

No. 19-36020

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

JOHN DOE #1, ET AL.,

*Plaintiffs-Appellees,*

v.

DONALD J. TRUMP, in his official capacity as

President of the United States, et al.,

*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the District of Oregon  
(Hon. Michael H. Simon, Presiding)  
Case No. 3:19-cv-01743-SI

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**BRIEF OF CASA ET AL. AS AMICI CURIAE IN SUPPORT  
OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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## DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that none of the Amici Curiae is a corporation that issues stock or has a parent corporation that issues stock.

/s/ Daniel B. Asimow  
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## INTEREST OF AMICI CURIAE<sup>1</sup>

Amici are organizations who provide social services to immigrant communities and education and technical assistance to health care providers and non-profit organizations that serve immigrant communities. Each Amici directly or indirectly (through other organizations) provides information and enrollment assistance to immigrants to obtain health insurance.

**CASA** is a non-profit, membership-based immigrant rights organization based in Langley Park, Maryland. CASA has more than 100,000 members in Maryland, Virginia, Pennsylvania, the District of Columbia and elsewhere, making it the largest membership-based immigrant rights organization in the Mid-Atlantic region. CASA's mission is to create a more just society by

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<sup>1</sup> This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. All parties have consented to its filing. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person or entity – other than the Amici Curiae or its counsel – contributed funds for preparing or submitting the brief.

increasing the power of and improving the quality of life in low-income immigrant communities. To advance this mission, CASA offers social, health, job training, employment and legal services to immigrants. CASA's health services unit conducts extensive outreach to immigrants. Over the last several years, CASA has had over 40,000 interactions with immigrants about health insurance issues, including through community workshops, a health information line, one-on-one interactions with the community, and other efforts. Over the same period, CASA has helped over 22,000 immigrants enroll in health insurance programs under the Affordable Care Act, federal and state health insurance programs, and private programs.

**The Center for Constitutional Rights** (“CCR”) is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources,

including numerous landmark civil and human rights cases fighting for immigrants' rights and racial justice. CCR represents numerous immigrants and immigrant advocacy organizations, who are challenging Executive policies that aim to rewrite the nation's immigration laws in the absence of Congressional authority and in violation of the Constitution. These include lawsuits challenging the recent promulgation of the public charge rule and the proclamation at issue in this case, *Make the Road New York et al. v. Pompeo*, No. 19-cv-11633 (S.D.N.Y., filed December 19, 2019) and the proclamation and regulation altering the rules for asylum eligibility, *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018).

**Make the Road New York** ("MRNY") is a nonprofit, membership-based community organization that integrates adult and youth education, legal, health and survival services, and community and civic engagement, in a holistic approach to help low-income New Yorkers improve their lives and neighborhoods. MRNY has over 200 staff, over 24,000 members, and five offices

spread throughout New York City, Long Island, and Westchester. MRNY's legal team represents clients in a range of immigration matters including family-based petitions and consular processing and its health team assists thousands of people a year through one-on-one screenings and benefit enrollment, healthcare navigation, community outreach and campaigns to increase access to care and coverage for immigrants in New York.

**National Immigration Law Center** is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, and advanced policies that reinforce our nation's values of equality, opportunity, and justice. NILC's interest in the outcome of this case arises from its efforts to defend against the Executive's racially motivated and xenophobic immigration policies as well as its concern about the harms to communities when the Executive takes unilateral action to exclude low- and moderate-income

immigrants. NILC offers education and technical assistance to health care providers and non-profit organizations across the country that assist low- and moderate-income individuals enrolling in health insurance programs.

### **SUMMARY OF ARGUMENT**

Proclamation No. 9945 (the “Proclamation”) imposes an unprecedented barrier on persons seeking immigrant visas that will prevent hundreds of thousands of individuals from immigrating to the United States. The Proclamation requires, for the first time, a prospective immigrant to demonstrate that they “will be covered by approved health insurance” (meaning one of eight enumerated types of insurance) or they possesses “the financial resources to pay for reasonably foreseeable medical costs.” Proclamation §§ 1-2.

Amici have extensive experience promoting “health literacy” among recent immigrants, including efforts to educate these individuals about the United States health care system, the

advantages to obtaining health insurance, and assisting with the enrollment in health care insurance programs.

