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
Case No. 20-cv-4887 - Hon. Jeffrey S. White

BRIEF FOR PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiffs-Appellees the National Association of Manufacturers, the Chamber of Commerce of the United States of America, the National Retail Federation, Technet, and Intrax, Inc. state that none of the Plaintiffs-Appellees has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any of the Plaintiffs-Appellees.

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INTRODUCTION

For decades, Congress has deemed it in the national interest for individuals to enter the United States on temporary work visas. These individuals provide their employers with special talents; they help grow the economy as a whole; and they contribute mightily to their communities.

On June 22, 2020, through Presidential Proclamation 10052, the Trump administration sought to fundamentally remake America's high-skilled immigration policy. The Proclamation would have barred entry of hundreds of thousands of workers in the second half of 2020.

On October 1, 2020, the district court preliminarily enjoined Proclamation 10052, as it applies to the named Plaintiffs and, for the Plaintiff associations, their hundreds of thousands of members.

That action was correct. Section 212(f) authorizes the President to supplement—not supplant—the Immigration and Nationality Act (INA). The President may not use this authority to overturn statutes duly enacted by Congress. But, as the district court concluded, that is just what this Proclamation sought to do—it would have nullified the H, J, and L visa statutes for more than half a year. Separately, in order to exercise Section 212(f) powers, the statute obligates the President to determine that his action serves the national interests. Here, however, the President failed to make such a finding. *Nothing* in the Proclamation—or anywhere else—supplies a meaningful con-

nection between COVID-19 related unemployment (the domestic policy concern that supposedly motivated this Proclamation) and the employment of workers on H, J, and L visas. Nor could such a finding be made, as COVID-19 related unemployment has impacted occupations far different than those targeted by the Proclamation.

As the district court succinctly put it, "there must be some measure of constraint on Presidential authority in the domestic sphere in order not to render the executive an entirely monarchical power in the immigration context, an area within clear legislative prerogative." ER 13. While acknowledging the broad powers conferred by Section 212(f), the district court appropriately identified limitations to the scope of executive authority. Because the Proclamation transgresses those essential limitations, the district court's preliminary injunction was proper.

JURISDICTION

Appellees agree with the government's statement of jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly concluded (ER 15-18) that Proclamation 10052 is unlawful because—in barring the entry of H, J, and L visa holders for more than half a year—it conflicts with statutes expressly providing for the entry of those visitors.

2. Alternatively, whether the district court correctly concluded (ER 18-21) that Proclamation 10052 fails to satisfy Section 212(f)'s requirement that the President make a finding.
3. Separately, whether the district court correctly concluded (ER 12 - 14) that, if the authority contained in Section 212(f) were as unbounded as the government maintains, the statute would pose a grave constitutional question pursuant to the nondelegation doctrine.
4. Finally, whether the district court abused its discretion in weighing (ER 22-24) irreparable injury, the balance of the equities, and the public interest.

STATUTORY PROVISION INVOLVED

8 U.S.C. § 1182(f) provides, in relevant part:

> 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.

STATEMENT

A. Legal framework

The Immigration and Nationality Act (INA) governs the admission of noncitizens into the United States. *See generally* 8 U.S.C. §§ 1101 *et seq.* Among other things, the INA provides for various categories of nonimmigrant visas for noncitizens planning to enter the United States temporarily and for a specific purpose. *See id.* §§ 1101(a)(15), 1184. Pertinent here are three nonimmigrant visa categories: L visas, H visas, and J visas.

L Visa Category. L visas provide for intra-company transfers. They are issued to noncitizens who have "been employed continuously for one year by a firm or corporation . . . and who seek[] to enter the United States temporarily in order to continue to render [their] services to the same employer" and will perform a "managerial" or "executive" function (L-1A visas) or have "specialized knowledge" about the company's product or processes and procedures (L-1B visas). 8 U.S.C. § 1101(a)(15)(L); *id.* § 1184(c)(2)(B) (defining "specialized knowledge"). L-2 visas are available for accompanying spouses and minor children. *Id.* § 1101(a)(15)(L).

H Visa Category. H-1B visas are issued to highly skilled workers "coming temporarily to the United States to perform services … in a specialty occupation" (8 U.S.C. § 1101(a)(15)(H)(i)(b)), which involves "application of a body of highly specialized knowledge" and "attainment of a bachelor's or

higher degree in the specific specialty" (*id.* § 1184(i)(1)). Before hiring an H-1B nonimmigrant, a company must attest, among other things, that the position pays prevailing wages, that the position will not adversely impact other workers, and that the employer has provided certain forms of notice regarding the position. *Id.* § 1182(n)(1)(A)-(D). Subject to certain exceptions, new H-1B visas are capped at 65,000 per year with an additional 20,000 available to individuals with an advanced degree from a U.S. higher-education institution.

H-2B visas are issued to noncitizens "coming temporarily to the United States to perform [non-agricultural] temporary service or labor." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). An H-2B visa may be issued only "if unemployed persons capable of performing [the needed] service or labor cannot be found in this country." *Id.* H-2B visas are limited to 66,000 per year.

H-4 visas are available to "the alien spouse and minor children" of a noncitizen entering under one of the other H visa categories. 8 U.S.C. § 1101(a)(15)(H); 8 C.F.R. § 214.1(a)(2).

J Visa Category. The J visa category—a mainstay of U.S. diplomatic efforts for decades—provides for cultural exchange visitors in a variety of programs. 8 U.S.C. § 1101(a)(15)(J). Relevant here, J-1 programs include the summer work travel program (22 C.F.R. § 62.32); the au pair program (*id.* § 62.31); and the trainee and intern programs (*id.* § 62.22). J-2 visas are

available to the spouse and children of an individual entering on a J-1 visa. 8 U.S.C. § 1101(a)(15)(J).

INA Section 212(f). The INA empowers the President to temporarily suspend the entry of noncitizens under certain circumstances. 8 U.S.C. § 1182(f).

B. Factual background

Purporting to act based on the COVID-19 pandemic, the President issued Presidential Proclamation 10052 on June 22, 2020. *See* ER 571-576. The Proclamation asserts 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." ER 573. Subject to limited exceptions, Section 2 of the Proclamation bars "[t]he entry into the United States of any alien seeking entry pursuant to":

> (a) an H-1B or H-2B visa, and any alien accompanying or following to join such alien;
>
> (b) a J visa, to the extent the alien is participating in an intern, trainee, teacher, camp counselor, au pair, or summer work travel program, and any alien accompanying or following to join such alien; and
>
> (c) an L visa, and any alien accompanying or following to join such alien.

ER 573-574. The Proclamation's entry ban "shall expire on December 31, 2020" but "may be continued as necessary." ER 575. In putative implementa-

tion of the Proclamation, the Department of State announced that it would not issue visas in the impacted categories. ER 596-601. For its part, DHS similarly announced it would "temporarily pause the issuance of certain new nonimmigrant visas until December 31, 2020." ER 592.

The Proclamation's purpose is clear: It is intended to radically alter the U.S. labor market on a massive scale. *See, e.g.*, ER 895-896. On June 22, 2020, the White House held a "background press call" during which a "senior administration official" stated that, taking the Proclamation together with an accompanying bar on immigrant visas, "the sum total of what these actions will do in terms of freeing up jobs over the course of the rest of 2020 is about 525,000 jobs. Quite a significant number." ER 579. The official described the purpose and effect of the policy as to "clear out this workspace for Americans." ER 585. The same day, DHS official Ken Cuccinelli stated on television that "just the temporary pieces of this … are over 500,000 job openings for Americans in the latter half of this year. That is a very big deal. Unprecedented level of effort by a president to clear the American job market of competition like this." ER 595.[1]

C. Procedural background

Plaintiffs are trade associations that directly represent hundreds of thousands of businesses across a broad cross-section of the American econo-

[1] *See* https://twitter.com/homelandken/status/1275201179920760839.

my, plus a J-program sponsor directly harmed by the Proclamation's visa ban. Plaintiffs filed this suit in district court on July 21, 2020, bringing one count seeking to enjoin *ultra vires* government conduct, and one count for violations of the Administrative Procedure Act (APA). *See* ER 996-999. Soon thereafter, they moved for a preliminary injunction on both counts, seeking to enjoin the government from enforcing the Proclamation against Plaintiffs and their member businesses only. *See* ER 532-564.

In a thorough opinion, the district court granted the preliminary injunction. *See* ER 1-25. After surveying the statutory landscape and rejecting the government's threshold arguments, the court held that Plaintiffs are likely to succeed on multiple, independent arguments that warrant an injunction. Because it enjoined application of the Proclamation as *ultra vires*, the court explicitly declined to reach the merits of Plaintiffs' alternative APA cause of action. ER 21-22.

First, the court held, "there must be some measure of constraint on Presidential authority in the domestic sphere in order not to render the executive an entirely monarchical power in the immigration context, an area within clear legislative prerogative." ER 13. The court rejected "unrestrained delegation in the context of immigration," as that "would plainly contradict the structural foundation undergirding the Constitutional separation of powers." ER 14. Indeed, the court feared that, absent the balance of limitations

addressed, Section 212(f) would be left "without any intelligible principle." ER 13 (quotation marks omitted). Thus, the court concluded, "executive power is reviewable and somewhat curtailed in the context of a purely domestic economic issue" like COVID-related unemployment. ER 15.

