No. 19-36020

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, *et al.*,

Plaintiffs-Appellees,

v.

DONALD TRUMP, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon

REPLY BRIEF FOR APPELLANTS

JOSEPH H. HUNT
Assistant Attorney General
AUGUST E. FLENTJE
Special Counsel
WILLIAM C. PEACHEY
Director
BRIAN C. WARD
Senior Litigation Counsel
U.S. Department of Justice, Civil Division
Office of Immigration Litigation,
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
COURTNEY E. MORAN
Trial Attorney

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INTRODUCTION

This Court should vacate the district court's universal preliminary injunction preventing the Presidential Proclamation on the Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System from taking effect. The Proclamation is a lawful exercise of the President's authority under 8 U.S.C. § 1182(f), § 1185(a)(1), and the Executive's inherent authority to conduct foreign affairs.

The district court enjoined the Proclamation after concluding that Plaintiffs were likely to succeed on the merits of their claims that the Proclamation violates the nondelegation doctrine and conflicts with other provisions of the INA. But Plaintiffs did not raise a nondelegation claim in the district court, and do not defend that aspect of the district court's ruling on appeal. This is understandable because there is binding Supreme Court precedent rejecting the district court's nondelegation holding. And the statutory claim cannot succeed because Plaintiffs' arguments that the Proclamation overrides other statutes and that it is not a lawful exercise of the President's foreign affairs power or § 1182(f), repeat narrowing theories the Supreme Court rejected in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Moreover, statutory challenges to a decision to exclude an alien abroad, including to the denial of a visa, are not judicially reviewable. Plaintiffs' contrary arguments are based on cases that do not involve exclusion of noncitizens or on cases raising

constitutional claims Plaintiffs do not raise here. They cite no basis that would permit a court to review a statutory challenge to a Presidential proclamation suspending entry under § 1182(f) and restricting the issuance of visas to aliens abroad.

The remaining preliminary injunction factors weigh heavily in favor of overturning the injunction. The injuries Plaintiffs allege are entirely speculative, far from irreparable, and outweighed by the harm to the government and the public caused by the injunction. The injunction is also vastly overbroad and violates the principle that injunctive relief must be narrowly tailored to the alleged injury, and no broader than necessary to provide complete relief to the actual litigants before the court. Plaintiffs' response that this Court should consider hypothetical harms to nonparties beyond the scope of their proposed class would violate basic requirements of Article III. At a minimum, the injunction must be narrowed to the parties before the Court.

ARGUMENT

I. Plaintiffs are not likely to succeed on the merits of their claims.

A. Courts may not review non-constitutional challenges to the political branches' decisions to exclude aliens.

The district court's injunction is improperly based on a holding that Plaintiffs are likely to succeed on the merits of non-justiciable statutory claims. Gov't Br. 27-28. The Supreme Court has "long recognized the power to expel or

exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). With the exception of certain constitutional claims raised by United States citizens who claim a visa denial burdens their own constitutional rights, *see Kleindienst v. Mandel*, 408 U.S. 753 (1972), it is a fundamental separation-of-powers principle that the decision to exclude aliens abroad is not judicially reviewable. Gov't Br. 27-28.

Plaintiffs do not respond to this fundamental flaw in the district court's order. Instead they rely on cases that deal neither with visa adjudications nor entry of aliens from abroad and are thus inapplicable here. Pls.' Br. 21-22 (citing challenges to Medicaid reimbursement rates in *Armstrong*, control of property within the U.S. in *Dames* and *Youngstown*, and an act allowing one house of Congress to overturn Executive decisions in *Chadha*). Plaintiffs cite *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd by equally divided Court*, 484 U.S. 1 (1987), for the proposition that, although the "executive has broad discretion over the admission and exclusion of aliens," in exercising that discretion, the Executive "may not transgress constitutional limitations." Pls.' Br. 22. But this merely affirms the government's point that there are narrow circumstances where a *constitutional claim* may be justiciable, but provides no support for the proposition that the district court can hear Plaintiffs' claims, which

are not constitutionally based. The *Abourezk* court permitted review of a First Amendment claim, citing *Mandel*—which, as noted above, limited review to constitutional claims raised by U.S. citizens. 785 F.2d at 1050.

Plaintiffs next argue that *Sale* and *Hawaii* reached the merits of statutory challenges to Executive action under § 1182(f). Pls.' Br. 22. But *Hawaii* did not hold that non-constitutional claims are reviewable; it merely decided that, because all the claims in that case failed on the merits, it did not need to resolve this question. Gov't Br. 28; *see Hawaii*, 138 S. Ct. at 2407 (noting that *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993), took the same approach). Plaintiffs urge that "[t]his Court should do the same," but the only way to avoid addressing justiciability is for the Court to similarly decide it is unnecessary to reach this issue because Plaintiffs' claims are likely to fail on the merits, which would require this Court to overturn the injunction.