From this experience, Amici can attest that if the Proclamation is allowed to go into effect, its impact will be devastating. *First*, the Proclamation will create a new logistical burden on hundreds of thousands of prospective immigrants each year, many of whom are seeking to reunify with family members in the United States. The U.S. health care and health insurance systems are complicated and difficult to understand. Based on the experience of Amici, prospective immigrants applying from abroad will have tremendous difficulty navigating the system to procure “approved health insurance.” Accordingly, the Proclamation will affect immigrants seeking to reunify with family members in every jurisdiction across the country, and should be enjoined on a nationwide basis.

*Second*, the Proclamation is drafted to unnecessarily and unreasonably burden persons seeking to immigrate to the United States. For example, the Proclamation does not allow a prospective

immigrant to demonstrate they will satisfy the “approved health insurance” requirement by indicating they plan to obtain an Affordable Care Act-compliant policy, notwithstanding the fact that Congress specifically provided that newly arriving immigrants are eligible for and should receive financial assistance to be able to enroll in such plans. Of the eight forms of “approved health insurance” specified in the Proclamation, each is illusory: individuals applying from outside the United States are not eligible for the government-sponsored insurance programs listed and the private insurance policies listed are either not generally available or difficult to understand and expensive to obtain. To the extent such private insurance market does exist, such private plans are inferior to Affordable Care Act-compliant plans, in that they do not provide comprehensive coverage and exclude pre-existing condition. Imposing such burdens on prospective immigrants is irrational in light of the eligibility of such individuals to enroll in Affordable Care Act-compliant plans after they immigrate to the United States.

## ARGUMENT

### I. ON A NATIONWIDE BASIS, THE PROCLAMATION WILL SEVERELY CURTAIL LEGAL IMMIGRATION AND FAMILY REUNIFICATION AND WARRANTS A NATIONWIDE INJUNCTION

#### A. The Proclamation Will Curtail Legal Immigration All Over the Country in Contravention of Basic Immigration Policy Decisions Made by Congress

Amici know first-hand that allowing the Proclamation to become effective will have a devastating impact on issuance of immigrant visas, frustrating a fundamental policy objective of national immigration law by preventing hundreds of thousands of individuals each year from reuniting with family members in the United States. During fiscal year 2018, almost 450,000 people received immigrant visas for family reunification purposes.<sup>2</sup> The Migration Policy Institute has estimated that almost two-thirds of immigrant visas would not have been granted under the Proclamation.<sup>3</sup> The District Court similarly found that “the

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<sup>2</sup> U.S. Dep’t of State, Report of the Visa Office 2018, Table I.

<sup>3</sup> J. Gelatt & M. Greenberg, Migration Policy Institute, *Health Insurance Test for Green-Card Applicants Could Sharply Cut Future U.S. Legal Immigration* (Oct. 2019).



Proclamation is anticipated to affect approximately 60 percent of all immigrant visa applicants.” Dist.Ct.Dkt. 95 at 34. And the Defendant Department of State submitted a notice in the *Federal Register* estimating that the impact of policy would impact 450,500 individual immigrant visa applicants.<sup>4</sup>

This effort to burden immigrant visas is directly contrary to congressionally-mandated immigration policy to promote family reunification. In adopting the Immigration and Nationality Act of 1965 (“INA”), Congress decided to establish a comprehensive immigration system to promote family-based immigration with emphasis on reunification of spouses, parents, and children (which are subject to no caps or limits on the number of immigrants) and other family connections. 8 U.S.C. § 1151(b)(2)(A)(i). As this court has repeatedly held, the INA “was intended to keep families together.” *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th

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<sup>4</sup> See *Notice of Information Collection Under OMB Emergency Review: Immigrant Health Insurance Coverage*, 84 FR 58199 (Oct. 30, 2019).

Cir. 2005). *See also Kaliski v. District Director of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (the “purpose” of the INA “is to prevent continued separation of families”).

As the District Court also found, the Proclamation also nullifies the INA’s clear provision for assessing whether a potential immigrant should be inadmissible based on financial burden. In adopting the “public charge” provision, 8 U.S.C. § 1182(a)(4), Congress specified that any financial burden determination must consider at least five factors, including “at a minimum” the prospective immigrants’ “age; health; family status; assets, resources and financial status’ [and] education and skills.” Dist.Ct.Dkt. 95 at 6. As this court has noted, “if anything has been consistent, it is the idea that a totality-of-the-circumstances test governs public charge determinations.” *City & Cty. Of San Francisco v. U.S. Citizenship & Immigration Services*, 944 F.3d 773, 796 (9th Cir. 2019). The Proclamation attempts to supplant this test with a single question of whether the individual “will be covered by approved health insurance” or “possess the financial

resources to pay for reasonably foreseeable medical costs.”

