No. 20-17132

In the
United States Court of Appeals
for the
Ninth Circuit

National Association of Manufacturers, *et al.*,

Plaintiffs-Appellees,

v.

U.S. 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

Brief of U.S. Tech Workers as *Amicus Curiae* in Support of Reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure US Tech Workers is a non-profit corporation that does not have shareholders.

CERTIFICATIONS

Pursuant to Federal Rule of Appellate Procedure 29, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that 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. Plaintiff-Appellant and Defendant-Appellee have consented to the filing of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law:

Legislative:

Executive:

Other Authorities:

INTERESTS OF AMICUS CURIAE

Amicus U.S. Tech Workers is a 501(c)(3) nonprofit corporation that represents the interests of American workers in technology fields. The use of non-immigrant guestworker visas to displace American workers and lower wages in the industry is a key issue that U.S. Tech Workers addresses. For example, the President of the United States acknowledged U.S. Tech Workers played a key role in bringing a halt to the Tennessee Valley Authority's use of H-1B non-immigrants to replace American workers. Remarks by President Trump in a Meeting with U.S. Tech Workers and Signing of an Executive Order on Hiring American, The White House, Aug. 3, 2020.

Amicus writes here to present legal issues affecting American technology workers that would not otherwise be brought before this Court.

INTRODUCTION

The Immigration and Nationality Act of 1952, Pub. L. No. 82–414, 66 Stat. 163 (INA), was a complete revision of the nation's immigration laws and remains the basis of the immigration system today. S. Rept. 82-1072 at 1. Section 202 of the Immigration and Nationality Act provides:

> (e) Whenever the President finds that the entry of any aliens or of entry class of aliens into the United States would be detri-

> mental 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 ally restrictions lie may deem to be appropriate.

66 Stat. at 188 (codified at 8 U.S.C. § 1182(f)). This provision was the subject of floor debate over the Immigration and Nationality Act. Rep. Emanuel Celler of New York, raised objection to it stating, "Under the [Section 202(e)], as proposed, the President is given an untrammeled right, an uninhibited right to suspend immigration entirely. That is very broad power." 98 Cong. Rec. 4,423. Rep. Abraham Multer of New York introduced an amendment that would have limited the president's power under Section 202(e) to times of war and national emergency and would have allowed the president to suspend requirements for admission of permanent residents during such times. *Id*. Rep. Francis Walter of Pennsylvania defended Section 202(e) as reported, calling it "absolutely essential" because there could be emergency situations "it is impossible for Congress to act." *Id*. Rep. Walter provided as examples when such presidential power would be necessary "an outbreak of an epidemic in some country" and "a period of great unemployment." *Id*. Rep. Multer's amendment was rejected and Section 202(e), as reported, was enacted. *See also Trump v. Hawaii*, 138 S. Ct. 2392, 2412–13 (2018) (discussing the legislative

history of Section 202(e)).

In technology fields the H-1B non-immigrant visa program is overwhelmingly used to import cheap, foreign labor. Daniel Costa and Ron Hira, *A majority of H-1B employers—including major U.S. tech firms—use the program to pay migrant workers well below market wages*, Economic Policy Institute, May 4, 2020. Writing about the H-1B program outside the realm of lobbying for more visas, the Indian investment research company Crisil published a report on H-1B earlier last year to provide insight for investors in Indian companies that supply H-1B workers to the United States. Crisil, *Bulging staff cost, shrinking margins*, May 27, 2019.[1] The report states that "[t]raditionally, the sector has relied on labour arbitrage for maintaining margins." *Id*. at 1. The report further points out that "in general, local talent needs to be paid 25–30% higher wages [than H-1B workers]." *Id*. at 6.

But increased competition from low wage foreign workers is not the only harm American workers suffer from American employers' importing H-1B workers. Because of the huge American–H-1B wage differential, Americans working at employers, such as Dis-

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[1] Available at https://www.crisil.com/en/home/our-analysis/reports/2019/05/bulging-staff-cost-shrinking-margins.html

[2]Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements.,* New York Times, June 4, 2015 (available at

ney,[2] Molina Healthcare,[3] Southern California Edison,[4] and the University of California,[5] have found themselves training their H-1B non-immigrant replacements before they joined the unemployment rolls. The displacement of Americans by H-1B workers continues even during the pandemic. Dave Flessner, *TVA lays off remaining 62 IT workers whose jobs are being outsourced*, Chattanooga Times Free Press, June 2, 2020. Joseph N. DiStefano, *Decision day for 1,300 Vanguard workers as their jobs head to India-based Infosys*, Philadelphia Inquirer, July 29, 2020.