There is no basis to conclude that Plaintiffs' statutory challenges to visa adjudications are reviewable. Outside of the narrow exception for certain constitutional claims, because noncitizens abroad have no "claim of right" to enter the United States and exclusion is "a fundamental act of sovereignty" by the political branches, courts may not review decisions to exclude noncitizens "unless expressly authorized by law." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950). Congress has made clear that there is no cause of action

to review a visa denial, Gov't Br. 27, and the INA, which sets forth a comprehensive framework for review of removal orders, authorizes judicial review only for individuals subject to immigration enforcement *within* the United States, *see* 8 U.S.C. § 1252. The only review permitted of a visa denial abroad is limited to ensuring a facially legitimate and bona fide reason was cited for the refusal in a case where a United States citizen raises a constitutional claim. *Kerry v. Din*, 135 S. Ct. 2128, 2139-40 (2015); *Mandel*, 408 U.S. at 769-70; *Knauff*, 338 U.S. at 542-43.

None of Plaintiffs' remaining arguments avoid this conclusion. They cite *Mandel*, Pls.' Br. 23, but that decision was based on a constitutional claim. 408 U.S. at 754. They cite *Fiallo*, but acknowledge it also involved constitutional claims, which are subject to a "narrow standard of review . . . in the area of immigration." 97 S. Ct. at 1480; Pls.' Br. 24. Plaintiffs argue that the judicial review limitations in 6 U.S.C. § 236(f) apply only to a visa denial "in a particular case" and do not bar review of "broad executive immigration policies, as distinct from individual visa decisions." Pls.' Br. 23. But this misconstrues the government's § 236 argument. Section 236 governs the issuance of visas, and § 236(f) provides that: "Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer . . . to grant or deny a visa." The point is not that § 236(f) *bars* judicial review, it is that

nothing in § 236 or any other statute *authorizes* judicial review of visa decisions. Plaintiffs do not point to any statute that authorizes review. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (denial of visa "is not subject to review . . . unless Congress says otherwise"); *Allen v. Milas*, 896 F.3d 1094, 1103-08 (9th Cir. 2018). And none of the cases they cite establish that Congress has authorized review of statutory claims with respect to visa adjudications. *Emami* dealt with an APA claim and even then largely rejected APA review of the manner in which a proclamation was implemented, and *Yavari* was nothing more than a dismissal of a mandamus claim. Pls.' Br. 23.[1]

In short, Plaintiffs' claims that the President acted in excess of statutory authority and the permissible scope of § 1182(f) are statutory claims, not constitutional claims. *Dalton v. Specter*, 511 U.S. 462, 471-77 (1994) (holding that claims that a President acted in excess of statutory authority are unreviewable statutory claims, not constitutional claims, even when framed as separation-of-powers claims). Because Plaintiffs' claims are non-justiciable statutory claims, they cannot succeed on the merits, and the injunction must be overturned.

[1] Plaintiffs cannot challenge the Proclamation—a presidential action—under the APA, so an APA claim cannot be a basis for enjoining the Proclamation itself.

B. The Proclamation is a valid exercise of the President's broad authority under 8 U.S.C. § 1182(f).

Even if Plaintiffs' claims were judicially reviewable, the Proclamation is a valid exercise of the President's authority and the district court's ruling is contrary to *Hawaii*, which affirmed that authority. Plaintiffs make a range of arguments in response, Pls.' Br. 25-48, but none overcome the fact that the President has broad authority Congress granted him in § 1182(f) in addition to his inherent foreign affairs authority to regulate entry of noncitizens from abroad.

The INA – Plaintiffs first argue that the Proclamation is inconsistent with the totality-of-the-circumstances test in the "public charge" provision at 8 U.S.C. § 1182(a)(4). Pls.' Br. 26-27. They argue that the Proclamation displaces this test with "a single-factor dispositive financial burden test based on healthcare coverage." *Id*. 27. They also argue that, because healthcare coverage may be considered as part of the totality-of-the-circumstances test under the public charge provision, this test is the only way "health and financial resources" can be considered and, "to comport with the INA," these factors "cannot be an independent ground for inadmissibility." *Id*. 27-28.

These arguments fundamentally misunderstand the inadmissibility grounds in the INA. Plaintiffs urge the Court to read the public charge statute as a congressional directive that any noncitizen who is not inadmissible as a public charge under § 1182(a)(4) must be admitted to the United States. The conflict they

allege is based on the idea that the Proclamation might prevent entry of individuals who, in their view, Congress has determined must be admitted because they are not public charges. But the statutory grounds of inadmissibility are not provisions that affirmatively permit entry whenever they do not apply. *See* Gov't Br. 41-42. They are a series of grounds of *inadmissibility* that supplement each other and are all supplemented by § 1182(f). This is evident from the INA itself.