Second, the court concluded that "[u]ntil, at a minimum, the end of the year, the Proclamation simply eliminates H-1B, H-2B, L-1, and J-1 visas and nullifies the statutes creating those visa categories," running afoul of "the widely accepted premise that Section 1182(f) 'does not give the President authority to countermand Congress's considered policy judgments'" or "allow the President to override particular provisions of the INA." ER 15-16 (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2410 (2018) (*Hawaii III*)). The court therefore concluded that Plaintiffs were likely to succeed on "the merits of their claim that the issuance of the Proclamation is invalid based on the finding that it unlawfully eviscerates portions of the INA." ER 18.

Third, the court held that the Proclamation's "find[ing]" that banning high-skilled work-based nonimmigrants from entering the country is in "the interest of the United States" (8 U.S.C. § 1182(f)) "is insufficient as a matter of law," "does not comport with actual facts," and "does not address the alleged problem it purports to address." ER 21. In short, the Proclamation's national-interest finding was deficient because of "a significant mismatch of facts regarding the unemployment caused by" COVID-19 "and the classes of

noncitizens who are barred by the Proclamation": "The statistics regarding pandemic-related unemployment actually indicate that unemployment is concentrated in service occupations and that large number[s] of job vacancies remain in the area most affected by the ban, computer operations which require high-skilled workers." ER 20. The Proclamation thus fails the statutory prerequisite of a sufficient "finding," the district court held, and Plaintiffs are likely to succeed on their *ultra vires* claim for this reason, as well. ER 21.

Finally, the court determined that the remaining equitable injunction factors also favored relief. As to irreparable injury, Plaintiffs demonstrated that "the limitation on their ability to hire and retain qualified individuals from abroad" cause a multitude of harms, including "the likelihood that some businesses … will have to cease operations altogether." ER 22.

As to the balance of equities and the public interest, the district court concluded that "it is in the public interest to respect Congressional judgments on purely domestic issues related to immigration," and that, "based on actual facts in the record … the public interest is served by cessation of a radical change in policy that negatively affects Plaintiffs whose members comprise hundreds of thousands of American businesses of all sizes and economic sectors. The benefits of supporting American business and predictability in their governance will inure to the public." ER 24.

The district court therefore issued a preliminary injunction prohibiting the government "from implementing, enforcing, or otherwise carrying out" the Proclamation "with respect to Plaintiffs and, with respect to the association Plaintiffs, their members." ER 25.

SUMMARY OF THE ARGUMENT

I. This case is justiciable. The Court rejected materially identical justiciability arguments in *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (*Hawaii II*)—and that holding continues to bind this Court. That decision is also correct: Here, Plaintiffs challenge the Executive's adoption of a sweeping immigration policy, not the non-issuance of any individual visa.

II. For three independent reasons, the district court was correct to conclude that Plaintiffs are likely to prevail in demonstrating that Proclamation 10052 exceeds the scope of the Section 212(f) power.

First, Proclamation 10052 contradicts affirmative statutory enactments: For a period exceeding six months, the Proclamation would negate the H, J, and L visa categories that Congress created. As this Court has held, while Section 212(f) authority is broad, it does not allow the President to "nullify[] Congress's considered judgments on matters of immigration." *Hawaii II*, 878 F.3d at 685. In *Hawaii*, the Supreme Court rested squarely on the conclusion that the travel ban at issue there did not pose any "contradiction with another provision of the INA." *Hawaii III*, 138 S. Ct. at 2412. Here,

however, the very purpose of the Proclamation is to "[e]viscerate[] [p]ortions of the INA." ER 15.

Second, the statutory text conditions the exercise of Section 212(f) authority on a Presidential finding that connects the proposed action to the national interest. ER 18. Proclamation 10052 flunks this essential requirement: The Proclamation does not link the action taken (suspending entry of H, J, and L visitors) with the problem identified (COVID-19 related unemployment). Nor could it. The H-2B program, for example, specifically forbids employers from hiring foreign workers if U.S. workers are available. And H-1B employees work in occupations with extraordinarily low unemployment.

Third, as defendants see it, the President may fundamentally rewrite immigration policy via Section 212(f), countermanding congressional statutes, all without rational findings. Such a conclusion would raise grave separation-of-powers concerns under the nondelegation doctrine. Meaningful limitations to the scope of Section 212(f) are thus necessary to avoid serious constitutional problems.

III. The district court did not abuse its discretion in finding irreparable harm and in its weighing of the equities. Through extensive record evidence, Plaintiffs proved multiple forms of irreparable injury, including potential failures of business, loss of customers, and irremediable economic loss. As for

the equities, the court recognized the public interest in a stable immigration system, and the importance of respecting congressional judgments.

ARGUMENT

The Court should affirm the district court's preliminary injunction. This Court "review[s] the district court's decision to grant or deny a preliminary injunction for abuse of discretion," evaluating "legal conclusions de novo and underlying factual findings for clear error." *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 843 (9th Cir. 2020). "On a motion for a preliminary injunction, plaintiffs must make a 'threshold showing' … that (1) they are likely to succeed on the merits, (2) they are likely to 'suffer irreparable harm' without relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest." *Id*. at 844. The district court correctly evaluated each of these four factors, and it appropriately entered an injunction.

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. This dispute is justiciable.

1. To start with, the government forfeited its justiciability argument below because, as the district court recognized, it "did not argue justiciability in opposing the [preliminary injunction] motion." ER 9 n.2. *See, e.g.*, *Scafidi v. Las Vegas Metro. Police Dep't*, 966 F.3d 960, 964 (9th Cir. 2020) (failure to raise an argument qualifies as forfeiture). The government raised justiciability solely as a response to the Plaintiffs' APA cause of action. *See* ER 512-513

(making this argument under the heading "*The APA* does not permit judicial review of Presidential action" and the subheading "Consular Nonreviewability.") (emphasis added); ER 512-513 (focusing on "the APA" argument).

Because the district court did not reach the APA claim (ER 22), it had no occasion to reach the justiciability argument that the government actually advanced. Nowhere below did the government argue that "[c]onsular [n]onreviewability" (ER 513) or the principles animating it preclude judicial review of Plaintiffs' *ultra vires* cause of action, which goes not to "consular officers' individualized visa determinations" (*id.*), but to the statutory authority of the President to issue the Proclamation in the first place. Nor is the government's argument jurisdictional; to the contrary, this Court recently held that "the rule of consular nonreviewability[] supplies a rule of decision, not a constraint on the subject matter jurisdiction of the federal courts." *Allen v. Milas*, 896 F.3d 1094, 1102 (9th Cir. 2018).

2. In any event, the government's sweeping justiciability argument—that courts simply may not review the President's invocation of Section 212(f)—is foreclosed by this Court's precedent and lacks merit.

First, this Court flatly rejected the very same argument in *Hawaii II*, and that holding is the law of the Circuit.[2] As the Court explained, the cases

[2] A brief recap of the *Hawaii* litigation: In *Hawaii I*, this Court affirmed a preliminary injunction against an executive order imposing a version of the President's so-called travel ban. *See Hawaii v. Trump*, 859 F.3d 741 (9th Cir.

on which the government relies here stand only for the proposition that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government to exclude a *given* alien." *Hawaii II*, 878 F.3d at 679 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)) (emphasis in *Hawaii II*); *cf.* Gov't Br., Dkt. 12, at 21-24 (quoting *Knauff* and its progeny but omitting the critical phrase). Where the challenge is not to "individual visa denials," but rather "the President's *promulgation* of sweeping immigration policy," those doctrines do not bar review. *Hawaii II*, 878 F.3d at 679; *accord Hawaii I*, 859 F.3d at 768-769 (same).

In other words, "[a]lthough 'the Executive has broad discretion over the admission and exclusion of aliens, that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional bound-

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2017) (*Hawaii I*). That opinion was vacated as moot by the Supreme Court after the executive order in question "expired by [its] own terms." *Trump v. Hawaii*, 138 S. Ct. 377 (2017). The President then issued a presidential proclamation with somewhat similar provisions; this Court in *Hawaii II* largely affirmed a preliminary injunction against the enforcement of that proclamation. *See Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (*Hawaii II*). That decision was reversed by the Supreme Court on its merits—although, as discussed below, the Court did not disagree with several of the premises underlying this Court's analysis, many of which are applicable here. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (*Hawaii III*).

aries lie." *Hawaii II*, 878 F.3d at 679 (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (R.B. Ginsburg, J.)); *see also id.* at 680 ("This doctrine shields from judicial review only the enforcement 'through executive officers' of Congress's 'declared immigration policy,' not the President's rival attempt to set policy.") (citation omitted; alteration incorporated). Because *Hawaii II*—like this case—turned precisely on whether a presidential proclamation was in fact within the authority delegated by Congress in Section 212(f), there was no bar to review.

