No. 20-17132

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

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INTRODUCTION

This Court should vacate the district court's preliminary injunction against Presidential Proclamation 10052, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 Fed. Reg. 38,263 (Jun. 25, 2020). The Proclamation is a lawful exercise of the President's authority. Plaintiffs attempt to defend the district court's ruling, but their arguments are unavailing.

First, Plaintiffs argue that their claims are justiciable. Pls.' Br. 13-19. Plaintiffs are wrong. As the Government has explained, the principles of nonreviewability preclude judicial review of statutory challenges to the decision to exclude foreign nationals abroad. Gov't Br. 18, 21-24. Plaintiffs contend that the Government did not make this argument below, but that is also wrong. *See id.* The Government argued below that nonreviewability barred Plaintiffs' claims, and that it did "not matter that Plaintiffs here purport to challenge a 'policy' rather than an individual visa decision." *See* ER 514. Plaintiffs also contend that the nonreviewability rule is limited to the decisions of consular officers. But both the Supreme Court and this Court have recognized that nonreviewability applies to challenges to policies. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2418-19 (2018) (explaining that in reviewing a constitutional challenge to a proclamation issued under section 1182(f), courts should limit their review to determining whether the Executive provided a facially legitimate and bona fide reason for the entry restrictions); *Allen v. Milas*, 896 F.3d 1094, 1107 (9th Cir. 2018) (applying nonreviewability to constitutional and statutory challenges).

Second, Plaintiffs make several arguments contending that the Proclamation exceeds the power delegated to the President in section 1182(f). Pls.' Br. 19-52. Each argument fails. Plaintiffs argue that the Proclamation "conflicts with" the Immigration and Nationality Act (INA) because it excludes entire classes of temporary workers who are otherwise admissible under various provisions in the INA. Pls.' Br. 19-34. But as the Government has explained, *see* Gov't Br. 33-36, section 1182(f) gives the President "ample power to impose restrictions on entry in addition to those enumerated in the INA." *Hawaii*, 138 S. Ct. at 2408. Thus, a proclamation does not exceed the President's authority under section 1182(f) simply because the proclamation addresses concerns covered elsewhere in the INA.

Plaintiffs next contend that the findings contained in the Proclamation "are insufficient to support the action taken." Pls.' Br. 34; *see id.* 34-45. This argument also conflicts with *Hawaii*, which made clear that the "sole prerequisite" to exercise of the President's authority in section 1182(f) is a Presidential finding that "the entry of covered aliens would be detrimental to the interests of the United States." *Hawaii*, 138 S. Ct. at 2408. The President made such a finding here. Gov't Br. 19 (citing 85 Fed. Reg. 38,263) (concluding that "the entry into the United States of persons" described in Proclamation 10052 "would be detrimental to the interests of the United States" because they would present "a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID-19 outbreak"). Plaintiffs argue that *Hawaii* is distinguishable because the Proclamation at issue here does not concern foreign affairs. Pls.' Br. 37-40. But as the

Government has explained, section 1182(f) does not distinguish between foreign and domestic concerns, and the exclusion of foreign nationals always touches upon foreign affairs. Gov't Br. 29-33. Such exclusion does not become a domestic matter simply because the harm avoided will occur within the United States.

Plaintiffs also take issue with the specific findings in the Proclamation. Pls.' Br. 41-46. But even if their granular disagreements were grounds for invalidating it—and they are not, Gov't Br. 24-38—their arguments misfire. The Proclamation instead reflects sound decisionmaking. The President explained the nature of the current emergency, its impact on the labor market, and the threat that nonimmigrant visa programs pose to employment of American workers at this unique moment. Gov't Br. 10-11 (85 Fed. Reg. 38,263-65). And the Proclamation contains specific factual findings as to the H-1B, H-2B, J, and L nonimmigrant visa programs. Gov't Br. 11 (citing 85 Fed. Reg. 38,263-65). So Plaintiffs arguments fail.

Third, Plaintiffs argue that the nondelegation doctrine "requires a reading" that limits the President's authority under this provision in order to avoid conferring "unbridled authority" on the President. Pls.' Br. 46; *see id.* 46-52. That is also wrong. *See* Gov't Br. 32-33. The President has inherent authority to control the entry of foreign nationals and as the Supreme Court has explained, Congress need not "lay down narrowly definite standards by which the President is to be governed" in the field of foreign affairs. *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 321-22 (1936). Indeed, the Supreme Court rejected a nondelegation challenge to a preceding related statute to section 1182(f). *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S.

537, 541-43 (1950) (interpreting Act of June 21, 1941, ch. 210, § 1, 55 Stat. 252-53, the predecessor to 8 U.S.C. § 1185(a)(1)). The same rejection is warranted here.