As result of the COVID-19 pandemic, the President of the United States issued a series of proclamations and executive orders designed to protect American workers. The first of these was Proc-

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[2]Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements.,* New York Times, June 4, 2015 (available at http://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html)

[3] Patrick Thibodeaux, *Fired IT workers file lawsuit claiming H-1B workers replaced them*, ComputerWorld, July 12, 2011 (available at https://www.computerworld.com/article/2510279/fired-it-workers-file-lawsuit-claiming-h-1b-workers-replaced-them.html)

[4] Patrick Thibodeaux, *Southern California Edison layoffs get U.S. Senate attention*, ComputerWorld, Feb. 6, 2015 (available at https://www.computerworld.com/article/2881315/southern-california-edison-layoffs-gets-us-senate-attention.html)

[5] Michael Hiltzik, *How the University of California exploited a visa loophole to move tech jobs to India*, Los Angeles Times, Jan 6, 2017 (available at https://www.latimes.com/business/hiltzik/la-fi-hiltzik-uc-visas-20170108-story.html)

lamation 9,994 in which the President declared that the COVID 19 pandemic had created a national emergency starting on March 1, 2020. 85 Fed. Reg. 15,337 (Mar. 18, 2020). Pursuant to Immigration and Nationality Act section 202(e) (8 U.S.C. § 1182(f)), the President issued Proclamation 10,044, 85 Fed. Reg. 23,441 (Apr. 22, 2020). In this proclamation, the President noted as a result of the COVID-19 pandemic 22 million Americans had applied for unemployment. *Id*. The President found that the admission of aliens during the emergency would have a detrimental effect on the labor market and would put a strain on health care. *Id*. at 23,441–42. The proclamation temporarily suspended the admission of aliens on immigrant visas, *id*. at 23,442, but exempted from the suspension certain aliens, including those already in the United States and those engaged in health care. *Id*. On June 22, 2020, the President issued Proclamation 10,052 that suspended the admission of non-immigrants on H-1B, H-2B, J, and L non-immigrant guestworker visas. 85 Fed. Reg. 38,263. The President issued Proclamation 10,052 pursuant to his authority under 8 U.S.C. 1182(f). *Id*.

Plaintiffs, representatives of business groups, were granted a preliminary injunction blocking the implementation of Proclamation 10,052. *Nat'l Ass'n of Mfrs. v. United States Dep't of Homeland Sec.*, No. 20-cv-04887-JSW, 2020 U.S. Dist. LEXIS 182267

(N.D. Cal. Oct. 1, 2020). In deciding at whether the Plaintiffs were likely to prevail on the merits, the district court reviewed the claim that Proclamation 10,052 exceeded the President's authority to suspend the admission of "all aliens" under 8 U.S.C. § 1182(f). *Nat'l Ass'n of Mfrs.* at *17–31. The district court concluded that the admission of foreign non-immigrant workers was purely a domestic issue and that the President's power to exclude "all aliens" under § 1182(f) did not encompass the domestic issue of excluding foreign labor. *Nat'l Ass'n of Mfrs.* at *18–25.

In considering the balance of equities in granting the injunction, the district court found that failing to grant an injunction against Proclamation 10,052 would harm the business Plaintiffs. *Nat'l Ass'n of Mfrs.* at *42. However, the district court did not consider whether granting the injunction would harm U.S. workers who were the intended beneficiaries of Proclamation 10,052. *Id.*

ARGUMENT

I. The District Court's opinion interprets the President's authority to "suspend the entry of all aliens or any class of aliens" as applying only to some unspecified class of aliens.

Under 8 U.S.C. § 1182(f) the president unambiguously has the authority to suspend the entry of "all aliens" or "any class of aliens." "By its terms, § 1182(f) exudes deference to the President in every clause." *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018). Under the plain language of the statute, the President has the authority to

halt immigration entirely. *Id.* And that was the understanding of Congress when it enacted § 1182(f). 98 Cong. Rec. 4,423–24.