That holding remains the law of the Circuit. The Supreme Court's reversal of *Hawaii II* was on the merits, not on this threshold justiciability ground; indeed, the Supreme Court "assume[d] without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue." *Hawaii III*, 138 S. Ct. at 2407. This Court's holding on the justiciability of challenges to Section 212(f) proclamations thus remains binding, since "[a]n appellate court's opinion on a particular issue will retain its precedential effect if the Supreme Court reverses the appellate court's judgment on other grounds." 18 *Moore's Federal Practice – Civil* § 134.05[5] (2020).[3]

[3] *See also Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1041 (9th Cir. 2010) ("[R]eversal on one merits ground may leave the decisions reached on other grounds intact" as binding precedent); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) (distinguishing "[a] decision . . . *re-*

Not only binding, *Hawaii II* convincingly rebuts the government's arguments as a persuasive matter, and the government does not even attempt to grapple with its analysis. Indeed, the cases cited by the government confirm the key insight of *Hawaii II*: Consular 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. *Hawaii II*, 878 F.3d at 679; *see Allen*, 896 F.3d at 1104 (summarizing the doctrine that "*a* consular official's decision to deny *a* visa to *a* foreigner is not subject to judicial review") (emphases added); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) ("The doctrine holds that *a* consular official's decision to issue or withhold *a* visa is not subject to judicial review.") (emphases added); *Knauff*, 338 U.S. at 543 (review barred as to "*a given* alien") (emphasis added). *Accord*, *e.g.*, *Patel v. Reno*, 134 F.3d 929, 931-932 (9th Cir. 1997) (doctrine inapplicable "when the suit challenges the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul's discretion").

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versed on other grounds" from "a decision that has been *vacated*[,] [which] has no precedential authority") (emphases in original); *TOPIC v. Circle Realty*, 532 F.2d 1273, 1274 n.4 (9th Cir. 1976) (Kennedy, J.) (noting that "the law of this circuit" was "left undisturbed by the Supreme Court's reversal on other grounds" of the relevant case); *accord Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 489 (5th Cir. 2008) ("Fifth Circuit cases overruled on other grounds by the Supreme Court remain binding authority.").

Fiallo v. Bell (addressed by *Hawaii II* (*see* 878 F.3d at 679)) held that certain immigration-related statutes are not subject to judicial challenge based on the constitutional rights of noncitizens, because "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." 430 U.S. 787, 792 (1977) (quotation marks omitted). In thus emphasizing the "special judicial deference to *congressional* policy choices in the immigration context" (*id.* at 793 (emphasis added)), the Supreme Court certainly did not bar suits seeking to *enforce* those "congressional policy choices" against the President's overstepping. To the contrary, "[e]xecutive action under legislatively delegated authority … is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review." *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983). That is precisely our point here—that the President has exceeded the authority delegated in Section 212(f). *Fiallo*, like the government's other cases, does nothing to preclude courts from determining whether executive action setting broad immigration policy has complied with the statute purportedly authorizing that very action.

B. The Proclamation exceeds the power delegated in Section 212(f).

The district court concluded that the Proclamation exceeds the power of the President under Section 212(f), and is therefore *ultra vires* and unlawful, on multiple independent grounds.[4] Those conclusions are correct.

1. The Proclamation conflicts with the INA.

Most fundamentally, the Proclamation is unlawful because it directly contradicts Congress's legislatively enacted policy judgments, declaring statutory visa categories invalid for the remainder of the year. That is, the Proclamation "unlawfully eviscerates portions of the INA." ER 18.

a. Although broad, Section 212(f) does not authorize the President to "nullify[] Congress's considered judgments on matters of immigration." *Hawaii II*, 878 F.3d at 685. As this Court explained, "Congress has delegated substantial power in this area to the Executive Branch, but the Executive may not exercise [its Section 212(f)] power in a manner that conflicts with the

[4] The government does not dispute the availability of an equitable cause of action to enjoin *ultra vires* government conduct. *See, e.g.*, *Sierra Club v. Trump*, 929 F.3d 670, 694 (9th Cir. 2019) ("The Supreme Court has 'long held that federal courts may in some circumstances grant injunctive relief against' federal officials violating federal law.") (quoting *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 326 (2015)); *Trudeau v. FTC*, 456 F.3d 178, 190 (D.C. Cir. 2006) ("[J]udicial review is available when an agency acts *ultra vires*, even if a statutory cause of action is lacking.") (quotation marks omitted).

INA's finely reticulated regulatory scheme governing the admission of foreign nationals." *Id.*

Although the Supreme Court ultimately concluded that the proclamation at issue in *Hawaii* did not conflict with the INA, it acknowledged the underlying legal "premise" of this Court's opinion: Section 212(f) "does not give the President authority to countermand Congress's considered policy judgments." *Hawaii III*, 138 S. Ct. at 2410-2411; *see also id.* at 2411 ("We may assume that § 1182(f) does not allow the President to expressly override particular provisions of the INA."). The district court therefore correctly held that, in enacting Section 212(f), "Congress did not delegate authority to eviscerate portions of the statute in which the Congressional delegation of power was made." ER 15.

But, as the district court further held, that is just what the Proclamation attempts here. The INA, and in particular the provisions governing work-related visas, sets out a "finely reticulated regulatory scheme governing the admission of foreign nationals." *Hawaii II*, 878 F.3d at 685. The statute provides in great detail which noncitizens may enter the country, for what purposes, and under what circumstances. The Proclamation takes a sledgehammer to that carefully crafted system, declaring by executive fiat that four entire visa categories are no longer operative. *See* ER 16 ("Until, at a mini-

mum, the end of the year, the Proclamation simply eliminates H-1B, H-2B, L-1, and J-1 visas and nullifies the statutes creating those visa categories.").

That alone is enough to render the Proclamation *ultra vires*, and the government has little to say in response. *See* pages 26-34, *infra*. But even more strikingly, the particular visa provisions that the Proclamation "effectively rewrit[es]" (*Doe #1 v. Trump*, 957 F.3d 1050, 1067 (9th Cir. 2020)) already strike a conscious balance—fine-tuned over decades of statutory amendments—between the very interests at stake here: American businesses' need for skilled and appropriately specialized workers, on the one hand; and protections for domestic workers on the other. As the district court put it, the INA's work visa provisions represent "the carefully delineated balance between protecting American workers and the need of American businesses to staff their operations with skilled, specialized, and temporary workers." ER 16. By purporting to strike a different balance than that enacted into law by Congress, the Proclamation further exceeds the President's power under Section 212(f).

Perhaps most obviously, the H-2B visa category is already subject to a stringent protection for domestic workers: By statute, the visa may only be issued "if unemployed persons capable of performing [the needed temporary] service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *see also* 8 C.F.R. § 214.2(h)(6)(iv)(A).

That assurance is achieved through a robust labor certification process overseen by the Department of Labor, under which an employer with a temporary job opening must provide a job order to the relevant State Workforce Agencies for posting and recruitment of domestic workers (20 C.F.R. § 655.16); contact former workers and "solicit their return to the job" (*id.* § 655.43); provide notice of the opening to any relevant union or post the opening at the job site or online (*id.* § 655.45); and conduct any other domestic recruitment deemed necessary by the Department of Labor personnel reviewing the application (*id.* § 655.46). Only if these (and other) steps are taken without filling the position will the Department of Labor "certify … that there is an insufficient number of U.S. workers who are qualified and who will be available for the job opportunity" (*id.* § 655.50(b))—and even after certification, the employer has a "[c]ontinuing requirement" to "provide employment to any qualified U.S. worker who applies" (*id.* § 655.20(t)). Thus, as the district court put it, "[t]he pre-existing law already guarantees that issuance of an H-2B visa will not disadvantage American native-born workers" (ER 16)—yet the Proclamation writes the entire visa category out of the INA anyway.

Congress also struck a conscious balance between the needs of American business and American labor with the H-1B visa, which is available to skilled foreign workers in "specialty occupation[s]." 8 U.S.C.

§ 1101(a)(15)(H)(i)(b). Recognizing the struggles of American companies to fill all their skilled specialty positions with domestic workers, Congress tailored the labor protections for H-1B visas slightly differently than for unskilled H-2B workers. For example, all sponsoring employers must attest that wages paid to H-1B workers will not undercut wages paid to U.S. workers; that H-1B employees' working conditions will not adversely affect those of U.S. workers; and that the employer has provided notice of its plan to hire H-1B employees to any relevant domestic union representative, or otherwise posted conspicuous notice. *Id.* § 1182(n)(1)(A)-(C). A subset of employers—those with a history of willful certification violations, and those with a large percentage of workers already on H-1B visas—must make additional certifications, including that the company has tried and failed to fill the position with a domestic worker. *Id.* § 1182(n)(1)(E), (n)(1)(G), (n)(3)(A).[5]

[5] The H visa category dates to the INA of 1952, and the current H-1B statute was enacted in roughly its current form in 1990. That law was explicitly aimed at addressing "the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found." H.R. Rep. 101-723, pt. 1, at 41 (1990). As such, the statutory scheme was immediately recognized by the government as the result of an intentional balancing of interests: "The Department believes that the broad intent of the Act is clear. . . . [It] seeks to make the immigration system more efficient and responsive to the needs of employers experiencing labor shortages, while at the same time providing greater safeguards and protections for both U.S. and alien workers." *Alien Temporary Employment Labor Certification Process*, 56 Fed. Reg. 11,705, 11,706-11,707 (Mar. 20, 1991).

