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

SUPPLEMENTAL BRIEF FOR THE APPELLANTS

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INTRODUCTION

Pursuant to this Court's order of January 7, 2021, Appellants hereby address the impact that Presidential Proclamation 10131, *Proclamation on Suspension of Entry of Immigrants and Nonimmigrants Who Continue to Present a Risk to the United States Labor Market*, Proclamation No. 10131, 86 Fed. Reg. 417 (Jan. 6, 2021), has on this appeal. In that Order, this Court asked:

> (1) Whether the factual findings in Proclamation 10131 supersede the factual findings in Proclamation 10052;
>
> (2) Whether the district court should assess the impact of Proclamation 10131 in the first instance;
>
> (3) Whether Proclamation 10131 is enjoined by the district court's October 1, 2020 injunction; and
>
> (4) What remaining independent force, if any, Proclamation 10052 has, given the President's invocation of 8 U.S.C. § 1182(f) in Proclamation 10131.

These questions are addressed in turn.

ARGUMENT

I. Proclamation 10131's Findings Supplement, But Do Not Supersede Proclamation 10052's Prior Findings.

Proclamation 10131's finding under 8 U.S.C. § 1182(f) piggybacks directly onto those made in both Proclamations 10052 and 10014 for the purposes of extending those Proclamations' impact. It does not "supersede" the findings made in Proclamation 10052. Instead, and like any other Proclamation that extends a predecessor, it supplements the finding with more updated information regarding the

continued need that initially gave rise to both Proclamations, while at the same time using that updated information to justify the extension. Such updating is, in fact, common in Proclamations based on pressing and tumultuous economic issues. *See, e.g.*, *Smith v. Witherow*, 102 F.2d 638, 640 (3d Cir. 1939) ("On March 6, 1933 by proclamation of the President, No. 2039 … a bank holiday for all banks in the country was declared until after March 9th. By proclamation of March 9th, No. 2040 … the President extended the proclamation of March 6th until further proclamation. As a result of these proclamations every bank in the country was closed and all banking operations were suspended."); *J. Conrad Ltd. v. United States*, 457 F. Supp. 3d 1365, 1371 & n.4 (Ct. Intl. Trade 2020) ("On January 24, 2020, the President issued Proclamation 9980, which extended Proclamation 9705's tariffs to apply to certain steel article derivatives not previously addressed by the Secretary's report and recommendation or by Proclamation 9705." (citing Proclamation 9980 of January 24, 2020, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, 85 Fed. Reg. 5281 (Jan. 29, 2020))). This supplementation and incorporation of Proclamation 10014 and 10052's findings is evident from the way these proclamations evolved during the 2019 Novel Coronavirus (COVID-19) pandemic.

COVID-19 has caused severe challenges for countries around the world. The United States is no exception. Apart from the devastating impact COVID-19 has had upon public health, the pandemic's economic ripple effects have been almost as extraordinary. The President's initial attempt to ameliorate an unprecedented rise in

unemployment prompted his issuance of Proclamation 10014 on April 22, 2020. *Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 Fed. Reg. 23,441 (Apr. 27, 2020). Proclamation 10014 suspended the entry of certain immigrants for 60 days and directed, "[w]ithin 30 days of the effective date of this proclamation, the Secretary of Labor and the Secretary of Homeland Security, in consultation with the Secretary of State, shall review nonimmigrant programs and shall recommend … other measures appropriate to stimulate the United States economy and ensure the prioritization, hiring, and employment of United States workers." *Id.* at 23,442.

Of course, COVID-19 and its enormous societal effects did not cease by the summer, prompting the President to issue Proclamation 10052 on June 22, 2020. *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 (June 22, 2020). With Proclamation 10052, the President determined that the conditions prompting Proclamation 10014 remained, and he therefore extended Proclamation 10014's suspension of entry through December 31, 2020. The President also broadened the categories of persons covered based on how the Secretaries of Labor and Homeland Security had reviewed nonimmigrant programs and found that the admission of several nonimmigrant (temporary) foreign workers would also pose a risk of disadvantaging U.S. workers in the middle of a jobs crisis.