In the INA, Congress laid out a range of inadmissibility grounds, each of which is an independent bar to admission to the United States. If a noncitizen is inadmissible under any one of them, she is inadmissible regardless of whether she would be found admissible under every other provision. For example, if a noncitizen would not be a public charge but would be inadmissible based on her criminal history, *see* 8 U.S.C. § 1182(a)(2) (criminal grounds), Plaintiffs could not reasonably argue that it would be inconsistent with congressional will to find her inadmissible and deny her entry or that Congress had directed that she *must* be admitted as an individual who is not considered likely to become a public charge under § 1182(a)(4).

If Plaintiffs' argument is that, by setting out particular factors that should be considered as part of one ground of inadmissibility, such as the public charge provision, Congress indicated that a noncitizen who is not deemed a public charge cannot otherwise be found inadmissible based on any of those same factors, this

cannot be correct either. The INA again makes this clear. For example, § 1182(a)(4) lists a number of factors that consular officers must "at a minimum consider" in determining whether an individual is inadmissible including the individual's "health." 8 U.S.C. § 1182(a)(4)(B)(i)(II). However, Congress also set out a whole range of separate "Health-Related Grounds" of inadmissibility at § 1182(a)(1)(A) that also require consular officers to consider an applicant's health. *See, e.g.*, 8 U.S.C. § 1182(a)(1)(A)(iii) (barring admission of noncitizens with health conditions that might pose a threat to the "property, safety, or welfare" of individuals in the U.S.). It cannot be then, as Plaintiffs argue, that because health is a factor that is considered as part of the public charge totality-of-the-circumstances test that "health . . . cannot be an independent ground of inadmissibility." Pls.' Br. 28. Congress has said precisely the opposite.

If Plaintiffs' argument is that Congress can enact various grounds of inadmissibility related to health or financial issues, but that the President cannot by Proclamation suspend entry of individuals for additional health or financial reasons, this also cannot be correct. Congress specifically authorized the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens *any restrictions he may deem to be appropriate*." 8 U.S.C. § 1182(f) (emphasis added). Congress did not say that the President could only adopt restrictions that in no way involve considerations that

might also be relevant to the public charge analysis or some other ground of inadmissibility. Rather it said the President could impose *any* restrictions he deems necessary. As the Supreme Court said in *Hawaii*, "§ 1182(f) vests the President with 'ample power' to impose entry restrictions *in addition* to those elsewhere enumerated in the INA." 138 S. Ct. at 2408 (emphasis added); *Doe v. Trump*, 944 F.3d 1222, 1227 (9th Cir. 2019) (Bress, J. dissenting); Gov't Br. 39-40.

Courts have thus repeatedly held that a President may restrict entry by Proclamation based on grounds that are very similar to existing grounds of inadmissibility in the INA. For example, in *Abourezk* the court said that a statute that made inadmissible individuals who "seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to United States interests" could not be read to bar individuals whose mere *presence* would be prejudicial because that would render meaningless the "engage in activities" language Congress included in the statute. *Abourezk*, 785 F.2d at 1054. However, the court noted that the President's authority under § 1182(f) is not limited by "the formulation Congress adopted," and that the President could, under his "sweeping proclamation power" in § 1182(f), suspend entry on nearly identical grounds, and simply omit the "engage in activities" test. *Id*. at 1053 n.2; *see also* Gov't Br. 39-43. The Supreme Court cited this aspect of *Abourezk* with approval in *Hawaii*. 138 S. Ct. at 2408. Presidents have thus often restricted entry by

Proclamation of classes of aliens that are quite similar, but not identical to, existing grounds of inadmissibility. Gov't Br. 42. Yet no Proclamation has been struck down as inconsistent with congressional will for expanding on the existing grounds of inadmissibility.

Plaintiffs argue the Proclamation here works at "cross-purposes" with the public charge statute because it may expand the number of noncitizens who are inadmissible to the United States and departs from "congressional judgment about the holistic way" to assess some of the same health and financial criteria covered by the public charge statute. Pls.' Br. 28-29. But this is the exact same argument the plaintiffs made and the Supreme Court rejected in *Hawaii*. *See Trump v. Hawaii*, No. 17-965, Brief for Respondents at 11, 13, 16 (arguing Proclamation conflicted with congressional "judgments embodied in the INA . . . by excluding aliens based on the 'same criteria' Congress applied to determine participation in the Visa Waiver Program" "notwithstanding that Congress weighed *precisely* the same consideration in enacting the [VWP] and the INA's vetting system, and judged that it does not warrant excluding a country's nationals"); *Hawaii*, 138 S. Ct. at 2411 (rejecting argument that Court should adopt "cramped" reading of § 1182(f) by finding implicit limits on the President's authority based on other provisions of the INA). Had Congress "intended . . . to constrain the President's power to determine who may enter the country, it could easily have chosen

language directed to that end." *Hawaii*, 138 S. Ct. at 2414 (rejecting argument that inadmissibility grounds and provisions governing visas operated in the same "sphere" and implicitly limited Executive authority "because it ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA").[2]

