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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

16 NATIONAL ASSOCIATION OF
17 MANUFACTURERS, CHAMBER OF
COMMERCE OF THE UNITED STATES
18 OF AMERICA, NATIONAL RETAIL
FEDERATION, TECHNET, and INTRAX,
INC.,

19 Plaintiffs,

20 v.

21 UNITED STATES DEPARTMENT
22 OF HOMELAND SECURITY,
UNITED STATES DEPARTMENT
23 OF STATE; CHAD F. WOLF,
in his official capacity as Acting Secretary of
24 Homeland Security; and, MICHAEL R.
POMPEO, in his official capacity as Secretary
25 of State,

26 Defendants.

27
28

Case No. 4:20-cv-4887-JSW

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR
PRELIMINARY INJUNCTION**

Date: September 11, 2020
Time: 9:00 a.m.
Judge: Hon. Jeffrey S. White
Ctrm.: 5

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SUMMARY OF ARGUMENT

On June 22, 2020, President Trump issued Presidential Proclamation 10052. A putative exercise of INA Section 212(f) (8 U.S.C. § 1182(f)), the Proclamation suspends entire visa categories for at least six months. The stated purpose of the Proclamation, according to administration officials, is to “free[] up” “about 525,000 jobs” in 2020 alone. Hughes Decl. Ex. 2.

Because the Proclamation is unlawful and is causing substantial, irreparable injury to countless businesses and the workers they employ, the Court should promptly enjoin it.

I. The Proclamation rests on Section 212(f), which authorizes the President to suspend the entry of noncitizens for reasons of foreign affairs and national security. The Ninth Circuit recently held that, if Section 212(f) supplies any authority to act with respect to domestic policy, that power is limited. The Proclamation here severely transgresses the scope of Section 212(f) authority.

First, in exercising Section 212(f) powers, the President may not direct actions that conflict with other statutory provisions. Yet that is precisely what the Proclamation does—deleting wholesale visa categories used by hundreds of thousands of individuals each year.

Second, Section 212(f) requires the President to “find” that the action serves the “interests of the United States.” Here, however, the Proclamation’s findings fail to meet the required standard because there is a fundamental mismatch between the problem identified and the action taken, there is a failure to address crucial evidence, and there is disregard of reliance interests.

Third, these limits on Section 212(f) ensure that it constitutes a lawful delegation of authority from Congress to the Executive. Absent such limits, the Proclamation is unlawful.

II. An injunction is necessary to prevent irreparable injury. The purpose of the Proclamation is to fundamentally disrupt how companies may hire employees for at least the next six months. The Plaintiff associations represent, in the aggregate, hundreds of thousands of American businesses. Accordingly, and by design, the Proclamation inflicts on Plaintiffs and their members—including Microsoft Corporation, Amazon.com, Inc., Gentle Giant Moving, Singing Hills Landscape, Intrax, Alliance Abroad, and more—specific, acute, and irremediable harms.

III. The balance of equities and the public interest favor an injunction for multiple reasons, including that adherence to congressional judgments necessarily serves the public interest.

1 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

2 PLEASE TAKE NOTICE that on September 11, 2020, at 9:00 a.m. in Courtroom 5 of the
3 Oakland Courthouse, 1301 Clay Street, Oakland, CA 94612, before the Honorable Jeffrey S.
4 White, Plaintiffs the National Association of Manufacturers, the Chamber of Commerce of the
5 United States of America, the National Retail Federation, TechNet, and Intrax, Inc. will and here-
6 by do move for a preliminary injunction against Defendants the United States Department of
7 Homeland Security, the United States Department of State, Chad F. Wolf, and Michael R. Pom-
8 peo pursuant to Federal Rule of Civil Procedure 65(a).

9 Plaintiffs seek a preliminary injunction enjoining Defendants, their agents, servants, em-
10 ployees, and all others in active concert or participation with them from, pending final judgment:

- 11 • implementing, enforcing, or otherwise carrying out Section 2 of Proclamation 10052 with
12 respect to Plaintiffs and, with respect to the association Plaintiffs, their members; and
- 13 • with respect to the Plaintiffs and the members of the association Plaintiffs, engaging in
14 any action that results in the non-processing or non-issuance of applications or petitions
15 for visas in the H, J, and L categories which, but for Presidential Proclamation 10052,
16 would be eligible for processing and issuance.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **BACKGROUND**

19 **A. Visa categories.**

20 The Immigration and Nationality Act (INA) governs the admission of noncitizens into the
21 United States. *See generally* 8 U.S.C. §§ 1101 *et seq.* Among other things, the INA provides for
22 various categories of nonimmigrant visas for noncitizens planning to enter the United States tem-
23 porarily and for a specific purpose. *See id.* §§ 1101(a)(15), 1184.

24 Pertinent here are three nonimmigrant visa categories: L visas, H visas, and J visas.

25 **L Visa Category.** L visas provide for intra-company transfers. They are issued to nonciti-
26 zens who have “been employed continuously for one year by a firm or corporation . . . and who
27 seek[] to enter the United States temporarily in order to continue to render [their] services to the
28 same employer” and will perform a “managerial” or “executive” function (L-1A visas) or have

1 “specialized knowledge” about the company’s product or processes and procedures (L-1B visas).
 2 See 8 U.S.C. § 1101(a)(15)(L); *id.* § 1184(c)(2)(B) (defining “specialized knowledge”). L-2 visas
 3 are available for accompanying spouses and minor children. *Id.* § 1101(a)(15)(L).

4 **H Visa Category.** H-1B visas are issued to highly skilled workers “coming temporarily to
 5 the United States to perform services . . . in a specialty occupation” (8 U.S.C.
 6 § 1101(a)(15)(H)(i)(b)), which involves “application of a body of highly specialized knowledge”
 7 and “attainment of a bachelor’s or higher degree in the specific specialty” (*id.* § 1184(i)(1)). Be-
 8 fore hiring an H-1B nonimmigrant, a company must attest, among other things, that the position
 9 pays prevailing wages, that the position will not adversely impact other workers, and that the em-
 10 ployer has provided certain forms of notice regarding the position. *Id.* § 1182(n)(1)(A)-(D). New
 11 H-1B visas are capped at 65,000 per year with an additional 20,000 available to individuals with
 12 an advanced degree from a U.S. higher-education institution.