The remaining preliminary injunction factors likewise favor vacating the injunction. *Contra* Pls.' Br. 52-60. Plaintiffs argue that the district court's injunction is in the public interest because "the Proclamation does not meaningfully address the problem of COVID-related domestic unemployment." Pls.' Br. 59; *see also id.* 34-45. But as the Government has explained, Proclamation 10052 is supported by specific factual findings of job losses for U.S. workers impacted by the pandemic. Gov't Br. 39 (citing 85 Fed. Reg. 38,263-64); *see id.* 39-42. Plaintiffs also argue that they demonstrated irreparable harm because the record purportedly establishes it was the Proclamation, and not the pandemic, that was the source of their harm. Pls.' Br. 56. This misses the point. Plaintiffs' purported injury is not that they are unable to bring in *any* foreign workers, but rather that they cannot bring into the country the desired number of foreign workers. Gov't Br. 44-45 (citing ER 489, 493). There is nothing in the record to connect this purported injury—the inability to bring the desired number of temporary foreign workers into the country—to the Proclamation itself as opposed to the pandemic. *Id.* at 45. Plaintiffs further argue that the district court, in weighing the equities, was correct in giving little or no weight to the Proclamation's national interest waiver exceptions. Pls.' Br. 57-58. But the existence of exceptions substantially limits the purported harm attributable and should have been considered by the district court. Gov't Br. 45. Thus, the balance of the equities weighs in favor of the Government.

This Court should vacate the district court's preliminary-injunction order.

ARGUMENT

I. This Court Should Vacate the Preliminary Injunction Because Plaintiffs Are Unlikely To Succeed On The Merits Of Their Claims.

A. Courts May Not Review Non-Constitutional Challenges to the Political Branches' Decisions to Exclude Foreign Nationals.

The district court erred in concluding that Plaintiffs claims are not barred by principles of nonreviewability. Gov't Br. 21-24. Plaintiffs' arguments to the contrary, Pls.' Br. 13-18, do not withstand scrutiny.

First, Plaintiffs contend that "the government forfeited its justiciability argument below because, as the district court recognized, it 'did not argue justiciability in opposing the [preliminary injunction] motion" and "raised justiciability solely as a response to the Plaintiffs' APA cause of action." Pls.' Br. 13 (quoting ER 9 n.2), 13-14. Plaintiffs erroneously focus on the headings and subheadings of the Government's opposition brief below. *See id.* That is wrong. The Government argued that nonreviewability barred Plaintiffs' claims, and that it did "not matter that Plaintiffs here purport to challenge a 'policy' rather than an individual visa decision." *See* ER 514; *id.* at 513-14 (arguing that Plaintiffs cannot seek review of Presidential actions carried out through visa denials).

Second, Plaintiffs argue that "this Court flatly rejected the very same nonreviewability argument in *Hawaii* [*v. Trump*, 878 F.3d 662 (9th Cir. 2017), *rev'd* 138 S. Ct. 2392 (2018) (referred to by Plaintiffs as "*Hawaii II*")], and that holding is the

law of the Circuit." Pls.' Br. 14, 14-16. That is also wrong because is at odds with the Supreme Court's approach to nonreviewability when it reversed this Court in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

In *Hawaii*, the Supreme Court refuted this Court's determination that it could not consider the merits of the plaintiffs' statutory claim without first addressing the issue of reviewability, assuming without deciding that it could review the proclamation at issue in that case. *Id.* at 2407 Nonetheless, the Supreme Court reversed the *Hawaii II* approach when it applied the rule of nonreviewability in *Hawaii* by "limit[ing its] review to whether *the Executive* gave a 'facially legitimate and bona fide' reason for its action," echoing the scope of review for constitutional claims of U.S. citizens explained in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the paradigmatic nonreviewability case. *Hawaii*, 138 S. Ct. at 2419 (emphasis added). Moreover, *Hawaii* made clear that nonreviewability applies to policymaking—not just consular officers' decisionmaking: "A conventional application of *Mandel*, asking only *whether the policy* is facially legitimate and bona fide, would put an end to our review." *Hawaii*, 138 S. Ct. at 2420 (emphasis added); *see also id.* at 2420-21 (upholding the Proclamation because "[i]t cannot be said that ... *the policy* is 'inexplicable by anything but animus'" (emphasis added)).

The *Hawaii* Court's application of the rule of nonreviewability is directly at odds with Plaintiffs' reliance on *Hawaii II* to argue that "[c]onsular nonreviewability bars review of 'individual visa denials' by consular officers, not 'the President's promulgation of sweeping immigration policy' alleged to be beyond his statutory

powers." Pls.' Br. 17 (quoting 878 F.3d 662, 679, *rev'd* 138 S. Ct. at 2418-23), 17-18. This argument neglects the broader principles of nonreviewability raised by the Government, as opposed to the narrow application of consular nonreviewability that addresses decisions of consular officers. As explained in the Government's opening brief, Gov't Br. 21-24, the Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Thus, with the exception of claims raised by United States citizens who claim a burden of their constitutional rights by a visa denial, *see Mandel*, 408 U.S. at 753, it is a fundamental separation-of-powers principle that the decision to exclude foreign nationals is not judicially reviewable. Gov't Br. 23. As the Fourth Circuit ruled earlier this year, "[t]he [*Hawaii*] Court invoked and relied on these longstanding principles of immigration jurisprudence in *Mandel*." *IRAP v. Trump*, 961 F.3d 635, 649 (4th Cir. 2020); *cf. also Allen v. Milas*, 896 F.3d 1094, 1106 (9th Cir. 2018) ("[I]n *Trump v. Hawaii*, the Court observed that its 'opinions have reaffirmed and applied [*Mandel*'s] deferential standard of review across different contexts and constitutional claims.'" (second alteration in original) (quoting 138 S. Ct. at 2419).