Section 1182(f) was debated during the enactment of the Immigration and Nationality Act of 1952. 98 Cong. Rec. 4,423–24. Opposing the enactment of this provision, Rep. Celler argued "[u]nder the bill, as proposed, the President is given an untrammeled right, an uninhibited right to suspend immigration entirely. That is very broad power. There is no restriction upon his power." *Id.* at 4,423; *see also Hawaii*, 138 S. Ct. at 2408. Rep. Multer introduced an amendment to restrict the power under section 1182(f) to times of war or national emergency. *Id.* That amendment was rejected, however.

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442–43 (1987) (citation omitted). Here, Congress noted section 1182(f)'s breadth, but expressly decided not to narrow it.[6] This Court should honor that congressional decision.

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[6] Even if the Multer Amendment had been adopted, the President would have authority to restrict alien admission now because there is a national emergency. Proclamation 9,994, 85 Fed. Reg. 15,337 (Mar. 18, 2020).

The district court had a different understanding of 8 U.S.C. § 1182(f) than Congress did when the provision was enacted. *Compare Nat'l Ass'n of Mfrs. v. United States Dep't of Homeland Sec.,* No. 20-cv-04887-JSW, 2020 U.S. Dist. LEXIS 182267, at *22–25 (N.D. Cal. Oct. 1, 2020) *with* 98 Cong. Rec. 4,423–24. The district court found a distinction between the use of 8 U.S.C. § 1182(f) for domestic policy and foreign policy in immigration. *Nat'l Ass'n of Mfrs.*, at *22–23. The district court held that the admission of foreign workers was purely a domestic policy concern where the president did not have the power to act. *Id*.

There at least three major problems with that holding. First, Proclamation 10,052 was implemented under conditions expressly contemplated by Congress during the debate over section 1182(f); specifically, national emergency epidemic, and high unemployment. 98 Cong. Rec. 4,423. As Rep. Walter noted,

> suppose we have a period of great unemployment? In the judgment of the Committee, it is advisable at such times to permit the President to say that for a certain time we are not going to aggravate that situation.

Id. That is exactly the situation here. Yet, the district court has held the President cannot intervene to restrict the admission of foreign labor during a period of high unemployment. *Nat'l Ass'n of Mfrs*, at *22–23 (N.D. Cal. Oct. 1, 2020).

Second, the district court's holding that the admission of foreign

labor is purely a domestic concern is baffling in light of the fact that the H-1B visa has been the subject of international negotiations and is included in U.S. commitments under the General Agreement on Tariffs and Services treaty, Schedule S/DCS/W/USA. The district court's holding is also contrary to a large body of case law. *E.g.*, *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) ("[I]mmigration matters typically implicate foreign affairs."); *Mirmehdi v. United States*, 689 F.3d 975, 982 (9th Cir. 2012) ("[I]mmigration issues; have the natural tendency to affect diplomacy, foreign policy, and the security of the nation") (quoting *Arar* v. *Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009)).

Finally, and most importantly, if, as the district court has held, "all aliens" does not really mean *all aliens* and "any class of alien" does not really mean *any class of alien*, what then does 8 U.S.C. § 1182(f) mean? The district court has not articulated any rule that a president could intelligently follow to determine the scope of his power under section 1182(f). Congress created 1182(f) to allow the president to act quickly with situations like epidemics, national emergencies, and high unemployment. 98 Cong. Rec. 4,423–24. Yet the president cannot act quickly during a national emergency if his actions under that section are subject to judicial review under the nebulous standard put forth by the district court.

II. The District Court failed to consider the interests of U.S. Workers as beneficiaries.

It is settled law that an increase in competitors causes injury. *E.g.*, *Int'l Bhd. of Teamsters v. United States DOT*, 861 F.3d 944 (9th Cir. 2017). This principle is rooted in the Law of Supply and Demand. *Adams v. Watson*, 10 F.3d 915, 923 (1st Cir. 1993). The public interest put forth in Proclamation 10,052 is to protect American workers from foreign competition. 85 Fed. Reg. 23,441–42. Basic economic logic dictates that adding more foreign workers injures American workers. *See AICPA v. IRS*, 804 F.3d 1193, 1198 (D.C. Cir. 2015) (holding basic economic logic showed that allowing uncredentialed tax preparers to be listed with credentialed tax preparers caused injury to the latter). Injury to American workers from foreign workers goes beyond routine competitive injury. American workers are even being replaced by foreign workers in the midst of the pandemic. Dave Flessner, *TVA lays off remaining 62 IT workers whose jobs are being outsourced*, Chattanooga Times Free Press, June 2, 2020; Joseph N. DiStefano, *Decision day for 1,300 Vanguard workers as their jobs head to India-based Infosys*, Philadelphia Inquirer, July 29, 2020.