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

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

19 **J Visa Category.** The J visa category—a mainstay of U.S. diplomatic efforts for dec-
 20 ades—provides for cultural exchange visitors in a variety of programs. 8 U.S.C. § 1101(a)(15)(J).
 21 Relevant here, J-1 programs include the summer work travel program (22 C.F.R. § 62.32); the au-
 22 pair program (*id.* § 62.31); and the trainee and intern programs (*id.* § 62.22). The J-2 visa is avail-
 23 able to the spouse and children of an individual entering on a J-1 visa. 8 U.S.C. § 1101(a)(15)(J).

24 **B. INA Section 212(f).**

25 INA Section 212(f) provides:

26 Whenever the President finds that the entry of any aliens or of any class of aliens
 27 into the United States would be detrimental to the interests of the United States, he
 28 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 im-
 pose on the entry of aliens any restrictions he may deem to be appropriate.

1 8 U.S.C. § 1182(f). INA Section 215(a) makes it unlawful “for any alien to . . . enter the United
 2 States except under such reasonable rules, regulations, and orders, and subject to such limitations
 3 and exceptions as the President may prescribe.” 8 U.S.C. § 1185(a)(1).

4 **C. The Proclamation.**

5 The Presidential Proclamation 10052, issued on June 22, 2020, asserts that “[t]he entry of
 6 additional workers through the H-1B, H-2B, J, and L nonimmigrant visa programs . . . presents a
 7 significant threat to employment opportunities for Americans affected by the extraordinary eco-
 8 nomic disruptions caused by the COVID-19 outbreak.” 85 Fed. Reg. 38,263, 38,264 (June 25,
 9 2020) (Hughes Decl. Ex. 1). Subject to limited exceptions, Section 2 of the Proclamation bars
 10 “[t]he entry into the United States of any alien seeking entry pursuant to”:

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

17 *Id.* § 2. The Proclamation’s entry ban “shall expire on December 31, 2020” but “may be contin-
 18 ued as necessary.” *Id.* § 6. In putative implementation of the Proclamation, the Department of
 19 State has announced that it will not issue visas in the impacted categories. Hughes Decl. Exs. 5-7.
 20 For its part, DHS similarly announced it would “temporarily pause the issuance of certain new
 21 nonimmigrant visas until December 31, 2020.” Hughes Decl. Ex. 3.

22 The Proclamation’s purpose is clear: It is intended to radically alter the U.S. labor market
 23 on a massive scale. Baslice Decl. ¶ 8. On June 22, 2020, the White House held a “background
 24 press call” during which a “senior administration official” stated that, taking the Proclamation
 25 together with an accompanying bar on immigrant visas, “the sum total of what these actions will
 26 do in terms of freeing up jobs over the course of the rest of 2020 is about 525,000 jobs. Quite a
 27 significant number.” Hughes Decl. Ex. 2. The official described the purpose and effect of the pol-
 28 icy as to “clear out this workspace for Americans.” *Id.* The same day, DHS official Ken Cucci-
 nelli 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

1 by a president to clear the American job market of competition like this.” Hughes Decl. Ex. 4.

2 **D. Plaintiffs and their members.**

3 Plaintiff associations—the National Association of Manufacturers, the U.S. Chamber of
4 Commerce, the National Retail Federation, and TechNet—represent hundreds of thousands of
5 American businesses of all sizes and across all economic sectors. Baselice Decl. ¶ 2; Hall Decl.
6 ¶¶ 2, 4, 7. Plaintiff Intrax is one of the Nation’s leading operators of State Department regulated
7 cultural exchange programs. The Proclamation’s unprecedented reconfiguration of the U.S. labor
8 market immediately and irreparably harms Plaintiffs and their respective members.

9 **ARGUMENT**

10 “On a motion for a preliminary injunction, plaintiffs must make a ‘threshold showing’ ...
11 that (1) they are likely to succeed on the merits, (2) they are likely to ‘suffer irreparable harm’
12 without relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public
13 interest.” *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020) (citations omitted).

14 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.**

15 **A. The Proclamation is beyond the President’s lawful authority.**

16 Plaintiffs are likely to succeed on their claim that the Proclamation and its implementation
17 exceeds the authority conferred on the President by Section 212(f).

18 At the outset, there is no doubt that, when the President acts with respect to foreign affairs
19 and national security, his authority pursuant to Section 212(f) is broad. In *Trump v. Hawaii*, 138
20 S. Ct. 2392, 2408 (2018) (*Hawaii III*),¹ the Court observed that Section 212(f) “exudes deference
21 to the President.” *See id.* at 2415 (noting “the President’s flexible authority [under Section 212(f)]
22 to suspend entry based on *foreign policy* interests.”) (emphasis added). More recently, however,

23 _____
24 ¹ A brief recap of the *Hawaii* litigation: In *Hawaii I*, the Ninth Circuit affirmed a preliminary
25 injunction against an executive order imposing a version of the President’s so-called travel ban.
26 *See Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (*Hawaii I*). That opinion was vacated as moot
27 by the Supreme Court after the executive order in question “expired by [its] own terms.” *Trump v.*
28 *Hawaii*, 138 S. Ct. 377 (2017). The President then issued a presidential proclamation with similar
provisions; the Ninth Circuit 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 the Ninth Circuit’s analysis,
many of which are applicable here. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (*Hawaii III*).