The Proclamation does not "expressly override" the public charge statute. *Hawaii*, 138 S. Ct. at 2411. Consular officers must still apply the public charge provision independent of the requirements of the Proclamation. Gov't Br. 42-43. Because these are separate determinations, individuals who satisfy the requirements of the Proclamation may nonetheless be inadmissible as individuals who are likely to become public charges. It is possible that the Proclamation could prevent entry of individuals who would not be found likely to become public charges, but this would be a conflict only if Plaintiffs could show that the public charge statute affirmatively requires admission of anyone who satisfies its terms, which, as explained above, Plaintiffs cannot do. For similar reasons, the Proclamation does not expressly override the VAWA exception to the public charge statute. *See* Pls.' Br. 29. That provision still applies as part of the public

[2] Plaintiffs repeatedly cite *Arizona v. United States*, 567 U.S. 387 (2012), as supporting narrowing the President's authority based on the same type of implicit limits the Supreme Court rejected in *Hawaii*, but *Arizona* dealt with preemption of state laws under the Supremacy Clause and is inapplicable here.

charge analysis and in any event, as is a problem with many of Plaintiffs' claims, they cannot succeed on this claim because none of the Plaintiffs allege they fall under this provision. Gov't Br. 44-45.

Finally, Plaintiffs argue that the Proclamation conflicts with the INA's goal of "keeping families together." Pls.' Br. 29. Even if this is *a* goal of the INA, it cannot be the *only* goal because, as Plaintiffs acknowledge, Congress included a range of inadmissibility grounds in the INA that do not appear to serve such a goal. *See Holder v. Martinez Gutierrez*, 566 U.S. 583, 594 (2012) (noting that "promoting family unity" is a goal that "underlie[s] or inform[s] many provisions of immigration law," but emphasizing it is "not the INA's only goal[ ], and Congress did not pursue [it] to the *n*th degree" (citations omitted)); *Kucana v. Holder*, 558 U.S. 233, 252 (2010) ("no law pursues its purpose at all costs . . . textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations").[3] Moreover, reading the INA to eliminate any entry restrictions that might apply to individuals who are related would similarly be inconsistent with Congress's decision to authorize additional entry restrictions in § 1182(f). And, of course, the restrictions approved in *Hawaii* resulted in some individuals not joining their families in the United States. 138 S. Ct. at 2406

[3] Congress has also determined that not every familial relationship can be the basis for a visa. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (children under 21 cannot petition for an immigrant visa for a parent).

(noting that the individual plaintiffs in that case were "U.S. citizens or lawful permanent residents who have relatives" abroad).

The ACA – Plaintiffs next argue that the Proclamation overrides provisions of the ACA and other healthcare laws. Pls.' Br. 30. They acknowledge "[t]he District Court did not reach this issue" but argue that "the Court can affirm on any basis in the record." Pls.' Br. 30, n.16. But Plaintiffs do not actually argue that this claim appears in the record. Instead they cite portions of their briefing raising other claims that the District Court did not reach. *Id*. The portion of Plaintiffs' preliminary injunction motion that argued a conflict between the Proclamation and other federal statutes, *see* ER 172-177, only references provisions of the INA and does not argue that the Proclamation conflicts with the ACA or other healthcare laws.

Even if Plaintiffs could somehow show likelihood of success on a claim they did not make, there is no conflict; intending immigrants can comply with both the Proclamation and the ACA because the Proclamation can be satisfied by a range of plans and nothing in the Proclamation precludes a new immigrant from obtaining any type of ACA coverage after arriving in the United States. 84 Fed. Reg. 53,992; Gov't Br. 7-9. Indeed, if an immigrant who would otherwise avoid obtaining any insurance takes these steps, the purposes of both the Proclamation and the ACA have been served.

Plaintiffs cite congressional findings in support of the ACA's goal of encouraging "minimal essential coverage." Pls.' Br. 30. But these findings, such as the finding that the "cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008," 42 U.S.C. § 18091(2)(F), support the Proclamation's goal of reducing uncompensated care costs. Plaintiffs argue that the ACA's purpose is to "improve[] access to subsidized and comprehensive coverage." Pls.' Br. 30. But the Proclamation does not bar new arrivals from obtaining subsidized coverage, so long as they showed prior to arrival that they were planning for their healthcare needs by obtaining one of qualifying insurance options set out in the Proclamation. And nothing in the ACA demonstrates any intent by Congress to require the entry of uninsured individuals or those who are likely to add to uncompensated care costs absent additional subsidies.