The availability of H-1B visas—and the associated labor protections—have been further titrated over the decades since 1990. The Senate Report accompanying a 2000 law that temporarily raised the numerical caps on H-1B visas identified Congress's policy judgment:

> Many of the concerns about H-1B visas revolve around the fear that individuals entering on H-1B visas will "take" a job from an American worker. This fear arises from the premise that there is a fixed number of jobs for which competition is a zero-sum game. But this premise is plainly flawed[.]

S. Rep. 106-260, at 12 (Apr. 11, 2000); *see also id.* (noting the "general principle that labor markets have demonstrated time and time again: additional people entering the labor force, whether native-born students out of school, immigrants, or nonimmigrants, expand job opportunities and create other jobs through innovation, entrepreneurship, and money spent on consumer items"). Congress has continued to refine H-1B conditions since, including through legislation that adjusted the number of visas available by adding a set-aside for individuals completing U.S. graduate degrees; and otherwise calibrated the program to meet the needs of the domestic economy. *See* H-1B Visa Reform Act of 2004, Pub. L. 108-447, Div. J, Subtitle B, 118 Stat. 3353. Indeed, the annual numerical cap, revised repeatedly over the years, is a clear congressional judgment on the scope of the H-1B program and its interrelation with domestic labor. *See* 8 U.S.C. § 1184(g)(1)(A).

Congress's chosen approach to labor protections for L-1 visas, used for intra-company transfers, reflects the same kind of purposeful balancing. In creating the category in 1970, Congress acted "to meet the objective of American industry which has been seriously hampered in transferring personnel"; the House Report observed that "[s]uch intracompany transfers have contributed immeasurably to the growth of American enterprise throughout the world and to the international trade of the United States." H.R. Rep. 91-851, at 5-6 (1970). In recognition that L-1 employees possess irreplaceable experience—L-1 nonimmigrants have at least a year of company-specific experience by definition (*see* 8 U.S.C. § 1101(a)(15)(L))—the L-1 category does not require the same labor certifications as H-1B or H-2B. But Congress has nonetheless been vigilant in responding to perceived abuses of the L-1 visa; in 2004, Congress prohibited the use of L-1 visas in so-called work-for-hire arrangements, in which companies would bring workers to the country on L visas and then hire them out to other domestic employers. L-1 Visa Reform Act of 2004, Pub. L. 108-447, Div. J, Subtitle A, 118 Stat. 3351-3353; *see* 8 U.S.C. § 1184(c)(2)(F).[6]

[6] Congress has been similarly attentive to perceived abuses of J visas, responding to criticism that the au pair program was primarily a source of labor (rather than cultural exchange) by explicitly reaffirming the program. *See* Eisenhower Exchange Fellowship Act of 1990, Pub. L. 101-454 § 8, 104 Stat. 1063, 1065.

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. These are precisely the sorts of "considered judgments" that the President may not simply discard under Section 212(f) because he would balance the relevant interests differently. *Hawaii II*, 878 F.3d at 685; *see also Doe #1*, 957 F.3d at 1067. But the stated aim of the proclamation is explicitly to rebalance the rules under which "American workers compete against foreign nationals for jobs in every sector of our economy." ER 572. Because it purports to "rewrit[e]" (*id.*) and "nullify[]" (*Hawaii II*, 878 F.3d at 685) Congress's policy judgments as embodied in the INA, the Proclamation is beyond the President's Section 212(f) authority. The district court correctly enjoined the government from carrying it out.

b. The government's arguments to the contrary are unavailing.

The government's primary contention is that the Supreme Court in *Hawaii* "rejected the exact argument" we make here (Gov't Br. 33)—but the district court correctly recognized that the government misapprehends *Hawaii III*. ER 17-18.

Hawaii III addressed a presidential proclamation that barred entry to nationals of a list of enumerated countries, on the basis that those countries

provided insufficient information to the United States for the proper vetting of their citizens, harming national security. *Hawaii III*, 138 S. Ct. at 2404-2405. The plaintiffs contended that this proclamation conflicted not with statutes explicitly allowing entry to those noncitizens, but with the INA's other national-security provisions. Their argument was that by setting up "an individualized vetting system" and "encourag[ing] information sharing through a Visa Waiver Program offering fast-track admission for countries that cooperate," Congress had "implicitly foreclose[d] the Executive from imposing tighter restrictions on nationals of certain high-risk countries." *Id.* at 2410-2411. In other words, the *Hawaii* plaintiffs' argument was one of negative implication: By addressing the issue of vetting in *one* way, they submitted, Congress prohibited the President from addressing it in *other* ways.

That negative-implication reasoning is what the Supreme Court rejected in *Hawaii*. The Court held that there was not actually "any contradiction with another provision of the INA" because in establishing the Visa Waiver Program for "less than 20% of the countries in the world, Congress did not address what requirements should govern the entry of nationals from . . . nations presenting heightened terrorism concerns." *Hawaii III*, 138 S. Ct. at 2412. Interstitial rulemaking by Section 212(f) proclamation was thus permitted, since Congress had not "stepped into the space and solved the exact problem." *Id.*

In other words, the holding of the Supreme Court in *Hawaii* was that congressional silence on a particular topic does not "implicitly bar the President" from filling those statutory gaps using Section 212(f), and the President may therefore "impose entry restrictions *in addition* to those elsewhere enumerated in the INA." *Hawaii III*, 138 S. Ct. at 2408, 2411 (emphasis added); *see also id.* at 2408 (Section 212(f) "enabl[es] the President to supplement the other grounds of inadmissibility in the INA"); ER 17 ("In *Hawaii III*, the Supreme Court found that the President was acting within his authority because the Proclamation was consistent with the INA and filled in spaces where the statute was otherwise silent.").

This Proclamation is different. Rather than simply "impose entry restrictions" that "*supplement* the other grounds of inadmissibility in the INA" by filling statutory gaps (*Hawaii III*, 138 S. Ct. at 2408 (emphasis added)), this Proclamation's entry restrictions "expressly *override* particular provisions of the INA" (*id.* at 2411 (emphasis added)) by declaring that duly enacted visa statutes are no longer the law of the land. In this Court's phrasing, the Proclamation "nullif[ies] Congress's considered judgments on matters of immigration." *Hawaii II*, 878 F.3d at 685.

Worse, the Proclamation does so by explicitly rebalancing the very same considerations—employment for American workers and the availability of skilled labor for American businesses—that Congress already balanced and

enacted into law. *See* pages 21-26, *supra*. As the district court explained, the work-visa statutes "reflect[] a set of legislative judgments that the entry of international workers is in the national interest provided they enter the market under the specific terms and conditions provided by the statute." ER 18. And "the Presidential Proclamation power cannot 'eviscerate[] the statutory scheme' by reversing course on legislatively enacted policy in its entirety." *Id*. (quoting *Doe #1*, 957 F.3d at 1064).

Our argument is thus not, as the government would have it, the straw man that Section 212(f) does not "permit[] the President to bar entry of skilled temporary workers" just because "these workers may be admissible under other provisions of the INA." Gov't Br. 33. Of course Section 212(f) authorizes the President to bar the entry of a noncitizen who otherwise "may be admissible." *Id*. Our point is that the use of that power must be consistent with the rest of the statute—or at most, span a statutory gap. It does not allow the President to replace the congressional policy judgments underlying the existing visa statutes with his own, contrary visions of proper immigration policy.

For example, we do not dispute that the President could bar temporary workers from certain geographical regions with especially high rates of COVID-19. *Cf. Hawaii III*, 138 S. Ct. at 2415 (suggesting that the President could "suspend entry from particular foreign states in response to an epidem-

ic confined to a single region."); *Proclamation 9993*, 85 Fed. Reg. 15,045, 15,046 (Mar. 11, 2020) (suspending entry to noncitizens from the Schengen Area). That is using Section 212(f) to fill the gaps—not to override existing statutes. What the President cannot do is bar temporary workers *because they are temporary workers*, when Congress has expressly determined that entry of temporary workers into the United States is in the national interest. Once again, that would "expressly override particular provisions of the INA" (*Hawaii III*, 138 S. Ct. at 2411), and "nullify[] Congress's considered judgments" (*Hawaii II*, 878 F.3d at 685), which is beyond even the power conferred by Section 212(f).[7]

In short, if Section 212(f) permitted the President to simply delete or modify existing visa categories and related qualifications as he sees fit,[8] the INA would authorize its own undoing. *See* pages 46-52, *infra*. Unlike in *Hawaii*, therefore, the Proclamation here in fact *does* attempt "to expressly over-

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[7] To be sure, Congress always remains free to amend the INA. In response to COVID-19, Congress enacted several laws, many of which changed or suspended existing policies.