1 the Ninth Circuit held that the calculus changes when the President purports to exercise this au-
 2 thority to accomplish domestic policy. While *Hawaii III* considered the president’s Section 212(f)
 3 authority in “the context of international affairs and national security,” “his power is more cir-
 4 cumscribed when he addresses a purely domestic economic issue.” *Doe #1 v. Trump*, 957 F.3d
 5 1050, 1067 (9th Cir. 2020). Thus, “in domestic economic matters, the national security and for-
 6 eign affairs justifications for policy implementations disappear, and the normal policy-making
 7 channels remain the default rules of the game.” *Id.*

8 Indeed, a straightforward reading of Section 212(f)—which requires the President to act in
 9 “the interests of the United States” (8 U.S.C. § 1182(f))—demonstrates that this power is tied,
 10 inherently, to foreign relations and national security. That operative phrase is a term of art refer-
 11 encing (in the context of immigration) the external-facing, national-security and foreign-affairs
 12 interests of “the United States” as an international actor, rather than the more general “public in-
 13 terest.”² Section 212(f) “does not provide the President with limitless power to deny visas to im-
 14 migrants based on purely long-term economic concerns” or “purely domestic economic prob-
 15 lem[s].” *Doe #1*, 957 F.3d at 1065, 1067.

16 Even if the President may employ Section 212(f) authority to achieve a domestic end, the
 17 deference due in that context is substantially lessened—and it markedly distinguishes this case
 18 from *Hawaii III*. As we will show, the Proclamation transgresses the limits of Section 212(f)
 19 power for several reasons.

20 Defendants therefore may not lawfully implement the Proclamation’s provisions, because
 21 there is no other source of authority that could authorize them to suspend the operation of the
 22 INA’s visa provisions and impose an entry ban. *See, e.g., City of L.A. v. Barr*, 941 F.3d 931, 938

23
 24 ² This interpretation is confirmed by unbroken executive practice. As a group of over thirty
 25 immigration-law scholars explained in an *amicus* brief before the Ninth Circuit, “[i]n every case
 26 out of the over forty proclamations and executive orders issued under § 1182(f) or related statuto-
 27 ry authority, presidential action has shown a specific nexus with the conduct of foreign govern-
 28 ments.” Br. of Immigration Law Professors 7, *Doe #1 v. Trump*, No. 19-36020 (Feb. 6, 2020),
 Dkt. 40; *see also id.* (“[E]very single example the [Supreme] Court cited [in *Hawaii III*] con-
 cerned foreign policy—because no counterexamples exist.”); *id.* at 20-36 (comprehensive chart of
 Section 212(f) entry suspensions; “[n]one address a purely domestic issue.”). Because domestic
 unemployment is not such a “foreign policy interest[.]” (*Hawaii III*, 138 S. Ct. at 2415), the Proc-
 lamation exceeds the scope of Section 212(f).

1 (9th Cir. 2019) (“When an agency is charged with administering a congressional statute, ‘both its
 2 power to act and how it is to act are authoritatively prescribed by Congress.’ An agency ‘literally
 3 has no power to act . . . unless and until Congress confers power upon it.”) (quoting *City of Ar-*
 4 *lington v. FCC*, 569 U.S. 290, 297 (2013); and *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374
 5 (1986)) (alterations incorporated).³ And it is established that “the officers who attempt to enforce
 6 the President’s directive” may be “enjoin[ed].” *Hawaii II*, 878 F.3d at 680 (quoting *Franklin v.*
 7 *Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring)).

8 **1. The Proclamation unlawfully eviscerates vast portions of the INA.**

9 First, the Proclamation nullifies significant swaths of the INA, declaring statutorily estab-
 10 lished visa categories invalid for the remainder of the year. Section 212(f) may provide the Presi-
 11 dent broad authority, but it does not allow him to “nullify[] Congress’s considered judgments on
 12 matters of immigration.” *Hawaii II*, 878 F.3d at 685; *see also id.* (“[T]he Executive may not exer-
 13 cise [its Section 212(f)] power in a manner that conflicts with the INA[]”). While the Supreme
 14 Court ultimately held that the proclamation in *Hawaii* did not conflict, it acknowledged the
 15 “premise” that Section 212(f) “does not give the President authority to countermand Congress’s
 16 considered policy judgments.” *Hawaii III*, 138 S. Ct. at 2410-2411 (“We may assume that
 17 § 1182(f) does not allow the President to expressly override particular provisions of the INA.”).

18 That is just what the Proclamation attempts here. The INA, and in particular the provi-
 19 sions governing the work-related visas, sets out a “finely reticulated regulatory scheme governing
 20 the admission of foreign nationals.” *Hawaii II*, 878 F.3d at 685; *cf. Arizona v. United States*, 567
 21 U.S. 387, 395 (2012) (“Federal governance of immigration and alien status is extensive and com-
 22 plex”). The statute provides in great detail which noncitizens may enter the country, for what pur-
 23 poses, and under what circumstances. The Proclamation takes a sledgehammer to that carefully
 24 crafted system, declaring by executive fiat that four entire visa categories are no longer operative.

25 _____
 26 ³ *See also Sierra Club v. Trump*, 929 F.3d 670, 694 (9th Cir. 2019) (“The Supreme Court has
 27 ‘long held that federal courts may in some circumstances grant injunctive relief against’ federal
 28 officials violating federal law.”) (quoting *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378,
 1384 (2015)); *E.V. v. Robinson*, 906 F.3d 1082, 1090-1091 (9th Cir. 2018) (acknowledging free-
 standing cause of action for “suits alleging that a federal official acted ultra vires of statutorily
 delegated authority”).

1 A comparison to the Supreme Court’s decision in *Hawaii III* is instructive here. The pres-
2 idential proclamation at issue in *Hawaii III* barred entry to nationals of a list of enumerated coun-
3 tries, on the basis that those countries provided insufficient information to the United States for
4 the proper vetting of their citizens, harming national security. *Hawaii III*, 138 S. Ct. at 2404-2405.
5 The Supreme Court upheld that proclamation against a challenge that it conflicted with the INA,
6 essentially because that proclamation was additive in nature: it did not actually “*conflict*” with
7 any existing INA provisions; rather, it “impose[d] *additional* limitations on entry beyond the
8 grounds for exclusion set forth in the INA.” *Id.* at 2411-2412 (emphases added).