Indeed, Congress has generally spoken to the need for intending immigrants to make plans to ensure self-sufficiency, consistent with the Proclamation. Congress has found that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," and that "[i]t continues to be the immigration policy of the United States that – aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations." 8 U.S.C. § 1601(1), (2). There is no

indication in the ACA that Congress intended to limit the President's authority to suspend or restrict entry under § 1182(f). In fact, Congress found there is a "compelling government interest to enact new rules . . . to assure that aliens be *self-reliant* in accordance with national immigration policy." *Id*. § 1601(5) (emphasis added).

Plaintiffs also cite a provision of CHIPRA that applies only to "Aliens *Not* Lawfully Admitted for Permanent Residence." 42 U.S.C. § 1396b(v) (emphasis added). The Proclamation on the other hand applies to individuals seeking to enter the United States on immigrant visas, at which point they will become aliens lawfully admitted for permanent residence, so there is no overlap or possible conflict.

Plaintiffs' argument boils down to an argument that the Proclamation impermissibly "denies entry to immigrants who would use the assistance Congress provided." Pls.' Br. 30. But such an argument requires embracing precisely the type of implicit limits on Executive authority that the Supreme Court rejected in *Hawaii*. It would also override a host of other inadmissibility grounds Congress enacted that similarly have the effect of preventing individuals from accessing ACA premium tax credits in the United States, and it would effectively write § 1182's authorization to restrict entry out of the INA entirely, despite the Supreme Court repeatedly upholding this provision.

Sale's treatment of a similar claim shows the fallacy in this argument based on the ACA. Like Plaintiffs' argument with respect to the ACA, *Sale* dealt with statutory asylum protections that were specifically intended for individuals once they arrived in the United States:

> The INA offers these statutory protections only to aliens who reside in or have arrived at the border of the United States. For 12 years, in one form or another, the interdiction program challenged here has prevented Haitians such as respondents from reaching our shores and invoking those protections.

Sale, 509 U.S. at 160. Despite holding that Congress intended these protections to be available to individuals upon reaching our shores, the Supreme Court held that "[i]t is perfectly clear" that § 1182(f) "grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Sale*, 509 U.S. at 187-88. If the plaintiffs in *Sale* could not succeed on such a claim, Plaintiffs cannot possibly show a likelihood of success here based on ACA provisions that provide benefits "only to aliens who reside in . . . the United States." *Id.* 160.

Finally, the Plaintiffs do not claim that they intend to obtain insurance in the United States or use the healthcare provisions they cite. Plaintiffs cannot succeed on claims they did not raise, that the district court did not reach, and that could only affect, if anyone, individuals who are not part of this case.

Foreign Affairs – Plaintiffs next argue that the Proclamation is not a lawful exercise of any Foreign Affairs power. Pls.' Br. 32-36. This issue—whether the Proclamation is based on the President's authority under Article II *in addition to* § 1182(f)—is relevant to the district court's conclusion that the Proclamation violates the nondelegation doctrine because this doctrine does not apply when the President has inherent constitutional authority. Gov't Br. 32-38. But Plaintiffs do not argue that the Proclamation violates the nondelegation doctrine or defend the district court's nondelegation ruling. Rather, their foreign-affairs argument is aimed only at showing that the President has no inherent Executive authority that justifies what they view as an "invasion into an occupied legislative sphere." Pls.' Br. 32.

This is a variation of Plaintiffs' argument that courts should read implicit limits into the President's authority under § 1182(f) based on other statutes governing admissibility, and it fails for several reasons. The Supreme Court has rejected the argument that courts should look for implied limits on § 1182(f), *Hawaii*, 138 S. Ct. at 2411, and, in any case, there is no conflict between the Proclamation and any other federal statute. Also, § 1182(f) only requires the President to make findings related to the entry of covered noncitizens, and exclusion of individuals seeking to come to the United States from abroad is always a matter of foreign or external affairs.

Section 1182(f) itself speaks only of entry to the United States and authorizes the President to "suspend the *entry* of all aliens or any class of aliens" or impose restrictions "on the *entry* of aliens" whenever he "finds that the[ir] *entry* . . . would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f) (emphasis added). There is nothing in the statute that requires the finding of harm to be explicitly connected to some foreign affairs goal beyond regulating entry that would be detrimental to U.S. interests. The harms addressed by a Proclamation under § 1182(f) thus will often be harms that would occur *within* the United States and past Proclamations have suspended entry to advance domestic interests. Gov't Br. 38. Consistent with § 1182(f), the President issued this Proclamation after finding that "[c]ontinuing to allow entry into the United States of certain immigrants who lack health insurance or the demonstrated ability to pay for their healthcare would be detrimental to these interests." 84 Fed. Reg. 53,991. This is all that is required.