Proclamation No. 9945, 84 FR 53991 (Oct. 9, 2019) at § 1(a) & (b).

The District Court correctly found the Proclamation contravenes the INA. Dist.Ct.Dkt. 95 at 33.

**B. The National Scope of the Proclamation Will Affect Immigrant Families All Over the United States and Warrants a National Injunction**

The nationwide injunction ordered by the District Court is necessary and appropriate because the impacts of the Proclamation will be felt nationally, and because the Proclamation is a component of a comprehensive and unified immigration control system. Limiting the scope of the injunction only to the named plaintiffs would have the bizarre consequence of creating a fragmented visa program where different rules apply based on geography. Such a result, in addition to being ungovernable on a practical basis, is inconsistent with longstanding authority regarding the need for a single, unified and consistent immigration system.

As the District Court noted, “[T]he scope of [a] remedy is determined by the nature and extent of the . . . violation.” Dist.Ct.Dkt. 95 at 43 (quoting *Milliken v. Bradley*, 433 U.S. 267, 270 (1977)). “[T]he scope of injunctive relief is dictated by the extent of the violation established . . . .” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). There is an “uncontroverted line of precedent” in the Ninth Circuit upholding the power of a district court to issue nationwide injunctions where the circumstances warrant. *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018). Indeed, it is well-established that an injunction “may extend ‘benefit or protection’ to nonparties ‘if such breadth is necessary to give prevailing parties the relief to which they are entitled.’” *Id.* at 779 (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987)).

Injunctions providing nationwide relief are especially important in immigration-related matters, where there is a national need for consistent and uniform policy. *Regents of the Univ. of California v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476,

511 (9th Cir. 2018) (“A final principle is also relevant: the need for uniformity in immigration policy.”). As the Fifth Circuit has observed, “the Constitution requires ‘an *uniform* Rule of Naturalization.’” *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015) (citing U.S. Const. art I, § 8, cl. 4) (upholding nationwide injunction of DAPA program). Congress has asserted that “the immigration laws of the United States should be enforced vigorously and *uniformly*.” *Id.* at 187-88 (citing the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 1151(1), 100 Stat 3359, 3384 (emphasis added)). The Supreme Court has described immigration control as “a comprehensive and unified system.” *Arizona v. United States*, 567 U.S. 387, 401 (2012).

These broad principles of immigration policy apply with equal force to the specific impacts of the Proclamation. Providing injunctive relief to the named plaintiffs here, and no one else, would mean that the fate of prospective visa applicants would turn on the geographic area where they intend to reside or to which they seek entry, rather than to the merits of their case.

Nationwide injunctions are also appropriate where the impacts of the challenged policy fall throughout the country, and where the rights of plaintiffs are affected in jurisdictions throughout the nation. *See Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992) (upholding nationwide injunction against tenant evictions in public housing due to national scope of eviction issue). *See also Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (upholding a nationwide injunction where plaintiffs reside throughout the country in order to provide “complete relief to the plaintiffs”) (citing *Califano v. Yamasaki*, 422 U.S. 682, 702 (1979))<sup>5</sup>.

Here, immigrant visa seekers and their sponsors throughout the nation will be directly impacted by the Proclamation. As

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<sup>5</sup> Amici are aware that the Supreme Court recently stayed a nationwide injunction applied to the Administration’s “public charge” regulation. *See Dep’t of Homeland Sec. v. New York*, 589 U.S. — (2020) (Gorsuch, J., concurring). Justice Gorsuch joined by Justice Thomas, opined that nationwide injunctions are overused by district courts. The remaining Justices did not offer a reason for granting the stay, so there is no reason to conclude that this position has majority support on the Court.

discussed above, during fiscal year 2018, almost 450,000 people received immigrant visas for family reunification purposes, and these individuals settled in every state in the country. According to the Migration Policy Institute, the Proclamation would have barred as many as 65% of applicants for immigrant visas.