Proclamation 10052 acknowledges that "[u]nder ordinary circumstances, properly administered temporary worker programs can provide benefits to the economy. But 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." *Id.* The President therefore found that "[t]he entry of additional workers through the H-1B, H-2B, J, and L nonimmigrant visa programs … presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID-19 outbreak." *Id.* at 38,264. This was needed because "more than 20 million United States workers lost their jobs in key industries where employers are currently requesting H-1B and L workers to fill positions." *Id.* at 38,264. Further, "the May unemployment rate for young Americans, who compete with certain J nonimmigrant visa applicants, has been particularly high." *Id.* Recognizing that, "[h]istorically, when recovering from economic shocks that cause significant contractions in productivity, recoveries in employment lag behind improvements in economic activity" and "assuming the conclusion of the economic contraction, the United States economy will likely require several months to return to pre-contraction economic output, and additional months to restore stable labor demand." *Id.*

On December 31, 2020, the date of Proclamation 10052's intended expiration, the President extended its end date by issuing Proclamation 10131. 86 Fed. Reg. 417 (Jan. 6, 2021). Much like Proclamation 10052 before it, Proclamation 10131 extends

the entry bar's effective period for both the covered immigrant and nonimmigrant categories to March 31, 2021, which may be further continued as necessary. *See id.* at 418. Proclamation 10131 explains that this extension was needed because "the considerations present in Proclamations 10014 and 10052 have not been eliminated." *Id.* at 417. And much like Proclamation 10052's extension, this need was based on a project of both "the current number of new daily cases worldwide reported by the World Health Organization," as well as the developed treatments' "effect on the labor market and community health ha[ving] not yet been fully realized." *Id.* In all three COVID-19 Labor Proclamations, then, the comparison point was "the number of workers that can be hired as compared with February of 2020," or before the COVID-19 national emergency was declared on March 13, 2020. *Id.*; *see also id.* ("While the November overall unemployment rate in the United States of 6.7 percent reflects a marked decline from its April high, there were still 9,834,000 fewer seasonally adjusted nonfarm jobs in November than in February of 2020.").

Thus, because the U.S. jobs market had not recovered to where it was in February 2020, the President again

> f[ou]nd that the entry into the United States of persons described in section 1 of Proclamation 10014, except as provided in section 2 of Proclamation 10014, and persons described in section 2 of Proclamation 10052, except as provided for in section 3 of Proclamation 10052 (as amended by Proclamation 10054 of June 29, 2020 (Amendment to Proclamation 10052)), would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions.

86 Fed. Reg. at 417–18. This is the only "finding" made in Proclamation 10131 and it

was made for the purpose of extending Sections 4 and 6 of Proclamation 10014 and 10052, respectively. *See* 86 Fed. Reg. at 418. In so doing, Proclamation 10131 affirmatively incorporates the findings of both Proclamation 10152 and 10014 to conclude that because the U.S. jobs market is not yet close to recovery, the need that prompted the earlier Proclamations persists to justify a further extension. *Compare id.*, *with* 85 Fed. Reg. at 38,264 ("[A]ssuming the conclusion of the economic contraction, the United States economy will *likely require several months to return to pre-contraction economic output, and additional months to restore stable labor demand*." (emphasis added)).

* * *

In sum, Proclamation 10131 and its findings operate to supplement, not supersede, Proclamation 10052. Regardless, Proclamation 10131's extension of Proclamation 10052 easily meets this Court's standard from *Doe #1 v. Trump* and the Supreme Court's decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). *See* — F.3d —, 2020 WL 7778213, at *8 (9th Cir. Dec. 31, 2020) (upholding another Proclamation under Section 1182(f) because the President's findings need only to "concisely explain[] the adverse impact that" they are designed to address, and that to require more "is inconsistent with the deference owed to the President and would improperly shift to the court the weighing of policy justifications for additional restrictions under § [1182](f)" (quotations omitted)).