In regulating entry of noncitizens from abroad, the Proclamation is an exercise of the President's inherent constitutional authority. The President has "inherent executive power" over "exclusion of aliens" that comes from and is part of his foreign affairs powers. *Knauff*, 338 U.S. at 542-43. Because "exclusion of aliens is a fundamental act of sovereignty" the exclusion power "is inherent in the executive power to control the foreign affairs of the nation." *Id*. Plaintiffs attempt

to distinguish past Proclamations by identifying ways in which some past Proclamations have had additional foreign affairs goals beyond regulating entry. Pls.' Br. 33-35. But they do not squarely grapple with the fact that regulating entry—particularly through regulating determinations about entry that are made at consulates and embassies on foreign shores—is itself an exercise of the President's inherent power under Article II.

Plaintiffs acknowledge that the President has "power to exclude aliens attendant to his foreign affairs functions" and argue only that this is a narrow exception to the rule that Congress formulates immigration policy and that "executive exclusion power" "runs through the legislature." Pls.' Br. 35. But the Supreme Court has said the opposite: "When Congress prescribes a procedure concerning the admissibility of aliens" it "is implementing an inherent executive power." *Knauff*, 338 U.S. at 542-43; *see also Hawaii*, 138 S. Ct. at 2418 (regulation of "entry of aliens abroad" is "a matter within the core of executive responsibility"); *Doe*, 944 F.3d at 1227 (Bress, J., dissenting) (rejecting "mistaken assumption that the President's authority in this area is entirely delegated"). Plaintiffs cite cases dealing with deportation proceedings, but these proceedings, which deal with the removal of individuals already within the United States, are distinct from cases addressing the President's authority to regulate entry. *See* Pls.' Br. 35-36 (citing portions of *Galvan*, *Fong Yue Ting* addressing deportation

proceedings); *Knauff*, 338 U.S. at 542-43 ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, 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."). The exclusion of noncitizens seeking to come to the United States fits squarely within the Executive's authority. Gov't Br. 37. To the extent Plaintiffs cite cases for the proposition that Congress can also delegate authority to the President—Pls.' Br. 36 (citing § 1182(f) authority at issue in *Sale* and *Hawaii*)—this simply means that the President is acting both pursuant to his inherent *and* delegated authority, and that "his authority is at its maximum." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952); *see* Gov't Br. 35.

Requirements of § 1182(f) – Plaintiffs argue that the Proclamation does not contain adequate findings or a sufficiently definite end point. Pls.' Br. 37-40. Plaintiffs take issue with the sufficiency of the President's finding that "[c]ontinuing to allow entry into the United States of certain immigrants who lack health insurance or the demonstrated ability to pay for their healthcare would be detrimental to these interests." 84 Fed. Reg. 53,991. But *Hawaii* rejected the argument that the President must "explain [his] finding[s]," and noted past Proclamations with far more minimal findings. 138 S. Ct. at 2409; Gov't Br. 29-31. There is also no "require[ment] to prescribe in advance a fixed end date for the

entry restrictions" and the Supreme Court emphasized that "not one of the 43 suspension orders issued" prior to that decision "ha[d] specified a precise end date." *Hawaii*, 138 S. Ct. at 2409-10; *see* Gov't Br. 31- 32.

"Grave Constitutional Concerns" – Plaintiffs' final merits argument is that § 1182(f) must be narrowly interpreted to avoid "grave constitutional concerns." Pls.' Br. 45-48. It is unclear what the basis is for this argument. Plaintiffs cite *Clinton v. City of New York*, 524 U.S. 417, 452 (1998)—which addressed the Line Item Veto Act's authorization for the President to repeal legislation—for the proposition that Congress cannot give legislative power to the President. Pls.' Br. 45. But the Supreme Court has never held that § 1182(f) presents any separation-of-powers issue despite repeatedly considering this statute, including most recently when it upheld § 1182(f)'s "comprehensive delegation" to the President. *Hawaii*, 138 S. Ct. at 2408; *Doe*, 944 F.3d at 1227 (Bress, J., dissenting).

Plaintiffs rehash their argument that the Proclamation does not involve external or foreign affairs. Pls.' Br. 45-46. But again, they do not address the fact that the Supreme Court has held that the President has inherent power to control entry to the United States and that doing so is itself an exercise of the President's foreign affairs power that makes the district court's nondelegation holding untenable. Gov't Br. 32-38. Plaintiffs' suggestion that Congress's decision not to limit § 1182(f) to national emergencies did anything other than broaden the

President's authority, Pls.' Br. 47, has been rejected by the Supreme Court, *Hawaii*, 138 S. Ct. at 2412-13.