Moreover, the Proclamation will further impact organizations like Amici that provide social services to and advocate on behalf of immigrants and immigrant communities. Amici have members and/or have assisted with enrollments in many states and in any given year reach out to tens of thousands of individuals, to provide social services, to provide counselling regarding accessing social services or to advocate on behalf of these individuals. An injunction limited to the named plaintiffs would create uncertainty and confusion within the broad immigrant community, and would in effect create a two-tiered framework of immigration law, where the Proclamation applied in some jurisdictions but not in others, an outcome inconsistent with the

broad Constitutional and statutory mandate for consistent application of immigration laws.

**II. THE PROCLAMATION UNDERMINES CONGRESS' LONGSTANDING GOAL OF EXTENDING QUALITY HEALTH CARE INSURANCE TO LAWFUL IMMIGRANTS**

**A. The Proclamation Fails to Recognize Health Literacy as Necessary to Navigate the U.S. Insurance Market**

Amici and organizations assisted by Amici have worked with tens of thousands of immigrants to procure health insurance. To this end, some Amici like CASA and Make the Road New York have expended tremendous resources doing outreach to and education of immigrants on the availability and advantages of health insurance, and have assisted immigrants in enrolling in health care insurance programs. For the reasons described below, due to the lack of familiarity of many immigrants with the U.S. health insurance system, much of this outreach needs to be done on one-on-one. Other Amici like NILC have provided education and training to health care providers and non-profit organizations that



assist low- and moderate-income immigrants enrolling in health insurance.

From this experience, Amici know that it requires appreciable health literacy to understand and distinguish between health insurance products. And from working directly with immigrants and organizations that work with immigrants, Amici know that the Proclamation is likely to impose extraordinary burdens on immigrant visa applicants seeking to comprehend and navigate the U.S. insurance market. This is true for at least three reasons.

1. Many key concepts that a consumer must understand in order to navigate our health care system and obtain a health insurance policy are complex. Unlike many countries, the United States provides care through a diverse mosaic of providers and insurers, including hospitals, private health centers, doctor's offices, community clinics and urgent care centers. And basic terms in U.S. health insurance policies are difficult for anyone, and especially newly-arriving immigrants, to understand. For

example, a “deductible” is by itself a complicated concept, and rendered even more complex as there are both individual and household deductibles. Similarly, the definitions of “premiums” and “copays,” the differences between the two, and the interrelationship of premiums, copays and deductibles, are difficult concepts even for educated English-speakers. A formulary that only covers certain medications is an unusual aspect of the U.S. insurance market, and is difficult to understand. For individuals coming from markets without private insurance, “in-network” and “out-of-network” are complex and confusing, including separate deductible requirements for “in-network” and “out-of-network” providers.

And for almost all immigrants, “exclusions” including “pre-existing conditions” and that an insurer can disallow expenses it deems not “medically necessary” are difficult concepts. If you are sick, why wouldn’t your health costs be covered? If you have been sick for some time, that is all the more reason you should have access to health care, so why wouldn’t the costs be covered? If you

did not know you were sick but the insurance company decides the condition must have been present before you got insurance, why wouldn't your costs be covered? If your physician prescribes a treatment, how can the insurance company conclude it is not necessary and deny payment? If you have insurance, why would anything be excluded?

These concepts are even harder to understand because the definitions of these terms can vary from carrier to carrier and policy to policy, and different carriers have different practices and protocols to implement each concepts. For example, carriers have different practices for how a subscriber pays down a deductible: some insurance carriers allow the deductible to be satisfied in increments over time, while others require full satisfaction of the deductible before the policy will cover other expenses; plans compliant with the Affordable Care Act use a hybrid of these concepts by requiring that essential health benefits be offered at no additional out-of-pocket cost, without regard to whether the deductible has been satisfied.

Amici have trained staff and volunteers to assist immigrants understand these concepts and to navigate the health insurance market. Even after engaging in this work for years, Amici's staff are constantly learning more about health insurance and how it works. But the Proclamation poses further challenges in that many of its terms and concepts are not defined. For example, what is an "unsubsidized health plan" within the meaning of Proclamation § 1(b)(ii)? In some jurisdictions, persons applying under the Affordable Care Act may qualify for a benefit to help them afford insurance. The out-of-pocket cost of the plan is not subsidized *per se* (i.e., charges lower than standard rate), but would an otherwise qualifying individual be waiving their right to the benefit? How would they know that before they immigrate, well before any taxes are computed? And is it reasonable to expect that someone applying from abroad could navigate these issues to comply with the Proclamation? Certainly not.