The district court failed to look at the entire scope of the H-1B statutes in regard to worker protection while it downplayed the harm it causes American workers. The district court noted the employers must "attest that the wages paid for H-1B workers will

not undercut wages paid to native-born workers" when they file a Labor Condition Application filed with the Department of Labor. *Nat'l Ass'n of Mfrs.*, at *28. 8 U.S.C. § 1182(n)(1). But the district court failed to note that the same statute section requires the Department of Labor to approve all such attestations within 14 days unless there are obvious errors or inaccuracies. 8 U.S.C. § 1182(n)(1). Furthermore, the Department of Labor is prohibited from reviewing Labor Condition Applications after they are approved. 8 U.S.C. § 1182(n)(2)(G)(v). Those provisions combine to turn the entire prevailing wage system in the H-1B program is a meaningless paper-shuffling exercise where, as long as the form is filled out correctly, anything the employer says goes. *See* Office of Inspector General, U.S. Department of Labor, *Semiannual Report to Congress*, Oct. 1, 2019–Mar. 21, 2020, p. 71 (stating that the Labor Department cannot have a meaningful role in H-1B without the ability to verify the accuracy of information submitted and that the H-1B "program is susceptible to significant fraud and abuse, particularly by employers and attorneys."). So, while the district court saw that employers must *attest* that H-1B workers are being paid what Americans earn, the district court missed the fact that H-1B workers are actually paid less than what Americans earn. Crisil *supra*; Costa & Hira *supra*; Strengthening Wage Protections for the Temporary and Permanent Employment of

Certain Aliens in the United States, 85 Fed. Reg. 63,872, 63,883 n.124 (Oct. 8, 2020) (collecting sources showing H-1B wages are less than U.S. wages).

The President made the determination that the interests of American workers in not facing competition from foreign labor during a time of pandemic, national emergency, and high unemployment outweighs other interests, such as the interest of business to have access for foreign workers. *See* 85 Fed. Reg. at 23,441. Yet the district court made no mention of those interests the President put forth and consequently did not weigh then against the interests of business. The district court simply declared "[t]he benefits of supporting American business and predictability in their governance will inure to the public." *Nat'l Ass'n of Mfrs.*, at *42. But, for purposes of a preliminary injunction, courts must weigh *competing* facets of the public interest, *Sierra Club v. Trump*, 929 F.3d 670, 705 (9th Cir. 2019) ("Public interest is a concept to be considered broadly."); *cf. Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1308 (9th Cir. 2003). Here, the district court failed to weigh the interests of American workers—decidedly part of the public—even though protecting them was the very purpose of Proclamation 10,052.

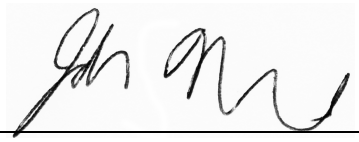
The great irony of the district court's opinion then is that it chastises the President for not discussing in his findings the inter-

est of non-natural person corporations in having access to foreign labor. *Nat'l Ass'n of Mfrs.*, at *36. Yet the district court did not weigh the interest of American citizen workers in not being displaced by or having to compete with foreign workers during a pandemic. *Nat'l Ass'n of Mfrs.*, at *42. Rather, the district court simply substituted its judgment—that the interests of business should take precedence over the interests of working Americans—for the President's judgment—that the interests of ordinary, working Americans should take precedence over the interests of business.

CONCLUSION

For the reasons given above, the opinion of the district court should be reversed.

Respectfully submitted,



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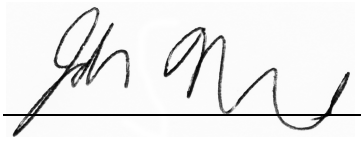
CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,767 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac in 14-point Century Schoolbook font.



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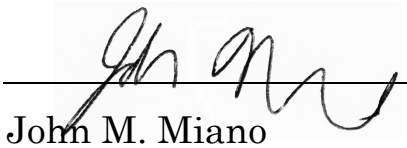
CERTIFICATE OF SERVICE

I certify that on November 20, 2020, I filed the attached Brief of U.S. Tech Workers as *Amicus Curiae* in Support of Reversal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ECF system that will provide notice and copies to the parties' counsel of record.



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