleviate the effects of the COVID-19 pandemic, or to conduct ongoing medical research in an area with a substantial public health benefit (e.g. cancer or communicable disease research). This includes those traveling to alleviate effects of the COVID-19 pandemic that may be a secondary effect of the pandemic (e.g., travel by a public health or healthcare professional, or researcher in an area of public health or healthcare that is not directly related to COVID-19, but which has been adversely impacted by the COVID-19 pandemic).

- Travel supported by a request from a U.S. government agency or entity to meet critical U.S. foreign policy objectives or to satisfy treaty or contractual obligations. This would include individuals, identified by the Department of Defense or another U.S. government agency, performing research, providing IT support/services, or engaging other similar projects essential to a U.S. government agency.

- Travel by applicants seeking to resume ongoing employment in the United States in the same position with the same employer and visa classification. Forcing employers to replace employees in this situation may cause financial hardship. Consular officers can refer to Part II, Question 2 of the approved Form I-129 to determine if the applicant is continuing in "previously approved employment without change with the same employer."

- Travel by technical specialists, senior level managers, and other workers whose travel is necessary to facilitate the immediate and continued economic recovery of the United States. Consular officers may determine that an H-1B applicant falls into this category when at least two of the following five indicators are present:

1. The petitioning employer has a continued need for the services or labor to be performed by the H-1B nonimmigrant in the United States. Labor Condition Applications (LCAs) approved by DOL during or after July 2020 are more likely to account for the effects of the COVID-19 pandemic on the U.S. labor market and the petitioner's business; therefore, this indicator is only present for cases with an LCA approved during or after July 2020 as there is an indication that the petitioner still has a need for the H-1B worker. For LCAs approved by DOL before July 2020, this indicator is only met if the consular officer is able to determine from the visa application the continuing need of petitioned workers with the U.S. employer. Regardless of when the LCA was approved, if an applicant is currently performing or is able to perform the essential functions of the position for the prospective employer remotely from outside the United States, then this indicator is

not present.

2. The applicant's proposed job duties or position within the petitioning company indicate the individual will provide significant and unique contributions to an employer meeting a critical infrastructure need. Critical infrastructure sectors are chemical, communications, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, healthcare and public health, information technology, nuclear reactors, transportation, and water systems. Employment in a critical infrastructure sector alone is not sufficient; the consular officers must establish that the applicant holds one of the two types of positions noted below:

   a.) Senior level placement within the petitioning organization or job duties reflecting performance of functions that are both unique and vital to the management and success of the overall business enterprise; OR

   b.) The applicant's proposed job duties and specialized qualifications indicate the individual will provide significant and unique contributions to the petitioning company.

3. The wage rate paid to the H-1B applicant meaningfully exceeds the prevailing wage rate by at least 15 percent (see Part F, Questions 10 and 11 of the LCA) by at least 15 percent. When an H-1B applicant will receive a wage that meaningfully exceeds the prevailing wage, it suggests that the employee fills an important business need where an American worker is not available.

4. The H-1B applicant's education, training and/or experience demonstrate unusual expertise in the specialty occupation in which the applicant

will be employed. For example, an H-1B applicant with a doctorate or professional degree, or many years of relevant work experience, may have such advanced expertise in the relevant occupation as to make it more likely that he or she will perform critically important work for the petitioning employer.

5. Denial of the visa pursuant to P.P. 10052 will cause financial hardship to the U.S. employer. The following examples, to be assessed based on information from the visa application, are illustrative of what may constitute a financial hardship for an employer if a visa is denied: the employer's inability to meet financial or contractual obligations; the employer's inability to continue its business; or a delay or other impediment to the employer's ability to return to its pre-COVID-19 level of operations.

H-2B applicants

- Travel based on a request from a U.S. government agency or entity to meet critical foreign policy objectives or to satisfy treaty or contractual obligations. An example of this would be supporting U.S. military base construction (e.g. associated with the National Defense Authorization Act) or IT infrastructure.

- Travel necessary to facilitate the immediate and continued economic recovery of the United States (e.g. those working in forestry and conservation, nonfarm animal caretakers, etc). Consular officers may determine that an H-2B applicant falls into this category when at least two of the following three indicators are present:

1. The applicant was previously employed and trained by the petitioning U.S. employer. The applicant must have previously worked for the petitioning U.S. employer under two or more

H-2B (named or unnamed) petitions. U.S. employers dedicate substantial time and resources to training seasonal/temporary staff, and denying visas to the most experienced returning workers may cause financial hardship to the U.S. business.

2. The applicant is traveling based on a temporary labor certification (TLC) that reflects continued need for the worker. TLCs approved by DOL during or after July 2020 are more likely to account for the effects of the COVID-19 pandemic on the U.S. labor market and the petitioner's business, and therefore this indicator is only present for cases with a TLC approved during or after July 2020 as there is an indication that the petitioner still has a need for the H-2B worker. For TLCs approved by DOL before July 2020, this indicator is only met if the consular officer is able to determine from the visa application the continuing need of petitioned workers with the U.S. employer.

3. Denial of the visa pursuant to P.P. 10052 will cause financial hardship to the U.S. employer. The following examples, to be assessed based on information from the visa application, are illustrative of what may constitute a financial hardship for an employer if a visa is denied: the employer's inability to meet financial or contractual obligations; the employer's inability to continue its business; or a delay or other impediment to the employer's ability to return to its pre-COVID-19 level of operations.

J-1 applicants

- Travel to provide care for a minor U.S. citizen, LPR, or nonimmigrant in lawful status by an au pair possessing special skills required for a child with particular needs (e.g., medical,

special education, or sign language). Childcare services provided for a child with medical issues diagnosed by a qualified medical professional by an individual who possesses skills to care for such child will be considered to be in the national interest.