This Court has similarly recognized that deference to decisions involving the admission of foreign nationals is due to both of the political branches and not just to Congress: "[J]udicial review [in immigration cases] is necessarily limited by the recognition that the power to exclude or expel aliens, as a matter affecting international relations and national security, is vested in the Executive and Legislative

branches of government." *Ventura-Escamilla v. INS*, 647 F.2d 28, 30 (9th Cir. 1981) (discussing *Fiallo v. Bell*, 430 U.S. 787 (1977)); *see also id.* ("From this foundation evolved the doctrine of nonreviewability[.]"). Courts have referred to this principle as "the doctrine of consular nonreviewability," *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999), but that shorthand label merely reflects the context in which the principle most often arises: challenges to visa-denial decisions by consular officers. The principles underlying that doctrine apply regardless of how the Executive decides to deny entry to foreign nationals abroad. In fact, Plaintiffs' insistence on distinguishing between individual consular officers and Executive Branch decisionmaking in this context was rejected by this Court two years ago because "the distinction ... presse[d] for would eclipse the *Mandel* exception itself. The claims in *Mandel, Fiallo,* and [*Kerry v.*] *Din*[, 576 U.S. 86 (2015)] were all legal claims." *Allen*, 896 F.3d at 1107-08. In short, *Allen* rejected the argument because the Plaintiffs' "theory converts consular nonreviewability into consular reviewability. The conclusion flies in the face of more than a century of decisions." *Id.* at 1107.

In sum, Plaintiffs' claim that the President acted in excess of statutory authority and the permissible scope of section 1182(f) are nonreviewable statutory claims, not constitutional claims. Furthermore, there is no basis to conclude that Plaintiffs' challenge here is reviewable. *Cf. Dalton v. Specter*, 511 U.S. 462, 471-77 (1994) (holding that *ultra vires* claims are unreviewable statutory claims, not constitutional claims, even when framed as separation-of-powers claims). Outside the narrow exception for certain constitutional claims, because foreign nationals abroad

have no "claim of right" to enter the United States and exclusion is "a fundamental act of sovereignty" by the political branches, courts may not review decisions to exclude noncitizens "unless expressly authorized by law." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950). The only review permitted of visa policies or denial abroad is limited to ensuring a facially legitimate and bona fide reason where United States citizens raise constitutional claims. *Din*, 576 U.S. at 103 (Kennedy, J., concurring); *Mandel*, 408 U.S. at 769-70; *Knauff*, 338 U.S. at 542-43. Plaintiffs do not point to any statute that authorizes review. *See Allen*, 896 F.3d at 1103-08; *see also Saavedra Bruno*, 197 F.3d at 1159. None of Plaintiffs' arguments avoids this conclusion.

Because Plaintiffs' claims are nonjusticiable statutory claims, they cannot succeed on the merits, and the injunction should be vacated.

B. Proclamation 10052 Is a Lawful Exercise of the President's Broad Authority Under 8 U.S.C. § 1182(f).

The district court erred in ruling that Plaintiffs demonstrated a substantial likelihood of success on the merits because Proclamation 10052 is a valid exercise of the President's authority. Gov't Br. 24-39. Plaintiffs contend otherwise, Pls.' Br. 19-52, but their arguments lack merit.

First, Plaintiffs argue that Proclamation 10052 conflicts with the INA. Pls.' Br. 19-34. They argue that the Proclamation "takes a sledgehammer to th[e INA's] carefully crafted system, declaring by executive fiat that four entire visa categories are no longer operative," *id.* at 20, and that "[b]y purporting to strike a different balance

than that enacted into law by Congress, the Proclamation further exceeds the President's power under Section [1182(f)]," *id.* at 21. They also argue that the Supreme Court's decision in *Hawaii* does not control here because they view Proclamation 10052 as eliminating entire categories of temporary nonimmigrant workers despite the Proclamation's language as a temporary bar on entry during a pandemic and the attendant unprecedented rises in unemployment in the U.S. labor market. *Id.* at 22-34. They are wrong.

As explained in the Government's opening brief, Gov't Br. 33-36, section 1182(f) permits the President to bar entry of certain foreign nationals even though they may be admissible under other provisions of the INA. Congress specifically authorized the President to "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*." 8 U.S.C. § 1182(f) (emphasis added). Congress did not say that the President could adopt only restrictions that in no way involve considerations that might also be relevant to temporary foreign labor or the U.S. labor market. Rather, it said the President could impose *any* restrictions he finds are necessary. As the Supreme Court explained in *Hawaii*, section 1182(f) grants the President "ample power to impose entry restrictions in addition to those elsewhere enumerated in the INA." 138 S. Ct. at 2408; *see also id.* at 2412. Indeed, empowering the President to impose those additional entry restrictions that would not otherwise exist in the INA is the point of sections 1182(f) and 1185(a)(1)—those provisions would serve no purpose otherwise. *See id.* at 2408; Gov't Br. 34-35.