Plaintiffs argue that § 1182(f) improperly gives the President "unfettered authority to override congressional judgments," and if upheld "would give the President discretion to rewrite immigration law unilaterally." Pls.' Br. 45, 47. But they have not identified even an implicit conflict with any other federal statute. Moreover, § 1182(f) applies to restrictions on entry, a distinct and separate context from law that applies domestically or immigration law that applies to removal proceedings in the United States. *Knauff*, 338 U.S. at 542-43. The cases Plaintiffs cite deal with removal of individuals already in the United States (*Witkovich*) or issuance of passports to U.S. citizens in the United States (*Kent*, *Zemel*, *Haig*), Pls.' Br. 48, and are inapplicable here. *See Sale*, 509 U.S. at 187-88 (rejecting argument that Proclamation conflicted with statutory immigration provisions that were meant to apply to individuals who are physically present in the United States).

II. Plaintiffs failed to show irreparable injury absent injunctive relief.

The injury Plaintiffs assert is entirely speculative, based on unsupported assumptions that they will not be able to meet the requirements of the Proclamation. Gov't Br. 45-48. Plaintiffs' assertions that they will not be able to obtain the types of health coverage contemplated by the Proclamation are based on

an extremely narrow view of the ways the Proclamation's requirements can be satisfied. This makes their bare assertions that they cannot afford approved health insurance, without any detail of what plans they evaluated or any evidence showing that they could not afford any necessary coverage, all the more problematic. Pls.' Br. 49-50. As explained, there are many ways to satisfy the Proclamation, and visa applicants without reasonably foreseeable medical costs, or who have the resources to pay for any such costs, may not need to show they have health insurance to do so. Gov't Br. 6-9.

Plaintiffs have also failed to identify any *irreparable* harm. *Id.* 48-50. Plaintiffs without visa interviews scheduled in the near future cannot be affected by the Proclamation and cannot claim any harm. Even if a Plaintiff had a visa interview and was found eligible but for the Proclamation, existing procedures allow an applicant to submit additional information and seek reconsideration of a visa denial. *Id*. 48-49. Plaintiffs argue that prolonged separation from a family member is irreparable harm and so any delay in processing a visa should be considered irreparable harm, Pls.' Br. 52, but they have not shown that any time necessary for reconsideration would be prolonged.

Plaintiffs also argue that the Proclamation would cause the organizational Plaintiff to divert resources from its core mission to advise intending immigrants about health coverage resources. Pls.' Br. 53. But such advice appears to be part of

their core mission, which Plaintiffs describe as educating Multnomah County Latinos on how to achieve physical and mental health and financial stability. Pls.' Br. 53; *see* Gov't Br. 23-24, 50-51.

III. The balance of hardships and public interest weigh against injunctive relief.

The balance of harms and the public interest weigh strongly against Plaintiffs' request for injunctive relief, as Plaintiffs' harms are wholly speculative, while enjoining the Proclamation and allowing the harms the Proclamation was designed to prevent to continue, causes "irreparable harm every day it persists." *Doe*, 944 F.3d at 1226 (Bress, J., dissenting); *see* Gov't Br. 51-54.

Plaintiffs' only response is that the Court, as the district court did, should disregard the findings set out in the Proclamation and presume that the Proclamation will not have its intended effect on the identified harms without further evidence. Pls.' Br. 53-56. But Plaintiffs do not dispute the finding in the Proclamation that "data show that lawful immigrants are about three times more likely than United States citizens to lack health insurance." 84 Fed. Reg. 53,991. This figure alone shows that the identified harms are not only valid but significant, and Plaintiffs identify no basis for disregarding findings they do not dispute. Gov't Br. 52-53. Moreover, *Hawaii* foreclosed any challenge to a Proclamation based on "perception of its effectiveness and wisdom," and courts "cannot substitute [their]

own assessment for the Executive's predictive judgments." 138 S. Ct. at 2421; *see* Gov't Br. 30-31.[4]

IV. Universal injunctive relief is not warranted in this case.

The district court's universal injunction directly conflicts with recent decisions from the Supreme Court and this Court addressing the permissible scope of preliminary injunctive relief, is vastly overbroad, and is in no way tailored to Plaintiffs' injuries, violating basic principles of standing. Gov't Br. 54-59.