II. There Is No Need For The District Court To Assess Proclamation 10131 In The First Instance.

There is no need to remand this case to the district court to make the same

rulings based on the exact same findings Proclamation 10131 incorporates by reference. *See* 86 Fed. Reg. at 417–18. This is especially true where, as here, the district court's ruling was based upon the erroneous presumption that the President must support a Proclamation's findings by providing evidence to a district court. *See* 1-ER-21 (noting how the "Presidential finding in the text of the Proclamation, such as it is, is not supported by any review or report proffered by Defendants"). If the Court were to remand to the district court without further instructions on this point, the exact same error of law would again be applied to the same set of labor-market findings. *See* 1-ER-10 (agreeing with Plaintiffs-Appellees that "the Proclamation is beyond the President's lawful authority under Section 1182(f)").

"It is the general rule … that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). But this Court has noted that there are exceptions: "The general rule … is flexible — an appellate court can exercise its equitable discretion to reach an issue in the first instance." *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 946 F.3d 1100, 1110 (9th Cir. 2020). Such circumstances include when "proper resolution is beyond any doubt," *Singleton*, 428 U.S. at 121 (citations omitted), when "injustice might otherwise result," *id.* (quotations omitted), and when an issue is purely legal, *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978); *see also In re Extradition of Howard*, 996 F.2d 1320, 1329 (1st Cir. 1993) (Selya, J.) ("That the district court failed to afford plenary review on this aspect of the case does not mean that we must remand…. Rather, because the question is quintessentially legal and this court is fully capable of deciding

it without any further development of the record, we can simply address and resolve it." (citations omitted)). This case fits all of those factors — especially where this appeal centers solely on the purely legal question of whether the President exceeded his authority under 8 U.S.C. § 1182(f) by issuing the COVID-19 Labor Proclamations. *See* 6-ER-996–97 (Count I of the Complaint — the only merits issue addressed by the district court alleged that Proclamation 10052 exceeded the Executive Branch's authority and thus constituted *ultra vires* conduct).

As this Court has recently explained, "[a]n appellate court need not wait when a question could not possibly be affected by deference to a trial court's fact-finding or fact application, or a litigant's further development of the factual record." *Planned Parenthood*, 946 F.3d at 1111 (citing *Turf Paradise, Inc. v. Ariz. Downs,* 670 F.2d 813, 821 (9th Cir. 1982); *Wong v. Bell,* 642 F.2d 359, 362 (9th Cir. 1981)). Similar treatment is due in this case because the President's Proclamation power under Section 1182(f) is a purely legal question that no amount of further factual development below will change.

By way of example, the Fourth Circuit reviewed the President's proclamation power under Section 1182(f) between *Hawaii*'s preliminary-injunction posture and a motion-to-dismiss standard of failing to state a claim. *See IRAP v. Trump*, 961 F.3d 635 (4th Cir. 2020). That case involved an interlocutory appeal of whether *Hawaii* was dispositive on the legal questions surrounding Proclamation 9645—that is, whether discovery would have been aided the plaintiffs in stating a valid claim for relief. The Fourth Circuit concluded that no such facts were necessary to decide the legal

questions because, "while it is true that the Court's *holding* in *Hawaii* was that the plaintiffs there had failed to show 'that they [were] likely to succeed on the merits of their claims,' the *reason* for that holding was the Court's predicate unconditional conclusion that the Proclamation 'survive[s] rational basis review.'" (quoting *Hawaii*, 138 S. Ct. at 2423). This was significant because the analysis employed in *Hawaii* "was not stated on a 'likelihood' basis. Rather, the Court stated definitively that 'because there [was] persuasive evidence that the entry suspension ha[d] a legitimate grounding in national security concerns, quite apart from any religious hostility,' it was required to 'accept that independent justification.'" *Id.* (quoting *Hawaii*, 128 S. Ct. at 2421). The same principles apply here.

This case raises "significant questions of general impact" that are purely legal. *Guam v. Okada,* 694 F.2d 565, 570 n.8 (9th Cir. 1982). They are purely legal in the sense that no amount of factfinding will change whether Proclamations 10131 and 10052 are lawful under *Hawaii*. And the district court's application of legal principles in reviewing both Section 1182(f) and the Proclamations were plainly erroneous after *Doe #1*. Moreover, each of the COVID-19 Labor Proclamations were temporally limited in the hope that the U.S. jobs market would recover quickly. *See Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986) (discussing how undue delay counsels in favor of deciding an issue on appeal rather than remanding to the district court). Remanding whenever a subsequent proclamation extends its predecessor would prolong district court preliminary injunctions by default, forestall a chance for meaningful appellate review, and further delay implementation on a matter the

President determined was necessary to alleviate the negative economic impact of a pandemic. *Cf. Doe #1*, 2020 WL 7778213, at *9 (noting how Section 1182(f)'s "reference to 'suspend[ing]' the entry of particular classes of aliens indicates" that proclamations will often be "temporally limited" to the conditions they are designed to address (quoting 8 U.S.C. § 1182(f))).