The conflict that Plaintiffs allege to exist between the Proclamation and the INA is based on the view that Proclamation 10052 might prevent entry of individuals who, in their view, Congress has determined must be admitted because the INA has other statutory protections for the U.S. job market. *See* Pls.' Br. 26 ("In all, Congress enacted specific labor-market protections for each of the tailored visa categories at issue and fine-tuned those statutory protections over time, making unmistakably clear the legislative judgment about the circumstances under which the Nation should admit foreign workers."). But the statutory grounds of compliance with the H-1B, H-2B, J-1, and L-1 visa programs are not provisions that affirmatively permit entry whenever other inadmissibility grounds apply. Nor do they undermine the President's statutory authority to exclude foreign nationals. This is because section 1182 includes various categories of inadmissibility that Congress has long contemplated *may be added to* by the President's use of section 1182(f). *See* Gov't Br. 33-35; *see also Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (discussing how "Congress expressly authorized the President *to impose additional restrictions on aliens entering* ... the United States").

Indeed, in *Hawaii*, the Supreme Court rejected the argument that Plaintiffs raise here—that a Proclamation exceeded the President's authority to exclude certain foreign nationals that was already addressed by other provisions within the INA. *See Hawaii*, 138 S. Ct. at 2408; *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (R.B. Ginsburg, J.) (recognizing that the "President's sweeping proclamation power thus provides a safeguard against the danger posed by any particular case or

class of cases that" are not already barred from entry). Plaintiffs attempt to distinguish their argument from *Hawaii* by characterizing Proclamation 10052 as "rebalancing" the temporary employment of foreign nationals. Pls.' Br. 26. But this argument is indistinguishable from the plaintiffs' assertions in *Hawaii* that the proclamation at issue there conflicted with congressional "judgments embodied in the INA ... by excluding aliens based on the 'same criteria' Congress applied to determine participation in the Visa Waiver Program" "notwithstanding that Congress weighed *precisely* the same consideration in enacting the [VWP] and the INA's vetting system, and judged that it does not warrant excluding a country's nationals." *Trump v. Hawaii*, No. 17-965, Brief for Respondents at 11, 13, 16. The Supreme Court squarely rejected the argument that the Court should adopt a "cramped" reading of section 1182(f) by finding implicit limits on the President's authority based on other provisions of the INA. *Hawaii*, 138 S. Ct. at 2411. Had Congress "intended ... to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end." *Hawaii*, 138 S. Ct. at 2414 (rejecting argument that inadmissibility grounds and provisions governing visas operated in the same "sphere" and implicitly limited Executive authority "because it ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA").

Plaintiffs next claim that it is "contrary to the ... INA" for the President, under section 1182(f), to suspend the entry of all foreign nationals, meaning that he therefore may not suspend the entry of temporary-worker visa categories, either. Pls.'

Br. 32-33. But Plaintiffs ignore the language of the statute, which speaks to "any aliens or of any class of aliens." 8 U.S.C. § 1182(f). Plaintiffs' interpret the words "any class" to mean "some" depending on the circumstance. Yet courts have repeatedly held that a President may restrict entry by Proclamation based on grounds that are in addition to other express routes of admissibility laid out in the INA. In *Abourezk*, for example, the D.C. Circuit emphasized that the President could, under his "sweeping proclamation power" in section 1182(f), suspend the entry of foreign nationals who, for whatever reason, might be prejudicial to the national interest. 785 F.2d at 1049 n.2; *see also* Gov't Br. 37-38. The Supreme Court cited this aspect of *Abourezk* with approval in *Hawaii*. 138 S. Ct. at 2408. And while Plaintiffs claim that they have found no proclamation "to nullify entire visa categories," Pls.' Br. 31, that is not what Proclamation 10052 accomplishes. It is merely a suspension of entry, not a nullification of visa programs. Regardless, their disagreement with Proclamation 10052 is one of policy rather than history—as no Proclamation has been struck down as inconsistent with congressional will for expanding on the existing grounds of inadmissibility.

Second, Plaintiffs argue that the findings contained in Proclamation 10052 "are insufficient to support the action taken." Pls.' Br. 34; *id.* at 34-45. This argument fails for several reasons.