Although the district court required the parties to complete class certification briefing before ruling on the injunction, it issued a universal injunction without ruling on class certification and, as Plaintiffs acknowledge, there is no certified class here. Plaintiffs argue that the Court should nonetheless consider harms to individuals who are not before the Court, including harms that relate to individuals even "beyond the putative class," because courts can fashion injunctions that extend "not only to named plaintiffs but others *similarly situated*." *Id.* 56-57 (emphasis added). But they offer no explanation for how a court can consider

[4] Plaintiffs also argue that the Proclamation will not reduce uncompensated care costs because some approved plans are not comprehensive. But again, Plaintiffs do not claim that they intend to obtain coverage under some more-comprehensive plan. Thus, even if courts could review the President's predictive judgments, the proper comparison would not be between plans that satisfy the Proclamation and more comprehensive plans that Plaintiffs have no intent to obtain, but between plans the Proclamation encourages intending immigrants to obtain and the coverage—or lack of coverage—they would have absent the Proclamation.

alleged harms to individuals who are *not* similarly situated or could not be part of the class. Injunctive relief cannot be broader "than necessary to provide complete relief to the plaintiffs," and cannot extend to other individuals who cannot become part of this case even through class certification. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see* Gov't Br. 55-57.

It was improper for the district court to grant universal relief without giving any consideration to the Rule 23 factors. In granting relief without assessing the possible extent of the class, the district court ignored several clear problems with the proposed class and granted relief to individuals who Plaintiffs themselves acknowledge would be beyond the scope of any class. For example, the Proclamation covers immigrant visa categories that are not based on any familial connection to the United States. No Plaintiff in this case falls into any of these categories and, since no class can be certified without a class representative, the district court improperly granted relief that extends not only beyond the parties to this case, but granted "classwide relief" beyond the outer limits of any possible class. Gov't Br. 57-58.[5] The Supreme Court has recently narrowed similar injunctions granting relief that extended to "foreign nationals abroad who have no

[5] Plaintiffs attempted to amend their complaint after the injunction to add an additional Plaintiff, but this new Plaintiff would not have resolved this issue, *see* Gov't Br. 58, and in any case, Plaintiffs acknowledge that he has already received a visa, Pls.' Br. 13, making his claim moot.

connection to the United States." *Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017); *see* Gov't Br. 58 (collecting similar cases).[6]

Plaintiffs cite law review articles in support of their assertion that courts can issue injunctive relief to benefit nonparties. Pls.' Br. 57, n.25. But those articles should be given little if any weight in the face of this Court's decisions rejecting nationwide injunctions. Plaintiffs cite nothing supporting the argument that a court can grant relief to individuals who are not part of the case, and doing so would violate bedrock standing and case-or-controversy requirements. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (nationwide and universal injunctions all "share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case"); *Salazar v. Buono*, 559 U.S. 700, 734 (2010) (Scalia, J., concurring) (Article III does not permit granting relief "cover[ing] additional actions that produce no concrete harm to the original plaintiff."); *see also* Bray, *Multiple Chancellors*: *Reforming the National Injunction*, 131 Harv. L. Rev. 417, 471-72 (2017) ("The court has no constitutional basis to decide disputes and issue remedies for those who are not parties").

[6] Because these individuals (who represent a substantial portion of the individuals covered by the district court's injunction) have no connection to the U.S., they could not raise a *Mandel*-type claim which, as noted above, would be the only type of claim that would be justiciable.

Rule 23 avoids these problems by ensuring both that absent class members are similarly situated to the named plaintiffs and that those plaintiffs can adequately represent their position. Fed. R. Civ. P. 23(a). This ensures that there is a sufficiently concrete case or controversy for the court to resolve, and that there is an actual plaintiff before the court who can present concrete facts and whose claims Defendants can test through discovery and other means. Allowing relief to dissimilar nonparties would require the government to defend against untestable abstract or hypothetical allegations, injuries, and claims raised on behalf of nonparties without their knowledge, in service of what could ultimately only be an advisory opinion on how the law might apply to parties and circumstances not before the court.

Finally, there is no merit to Plaintiffs' claim that a universal injunction is necessary to promote "the interest of uniformity in immigration law." Pls.' Br. 61. Recent decisions rejecting universal injunctions in the immigration context foreclose that argument. *See, e.g.*, *City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018); *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) ("all injunctions—even ones involving national policies—must be" narrowly tailored).

CONCLUSION

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

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

AUGUST E. FLENTJE
Special Counsel

WILLIAM C. PEACHEY
Director

COURTNEY E. MORAN
Trial Attorney

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/s/ Brian C. Ward
BRIAN C. WARD
Senior Litigation Counsel
U.S. Department of Justice, Civil Division
Office of Immigration Litigation,
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel: (202) 616-9121
Email: brian.c.ward@usdoj.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Ninth Circuit Rule 32-1(b) because it contains 6,970 words. This brief also complies with the typeface and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared in a proportionally spaced typeface using Word 14-point Times New Roman font.

/s/ Brian C. Ward
BRIAN C. WARD
United States Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Brian C. Ward
BRIAN C. WARD
United States Department of Justice