2. These complex issues are even more confusing for individuals who are emigrating from countries with very different

health care systems than ours. Many immigrants come from countries where there is no health insurance. Rather public hospitals or community health clinics serve as the country's safety net with no expectation that the individual will pay for medical care. Other immigrants come from countries or regions within countries where there is limited access to health care, and market conditions do not support features that are integral to the U.S. private health insurance market, such as competition between providers and networks of coverage. For individuals applying from such countries, the concept of private insurance is complex and confusing.

Other immigrants come from countries where there is no private insurance, or if there is private insurance, it is parallel to a public option. For example, Mexico and Guatemala have a Social Service System that is a pension and health system that many have access to. For individuals applying from such countries, basic insurance concepts in the United States described above

(networks, deductibles, formularies, coverage or prescription exclusions, etc.) make no sense at all.

3. On top of the inherent complexity of these insurance concepts, many immigrants also face language barriers. Many insurance carriers do not provide any (and certainly not adequate) translation services; this presents significant challenges for non-English speaking immigrants in the United States, and would pose almost insurmountable challenges to individuals applying from abroad. Notwithstanding regulations dictating that health insurance carriers provide language access, compliance and quality are inadequate. For example, in the experience of Amici who have assisted immigrants with the insurance enrollment process, while the voicemail carriers for certain carriers purport to offer an option to “press 2 for Spanish,” for most carriers such calls are routed to an English speaking operator. And almost no carriers purport to provide translation services for languages other than Spanish. As noted above, health insurance concepts are akin to a different language even for individuals who speak English;

combined with the lack of translation services, it is extraordinarily difficult for a non-English speaker applying from overseas to navigate and successfully enroll in a health insurance program.

The difficulty translating inherently complicated insurance concepts into foreign languages cannot be understated. From their first-hand experience, Amici know that it can be extraordinarily difficult explaining some of these concepts. For example, to convey the meaning of “in-network,” Amici must explain that the insurer has contracts with different types of providers (physicians, hospitals, clinics, labs and other diagnostic centers, pharmacies), and that the immigrant using such an “in-network” service, must pay the co-pay (and potentially pay down their deductible), but if they select a provider that is not on the approved list, they risk paying significantly more.

\* \* \*

Amici have all invested significant resources in helping immigrants navigate this complex maze to find quality insurance products. So has Congress, which has expressly and deliberately

set out what insurance plans need to cover (e.g., minimum essential benefits) to qualify on an exchange as an Affordable Care Act-compliant plan, and has mandated that newly arriving immigrants are eligible for and should receive financial assistance to be able to enroll in comprehensive Affordable Care Act plans. But immigrants in the United States have tremendous difficulty navigating these issues without considerable assistance and guidance from social service organizations, such as Amici. It is inconceivable that an immigrant working overseas to obtain a visa would be able to navigate these issues on their own.

The difficulty someone overseas would have navigating the system is amply illustrated by the two websites the Defendants reference in their brief as examples of the “growing private marketplace for plans to meet the Proclamation’s requirements.” Doc. 23 at 7. The insurance options described in these websites appear in many instances not to meet the requirements of the Proclamation, and are in any case incomprehensible even to a reasonably well-informed immigrant. For example, the first



website cited—[www.visitorscoverage.com](http://www.visitorscoverage.com)—directed visitors to three plans on January 30, 2020. Of these three plans:

- One (Inbound Immigrant) is a short term limited duration plans that is available from “5 days to 364 days.”<sup>6</sup> This policy is not sold in a number of jurisdictions with significant immigrant populations, including Maryland and New York (where many of Amici’s members live).
- The other two policies (Patriot America Plus and Diplomat America) are travel insurance intended for individuals visiting the United States, not immigrants.<sup>7</sup> As the Diplomat America policy brochure states, it is “designed to cover Non-U.S. Citizens and Non-U.S. Residents

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<sup>6</sup> INBOUND IMMIGRANT INSURANCE, <https://www.visitorscoverage.com/inbound-immigrant-insurance/> (last visited Feb. 4, 2020).

<sup>7</sup> The Patriot America Plus summary states that it provides coverage “to individuals and families travelling outside their home country.” PATRIOT AMERICA PLUS INSURANCE, <https://www.visitorscoverage.com/patriot-america-plus-insurance/> (last visited Feb. 4, 2020).

travelling to the United States. . . Applicant must reside outside of the United States.”<sup>8</sup>

- All of the policies exclude “pre-existing conditions” and are indemnity policies that are capped at pre-set limits. And they indicate on their face that they only cover “medically necessary” coverage or services, meaning that they do not provide comprehensive coverage. Accordingly, these policies appear not to satisfy the Proclamation requirement that the insurance plan “provide adequate coverage for medical care.”