To start, as explained in the Government's opening brief (at 26-29), the "sole prerequisite" to exercise of the President's authority in section 1182(f) is a Presidential finding that "the entry of the covered aliens would be detrimental to the

interests of the United States." *Hawaii*, 138 S. Ct. at 2408. The Supreme Court in *Hawaii* was unequivocal that this is the only necessary finding; there is no additional evidentiary requirement in the statute. *See Hawaii*, 138 S. Ct. at 2408, 2409; *see also* Gov't Br. at 37-38. The Court's holding in *Hawaii* is fully in accord with long-established authority that Presidential findings of fact are not subject to judicial review. *Id.* at 37 (citing, *inter alia*, *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371, 380 (1940) ("It has long been held that where Congress has authorized a public officer [such as the President] to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review"); *see also id.* at 25-26 (collecting cases). And the Court's holding in *Hawaii* makes practical sense—a heightened evidentiary requirement might force the President to reveal sensitive information that could disrupt the national interest.

Contrary to Plaintiffs' assertions, Pls.' Br. 34-36, the President made the necessary finding here, *see* Gov't Br. at 26-29. When issuing Proclamation 10052, the President found "that the entry into the United States of persons" described in the Proclamation "would be detrimental to the interests of the United States." 85 Fed. Reg. at 38,264. The President therefore suspended entry of the enumerated nonimmigrant visa categories through December 31, 2020. *Id.* at 38,264-65.

Plaintiffs contend that *Hawaii* is distinguishable from the present case because the present case does not arise in the context of foreign affairs. Pls.' Br. 38; *see id.* at 37-40. But, as the Government has explained, there is no basis for concluding that

section 1182(f) embodies a distinction between a presidential proclamation motivated by "foreign" as opposed to "domestic" concerns. Gov't Br. 29 (citing *Gomez v. Trump*, No. 20-cv-01419, 2020 WL 5367010, at *19 (D.D.C. Sept. 4, 2020), *amended in part by*, 2020 WL 5886855 (D.D.C. Sept. 14, 2020) (stating that the text of section 1182(f) "simply speaks in terms of restricting entry of aliens 'detrimental to the United States,'" without limiting that detriment "to a particular sphere, foreign or domestic"); *see also id.* at 29-33. Moreover, the exclusion of foreign nationals abroad does not become a "purely domestic" issue simply because the harms would occur within the United States. *Id.* at 33 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (explaining "that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations")); *see also id.* (citing *Hawaii*, 138 S. Ct. at 2404 (upholding restriction on entry of individuals who could pose a threat of violence to individuals *within* the United States)).

Plaintiffs nonetheless maintain that *Hawaii* does not "undercut[]" their interpretation of section 1182(f) because Proclamation 10052 is not as "detailed" as the proclamation at issue in *Hawaii*, which was "tailored ... to the specific facts found for each country." Pls.' Br. 37; *see id.* at 38 ("Proclamation 10052 has no findings remotely similar" to the findings in *Hawaii*); *id.* at 37-38. As already noted, there is no requirement that the President's findings or cited evidence be as "detailed" as the Plaintiffs demand. And even if there were, Proclamation 10052's findings are "more detailed than those contained in past 1182(f) proclamations identified by the Court in *Trump v. Hawaii*." Gov't Br. 28 (citing *Gomez*, 2020 WL 5367010, at *21); *see also*

Hawaii, 138 S. Ct. at 2409 (observing that previous proclamations had contained as few as one to five sentences of justification). And, in *Hawaii*, the Court recognized that section 1182(f) does not contain any "unspoken tailoring requirement." 138 S. Ct. at 2410. Nor would such a requirement make sense here, because Proclamation 10052 is not limited to certain countries, but instead applies to foreign workers throughout the world. In short, the findings contained in Proclamation 10052 "are more than adequate." *Gomez*, 2020 WL 5367010, at *20-21.

Plaintiffs also argue, notwithstanding a long line of authority, that the sufficiency of the factual findings contained in Proclamation 10052 are subject to judicial scrutiny because in enacting section 1182(f), Congress required the President to make a *finding* as opposed to authorizing him to act based on his "judgment." Pls.' Br. 41; *see also id.* at 34-36, 40-42. According to Plaintiffs, Congress's use of the word "finds" reflects Congress' intent, in enacting section 1182(f), to authorize courts to review Presidential findings contained in proclamations. *See id.* at 41. There is no basis for this conclusion. Nothing in *Bush* suggests that 19 U.S.C. § 1336(c)'s use of the word "judgment" was outcome determinative, 310 U.S. at 377-380, and the Supreme Court has not read *Bush* in this manner, *see Specter*, 511 U.S. at 476 (holding that "[h]ow the President chooses to exercise the discretion Congress has granted him is not a matter for our review"); *id.* (citing *Bush* for the proposition that "[n]o question of law is raised when the exercise of [the President's] discretion is challenged"). More significantly, Supreme Court authority interpreting section 1182(f) is at odds with Plaintiffs' distinctions. *See Hawaii*, 138 S. Ct. at 2408 (explaining that section 1182(f)

"exudes deference to the President in every clause" and "entrusts to the President the decisions whether and when to suspend entry," "whose entry to suspend," "for how long," and "on what conditions"); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 165 (1993) ("[t]he wisdom of the policy choices" in proclamations are not "matter[s] for our consideration"). There is no basis for concluding that because, in some contexts, certain factual findings are subject to judicial review, Congress intended to make presidential findings under section 1182(f) judicially reviewable merely because it used the word "finds" in the statute. *See Gomez*, 2020 WL 5367010, at *20 (rejecting such a reading).