[8] The government suggests that the Proclamation is somehow excusable because it is temporary. Gov't Br. 34-35. But *all* Section 212(f) suspensions must be temporary, one way or another (*see Hawaii III*, 138 S. Ct. at 2409-2410)—yet the Supreme Court nevertheless agreed that Section 212(f) "does not allow the President to expressly override particular provisions of the INA" (*id.* at 2411). That is, an "override" is no less of an "override" just because it is not permanent.

ride particular provisions of the INA"—precisely what Section 212(f) "does not allow." *Hawaii III*, 138 S. Ct. at 2411; *see also Hawaii II*, 878 F.3d at 685.

Ultimately, then, the question is whether the President uses Section 212(f) to "supplement the INA"—a permissible exercise of authority—or whether he uses Section 212(f) to "supplant it," an action which exceeds the statutory scope. *Hawaii III*, 138 S. Ct. at 2410. *Hawaii III*'s approval of a proclamation that used Section 212(f) to "supplement the INA" says nothing at all about whether, in *this* case—where the very purpose of Proclamation 10052 is to nullify entire visa categories—the President has instead acted to "supplant" the INA. Here, the Executive surely has, rendering the action unlawful.

It is notable that, prior to these most recent actions, *all* historical exercises of Section 212(f) authority served to supplement—not supplant—INA authority. A comprehensive *amicus* brief by immigration scholars (D. Ct. Dkt. 40-1) demonstrated that prior exercises of Section 212(f) authority fall into a few broad categories. In *Hawaii III*, for example, the President acted to supplement putative gaps in foreign vetting of individuals entering the United States. *See Proclamation 9645*, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

Presidents have also used Section 212(f) to respond to wrongful conduct of individuals abroad, such as those participating in certain acts relating to the Russian occupation of the Crimea region (Exec. Order No. 13,685, 79 Fed.

Reg. 77,357 (Dec. 19, 2014)), and those who aid certain human rights abuses (Exec. Order No. 13,619, 77 Fed. Reg. 41,243 (July 11, 2012)). And the authority has been used to suspend entry of individuals who are members of certain groups, such as members of a military junta in Sierra Leone *(Proclamation 7062*, 63 Fed. Reg. 2,871 (Jan. 14, 1998)). Once more, using Section 212(f) in this way supplements, not supplants, the INA. Never, however, has Section 212(f) been used to repeal whole visa categories enacted by Congress.[9]

The government offers one final argument, asserting that "[i]f Congress has authorized the President to … suspend the entry of *all aliens* into the United States without nullifying the INA … then a Proclamation that merely suspends the entry of *certain classes* of nonimmigrant workers can hardly be said" to do so. Gov't Br. 35; *see* 8 U.S.C. § 1182(f) (President may "suspend the

[9] The exceptions to the Proclamation's entry ban do not save its legality. By banning the entry of all H-1B, H-2B, and L-1 workers (among others) and then granting exemptions from that ban based on non-statutory factors, the President has effectively replaced the duly enacted visa statutes with different ones of his own devising. For example, the INA provides that an individual is eligible for an L-1 visa after working for an employer for one year. 8 U.S.C. § 1101(a)(15)(L). The new policy, however, would require two years. ER 147. Congress determined that employers must pay H-1B workers a "prevailing wage." 8 U.S.C. § 1182(n)(1)(A). The new policy would require payment at 115% of the "prevailing wage." ER 142. In this way, the President has no less "countermand[ed] Congress's considered policy judgments" (*Hawaii III*, 138 S. Ct. at 2410), than if the ban contained no exceptions.

entry of all aliens or any class of aliens").[10] First of all, this argument goes much too far; its result would be that, despite what this Court held and the Supreme Court accepted as true, it is *impossible* for a Section 212(f) proclamation to "expressly override" the INA in a manner beyond the power delegated by Congress. That is certainly not the law of this Circuit. *See Hawaii II*, 878 F.3d at 685.

In any event, the provision for suspending the entry of all noncitizens is fully compatible with our position: It may have been permissible for the President, for example, to bar the entry of all noncitizens early in 2020 to slow the spread of COVID-19. But just as he cannot bar the entry of temporary workers simply because they *are* temporary workers (when a statute permits and governs the entry of temporary workers), he could not bar *all* noncitizens just because he believes immigration is a net-negative for the Nation, contrary to the very existence of the INA. To do so would be to "countermand Congress's considered policy judgment[]" (*Hawaii III*, 138 S. Ct. at 2410) that immigration should be permitted.[11] That is, Section 212(f) is not a switch by which the President may turn off the INA.

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[10] To our knowledge, no President has ever purported to exercise the power to bar entry to all noncitizens. *See* D. Ct. Dkt. 40-1 (*amicus* brief cataloguing all past uses of Section 212(f)).

[11] Moreover, if the provision for suspending entry of "all aliens" were not thus cabined, it would be especially susceptible to a nondelegation challenge. *See* pages 46-52, *infra*.

As the district court concluded, therefore, the "issuance of the Proclamation is invalid based on the finding that it unlawfully eviscerates portions of the INA." ER 18. The Court should affirm that conclusion—and this alone is a sufficient basis to affirm the preliminary injunction.

2. The Proclamation's "findings" are insufficient to support the action taken.

The district court also correctly held that Plaintiffs are likely to succeed on the merits of their claim that the Proclamation is unlawful because it fails the one procedural prerequisite contained in Section 212(f): a presidential "find[ing]" that "the entry of" the excluded class of noncitizens "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). As the district court held, "the finding set out in the text of the Proclamation is insufficient as a matter of law, it does not comport with actual facts, and lastly, it does not address the alleged problem it purports to address." ER 21.

a. Section 212(f)'s "find[ing]" requirement calls for more than just the President's *ipse dixit*. Rather, as this Court explained in *Hawaii*, the statutory language "requires that the President's findings *support* the conclusion" that the admission of the excluded noncitizens actually "would be harmful to the national interest." *Hawaii I*, 859 F.3d at 770 (emphasis added); *see also Hawaii II*, 878 F.3d at 692-693.

That conclusion flows directly from the statutory language itself. Congress has required that the President "find" that entry would be detrimental

(8 U.S.C. § 1182(f)), a common-law term invoking the weighing of evidence by a factfinder, not an unreviewable executive policy preference. *See* Finding of Fact, *Black's Law Dictionary* (11th ed. 2019) ("A determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record."). And "[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *United States v. Castleman*, 572 U.S. 157, 162 (2014) (quotation marks omitted); *accord, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law* 320 (2012) ("The age-old principle is that words undefined in a statute are to be interpreted and applied according to their common-law meanings.").

By contrast, 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." 8 U.S.C. § 1182(f) (emphasis added); *see* Deem, *Black's Law Dictionary* (11th ed. 2019) ("To consider, think, or judge."). Again, this choice to "use . . . different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." *Tin Cup, LLC v. U.S. Army Corps of Eng'rs*, 904 F.3d 1068, 1074 (9th Cir. 2018); *accord, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the

statute and different language in another, the court assumes different meanings were intended.").

Indeed, this Court in *Hawaii* examined the legislative history of Section 212(f) and determined that "[t]he use of the word 'find' was deliberate. Congress used 'find' rather than 'deem' in the immediate predecessor to § 1182(f) so that the President would be required to 'base his [decision] on some fact,' not on mere 'opinion' or 'guesses.'" *Hawaii II*, 878 F.3d at 692-693 (quoting 87 Cong. Rec. 5051 (1941)).[12] This Court therefore held that Section 212(f) contains a judicially enforceable standard that "requires … 'find[ings]' that support the conclusion that admission of the excluded aliens would be 'detrimental.'" *Id.* at 693.

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[12] *See also*, *e.g.*, 87 Cong. Rec. 5051 (statement of Rep. Jonkman) ("If the President must find . . . he must base his finding on some fact. That is the legal and special meaning of the word today."). In the district court, the government pointed to statements of other members of Congress arguing that "find" and "deem" are not actually so different. *See* ER 522-533 n.4. The point of the legislative history, though, is that the understanding that "there is a vital difference between the word 'deem' and the word 'find'" (87 Cong. Rec. 5050) ultimately won out, and "deem" was therefore replaced with "find" in the text of the bill. *Id.* at 5052. That amendment history is another critical clue to the statute's meaning. *See Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) ("We ordinarily will not assume that Congress intended 'to enact statutory language that it has earlier discarded in favor of other language.'") (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987)); *cf. Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

b. Nothing in *Hawaii III* undercuts this plain understanding of the statutory text. In fact, the Supreme Court rested on the "extensive findings describing how deficiencies in the practices of select foreign governments"—certain of which were designated "state sponsors of terrorism"—failed to provide "sufficient information to assess the risks those countries' nationals pose to the United States." 138 S. Ct. at 2408 (alteration incorporated).