Similarly, of the three plans offered on January 30, 2020 on the second website—[www.insbuy.com](http://www.insbuy.com):<sup>9</sup>

- One of the policies (National General STM) is not available in 18 states (including states with significant immigrant

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<sup>8</sup> DIPLOMAT AMERICA POLICY BROCHURE, <https://www.visitorscoverage.com/brochure/diplomat-america-insurance-brochure.pdf> (last visited Feb. 4, 2020).

<sup>9</sup> Listed at <https://www.insubuy.com/new-immigrants-health-insurance/> (last checked Feb. 4, 2020).

populations such as California, Colorado, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, or Washington). Of the 32 states where the policy is sold, the policy is not available for the minimum period of time required under the Proclamation in 15 (including states with significant immigrant populations such as Illinois, Maryland, North Carolina, Oregon, and Virginia).<sup>10</sup> Notably, the policy is not sold in a number of jurisdictions with significant immigrant populations.

- The other two policies (The Bridge Plan and International Major Medical) are short term limited duration plans that are not available for the minimum period of time required under the Proclamation.<sup>11</sup>

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<sup>10</sup> NATIONAL GENERAL STM POLICY BROCHURE, <https://www.insubuy.com/national-general/short-term-medical-insurance/> (last visited Feb. 4, 2020).

<sup>11</sup> The Bridge Plan states that its policy is available for 1 month to 364 days. BRIDGE PLAN INSURANCE, <https://www.insubuy.com/bridge-plan/health-insurance/> (last visited Feb. 4, 2020). The International Major Medical plan states that is available for periods of “2 days to 6 months.” INTERNATIONAL MAJOR MEDICAL,

- The Bridge Plan indicates that it is limited to “persons aged 60-95 who are awaiting acceptance as a participant in the U.S. Medicare System.”
- All of the policies exclude “pre-existing conditions” and are indemnity policies that are capped at pre-set limits. Accordingly, these policies appear not to satisfy the Proclamation requirement that the insurance plan “provide adequate coverage for medical care.”

These policies include terms like “deductibles,” “PPO,” “Enhanced PPO,” “Coinsurance,” “coverage period maximum.” And they are full of impenetrable boilerplate. For example, the Inbound Immigrant brochure includes over 40 separate “exclusions and limitations.”<sup>12</sup> Imagine what it would be like to be someone living in El Salvador seeking a family reunification visa and being

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<https://www.insubuy.com/international-major-medical/travel-insurance/> (last visited Feb. 4, 2020).

<sup>12</sup> INBOUND IMMIGRANT INSURANCE BROCHURE at pp. 3-4, <https://www.visitorscoverage.com/brochure/inbound-immigrant-insurance-brochure.pdf> (last visited Feb. 4, 2020).

directed to understand this language from the Diplomat America plan:

### **Covered Expenses**

Only such Expenses that are specifically enumerated in the following list of charges that are incurred for medical care and supplies which are: (a) necessary and customary; (b) prescribed by a Physician for the therapeutic treatment of a disablement; (c) are not excluded under the policy; (d) are not more than the Usual and Customary charges (as determined by the Company); and (e) are incurred within 180 days from the date of the Disablement will be considered.

1) Expenses made by a Hospital for room and board, floor nursing and other services, including Expenses for professional services, except personal services of a non-medical nature, provided, however, that Expenses do not exceed the Hospital's average charge for semi-private room and board accommodation. 2) Charges made for Intensive Care or Coronary Care charges and nursing services. 3) Expenses made for diagnosis, Treatment and surgery by a Physician. 4) Charges made for an operating room. 5) Charges made for Outpatient Treatment, same as any other Treatment covered on an Inpatient basis. This includes ambulatory surgical centers, Physician's Outpatient visits/examinations, clinic care, and surgical opinion consultations. 6) Expenses made for administration of anesthetics. 7) Expenses for medication, x-ray services, laboratory tests and services, the use of radium and

radioactive isotopes, oxygen, blood transfusions, iron lungs, and medical Treatment. 8) Expenses for physiotherapy, if recommended by a Physician, for the Treatment of a specific Disablement and administered by a licensed physiotherapist; With regards to physiotherapy care, eligible charges up to \$50.00 per visit, with a maximum of 10 visits. 9) Dressings, drugs, and medicines that can only be obtained upon written prescription of a Physician. 10) Hotel room charge, when the insured, otherwise necessarily confined in a Hospital, shall be under the care of a duly qualified Physician in a hotel room owing to the unavailability of a Hospital room by reason of capacity or distance or to any other circumstances beyond the control of the insured;