9 This Proclamation is quite different. Rather than simply “supplement[ing]” the INA’s ex-
10 isting national-security provisions (*Hawaii III*, 138 S. Ct. at 2412), it would wipe whole catego-
11 ries of legislatively created visas from the statute books. Until the end of the year, the Proclama-
12 tion announces, there simply *is no more* H-1B visa—and no H-2B, L-1, or J-1 visas either—and
13 the statutes creating those visas are without effect. Such an attempt to nakedly “nullify[] Con-
14 gress’s considered judgments on matters of immigration,” as embodied in the INA, is not within
15 the power conferred by Section 212(f). *Hawaii II*, 878 F.3d at 685; *see also Doe #1*, 957 F.3d at
16 1067 (rejecting reliance on Section 212(f) due to “serious questions as to whether the President
17 has effectively rewritten provisions of the INA”).

18 That alone is enough to render the Proclamation *ultra vires*. But even more strikingly, the
19 particular visa provisions that the Proclamation “effectively rewrit[es]” (*Doe #1*, 957 F.3d at
20 1067) already strike a conscious balance—fine-tuned over decades of statutory amendments—
21 between the very interests at stake here: American businesses’ need for skilled, specialized, and
22 temporary workers, on the one hand; and protections for domestic workers on the other. By pur-
23 porting to strike a different balance than that enacted into law by Congress, the Proclamation fur-
24 ther exceeds the President’s power under Section 212(f).

25 Perhaps most obviously, the H-2B visa category is already subject to an incredibly strin-
26 gent protection for domestic workers: By statute, the visa may only be issued “if unemployed per-
27 sons capable of performing [the needed temporary] service or labor cannot be found in this coun-
28 try.” 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *see also* 8 C.F.R. § 214.2(h)(6)(iv)(A).

1 That assurance is achieved through a robust labor certification process overseen by the
2 Department of Labor, under which an employer with a temporary job opening must provide a job
3 order to the relevant State Workforce Agencies for posting and recruitment of domestic workers
4 (20 C.F.R. § 655.16); contact former workers and “solicit their return to the job” (*id.* § 655.43);
5 provide notice of the opening to any relevant union or post the opening at the job site or online
6 (*id.* § 655.45); and conduct any other domestic recruitment deemed necessary by the Department
7 of Labor personnel reviewing the application (*id.* § 655.46). Only if these (and other) steps are
8 taken without filling the position will the Department of Labor “certify . . . that there is an insuffi-
9 cient number of U.S. workers who are qualified and who will be available for the job opportuni-
10 ty” (*id.* § 655.50(b))—and even after certification, the employer has a “[c]ontinuing requirement”
11 to “provide employment to any qualified U.S. worker who applies” (*id.* § 655.20(t)). Existing law
12 thus guarantees that the issuance of an H-2B visa will not disadvantage American workers⁴—yet
13 the Proclamation writes the entire visa category out of the INA anyway.

14 Congress also struck a conscious balance between the needs of American business and
15 American labor with the H-1B visa, which is available to skilled foreign workers in “specialty
16 occupation[s].” 8 U.S.C. § 1101(a)(15)(H)(i)(b). Recognizing the struggles of American compa-
17 nies to fill all their skilled specialty positions with domestic workers, Congress tailored the labor
18 protections for H-1B visas slightly differently than for unskilled H-2B workers. For example, all
19 sponsoring employers must attest that wages paid to H-1B workers will not undercut wages paid
20 to U.S. workers; that H-1B employees’ working conditions will not adversely affect those of U.S.
21 workers; and that the employer has provided notice of its plan to hire H-1B employees to any rel-
22 evant domestic union representative, or otherwise posted conspicuous notice. *Id.* § 1182(n)(1)(A)-
23 (C). A subset of employers—those with a history of willful certification violations, and those with
24 a large percentage of workers already on H-1B visas—must make additional certifications, in-
25 cluding that the company has tried and failed to fill the position with a domestic worker. *Id.*
26 § 1182(n)(1)(E), (n)(1)(G), (n)(3)(A).⁵

27 _____
28 ⁴ H-2B visas are also capped at 66,000 per year. *See* 8 U.S.C. § 1184(g)(1)(B).

⁵ The H visa category dates to the INA of 1952, and the current H-1B statute was enacted in

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

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

7 S. Rep. 106-260, at 12 (Apr. 11, 2000); *see also id.* (noting the “general principle that labor mar-
8 kets have demonstrated time and time again: additional people entering the labor force, whether
9 native-born students out of school, immigrants, or nonimmigrants, expand job opportunities and
10 create other jobs through innovation, entrepreneurship, and money spent on consumer items”).
11 Congress has continued to refine H-1B conditions since, including through legislation that adjust-
12 ed the number of visas available by adding a set-aside for individuals completing U.S. graduate
13 degrees; and otherwise calibrated the program to meet the needs of the domestic economy. *See H-*
14 *1B Visa Reform Act of 2004*, Pub. L. 108-447, Div. J, Subtitle B, 118 Stat. 3353. Indeed, the an-
15 nual cap, revised over the years, is clear congressional judgment on the scope of the H-1B pro-
16 gram, and its interrelation with domestic labor.

17 This “finely reticulated regulatory scheme” (*Hawaii II*, 878 F.3d at 685)—arrived at
18 through decades of intentional balancing by Congress—reflects a final legislative judgment that
19 the entry of international workers is in the national interest when they arrive under the terms and
20 conditions set by the statute. Unlike the proclamation upheld in *Hawaii*, the Proclamation here
21 goes far beyond “supplement[ing]” that legislative judgment; rather, it “supplant[s] it,” refusing
22 admission to entire classes of people that Congress has affirmatively said should be admitted.
23 *Hawaii III*, 138 S. Ct. at 2410. And this overruling of Congress was based not on some national

24 roughly its current form in 1990. That law was explicitly aimed at addressing “the need of Ameri-
25 can business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs
26 for which domestic personnel cannot be found.” H.R. Rep. 101-723, pt. 1, at 41 (1990). As such,
27 the statutory scheme was immediately recognized by the government as the result of an intention-
28 al 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 employ-
ers experiencing labor shortages, while at the same time providing greater safeguards and protec-
tions for both U.S. and alien workers.” *Alien Temporary Employment Labor Certification Pro-*
cess, 56 Fed. Reg. 11,705, 11,706-11,707 (Mar. 20, 1991).