Plaintiffs also argue that the structure of section 1182(f) supports their position, contrasting the provision's use of the word "finds" with the word "deems." Pls.' Br. 34-37. According to Plaintiffs, Congress' use of these two different words within section 1182(f) means that courts should be far more deferential to the portion of a proclamation governing its duration as opposed to the portion of the proclamation addressing whether it was lawful as an initial matter. Pls.' Br. 35 ("Congress chose to employ much more deferential phrasing elsewhere in section 212(f), permitting a suspension to last 'for such period as [the President] shall *deem* necessary'") (emphasis original to Pls.' Br.); *see also, id.* at 34-37.

Again, Plaintiffs are wrong. The Supreme Court made clear in *Hawaii* that section 1182(f) entrusts to the President *both* the decision of "whether and when to suspend entry" as well as the decision "for how long" the suspension should last. *Hawaii*, 138 S. Ct. at 2408. Plaintiffs argue to the contrary citing statements from the

legislative debate over the precursor to section 1182(f). Pls.' Br. 36 n.12 (citing 87 Cong. Rec. 5051 (1941) (statement of Rep. Jonkman)). But "a review of the 1941 debate indicates that Congressman Jonkman's colleagues disagreed with him, believing that there was no difference between a statute authorizing a President to act based on a "finding" as opposed to a statute authorizing Presidential action whenever the President "deems" it necessary. *See* 87 Cong. Rec. 5049 ("[T]here is no difference between the word 'deem' and the word 'find.' There is absolutely no difference") (statement of Rep. Bloom); 87 Cong. Rec. 5052 ("I think it is the difference between tweedledum and tweedledee") (statement of Rep. Johnson). Thus, to the extent this congressional debate has any relevance here, it cuts against Plaintiffs' reading of section 1182(f).

Plaintiffs also argue that the President's findings are insufficient because Proclamation 10052 purportedly does not explicitly reflect whether the President weighed the benefits of the Proclamation against its costs and, therefore, "cannot survive under any standard of review." Pls.' Br. 46; *see id.* at 45 (contending that the Proclamation "is not reflective of a rational decisionmaking process"); *see also*, *id.* at 45-46. This too is wrong. As the Government explained, section 1182(f) does not require that a Proclamation reflect that the President engaged in this type of balancing. *See* Gov't Br. 25 (citing *Hawaii* for the proposition that the "sole prerequisite" under section 1182(f) is that the President find that class of foreign nationals' entry would be detrimental; citing *Abourezk*, 785 F.2d at 1049 n.2); *see also id.* at 36-37. The only purportedly contrary authority Plaintiffs point to is a dissenting

opinion addressing the APA's standard to review agency action. *See* Pls.' Br. 45 (citing *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732 (D.C. Cir. 2016) (Kavanaugh, J., dissenting)). But as the district court recognized, the President is not an agency under the APA. *See* ER 9 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992)). Thus, the dissenting opinion in *Mingo Logan* discussing the APA's standard of review is inapplicable here.

Moreover, Plaintiffs are simply mistaken about Proclamation 10052. As the Government previously explained, the Proclamation *does* reflect sound decisionmaking. *See* Gov't Br. 26 (citing 85 Fed. Reg. at 38,264); *id.* at 38 (explaining that "given the current emergency, the suspension of entry of foreign workers of certain categories will ameliorate U.S. unemployment in some measure"); *see also, id.* at 10-11, 27-28, 38-40. The Proclamation recognizes that under "ordinary circumstances, properly administered temporary worker programs can provide benefits to the economy," but explains "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." Gov't Br. 10 (citing 85 Fed. Reg. 38,263); *see also id.* at 27, 39-40. The Proclamation contains specific factual findings as to the H-1B, H-2B, J, and L nonimmigrant visa programs. Gov't Br. 11 (citing 85 Fed. Reg. 38,263-65); *see also Gomez*, 2020 WL 5367010, at *20 (recognizing that that the Proclamation details the job losses in industries in which employers seek to fill positions with H-1B, H-2B, and L workers and explains that certain J nonimmigrant

visa applicants "compete for jobs with young Americans, whose job prospects have been hit particularly hard during the pandemic"). The Proclamation further explains the harm that it seeks to avoid, recognizing that "excess labor supply is particularly harmful to workers at the margin between employment and unemployment." *Id.* at 40 (citing 85 Fed. Reg. 38,264). After detailing these harms, the Proclamation sets forth exceptions for certain workers with critical skills that are needed by the country and directs the Secretaries of State and Homeland Security to establish criteria for additional national interest waivers that employers may use to bring foreign workers into the country to accomplish, for example, mission-critical tasks. *See* Gov't Br. 11 (citing 85 Fed. Reg. at 38,265); *see also id.* at 11-13; *id.* at 45 (citing ER 137-50). The existence of such exceptions does not mean, as Plaintiffs suggest, that Proclamation 10052 is "internally inconsistent." Pls.' Br. 42; *see also, id.* at 42-43. Rather, these exceptions are further evidence of the deliberate nature of the President's decisionmaking seeking to protect U.S. workers, while also ensuring that companies could bring into the country certain workers with critical skills. *See* 85 Fed. Reg. 38,264-65. Thus, although section 1182(f) does not *require* it, Proclamation 10052 does contain facts reflecting that the President issued this Proclamation as part of a sound decisionmaking process that sought to balance competing policy considerations. For this additional reason, Plaintiffs' argument that the findings in Proclamation 10052 are insufficient fails.