The charges enumerated above shall in no event include any amount in excess of the Usual and Customary charges (as determined by the Company). To determine if Expenses are Usual and Customary, the Company will consider the following: the medical care or supplies usually given and the fees usually accepted for like cases in the area. "Area" means a region large enough to get a cross section of providers or medical care or supplies. All Expenses are deemed to be incurred on the date such service is received.<sup>13</sup>

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<sup>13</sup> DIPLOMAT AMERICA INSURANCE BROCHURE at p. 3, <https://www.visitorscoverage.com/brochure/diplomat-america-insurance-brochure.pdf> (last visited Feb. 4, 2020).

Even a native English-speaker who has lived their whole life in the U.S. healthcare system would find this verbiage incomprehensible. That is why the work Amici do is so intensive and so critical to assisting immigrants find appropriate insurance.

**B. The Proclamation Excludes Readily Available Sources of Health Insurance While Requiring Illusory or Inferior Insurance**

By design and intent, Congress has decided again and again that legal immigrants should be part of the national health care system. For example:

- In 1965, Congress decided that legal immigrants should pay Medicare taxes and are eligible to receive Medicare (after meeting a five-year residency requirement).
- In 2009, Congress decided that legal immigrants should be eligible to participate in CHIP (CHIP Reauthorization Act of 2009 (“CHIPRA”)). Public Law 111-3 § 214. Under CHIPRA, Congress affirmatively provided federal dollars for states to fund Medicaid coverage for newly-arrived immigrant children up to

age 21 and pregnant women during their first five years in the United States. *See id.*; 42 U.S.C. § 1396b(v)(4)(A).

- In 2010, Congress decided that legal immigrants should be eligible to participate in the Affordable Care Act (Congress expressly provided that tax credits for ACA exchange plans “shall be allowed” for applicable taxpayers, 26 U.S.C. § 36B(a), and by “Special Rule” mandated tax credits for “alien[s] [who are] lawfully present in the United States” with household incomes up to 400 percent of the federal poverty line. 26 U.S.C. § 36B(c)(1)(B)).

Amici (and organizations assisted by Amici) have assisted tens of thousands of immigrants obtain health insurance under these programs. It is through, in considerable part, the efforts of Amici and organizations like them that the rate of health insurance for immigrants is comparable/higher than persons born in the United States.



And these programs are all high-quality programs. Medicare is the gold standard for health insurance, and policies sold under the Affordable Care Act are required to cover ten essential medical areas. But the Proclamation does not recognize that immigrants may become eligible for these programs after immigrating to the United States, and does not allow the availability of these programs to be considered in evaluating an immigration visa. If the Administration's goal is really to reduce the amount of uncovered medical services from legal immigrants, what possible rationale could they have not to allow consideration of the fact that an immigrant would be eligible for adequate health insurance under the Affordable Care Act after they immigrate? *Cf. Dep't of Commerce v. New York*, 588 U.S. —, 139 S. Ct. 2551, 2575 (2019) (courts "cannot ignore the disconnect between the decision made and the explanation given.").

Rather, the Administration has required persons seeking immigrant visas to establish that they have novel, non-comprehensive kinds of insurance. Indeed, at page 7 of its brief,

the Government claims that there is “already a growing private marketplace for plans to meet the Proclamation’s requirements,” citing two websites. Doc. 23 at 7. As the District Court noted, many of the so-called “approved health insurance” are illusory, in that individuals applying from outside the United States would not be eligible, no such insurance products exist, or the products (as described) are contrary to the law of many jurisdictions. Dist.Ct.Dkt. 95 at 9-11. And to the extent such insurance products exist and are being offered, they contain important exclusions (for pre-existing conditions, failure to cover the ACA ten minimum coverage requirements) that would result in immigrants being underinsured, directly contrary to the purported rationale of the Proclamation.