1 security threat or interstitial rulemaking—it is not simply an “additional limitation[] on entry be-
2 yond the grounds for exclusion set forth in the INA” (*id.* at 2412)—but on an executive rebalanc-
3 ing of the precise domestic policy factors Congress already considered and enacted into law. *Ha-*
4 *waii III* lends no support for the Proclamation’s evisceration of careful congressional judgment.

5 Congress’s chosen approach to labor protections for L-1 visas, used for intra-company
6 transfers, reflects the same kind of purposeful balancing. In creating the category in 1970, Con-
7 gress acted “to meet the objective of American industry which has been seriously hampered in
8 transferring personnel”; the House Report observed that “[s]uch intracompany transfers have con-
9 tributed immeasurably to the growth of American enterprise throughout the world and to the in-
10 ternational trade of the United States.” H.R. Rep. 91-851, at 5-6 (1970). In recognition that L-1
11 employees possess irreplaceable experience—L-1 nonimmigrants have at least a year of compa-
12 ny-specific experience by definition (*see* 8 U.S.C. § 1101(a)(15)(L))—the L-1 category does not
13 require the same labor certifications as H-1B or H-2B. But Congress has nonetheless been vigi-
14 lant in responding to perceived abuses of the L-1 visa; in 2004, Congress prohibited the use of L-
15 1 visas in so-called work-for-hire arrangements, in which companies would bring workers to the
16 country on L visas and then hire them out to other domestic employers. L-1 Visa Reform Act of
17 2004, Pub. L. 108-447, Div. J, Subtitle A, 118 Stat. 3351-3353; *see* 8 U.S.C. § 1184(c)(2)(F).⁶

18 In all, Congress enacted specific labor-market protections for each of the tailored visa cat-
19 egories at issue and fine-tuned those statutory protections over time, making unmistakably clear
20 the legislative judgment about the circumstances under which the Nation should admit foreign
21 workers. These are precisely the sorts of “considered judgments” that the President may not simp-
22 ly discard under Section 212(f) because he would balance the relevant interests differently. *Ha-*
23 *waii II*, 878 F.3d at 685; *see also Doe #1*, 957 F.3d at 1067. Because it purports to “rewrit[e]”
24 (*id.*) and “nullify[]” (*Hawaii II*, 878 F.3d at 685) those statutory enactments, the Proclamation is
25

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

1 beyond the President’s Section 212(f) authority. This court should therefore enjoin Defendants
2 from carrying it out. *Sierra Club*, 929 F.3d at 694.

3 **2. The Proclamation lacks a reasonable relationship to its stated goals.**

4 The Proclamation is also exceeds the authority conferred in Section 212(f) because it does
5 not comport with the one procedural prerequisite contained in that section: a presidential
6 “find[ing]” that “the entry of” the excluded class of noncitizens “would be detrimental to the in-
7 terests of the United States.” 8 U.S.C. § 1182(f).

8 Section 212(f)’s finding requirement calls for more than just the President’s *ipse dixit*. Ra-
9 ther, as the Ninth Circuit has explained, the statutory language “requires that the President’s find-
10 ings *support* the conclusion” that the admission of the excluded noncitizens “would be harmful to
11 the national interest.” *Hawaii I*, 859 F.3d at 770 (emphasis added); *see also Hawaii II*, 878 F.3d at
12 692-693. Although the Supreme Court cast some doubt on this standard in the foreign-affairs con-
13 text at issue in *Hawaii III* (138 S. Ct. at 2409), the Ninth Circuit subsequently made clear that
14 more searching review of the President’s findings *is* warranted when he uses his Section 212(f)
15 power to solve a *domestic* problem: “[W]hile the ‘President may adopt a preventive measure in
16 the context of international affairs and national security,’ and he is then ‘not required to conclu-
17 sively link all of the pieces in the puzzle before courts grant weight to his empirical conclusions,’
18 his power is more circumscribed when he addresses a purely domestic economic issue.” *Doe #1*,
19 957 F.3d at 1067 (quoting *Hawaii III*, 138 S. Ct. at 2409) (citations omitted; alterations incorpor-
20 ated); *see also id.* (“We reject the government’s argument that the Proclamation implicates the
21 President’s foreign affairs powers simply because the Proclamation affects immigrants.”).

22 It is thus the law of this Circuit that Section 212(f) requires “‘find[ings]’ that support the
23 conclusion that admission of the excluded aliens would be ‘detrimental,’” and that courts are
24 competent to adjudicate whether the President’s findings satisfy that requirement. *Hawaii II*, 878
25 F.3d at 693 (quoting 8 U.S.C. § 1182(f)); *see also Doe #1*, 957 F.3d at 1066-1067.⁷

26 _____
27 ⁷ That is also the natural reading of Section 212(f)’s text. Congress has required that the Presi-
28 dent “find” that entry would be detrimental, a common-law term invoking the weighing of evi-
dence by a factfinder. *See Finding of Fact*, *Black’s Law Dictionary* (11th ed. 2019) (“A determi-
nation by a judge, jury, or administrative agency of a fact supported by the evidence in the rec-

1 The Proclamation flunks that test. That is because there is no reasonable relationship be-
2 tween the problem identified and the action taken.