These findings were substantial and detailed. DHS "collected and evaluated data regarding all foreign governments." *Hawaii III*, 138 S. Ct. at 2405. "It identified 16 countries as having deficient information-sharing practices and presenting national security concerns," and another 31 countries as at risk. *Id*. Ultimately, the President identified eight countries with deficient information sharing. *Id*. And he tailored the entry ban to the specific facts found for each country. Thus, for those "that do not cooperate with the United States in identifying security risks"—Iran, North Korea, and Syria—the Proclamation suspended entry of all nationals (save Iranian students). *Id*. Nationals from other countries which shared some information faced fewer restrictive bars to entry. *Id*. The "restrictions" varied "based on the 'distinct circumstances'" specifically found as to each country. *Id*.

These findings, the Supreme Court held, "thoroughly describe[] the process, agency evaluations, and recommendations underlying the President's

chosen restrictions." *Hawaii III*, 138 S. Ct. at 2409. Proclamation 10052 has no findings remotely similar.

c. When the Supreme Court in *Hawaii* explained that the President need not "conclusively link all of the pieces in the puzzle," it was specifically describing circumstances where the Executive acts "in the context of international affairs." *Hawaii III*, 138 S. Ct. at 2409 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010)). *Humanitarian Law Project* cited to *Zemel v. Rusk*, 381 U.S. 1, 17 (1965), which in turn relied on *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936). This holding thus traces to *Curtiss-Wright*'s broad understanding of presidential powers in matters "affecting foreign relations." *Id*. at 325.

But the scope of that power is far more limited here. *First*, Justice Jackson's seminal *Youngstown* opinion cabined *Curtiss-Wright*, which only "intimated that the President might act in external affairs *without* congressional authority, but not that he might act *contrary* to an Act of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring) (emphases added). Importantly, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id*. at 637. That is decidedly the case here—the President seeks to use Section 212(f) in a manner to contradict the express

will of Congress (*see* pages 19-34, *supra*), placing the President's authority at its nadir.

Second, as *Hawaii III* expressly stated—and as its ultimate reliance on *Curtiss-Wright* makes plain—any relaxed burden on the President relates to unique executive powers governing "international affairs." *Hawaii III*, 138 S. Ct. at 2409. Such expansive powers are not triggered when, as here, the President attempts to use his Section 212(f) power to address a *domestic* concern—as this Court has already explained: "[W]hile the 'President may adopt a preventive measure in the context of international affairs and national security,' and he is then 'not required to conclusively link all of the pieces in the puzzle before courts grant weight to his empirical conclusions,' his power is more circumscribed when he addresses a purely domestic economic issue." *Doe #1*, 957 F.3d at 1067 (quoting *Hawaii III*, 138 S. Ct. at 2409) (citations omitted; alterations incorporated); *see also id.* ("We reject the government's argument that the Proclamation implicates the President's foreign affairs powers simply because the Proclamation affects immigrants.").

Thus, in addressing "the deference traditionally accorded the President *in this sphere*," *Hawaii III* was specifically referencing "international affairs and national security." *Hawaii III*, 138 S. Ct. at 2409 (emphasis added). Similarly, the language highlighted by the government—rejecting a "challenge [to] the entry suspension" that was based on plaintiffs' "perception of its ef-

fectiveness and wisdom"—was premised on the notion that courts "cannot substitute [their] own assessment for the Executive's predictive judgments *on such matters*"—that is, on "national security interests"—or "conduct an 'independent foreign policy analysis.'" *Id*. at 2421-2422 (emphasis added).

The government argues at length that "[t]here is no sound legal basis for the view that [Section 212(f)] embodies a foreign-domestic distinction," since "[t]he statutory text does not make or imply any such distinction." Gov't Br. 29, *see id.* at 29-33. But our argument is different. Our point is that when the President uses his Section 212(f) power to further domestic economic policy, that decision does not receive the judicial deference due to presidential judgments on foreign policy or national security. *Cf.* ER 15 (finding that "executive power is reviewable and somewhat curtailed in the context of a purely domestic economic issue").

Indeed, the deference afforded the President in *Hawaii III* was not born from the statutory language, but arose from judicial notions of inter-branch comity with respect to decisions "involving sensitive and weighty interests of national security and foreign affairs." *Hawaii III*, 138 S. Ct. at 2422 (quotation marks omitted). Because this Proclamation is not such a decision, the same extra-statutory deference is not due here.

Finally, *Dalton v. Specter*, 511 U.S. 462 (1994), and *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940), are inapt as to the reviewability

of Section 212(f) findings. *Cf.* Gov't Br. 37. Those cases stand for the proposition that Congress *can* vest the President with specific discretion that will be unreviewable in court, not that *all* decisions committed to the President by statute are thus unreviewable. Indeed, *Dalton* makes explicit that its non-reviewability holding was based on the text of the specific statute at issue, which "d[id] not at all limit the President's discretion" to take or reject the actions in question "for whatever reason he sees fit." 511 U.S. at 476; *see id.* at 477 ("[O]ur conclusion that judicial review is not available . . . follows from our interpretation of an Act of Congress."); *accord George S. Bush & Co.*, 310 U.S. at 376-377, 380 (declining to review "the existence of the facts calling for [presidential] action" because the statute empowered the President to act "if in his judgment" the relevant action was "necessary") (quoting 19 U.S.C. § 1336(c)).

By contrast, the statute here does not commit the decision whether to act to the President's sole "judgment" or "discretion," or permit a suspension whenever he may merely "deem" it appropriate. To the contrary, it requires the President to "find" that the triggering condition is satisfied (8 U.S.C. § 1182(f)), a common-law term denoting something eminently reviewable in court. *See, e.g.*, Fed. R. Civ. P. 52(a)(6); *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 542 (1948) (discussing "[t]he practice in equity prior to the present Rules of Civil Procedure" under which "the findings of the trial court . . . had

great weight with the appellate court" but "were never conclusive."); *see also* pages 34-37, *supra*. If anything, therefore, *Dalton* and *George S. Bush & Co.* confirm that "[w]hen Congress wants" to confer unreviewable discretion on the President, "it knows how to do so." *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 714 (2014).

d. The government does not make much of an argument that, if judicial review of Section 212(f) findings is permissible, the Proclamation here should survive that review. And rightly so: the Proclamation's "find[ings]," such as they are, do not "support the conclusion that admission of the excluded aliens would be 'detrimental.'" *Hawaii II*, 878 F.3d at 693.

The Proclamation's finding that barring high-skilled immigrants would be "in the interest of the United States" (8 U.S.C. § 1182(f)) is premised on the understanding that "American workers compete against foreign nationals for jobs in every sector of our economy" (ER 572). "[U]nder the extraordinary circumstances of the economic contraction resulting from the COVID-19 outbreak," the Proclamation asserts, the banned "nonimmigrant visa programs … pose an unusual threat to the employment of American workers" laid off during the pandemic. *Id.* This argument fails on several levels.

First, the Proclamation is internally inconsistent. As the government explained it at oral argument below, its position is "really as simple as the law of supply and demand." ER 39. That is, the government rests on a con-

tention that jobs are fungible throughout the economy. Precluding temporary immigrant workers from entering the country, we are told, "will ameliorate U.S. unemployment in some measure." Gov't Br. 38.

But the Proclamation conclusively refutes this premise. It expressly exempts from the travel ban individuals providing "temporary labor or services essential to the United States food supply chain," and it directs the Secretary of State to exempt those "involved with the provision of medical care to individuals who have contracted COVID-19 and are currently hospitalized." ER 574. Why are these jobs exempt from the travel ban, if the point is to reduce domestic worker unemployment? The obvious answer is that workers have different skills, and the demand for those skills differs. The text of the Proclamation itself thus disproves the government's facile assertion that barring H, J, and L visa holders relates to *any* rise in unemployment. And the Proclamation offers nothing more. It merely states that 17 million jobs were lost in the United States, without providing any link connecting those jobs to the high-skilled nonimmigrants it targets. *See* ER 572-573.

Second, as the district court concluded, the "extensive record proffered by Plaintiffs" below demonstrates that there is "a significant mismatch of facts regarding the unemployment caused by the proliferation of the pandemic and the classes of noncitizens who are barred by the Proclamation." ER 19 n.7, 20.

Specifically, "[t]he statistics regarding pandemic-related unemployment actually indicate that unemployment is concentrated in service occupations and that large number[s] of job vacancies remain in the area most affected by the ban, computer operations which require high-skilled workers." ER 20; *see* ER 873-877 (based on government statistics, unemployment in "computer occupations" has remained low, and actually *decreased* from 3.0% in January 2020 to 2.8% in April 2020, and 2.5% in May 2020); ER 875 (government statistics showing that 66% of approved H-1B visa petitions are for jobs in these same "computer-related occupations") (*see also* D. Ct. Dkt. No. 31-15, at ii); ER 873 (study showing that over 630,000 active job vacancy postings were advertised online for jobs in common computer occupations during the 30 days ending June 9, 2020). In other words, the jobs for which businesses seek H-1B and other high-skilled noncitizen workers "are simply not fungible," and thus cannot be filled by service-occupation workers unemployed because of COVID-19. ER 20.[13]

Moreover, "the Proclamation bars entry of noncitizens"—specifically, H-2B visa-holders—"who are already prevented, by statute, from competing [for] jobs [with] United States citizens." ER 20; *see also* ER 20-21 ("The actual process required in order to fill an open position with an H-2B visa applicant

[13] All of this material was provided to the administration before it issued Proclamation 10052. *See* ER 923-934.