From Amici’s extensive experience assisting immigrants enroll in health insurance, Amici conclude that most of the Proclamation’s “approved health insurance” plans are—for legal or practical reasons—unavailable to immigrant visa applicants:

- “an employer-sponsored plan.” Proclamation § 1(b)(i).  
As the District Court noted, very few immigrant visa applicants have secured employment prior to immigration, and employers are permitted to and most have waiting periods of employment before coverage begins. 42 U.S.C. § 300gg-7.
- “an unsubsidized health plan offered in the individual market within a State.” Proclamation § 1(b)(ii). This is a reference to plans available through the Affordable Care Act exchanges. These plans are illusory because (i) in order to enroll through the Affordable Care Act, an individual has to already reside in the United States, 42 U.S.C. § 18032(f)(1), and (ii) plans available through the exchanges are subsidized, both at the federal level and by many states as well.
- “a short-term limited duration health policy effective for a minimum of 364 days.” Proclamation § 1(b)(iii).  
Such plans do not appear to be available in many

jurisdictions, or for periods that satisfy the “minimum of 364 days.” Moreover, these policies are banned in many jurisdictions, because these plans are inferior to comprehensive coverage in that they typically exclude preexisting health conditions and contain strict coverage caps.

- “a catastrophic plan.” Proclamation § 1(b)(iv). Catastrophic plans require residency in the United States and are only available to individuals under the age of 30. *See* 42 U.S.C. § 18022(e)(2)(A); 45 C.F.R. § 155.305(a)(1), (a)(3)(i) & (h). These policies are also inferior to comprehensive coverage, in that they do not cover the ten “essential health benefits” required by the ACA. *See* 42 U.S.C. § 18022(b) & (e).
- “a family member’s plan.” Proclamation § 1(b)(v). Family coverage is only available to spouses and dependent children of the covered individual who are under the age of 27. 42 U.S.C. § 300gg-14.

- “the TRICARE program.” Proclamation § 1(b)(vi). Coverage under Tricare is only available to members of the military. 10 U.S.C. § 1071 *et seq.* In order to join the United States military, an individual has to be a citizen or a lawful permanent resident.<sup>14</sup>
- “a visitor health insurance plan that provides adequate coverage for medical care for a minimum of 364 days.” Proclamation § 1(b)(vii). These plans are intended for visitors and not intended for immigrants, and do not provide for this length of coverage. *e.g.*, The Diplomat America and Patriot America Plus policies advertised on the websites identified by Defendants are clear that they are limited to travelers to the United States, not individuals who intend to immigrate. Moreover, these plans are typically limited in coverage, falling far short of the “essential health” and other requirements of the

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<sup>14</sup> See ELIGIBILITY CRITERIA, [www.usa.gov/join-military](http://www.usa.gov/join-military) (last visited Feb. 4, 2020).

Affordable Care Act, and accordingly do not provide “adequate coverage” as defined in the Proclamation.

- “a medical plan under the Medicare program.” Proclamation § 1(b)(viii). Individuals are typically not eligible for Medicare until they have reached the age of 65 and have resided in the United States for five years and they or their spouse have paid into the Medicare system for 40 quarters. *See* 42 U.S.C. §§ 1395o, 1395i-2(a), 1395w-21(a)(3), and 1395w-101(a)(3)(A).

Moreover, to the extent the Proclamation has, as the Government claims, created a new private marketplace for policies that would satisfy the Proclamation, the plans available are not comprehensive and provide inferior insurance to products available through Affordable Care Act exchanges. As discussed above, the policies promoted by the websites the Government points to do not meet Affordable Care Act standards, meaning that they are not comprehensive, do not offer the required essential health benefits, and can exclude preexisting coverage.

## CONCLUSION

To the extent that historically there was a problem with uncompensated care, Congress addressed it ten years ago when it directed that immigrants be eligible to participate in the Affordable Care Act and be allowed to obtain tax credits. The entire premise of the Proclamation—that persons coming into the United States on immigrant visas to reunite with their families knowingly neglect to obtain appropriate insurance and thereby impose a substantial burden on the health care system—is a poorly-disguised, xenophobic, nativist, anti-family policy in search of a problem.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it is 6,156 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface and the type-style requirements of Federal Rule of Appellate Procedure 32 because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

*/s/ Daniel B. Asimow*

Daniel B. Asimow

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 6, 2020 for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

*/s/ Daniel B. Asimow*

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