Third, Plaintiffs argue that the nondelegation doctrine requires a limiting construction of section 1182(f). Pls.' Br. 46-52. This argument is unavailing.

As explained in the Government's opening brief, Govt. Br. 31-33, the President has inherent authority to control the entry of foreign nationals and as a result Congress need not "lay down narrowly definite standards by which the President is to be governed" in the field of foreign affairs. *Curtiss-Wright*, 299 U.S. at 321-22; *see also Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089 (2015) (recognizing that "Congress may grant the President substantial authority and discretion in the field of foreign affairs"). And the Supreme Court rejected a nondelegation challenge to the predecessor statute to section 1185(a)(1). *Knauff*, 338 U.S. at 541-43. The same result is appropriate here.

Beyond these points, Plaintiffs' attempt to read implicit limits into section 1182(f) based on other statutes governing the admissibility of temporary foreign workers fails for several reasons. To start, they rehash their argument that the President must not be allowed to "rewrite the INA, nor to issue an unreasoned decision, especially in the domestic policymaking context" and thus section 1182(f) must be narrowly interpreted to avoid "grave [constitutional] doubts." Pls.' Br. 46-47. But the Supreme Court has never held that section 1182(f) presents any separation-of-powers issue despite repeatedly considering this statute, including most recently when it upheld section 1182(f)'s "comprehensive delegation" to the President. *Hawaii*, 138 S. Ct. at 2408; *see also Doe #1 v. Trump*, 944 F.3d 1222, 1227 (9th Cir. 2019) (Bress, J., dissenting). And, as previously explained, there is no "rewriting" of the INA in this case, nor is Proclamation 10052 "unreasoned" under any fair reading

of *Hawaii*, which rejected the argument that courts should look for implied limits on section 1182(f). 138 S. Ct. at 2411.

Similarly, in regulating the entry of foreign nationals from abroad, the Proclamation is an exercise of the President's inherent constitutional authority. The President has "inherent executive power" over the "exclusion of aliens" that comes from and is part of his foreign-affairs powers. *Knauff*, 338 U.S. at 542-43. Because "exclusion of aliens is a fundamental act of sovereignty" the exclusion power "is inherent in the executive power to control the foreign affairs of the nation." *Id.* Plaintiffs cast Proclamation 10052 as "domestic policymaking," Pls.' Br. 46, but they fail to account for the reality that regulating the entry of foreign nationals—particularly through regulating determinations about admissibility that are made at consulates and embassies on foreign shores—is an exercise of the President's inherent power under Article II. A power closely related to the President's exclusive power to act "as the sole organ of the federal government in the field of international relations." *Curtiss-Wright*, 299 U.S. at 319-20.

Instead of acknowledging this constitutional backdrop, Plaintiffs invoke the nondelegation doctrine to argue that section 1182(f) provides no intelligible principle and that this Court has limited the President's inherent authority over the admission of foreign nationals. Pls.' Br. 47-49. Plaintiffs rely again upon this Court's decision that was reversed in *Hawaii* to argue against the President's inherent authority to control the entry of foreign nationals in a time of national emergency, *id.* at 48-49, but the Supreme Court has said the opposite: "When Congress prescribes a procedure

concerning the admissibility of aliens" it "is implementing an inherent executive power." *Knauff*, 338 U.S. at 542-43; *see also Hawaii*, 138 S. Ct. at 2418 (regulation of "entry of aliens abroad" is "a matter within the core of executive responsibility"); *Doe #1*, 944 F.3d at 1227 (Bress, J., dissenting) (rejecting "mistaken assumption that the President's authority in this area is entirely delegated"). And Plaintiffs' argument is mistaken because it again relies upon the same premise rejected by the *Hawaii* Court—that the President is taking section 1182(f) too far by issuing this Proclamation. Nor are the domestic cases discussed by Plaintiffs relevant when, as here, the admission of foreign nationals during a pandemic and national emergency is closely related to the field of foreign affairs. Pls.' Br. 46-48. And it is in those circumstances where Congress need not "lay down narrowly definite standards by which the President is to be governed." *Curtiss-Wright.*, 299 U.S. at 321-22.[1] This is why the exclusion of foreign nationals seeking to come to the United States fits squarely within the Executive's authority. Gov't Br. 32. To the extent that Plaintiffs cite cases for the proposition that Congress can also delegate authority to the President, Pls.' Br. 49-51, those simply mean that the President is acting pursuant to both his inherent *and* delegated authority, such that his "authority is at its maximum."