… culminat[es] in the Department of Labor making an affirmative finding that 'there is an insufficient number of U.S. workers who are qualified and who will be available for the job opportunity.'") (quoting 20 C.F.R. § 655.50); *see* page 22, *supra*. And "[i]n addition, the Proclamation has the effect of barring seasonal temporary labor even in instances in which an employer is unable to fill open positions with American workers during the pandemic." ER 21. In short, the Proclamation "does not address the alleged problem it purports to address," and "does not comport with actual facts." *Id*.

Tellingly, the government does not even try to respond to this compelling evidentiary showing on appeal. *Cf. East Bay*, 964 F.3d at 843 (district court's factual findings reviewed only for clear error). Instead, it places all its eggs in the basket of precluding review entirely (*see* Gov't Br. 36-38)—but as discussed above, those arguments fail completely to persuade.

Third, the government's only actual attempt to argue the rationality of the Proclamation's entry ban is a suggestion that *any* benefit to domestic unemployment, no matter how small, is enough to justify upending the Nation's immigration system. *See* Gov't Br. 38. To put it mildly, that contention is not reflective of a rational decisionmaking process. As then-Judge Kavanaugh bluntly put it, "reasoned decisionmaking requires assessing whether a proposed action would do more good than harm." *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732 (D.C. Cir. 2016) (Kavanaugh, J., dissenting); *see also id.* at

733 (collecting authorities). A policy pursued because it might "ameliorate U.S. unemployment in some measure" (Gov't Br. 38), without *any* consideration of the enormous resulting upheaval and costs to economic security and prosperity, cannot survive under any standard of review.

As the district court correctly concluded, Plaintiffs "are likely to prevail on the merits … of their claim that … the finding set out in the text of the Proclamation is insufficient as a matter of law, it does not comport with actual facts, and [] it does not address the alleged problem it purports to address." ER 21. The Court should uphold the preliminary injunction for this independent reason, as well.

3. The nondelegation doctrine requires a reading of Section 212(f) that does not confer unbridled authority.

a. These limitations on the scope of Section 212(f)—that the President cannot use it to rewrite the INA, nor to issue an unreasoned decision, especially in the domestic policymaking context—render the statute a lawful delegation of authority from Congress to the President.

It is a basic principle that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998); *see also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Institute*, 448 U.S. 607, 646 (1980) ("If the Government was correct [about the scope of a provision], the statute would make such a sweeping delegation of

legislative power that it might be unconstitutional. … A construction of the statute that avoids this kind of open-ended grant should certainly be favored.") (quotation marks omitted).

If this Court concludes that we (and the district court) are wrong about the scope of the President's power under Section 212(f)—that is, if the statute actually *does* empower the President to simply delete entire sections of the INA with the stroke of a pen, and to act based on findings that do not reasonably support the proposed action—then the Court would have to confront the serious constitutional question whether Section 212(f) amounts to an unconstitutional delegation of power to the executive branch. *See* ER 13.

"The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government." *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality op. of Kagan, J.). As the law now stands, "a statutory delegation is constitutional as long as Congress 'lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.'" *Id.* at 2123 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)) (alterations incorporated); *see also id.* at 2129 ("[I]n a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of his authority'") (quoting

Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)) (alteration incorporated).

If, contrary to our position, the President can invoke Section 212(f) to overturn duly enacted statutes, and do so absent a rational justification, then nothing in the statute supplies a limit to executive authority. Under that reading of Section 212(f), Congress has neither "made clear" any "'general policy' [the President] must pursue" nor set any "boundaries" on his "authority" (*Gundy*, 139 S. Ct. at 2129 (quoting *Am. Power & Light*, 329 U.S. at 105))—or, in other words, Congress would not have set out an "intelligible principle" to which the President "is directed to conform" (*id.* at 2123 (quoting *Mistretta*, 488 U.S. at 372)). If Section 212(f) authority is limitless, "[t]his is delegation running riot." *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

b. Rather than argue that its reading does provide Section 212(f) with an "intelligible principle," the government makes the sweeping assertion that "the present case does not implicate the nondelegation doctrine" *at all*, because the President supposedly enjoys "inherent executive authority to exclude foreign nationals," rendering congressionally delegated authority redundant. Gov't Br. 31-32 (citing *Curtiss-Wright*, 299 U.S. at 320-322, and *Knauff*, 338 U.S. at 541-542). Both assertions are wrong.

This Court has already rejected the government's broad reading of *Knauff* and *Curtiss-Wright*: "We conclude that the President lacks independent constitutional authority to issue the Proclamation, as control over the entry of aliens is a power within the exclusive province of Congress." *Hawaii II*, 878 F.3d at 697; *see also id.* at 698 ("While the Supreme Court's earlier jurisprudence contained some ambiguities on the division of power between Congress and the Executive on immigration, the Court has more recently repeatedly recognized congressional control over immigration policies.") (collecting cases).

Far from overruling this holding in *Hawaii III*, the Supreme Court engaged in painstaking analysis of whether the President's action was in fact authorized by Section 212(f) (*Hawaii III*, 138 S. Ct. at 2407-2415)—all of which would have been unnecessary if, as Justice Thomas alone would have held, the President holds exclusion power independent of congressional authorization (*id.* at 2424 (Thomas, J., concurring) (citing *Knauff*)). This Court's uncontradicted conclusion about the scope of the President's inherent power thus remains the law of the Circuit. *See* note 3, *supra*.

This holding is buttressed by repeated statements from the Supreme Court, emphasizing that the President's role in immigration is to implement the policies that *Congress* has established through statute—not to be a law unto himself. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) ("[T]hat the for-

mulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."); *Chadha*, 462 U.S. at 940 ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question."); *Fiallo*, 430 U.S. at 792 ("This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."). In short, the President lacks independent power to legislate general rules of exclusion in the first instance.

Even if *Knauff* were as broad as the government claims, it still does not authorize *this* Proclamation, which *contradicts* the congressional policy judgments embedded in the INA. *See* pages 19-33, *supra*. As we said, there is a critical difference between a presidential action that is either authorized by, or at least compatible with, congressional enactments, on the one hand; and "measures incompatible with the expressed or implied will of Congress," on the other. *Youngstown.*, 343 U.S. at 635-638 (Jackson, J., concurring).[14] When the President's actions fall into this latter category, "his power is at its lowest ebb" (*id.* at 637), because "[c]ourts can sustain exclusive Presidential control

[14] *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme [from *Youngstown*] provides the accepted framework for evaluating executive action in this area."); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (similar).

in such a case only by disabling the Congress from acting upon the subject" (*id.* at 637-638).

Indeed, Justice Jackson's *Youngstown* opinion explicitly rejected the *Curtiss-Wright* line of cases—of which *Knauff* is a part[15]—as authority for a presidential power to override statutes in the area of foreign affairs. The *Curtiss-Wright* case, Justice Jackson explained, "intimated that the President might act in external affairs *without* congressional authority, but not that he might act *contrary* to an Act of Congress." *Youngstown*, 343 U.S. at 635 n.2 (Jackson, J., concurring) (emphases added). That is, the foreign affairs context is no exception to the fundamental principle that the President has no constitutional power to simply set aside statutes as he sees fit. *See*, *e.g.*, *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 525 (1838) ("[V]esting in the President a dispensing power"—that is, "clothing the President with a power to control the legislation of Congress"—"has no countenance for its support in any part of the constitution.").

Knauff therefore provides no authority for the government's claim of inherent presidential power to enact the Proclamation at issue here, which simply sets aside duly enacted sections of the INA. *See* pages 19-34, *supra*. For the same reasons, it fails to support the government's claim that foreign-

[15] *Knauff*, 338 U.S. at 542, cited *Curtiss-Wright* for the assertion that "[t]he exclusion of aliens … is inherent in the executive power to control the foreign affairs of the nation."

affairs statutes are immune from nondelegation challenge: Whatever the continued relevance of *Knauff*'s statements on this point generally,[16] it is clear that *no* act of Congress may constitutionally "give[] the President the unilateral power to change the text of duly enacted statutes." *Clinton v. City of New York*, 524 U.S. 417, 447 (1998); *see also id.* at 465 (Scalia, J., dissenting) (agreeing that "the doctrine of unconstitutional delegation . . . may [impose] much more severe" "limits" upon statutes that purport to authorize the Executive to undo what Congress has done than upon run-of-the-mill delegations of power to interstitially "augment[]" existing statutes).

But that is just what Section 212(f) *must* do, if it is to provide any support for the Proclamation here. The district court appropriately identified limits on the Section 212(f) power that preserve the statute's constitutionality.