3 **First**, because there is a significant mismatch between the unemployment caused by the
4 COVID-19 pandemic and the classes of noncitizens barred by the Proclamation, its “find[ings]”
5 do not “support the conclusion that admission of the excluded aliens would be ‘detrimental.’”
6 *Hawaii II*, 878 F.3d at 693. Pandemic-related unemployment is concentrated in service occupa-
7 tions; by contrast, an analysis of the federal government’s unemployment statistics reveals that
8 unemployment in “computer occupations” has remained low, and actually *decreased* from 3.0%
9 in January 2020 to 2.8% in April 2020, and 2.5% in May 2020.⁸ That rate is actually lower than
10 what the Federal Reserve believes to be the lowest unemployment rate the economy can sustain.⁹
11 And during the 30 days ending June 9, 2020, there were over 630,000 active job vacancy postings
12 advertised online for jobs in common computer occupations, indicating that overall demand for
13 high-skilled workers in these occupations still exceeds the domestic supply.¹⁰

14 These computer-related jobs, with low unemployment and great demand, are precisely the
15 ones that H-1B workers seek to fill: 66% of approved H-1B visa petitions are for jobs in “com-
16 puter-related occupations,” according to DHS data.¹¹ This information was also presented to the

17
18 ord.”). And “[i]t is a settled principle of interpretation that, absent other indication, Congress in-
19 tends to incorporate the well-settled meaning of the common-law terms it uses.” *United States v.*
20 *Castleman*, 572 U.S. 157, 162 (2014). Moreover, the fact that Congress chose to employ more
21 deferential phrasing elsewhere in the same section—permitting a suspension to last “for such pe-
22 riod as [the President] shall *deem* necessary” (8 U.S.C. § 1182(f) (emphasis added))—
23 “demonstrates that Congress intended to convey a different meaning for those words.” *Tin Cup*
24 *LLC v. U.S. Army Corps of Eng’rs*, 904 F.3d 1068, 1074 (9th Cir. 2018); see Deem, *Black’s Law*
25 *Dictionary* (11th ed. 2019) (“To consider, think, or judge.”). Indeed, the legislative history con-
26 firms as much. See *Hawaii II*, 878 F.3d at 692-693 (“The use of the word ‘find’ was deliberate.
27 Congress used ‘find’ rather than ‘deem’ in the immediate predecessor to § 1182(f) so that the
28 President would be required to ‘base his [decision] on some fact,’ not on mere ‘opinion’ or
‘guesses.’”) (quoting 87 Cong. Rec. 5051 (1941)).

⁸ Hughes Decl. Ex. 31, Nat’l Foundation for American Policy 1, *Updated Analysis of Employment Data for Computer Occupations* (June 2020), perma.cc/P7JB-NFBQ.

⁹ Hughes Decl. Ex. 10. Bd. of Governors of the Federal Reserve System, *What is the lowest level of unemployment that the U.S. economy can sustain?* (June 10, 2020), perma.cc/R79F-QVFE; see also *id.* (“Even in good times, a healthy, dynamic economy will have at least some unemployment as workers switch jobs, and as new workers enter the labor market and other workers leave it.”).

¹⁰ Hughes Decl. Ex. 31, Nat’l Foundation for American Policy, *supra*.

¹¹ Hughes Decl. Ex. 14, at ii.

1 Administration—but the Proclamation failed to consider it. Corley Decl. ¶ 5 & Ex. 1. Instead, the
2 Proclamation cites statistics regarding unemployment in (unnamed) “*industries*” in which em-
3 ployers are currently seeking (an unspecified number of) work-related visas. *See* Proclamation,
4 preamble. But unemployment in an “*industr[y]*” is not probative of whether there are qualified
5 workers available to fill open *positions*—a retailer, for example, cannot hire unemployed retail
6 clerks to work in its IT department as software engineers.

7 Yet more strange, the Proclamation bars the entry of categories of noncitizens who are al-
8 ready prevented, by statute, from competing for jobs with United States workers. H-2B visas *al-*
9 *ready* may be issued only “if unemployed persons capable of performing [the needed] service or
10 labor cannot be found in this country.” 8 U.S.C. § 1101(a)(15)(H)(ii)(b). As discussed above, this
11 prohibition is implemented through an extensive labor certification process that culminates in a
12 visa only if the Department of Labor makes an affirmative finding, based on the specifics of a
13 particular employer’s application, that “there is an insufficient number of U.S. workers who are
14 qualified and who will be available for the job opportunity” 20 C.F.R. § 655.50.¹² The Proclama-
15 tion has the remarkable effect of barring temporary seasonal labor *even when* an employer is una-
16 ble to fill open positions during the COVID-19 pandemic. *See* Lemman Decl. ¶ 9; O’Gorman Decl.
17 ¶ 12. Existing law thus guarantees that H-2B workers will not “pose[] a risk of displacing and
18 disadvantaging United States workers during the current recovery” (Proclamation, preamble)—
19 meaning that the Proclamation’s “find[ings]” do not actually “support the conclusion that admis-
20 sion of the excluded aliens would be ‘detrimental.’” *Hawaii II*, 878 F.3d at 693.

21 The same is true for the dependents of H-1B and H-2B workers, who enter the country on
22 H-4 visas. *Cf.* Proclamation § 2(a). With one cabined exception (*see* 8 C.F.R. § 214.2(h)(9)(iv)),
23 such dependents are not authorized to work in the United States in the first place. *Id.* § 274a.12.
24 These dependents, too, are prevented by existing law from competing with domestic workers for
25 jobs, and their entry similarly cannot be “detrimental to the interests of the United States” (8
26

27 ¹² Even after the Department of Labor issues the certification, the employer is subject to a
28 “[c]ontinuing requirement” to “provide employment to any qualified U.S. worker who applies to
the employer for the job opportunity” in preference to H-2B workers. 20 C.F.R. § 655.20(t).

1 U.S.C. § 1182(f) for the reasons stated in the Proclamation.¹³

2 **Second**, the Proclamation fails to support the conclusion reached because it declined to
3 address substantial evidence relevant to the problem at issue. Again, not only was the data availa-
4 ble to the Administration, but was actively presented to decisionmakers by a coalition of compa-
5 nies and business groups in the run-up to the Proclamation. *See* Corley Decl. ¶ 5 & Ex. 1.

