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

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.
2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

DATED: November 20, 2020

Respectfully submitted,

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and lawful permanent residents, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in important immigration cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); and *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016). For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's parent organization, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has a direct interest in the issues here.

INTRODUCTION

When Congress enacted the Immigration and Nationality Act, it understood that certain emergency situations could arise in which the President would need the

[1] The parties have consented in writing to the filing of this *amicus* brief. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

ability to act swiftly and decisively to suspend the entry of aliens into the country in order to protect the best interests of the nation. *See, e.g.*, 98 Cong. Rec. 4423 (Apr. 25, 1952) (citing times when it would be "impossible for Congress to act," such as in response to "an outbreak" or "a period of great unemployment," as reasons for providing the President broad authority.). 8 U.S.C. § 1182(f) addresses this concern, providing:

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

The plain and concise language of the statute makes clear that Congress granted the President broad power to act swiftly and decisively when necessary to protect the interests of the United States by suspending the admission of aliens. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) ("By its plain language, § 1182(f) grants the President broad discretion to suspend entry of aliens into the United States.").

In light of the COVID-19 pandemic, the President declared a national emergency as of March 1, 2020. Proclamation 9,994, 85 Fed. Reg. 15,337 (Mar. 18, 2020). In April 2020, noting that the pandemic had caused over 20 million Americans to apply for unemployment benefits, the President issued another proclamation that suspended the admission of aliens to avoid further negative effects on the U.S. labor market and healthcare system. Proclamation 10,014, 85 Fed. Reg.

23,441, 23441-42 (Apr. 22, 2020) ("Proclamation 10014"). In June 2020, the President issued the proclamation at issue in this case, continuing Proclamation 10014 and additionally suspending the grant of certain non-immigrant visas (H-1B, H-2B, J, and L) further to protect the tens of millions of unemployed American workers during these extraordinary times. Proclamation 10,052, 85 Fed. Reg. 38,263 (June 22, 2020 ("Proclamation").

Plaintiffs moved for and were granted a preliminary injunction preventing the Department of Homeland Security ("DHS") from enacting and administering the Proclamation against them. IRLI supports DHS in its appeal and adds the following regarding the merits of the case.

SUMMARY OF THE ARGUMENT

The court below erred by using a flawed test for determining whether a given exercise of power is in the domestic or foreign-affairs arena. Looking to the purpose for which a power was exercised to determine whether that exercise was foreign or domestic, the court below, finding that the Proclamation had a domestic economic purpose, concluded that it was a domestic exercise of power, and hence made pursuant to an unconstitutionally broad delegation of power to the executive. It accordingly enjoined the Proclamation.

This "purpose" test for determining whether a given exercise of power is foreign or domestic quickly leads to absurd results, however, and has been rejected

by the Supreme Court. For example, under it, a military action abroad to secure a natural resource for domestic consumption would be mislabeled a "domestic" exercise of power, and economic measures taken in the United States that were meant to safeguard the national defense would become "foreign-affairs" exercises of power.

The Supreme Court has never used this problematic "purpose" test to limit its numerous holdings that the entry of aliens into the United States is in the arena of foreign affairs, over which the President has inherent authority. Indeed, when invited to do so, the Court declined to adopt this test. When President Truman seized domestic steel production in the name of safeguarding the national defense, the Court, despite the President's foreign-affairs purpose, famously did not uphold his action as an exercise of his foreign-affairs powers, but held that he had exceeded his authority. Indeed, if the Court had accepted President Truman's reasoning, and that of the court below, it would have enabled the President to assume the very sort of domestic monarchical power the court below decried, under which the President could justify all manner of domestic edicts in the name of foreign policy and national security.

For these reasons, whatever the merits of the "purpose" test when used in cases under the Administrative Procedure Act to review agency rulemaking, it should not be used, as the court below used it, to decide whether the President, who

unlike an agency has inherent foreign-affairs powers, has exercised those powers in a given instance.

ARGUMENT

I. The Proclamation Does Not Violate The Nondelegation Doctrine.

A preliminary injunction is only appropriate where the plaintiff has "establish[ed] [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Because appellees, under the first prong, cannot succeed on the merits, the "extraordinary and drastic remedy" of a preliminary injunction, *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008), was not warranted here.