II. THE DISTRICT COURT CORRECTLY EVALUATED THE REMAINING INJUNCTION FACTORS.

The district court did not abuse its discretion in concluding that the remaining injunction factors—irreparable harm, the balance of the equities, and the public interest—weigh in favor of relief here. As noted above, this Court reviews the district court's conclusions on these factors for abuse of dis-

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

cretion only. *See, e.g.*, *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1510 (9th Cir. 1994) ("The district court's finding on the likelihood of irreparable harm is reviewed for abuse of discretion."); *Padilla v. ICE*, 953 F.3d 1134, 1148 (9th Cir. 2020) ("[W]e conclude that the district court did not abuse its discretion in determining that the balance of the equities and public interest favors plaintiffs.").

a. Drawing on reams of record evidence submitted by no less than seven of Plaintiffs' individual business members, the district court concluded that Plaintiffs' and their members' "businesses have and will likely continue to suffer harm as a result of the limitation on their ability to hire and retain qualified individuals from abroad," including "disruption of business operations, interference with existing employees, the closing of open positions, the furlough or laying off of employees, substantial pay cuts, threatened loss of prospective customers, shutting down of entire programs, inability to make capital investments, and the likelihood that some businesses or cultural programs will have to cease operations altogether." ER 22-23 (citing nine declarations in the record at ER 892-957). The government does not contend—nor could it—that the district court committed clear error in its evaluation of the substantially rich factual record.

The government's primary response—that these dire harms "constitute only monetary injury that is not irreparable harm at all" (Gov't Br. 42)—is mistaken on several counts.

First, the government agrees that there is irreparable injury "'where [monetary] loss threatens the very existence of the movant's business.'" Gov't Br. 42 (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). That is *precisely* what we showed: James Bell, the Chief Operating Officer of the Alliance Abroad Group (a U.S. Chamber member), testified that "the Proclamation is what has fully shut down the entirety of Alliance Abroad's business," destroying "$7.5M in revenues." ER 900-901. Bell provided substantial detail, including specific numbers showing that the company had to fire most of its staff, that it is unable to recruit for the 2021 program year because of the Proclamation, and that the Proclamation has rendered banks unwilling to lend money to the company. ER 901-902. Bell ultimately concluded that "[t]he Proclamation is an existential threat to Alliance Abroad as a company. Unless the Proclamation is lifted within the next few months, Alliance Abroad will likely have to cease operations." ER 903. The district court specifically credited this testimony in finding a "likelihood that some businesses … will have to cease operations altogether." ER 22. The government disregards this evidence entirely.

Second, the government misstates the law more broadly. True, "monetary injuries *generally* do not constitute irreparable injury" (Gov't Br. 42 (emphasis added)), but the government's own authorities explain that the *reason* for that general rule is that in the normal case, "any loss of revenues would be compensable by a damage award should the [plaintiffs] ultimately prevail on the merits." *Colo. River Indian Tribes v. Parker*, 776 F.2d 846, 850 (9th Cir. 1985) (discussing *L.A. Mem'l Coliseum v. NFL*, 634 F.2d 1197 (9th Cir. 1980)).

By contrast, "where parties *cannot* typically recover monetary damages flowing from their injury—as is often the case in APA cases—economic harm *can* be considered irreparable." *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020) (emphasis added); *see also California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (concluding that "[e]conomic harm . . . is irreparable here because the [plaintiffs] will not be able to recover monetary damages connected to" the challenged government action). Because plaintiffs have no recourse to recover monetary damages from the government for the economic harms they would suffer in the absence of the injunction, their harms are irreparable.

Third, the government disregards the other categories of irreparable harm found by the district court, including "loss of prospective customers." ER 22. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832,

841 (9th Cir. 2001) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."). This finding is supported by a rich record. *See*, *e.g.*, ER 902-903 (lost customers for Alliance Abroad); ER 911 (lost customers for U.S. Chamber Member, Brummel Lawn & Landscape); ER 940-941, ER 946.

The government's other rejoinders similarly fail.

The district court properly rejected—as "patently false" (ER 23)—the government's argument that "[i]t was th[e] suspension of routine [visa] services" due to COVID-19 "that caused Plaintiffs' purported injuries," not the Proclamation. *See* Gov't Br. 44. As the district court explained, Plaintiffs submitted evidence that "many of the consulate offices have reopened but continue not to process the banned visas." ER 23 (citing ER 487-489; ER 490-497). The Proclamation is thus an independent source of Plaintiffs' harms.

The government's complaint (Gov't Br. 44) that we attached affidavits to the reply brief lacks merit. The issue relevant here—whether any embassies were open and processing visas notwithstanding COVID-19—was independently established in Marcie Schneider's first affidavit, rendering this issue moot. ER 949. It was also established in the *Gomez* administrative record, which we entered below. ER 189.

Additionally, we provided the additional affidavits for good reason: They addressed "developments" that "transpired" *after* Plaintiffs filed their

motion in this fast-moving preliminary-injunction litigation. ER 491 (Second Schneider Decl.). Had the government wanted an "opportunity to respond" to these new factual developments (Gov't Br. 44), it could have objected or moved to file supplemental papers—but it did not. It was therefore proper for the district court to rely on the evidence. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (error for district court to allow new evidence on a summary-judgment reply *while simultaneously* "refus[ing] to consider" opposing party's proffered response to that new evidence); *cf.* Gov't Br. 44 (citing *Provenz*); s*ee also Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1172 (9th Cir. 2018) ("[D]ispositive of Dutta's objection to the district court's consideration of the Beasley Declaration, Dutta did the one thing that a party claiming to be aggrieved by an improper reply submission may not do—he did nothing" and therefore "waived any challenge on the admissibility of [the] evidence.").[17]

Finally, the government asserts that the State Department's limited exceptions to the Proclamation's entry ban somehow mitigate Plaintiffs' harms as a matter of law (Gov't Br. 45-46)—but the district court correctly re-

[17] The government's focus on the Gustafson Declaration (*see* Gov't Br. 44-45) is a distraction. We do not cite it for harms to non-party ASSE; we cite it because, as one of the leading J-1 programs, ASSE provided substantial facts relevant generally to J-1 programs. In all events, the information overlapped with the Second Schneider Declaration. *See* ER 490-497.

jected this argument. *See* ER 23-24.[18] The district court gave three reasons for that conclusion: (1) that "applying for a national-interest exception … is expensive," causing harm even if an exception is ultimately granted; (2) that "an exception … that might be possibly available to a few applicants[] does not relieve the irreparable injury to the remainder of the Plaintiffs whose employees would not qualify"; and (3) that "the claim that a policy does not cause harm because there are exceptions to the policy is a logical fallacy." ER 23-24. The government responds only to the first of these considerations, and its response is limited to a reiteration of its legally incorrect stance that "monetary injury does not constitute irreparable harm." Gov't Br. 45-46. It does not respond at all to the central point: that the availability of limited exceptions does not mitigate the harm to the majority of applicants who will not qualify for those exceptions. *See* ER 23.

For all of these reasons, the district court did not abuse its discretion in holding that Plaintiffs have shown a likelihood of irreparable harm absent the injunction. *Nat'l Wildlife Fed'n*, 23 F.3d at 1510.

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[18] The government's objection to the Second Schneider Declaration is especially surprising in view of this argument. Plaintiffs filed their motion for a preliminary injunction on July 31, 2020. ER 564. Presumably in response, the State Department filed revised guidance on August 12, 2020, creating the National Interest Exceptions (NIEs). ER 138-150. Defendants then relied on the NIEs in opposition to our motion (ER 525-526), and again now (Gov't Br. 45). Affidavits attached to the reply brief were Plaintiffs' sole opportunity to provide factual rebuttal to these late-breaking NIEs.

b. As to the balance and the equities and the public interest—which "merge" "[w]hen the government is a party" (*Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)—the government largely parrots the preamble to the Proclamation itself. Gov't Br. 39-40. But we (and the district court) already addressed those concerns in demonstrating the inadequacy of the Proclamation's findings: Because banning high-skilled computer workers in occupations where unemployment has remained low—not to mention H-2B workers who are already prevented by statute from competing with domestic workers—does not actually address the largely low-skilled unemployment caused by COVID-19, the Proclamation does not meaningfully address the problem of COVID-related domestic unemployment. *See* pages 42-46, *supra*. For the same reason, enjoining the Proclamation does not meaningfully benefit those Americans unemployed because of COVID-19.

To the contrary, "the public interest is served by cessation of a radical change in policy that negatively affects Plaintiffs whose members comprise hundreds of thousands of American businesses of all sizes and economic sectors." ER 24. In other words, "[t]he benefits of supporting American business and predictability in their governance will inure to the public." *Id.*

Finally, we agree with the government that "the public interest favors applying federal law correctly" (Gov't Br. 41 (quoting *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011))—but that principle cuts in fa-

vor of injunctive relief here. Section 212(f) does not permit the President to simply "countermand Congress's considered policy judgments" or "expressly override particular provisions of the INA" (*Hawaii III*, 138 S. Ct. at 2410-2411), but that is exactly what the Proclamation would do. *See* pages 19-34, *supra*. Because "the public has an interest in ensuring that the statutes enacted by [their] representatives are not imperiled by executive fiat" (*East Bay*, 950 F.3d at 1281), the public interest militates strongly in favor of the injunction entered by the district court.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's entry of the preliminary injunction.

Respectfully submitted,

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