III. Appellants May Not Implement Proclamation 10131 Here Because Its Extension Of Proclamation 10052's Section 6 Is Still Enjoined.

This Court's January 7, 2021 Order's final two questions are "(3) Whether Proclamation 10131 is enjoined by the district court's October 1, 2020 injunction; and (4) What remaining independent force, if any, Proclamation 10052 has, given the President's invocation of 8 U.S.C. § 1182(f) in Proclamation 10131." These two questions are interrelated because they both concern what force Proclamation 10052 still has and hence, whether the district court's injunction remains.

Turning to the latter question first, it is important to keep in mind that Proclamation 10131 merely extends Proclamation 10052. Proclamation 10131 does not supplant or revise Proclamation 10052 other than to extend the latter's expiration date. This is evidenced by how Proclamation 10131 incorporates Proclamation 10052's past findings by reference, and explicitly amends Proclamation 10052's period of application to March 31, 2021. *See* 86 Fed. Reg. at 418 ("**Sec. 2**. *Continuation of Proclamation 10052*. Section 6 of Proclamation 10052 is amended to read as follows: '**Sec. 6**. *Termination*. This proclamation shall expire on March 31, 2021, and may be continued as necessary.'" (quoting Proclamation 10052, § 6)). In this regard,

Proclamation 10052 is still in effect. It has not expired and has not been rescinded. And, as described above, Proclamation 10131's additional finding based on December 2020 jobs data was simply used to justify the extension to March 31, 2021 for both of the earlier COVID-19 Labor Proclamations.

This clarifies this Court's former question regarding "[w]hether Proclamation 10131 is enjoined by the district court's October 1, 2020 injunction." That is so here because the central impact of Proclamation 10131 (extending the COVID-19 Labor Proclamations, including Proclamation 10052) may not be accomplished as long as the district court's preliminary injunction remains in effect. By way of background, the Plaintiffs moved to preliminarily enjoin the government from "implementing, enforcing, or otherwise carrying out" Proclamation 10052 as to Plaintiffs and their members. Specifically, they sought to prevent the government from "engaging in any action that results in the non-processing or non-issuance of applications or petitions for visas in the H, J, and L categories which, but for Presidential Proclamation 10052, would be eligible for processing and issuance." 4-ER-539. And this motion was granted in the district court's October 1, 2020 preliminary-injunction order, which bars the government from applying Proclamation 10052 to any of the member-companies of the organizational Plaintiffs or to Intrax, Inc., as to H-1B, H-2B, L, or certain J visas. *See* 1-ER-25. While that decision was confined to Proclamation 10052 at that time (largely because Proclamation 10131 had not been issued), the decision is still live because an already enjoined proclamation cannot be "extended" by a subsequent proclamation that does not substantively change its predecessor. In this

regard, Proclamation 10131 and its attempt to extend Proclamation 10052, 86 Fed. Reg. at 418, is now being blocked by the district court's injunction.

To the extent the Court disagrees with this analysis to conclude that Proclamation 10052 no longer has any force, or is in some way moot, Appellants request that this Court indicate that explicitly.

CONCLUSION

The district court's order is ripe for appellate review and this Court should vacate the district court's preliminary-injunction.

Respectfully submitted,

/s/ Joshua S. Press

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Dated: January 20, 2021

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STATEMENT OF RELATED CASES
PURSUANT TO NINTH CIRCUIT RULE 28-2.6

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellants state, through counsel, that they are unaware of any case pending in this Court that presents the same or related issues as this case.

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of the Court's January 7th Order because it is no longer than fifteen pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). It likewise complies with the typeface and type-style requirements of Rules 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2021, I electronically filed the foregoing SUPPLEMENTAL 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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