In reaching its decision, the court below determined whether the President's use of § 1182(f) was a foreign or domestic use of power by considering whether the Proclamation had a foreign or domestic purpose. Finding that the Proclamation had a domestic economic purpose, the court concluded that it was a domestic exercise of power, and hence made pursuant to an unconstitutionally broad congressional delegation of power to the executive. ER0013.

Whether an exercise of power is in the area of foreign policy or domestic policy, however, does not depend on its purpose, or the problem it seeks to address. If it did, the use of military force abroad to secure a natural resource, such as oil, for domestic consumption would be, absurdly, a *domestic* exercise of power, and economic stimulus policies executed domestically but meant to aid a war effort would be foreign-policy exercises of power. And often, of course, the motives for a given exercise of power are mixed, often inextricably.

Avoiding such absurdities and inextricabilities, the Supreme Court has taken the straightforward approach of looking to the domestic or foreign *subject matter* of a power's exercise to determine whether that exercise is foreign or domestic, and has rejected the "purpose" test of the court below. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), President Truman sought to seize steel production pursuant to his foreign-affairs power, but the Supreme Court held that he had overstepped his authority; Truman's foreign-affairs *purpose* for his action, with its domestic subject matter, did not make it a foreign-affairs *action* within his inherent Article II authority:

> The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately *jeopardize our national defense* and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel. Reciting these considerations for his action, the President [by executive order]… directed the Secretary of Commerce to take possession of most of the steel mills and keep them running.

Id. at 583 (emphasis added). Despite the President's national-defense purpose, the Court held that

> [t]he order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production [and thereby jeopardizing the national defense]. This is a job for the Nation's lawmakers, not for its military authorities.

Id. at 587. Here, by contrast, whatever the purpose of the Proclamation, its subject matter—the entry of aliens into the United States—is within the area of foreign affairs, and thus is a subject matter over which the President has inherent Article II authority, as the Supreme Court has recognized again and again. *See, e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (explaining that, although Congress generally determines rules of alien admission, "the power of exclusion of aliens is also inherent in the executive department of the sovereign"); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1248 (2018) ("Congress does not 'delegate' when it merely authorizes the Executive Branch to exercise a power that it already has."). As the Supreme Court has explained: "When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a

legislative power. It is implementing an inherent executive power." *Knauff*, 338 U.S. at 542.

Indeed, the "purpose" test, as *Youngstown* itself illustrates, could lead to tyranny, granting the President the very monarchical power the court below decried, ER0013, whenever he could find a plausible foreign-affairs justification for a domestic edict. As the Supreme Court pointed out in *Youngstown*, 343 U.S. at 587, "we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has," in the domestic arena, such "ultimate power."

Nor was the court below correct when it claimed that precedents of this Court forced its decision. ER0014. Even if this Court has endorsed the "purpose" method of making the foreign affairs-domestic affairs distinction when an administrative agency has exercised power through rulemaking, administrative agencies, which are creatures of statute, do not have inherent Article II executive power. The President does have such power, and it should not be constrained by a deeply flawed and inaccurate test for determining when he has exercised it. (And, of course, when an agency, such as the Department of Commerce in *Youngstown* or DHS here, merely carries out an executive order, rather than making a rule, the action is that of the President. *E.g., Detroit Int'l Bridge Co. v. Gov't of Can.*, 189 F. Supp. 3d 85, 101-04 (D.D.C. 2016) (citing Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2351 (2001)).) Also, as the government points out, the tentative

suggestion of a motions panel in another case, disclaiming any intention of binding a subsequent panel even in that case, does not bind this Court here. Gov't Br. at 30.

In sum, the court below erred in finding § 1182(f) unconstitutional as applied in the Proclamation on the ground that the Proclamation had a domestic purpose, and hence was a domestic use of power. This drastic abridgment of a power validly conferred on the President by both the Constitution and Congress should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the judgement of the court below should be reversed.

DATED: November 20, 2020

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 29(a)(5) because:

   This brief contains 2,065 words, including footnotes, but excluding parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

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CERTIFICATE OF SERVICE

I certify that on November 20, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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