6 That is, the Proclamation utterly disregards the clear economic consensus that the pres-
7 ence of international workers in this country boosts productivity and innovation, and has the net
8 result of *creating* jobs for domestic workers. An exhaustive 2015 empirical study of state-level
9 employment data conducted by the American Enterprise Institute and the Partnership for a New
10 American Economy found that, “[o]verall, when looking at the effect of all immigrants on em-
11 ployment among US natives, *there is no evidence that immigrants take jobs from US-born work-*
12 *ers.*”¹⁴ To the contrary, “[t]he results give clear evidence that both the H-1B and H-2B programs
13 for temporary workers correspond to *greater* job opportunities for US-born workers.”¹⁵ In short,
14 foreign workers tend to complement native workers, not compete with them.¹⁶

15 **Third**, the Proclamation abruptly changes the immigration policy of the United States
16 without any apparent consideration of the impact on American firms and their business planning.
17 *See* Chen Decl. ¶¶ 6, 14-19 (describing but a few examples of interests upset by the Proclama-
18

19 ¹³ The State Department recently issued guidance asserting that certain dependents may apply
20 for discretionary national interest exceptions. *See* Compl. ¶ 141. Agency guidance—at odds with
21 the Proclamation’s text, and issued a month later—cannot render the Proclamation itself lawful.
22 What is more, even if dependents were categorically eligible for exceptions, that would be all the
23 more proof that the Proclamation—which includes them facially—is overbroad.

24 ¹⁴ Hughes Decl. Ex. 29, Madeline Zavodny, *Immigration and American Jobs* 11 (2011).

25 ¹⁵ *Id.* Indeed, “[a]dding 100 H-1B workers results in an additional 183 jobs among US natives,”
26 and “[a]dding 100 H-2B workers results in an additional 464 jobs for US natives.” *Id.* at 4.

27 ¹⁶ This is not a controversial point among economists. A literature review conducted the Nation-
28 al Academies of Sciences, Engineering, and Medicine—authored by nearly 40 economists from
across the political spectrum—highlighted “several studies [that have] found a positive impact of
skilled immigration on the wages and employment of both college-educated and noncollege-
educated natives . . . consistent with the view that skilled immigrants are often complementary to
native-born workers.” Hughes Decl. Ex. 32, National Academies of Sciences, Engineering, and
Medicine, *The Economic and Fiscal Consequences of Immigration*, *The National Academies*
Press 6 (2017), perma.cc/JU7U-LVJ2. The panel concluded that “immigration is integral to the
nation’s economic growth,” and that “[t]he prospects for long-run economic growth in the United
States would be considerably dimmed without the contributions of high-skilled immigrants.” *Id.*
at 6-7. Many other analyses tell the same story. *See* Hughes Decl. Exs. 18-33.

1 tion); Brown Decl. ¶ 14 (“Like other Fortune 100 companies, Amazon builds its business plans
2 around short-term and long-term goals. Many L-1 transfers from overseas operations were
3 planned prior to the COVID-19 pandemic, and the transferees were expected to help implement
4 Amazon’s operational growth plans.”); Bell Decl. ¶ 9. Consideration of reliance interests is a fun-
5 damental requirement of reasoned decisionmaking when a policy is reversed.¹⁷

6 In the end, the Proclamation fails to offer a reasonable connection between the executive
7 action in question and the policy interest it purports to serve. It is therefore insufficient under Sec-
8 tion 212(f). *Hawaii II*, 878 F.3d at 693; *Doe #1*, 957 F.3d at 1066-1067.

9 **3. The nondelegation doctrine requires a reading of Section 212(f) that**
10 **imposes meaningful limitations on the President’s authority.**

11 These limitations on the scope of Section 212(f) authority render it a lawful delegation of
12 authority from Congress to the President. It is a basic principle that “[a] statute must be construed,
13 if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave
14 doubts upon that score.” *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998); *see also*
15 *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Institute*, 448 U.S. 607, 646 (1980) (“If the Gov-
16 ernment was correct [about the scope of a provision], the statute would make such a sweeping
17 delegation of legislative power that it might be unconstitutional. . . . A construction of the statute
18 that avoids this kind of open-ended grant should certainly be favored.”).

19 If the Court concludes that we are wrong about the scope of the President’s power under
20 Section 212(f), though—that is, if the statute actually *does* empower the President to simply de-
21 lete entire sections of the INA with the stroke of a pen, or to act based on findings that do not rea-
22 sonably support the proposed action, or to suspend entry to achieve domestic economic policy
23 goals—then the Court would have to confront the serious constitutional question whether Section
24 212(f) amounts to an unconstitutional delegation of power to the executive branch.

25
26 ¹⁷ That rule is an application of the general principle that “reasonable regulation ordinarily re-
27 quires paying attention to the advantages *and* the disadvantages of agency decisions.” *Michigan v.*
28 *EPA*, 135 S. Ct. 2699, 2707 (2015); *see Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732 (D.C.
Cir. 2016) (Kavanaugh, J., dissenting) (“[R]easoned decisionmaking requires assessing whether a
proposed action would do more good than harm.”). But the Proclamation considers neither.

1 “The nondelegation doctrine bars Congress from transferring its legislative power to an-
2 other branch of Government.” *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality op.
3 of Kagan, J.). As the law now stands, “a statutory delegation is constitutional as long as Congress
4 ‘lays down by legislative act an intelligible principle to which the person or body authorized to
5 exercise the delegated authority is directed to conform.’” *Id.* at 2123 (quoting *Mistretta v. United*
6 *States*, 488 U.S. 361, 372 (1989) (alterations incorporated)); *see also id.* at 2129 (“[I]n a related
7 formulation, the Court has stated that a delegation is permissible if Congress has made clear to the
8 delegee ‘the general policy’ he must pursue and the ‘boundaries of his authority’”) (quoting *Am.*
9 *Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)) (alteration incorporated).