[1] Plaintiffs invoke *Galvan v. Press*, 347 U.S. 522, 531 (1954), and its progeny to argue that immigration policy is "entrusted exclusively to Congress." Pls.' Br. 49-50. But *Galvan* was describing Congress's role in setting procedural safeguards of due process for immigration policy. 347 U.S. at 531. The Court did not question the President's inherent authority to exclude foreign nationals from entering the United States—an authority the Court has recognized many times. *Knauff*, 338 U.S. at 542; *Hawaii*, 138 S. Ct. at 2424 (Thomas, J., concurring).

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also* Gov't Br. 32.

Consistent with this view, *Knauff* rejected a nondelegation challenge to a predecessor to section 1185(a)(1), which authorized the President, "upon finding that the interests of the United States required it," to "impose additional restrictions and prohibitions on the entry into ... the United States during the national emergency proclaimed May 27, 1941." 338 U.S. at 541. The Court held that "there [wa]s no question of inappropriate delegation of legislative power involved" because "[t]he exclusion of aliens is a fundamental act of sovereignty" that "is inherent in the executive power to control the foreign affairs of the nation." *Id.* at 542. *Hawaii* built on this approach to likewise conclude that section 1182(f) is a "comprehensive delegation" and rejected a rule of constitutional law that "would inhibit the flexibility" of the President "to respond to changing world conditions." 138 S. Ct. at 2408, 2419-20.

* * *

In sum, the district court wrongly concluded that Plaintiffs demonstrated a substantial likelihood of success. The injunction should be vacated.

II. The Remaining Factors Weigh Against a Preliminary Injunction.

The remaining equitable considerations strongly favor vacatur. Gov't Br. 39-46. Plaintiffs' arguments to the contrary, Pls.' Br. 52-60, lack merit.

First, Plaintiffs repeat their argument that Proclamation 10052's findings are inadequate, claiming that "the Proclamation does not meaningfully address the

problem of COVID-related domestic unemployment." Pls.' Br. 59. But Proclamation 10052 *is* supported by specific factual findings of job losses for U.S. workers. Gov't Br. 39 (citing 85 Fed. Reg. 38,263-64); *see also id.* 39-42. Moreover, not only does the injunction hurt U.S. workers, it undermines the President's ability to carry out its statutory authority to regulate the admission and employment of temporary foreign workers. *Id.* at 41 (citing 8 U.S.C. §§ 1103(a)(1), 1184(a)(1)).

Second, Plaintiffs agree with the Government that "the public interest favors applying federal law correctly," Pls.' Br. 59 (quotations and citations omitted), yet argue that this factor cuts in their favor. *Id.* at 59-60. But Proclamation 10052 is a lawful exercise of the President's authority under section 1182(f). Gov't Br. 24-39, 41-42.

Third, Plaintiffs argue that the record establishes that the Proclamation is the "independent" source of their purported irreparable harm because, at the time, a number of consulates had reopened but were not processing visas for categories subject to the Proclamation. Pls.' Br. 56. This misses the point. Gov't Br. 43-45. Plaintiffs' purported injury is not that they are unable to employ specific foreign workers, but that they cannot bring into the country their own desired number. *Id.* at 44-45 (citing ER 489, 493). But there is nothing in the record to connect this purported injury—the inability to bring the desired number of temporary foreign workers into the country—to the Proclamation itself, as opposed to the pandemic, which required consulates to adjust priorities and limit routine visa services. *Id.* at 45.

Fourth, Plaintiffs argue that the exceptions to the Proclamation do "not mitigate the harm to the majority of applicants who will not qualify" for them. Pls.' Br. 57; *id.* at 57-58. But the existence of exceptions limits the purported harm attributable to the Proclamation and should have been considered by the district court in weighing the equities. Gov't Br. 45. A preliminary injunction is an extraordinary and drastic remedy that should be granted only upon a clear showing that the movant is entitled to such relief. *Id.* at 20. While not all employers are able to qualify for an exception, Pls.' Br. 57, the fact that some employers—those who have an urgent need for foreign workers with critical skills—are able to use this process, cuts heavily against Plaintiffs' argument that they have demonstrated an immediate entitlement to such extraordinary relief. *See* Gov't Br. 45. Moreover, as previously explained, the district court was wrong in concluding that the time and expense of seeking an exception constitutes an irreparable injury to support a preliminary injunction. Gov't Br. 45-46; ER 23 ("applying for a national-interest exception in the recent Guidance is expensive, a cost that would be borne by the Plaintiff applicant").

CONCLUSION

This Court should vacate the district court's preliminary injunction.

Respectfully submitted,

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Dated: December 18, 2020

CERTIFICATE PURSUANT TO
FED. R. APP. P. 32(A) AND NINTH CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a) and Ninth Circuit Rule 32-1, the attached response brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,969 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2020, I electronically filed the foregoing REPLY BRIEF FOR THE APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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