- Travel by an au pair that prevents a U.S. citizen, lawful permanent resident, or other nonimmigrant in lawful status from becoming a public health charge or ward of the state of a medical or other public funded institution.

- Childcare services provided for a child whose parents are involved with the provision of medical care to individuals who have contracted COVID-19 or medical research at United States facilities to help the United States combat COVID-19.

- An exchange program conducted pursuant to an MOU, Statement of Intent, or other valid agreement or arrangement between a foreign government and any federal, state, or local government entity in the United States that is designed to promote U.S. national interests if the agreement or arrangement with the foreign government was in effect prior to the effective date of the Presidential Proclamation.

- Interns and Trainees on U.S. government agency-sponsored programs (those with a program number beginning with "G-3" on Form DS-2019): An exchange visitor participating in an exchange visitor program in which he or she will be hosted by a U.S. government agency and the program supports the immediate and continued economic recovery of the United States.

- Specialized Teachers in Accredited Educational Institutions with a program number beginning

with "G-5" on Form DS-2019: An exchange visitor participating in an exchange program in which he or she will teach full-time, including a substantial portion that is in person, in a publicly or privately operated primary or secondary accredited educational institution where the applicant demonstrates ability to make a specialized contribution to the education of students in the United States. A "specialized teacher" applicant must demonstrate native or near-native foreign language proficiency and the ability to teach his/her assigned subject(s) in that language.

- Critical foreign policy objectives: This only includes programs where an exchange visitor participating in an exchange program that fulfills critical and time sensitive foreign policy objectives.

L-1A applicants

- Travel as a public health or healthcare professional, or researcher to alleviate the effects of the COVID-19 pandemic, or to conduct ongoing medical research in an area with a substantial public health benefit. This includes those traveling to alleviate effects of the COVID-19 pandemic that may be a secondary effect of the pandemic.

- Travel based on a request from a U.S. government agency or entity to meet critical foreign policy objectives or satisfy treaty or contractual obligations. An example of this would be supporting U.S. military base construction or IT infrastructure.

- Travel by applicants seeking to resume ongoing employment in the United States in the same position with the same employer and visa classification. Forcing employers to replace

employees in this situation may cause undue financial hardship.

- Travel by a senior level executive or manager filling a critical business need of an employer meeting a critical infrastructure need. Critical infrastructure sectors include chemical, communications, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, healthcare and public health, information technology, nuclear reactors, transportation, and water systems. An L-1A applicant falls into this category when at least two of the following three indicators are present AND the L-1A applicant is not seeking to establish a new office in the United States:

1. Will be a senior-level executive or manager;

2. Has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization that can only be replicated by a new employee within the company following extensive training that would cause the employer financial hardship; or

3. Will fill a critical business need for a company meeting a critical infrastructure need.

L-1A applicants seeking to establish a new office in the United States likely do NOT fall into this category, unless two of the three criteria are met AND the new office will employ, directly or indirectly, five or more U.S. workers.

L-1B applicants

- Travel as a public health or healthcare professional, or researcher to alleviate the effects of the COVID-19 pandemic, or to conduct ongoing medical research in an area with a substantial public health benefit. This

includes those traveling to alleviate effects of the COVID-19 pandemic that may be a secondary effect of the pandemic.

- Travel based on a request from a U.S. government agency or entity to meet critical foreign policy objectives or satisfy treaty or contractual obligations. An example of this would be supporting U.S. military base construction or IT infrastructure.

- Travel by applicants seeking to resume ongoing employment in the United States in the same position with the same employer and visa classification. Forcing employers to replace employees in this situation may cause undue financial hardship.

- Travel as a technical expert or specialist meeting a critical infrastructure need. The consular officer may determine that an L-1B applicant falls into this category if all three of the following indicators are present:

1. The applicant's proposed job duties and specialized knowledge indicate the individual will provide significant and unique contributions to the petitioning company;

2. The applicant's specialized knowledge is specifically related to a critical infrastructure need; AND

3. The applicant has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization that can only be replicated by a new employee within the company following extensive training that would cause the employer financial hardship.

H-4, L-2, and J-2 applicants

- National interest exceptions are available for those who will accompany or follow to join a principal applicant who is a spouse or parent and who has been granted a national interest exception to P.P. 10052. Note, a national interest exception is not required if the principal applicant is not subject to P.P. 10052 (e.g. if the principal was in the United States on the effective date, June 24, or has a valid visa that the principal will use to seek entry to the United States). In the case of a principal visa applicant who is not subject to P.P. 10052, the derivative will not be subject to the proclamation either.

Exceptions under P.P. 10014 for certain travel in the national interest by immigrants may include the following:

- Applicants who are subject to aging out of their current immigrant visa classification before P.P. 10014 expires or within two weeks thereafter.

Travelers who believe their travel falls into one of these categories or is otherwise in the national interest may request a visa application appointment at the closest Embassy or Consulate and a decision will be made at the time of interview as to whether the traveler has established that they are eligible for a visa pursuant to an exception. Travelers are encouraged to refer to the Embassy/Consulate website for detailed instructions on what services are currently available and how to request an appointment.

Applicants for immigrant visas covered by Presidential Proclamation 10014, as extended by P.P. 10052, including Diversity Visa 2020 (DV-2020) applicants, who have not been issued an immigrant

visa as of April 23, are subject to the proclamation's restrictions unless they can establish that they are eligible for an exception. No valid visas will be revoked under this proclamation.