10 If, contrary to our position, the President can invoke Section 212(f) for *any* conceivable
11 policy end, then nothing in the statute supplies a limit to executive authority. Under that reading
12 of Section 212(f), Congress has neither “made clear” any “general policy [the President] must
13 pursue” nor set any “boundaries” on his “authority” (*Gundy*, 139 S. Ct. at 2129 (quoting *Am.*
14 *Power & Light*, 329 U.S. at 105))—or, in other words, Congress would not have set out an “intel-
15 ligible principle” to which the President “is directed to conform” (*id.* at 2123 (quoting *Mistretta*,
16 488 U.S. at 372)). If Section 212(f) authority is limitless, “[t]his is delegation running riot.”
17 *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

18 Thus, another court in this Circuit recently held that, if Section 212(f) authorizes the Pres-
19 ident to engage in domestic policymaking, then, “[i]n this wholly domestic context, the delegation
20 by Congress is without any intelligible principle and thus fails under the nondelegation doctrine.”
21 *Doe v. Trump*, 418 F. Supp. 3d 573, 592 (D. Or. 2019).

22 As we described above, Section 212(f) authority is most broad when invoked to advance
23 foreign relations and national security interests. It does not provide the President limitless authori-
24 ty to make *domestic* policy judgments, it certainly does not permit the President to nullify statutes
25 reflecting *congressional* determinations (including the decision to allow immigration for certain
26 temporary work), and it does not license the President to rest on putative findings where the ac-
27 tion taken bears no reasonable relationship to the problem addressed. Identifying these limits ap-
28 propriately avoids the underlying and serious constitutional question.

1 **4. There is no alternative authority for the Proclamation.**

2 The President has no alternative authority, apart from Section 212(f), that could inde-
3 pendently authorize the Proclamation. Although the Proclamation cites Section 215(a) of the INA
4 (8 U.S.C. § 1185(a)), the Ninth Circuit has rejected that provision as an independent source of
5 authority for actions beyond the scope of Section 212(f): “[T]he Government cannot justify the
6 Proclamation under § 1182(f) by using § 1185(a) as a backdoor.” *Hawaii II*, 878 F.3d at 694; *cf.*
7 *Hawaii III*, 138 S. Ct. at 2407 n.1 (“Because [Section 215(a)] ‘substantially overlap[s]’ with [Sec-
8 tion 212(f)], . . . we need not resolve the precise relationship between the two.”). And even if—
9 contrary to the Ninth Circuit—it could be viewed as providing the President authority, all the lim-
10 itations on Section 212(f) we have identified would apply, too. *See* pages 6-10, *supra*.

11 Nor is the Proclamation a proper exercise of any constitutional authority of the President.
12 As the Ninth Circuit held in *Hawaii II*, “the President lacks independent constitutional authority
13 to issue the Proclamation, as control over the entry of aliens is a power within the exclusive prov-
14 ince of Congress.” *Hawaii II*, 878 F.3d at 697.¹⁸ Indeed, “[p]olicies pertaining to the entry of al-
15 iens and their right to remain here are . . . entrusted exclusively to Congress.” *Galvan v. Press*,
16 347 U.S. 522, 531 (1954).¹⁹ As the Supreme Court long ago established, under our constitutional
17 system, “[t]he power to exclude or to expel aliens . . . is to be regulated by treaty or by act of con-
18 gress.” *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893). The President’s role is limited
19 to “execut[ing]” that power “according to the regulations so established” (*id.*)—that is, he has no
20 independent power to legislate general rules of exclusion in the first instance, and he certainly
21 may not do so in a manner that contradicts duly enacted statutes. *See* pages 4-6, *supra*.

22 **B. For the same reasons, the implementation of the Proclamation is invalid un-**
23 **der the APA.**

24 For these same reasons, Plaintiffs are likely to demonstrate that the Defendants’ imple-

25 _____
26 ¹⁸ Because it ruled on other grounds, the Supreme Court had no occasion in *Hawaii III* to ad-
27 dress this holding.

28 ¹⁹ *See also INS v. Chadha*, 462 U.S. 919, 940 (1983) (“The plenary authority of Congress over
aliens under Art. I, § 8, cl. 4 is not open to question.”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)
 (“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.”) (quotation marks omitted).

1 mentation of the Proclamation violates the APA, as it is “arbitrary, capricious,” and “not in ac-
2 cordance with law.” 5 U.S.C. § 706.

3 While presidential action is ordinarily not “agency action” reviewable under the APA
4 (*Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992)), that rule “is limited to those cases in
5 which the President has final constitutional or statutory responsibility for the final step necessary
6 for the agency action directly to affect the parties.” *Pub. Citizen v. U.S. Trade Rep.*, 5 F.3d 549,
7 552 (D.C. Cir. 1993). The Ninth Circuit in *Hawaii* thus heard an APA challenge against a Section
8 212(f) proclamation that was implemented by agency officials, and the Supreme Court did not
9 disagree. *Hawaii II*, 878 F.3d at 680-681; *see also East Bay Sanctuary Covenant v. Trump*, 950
10 F.3d 1242, 1271 (9th Cir. 2020) (the “operative rule of decision” established by Section 212(f)
11 proclamation and agency’s implementing actions “is reviewable by this court” under the APA).²⁰

12 Thus, the same failings identified above—that the Proclamation is not authorized by Sec-
13 tion 212(f); that it disregards critical evidence and is not reasonably related to the unemployment
14 caused by COVID-19; and that it fails to account for reliance interests—are independently action-
15 able under the APA. The Court should therefore stay implementation of the Proclamation by De-
16 fendants under the APA as well. 5 U.S.C. § 705; *Dep’t of Commerce v. New York*, 139 S. Ct.
17 2551, 2584 (2019); *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

18 **C. Defendants’ moratorium on visa processing and issuance is unlawful, wholly**
19 **apart from the Proclamation’s own failings.**

20 Plaintiffs are also likely to succeed in demonstrating that, apart from the validity of the
21 Proclamation itself, related steps Defendants have taken are *ultra vires* and also violate the APA.

22 Putatively relying on the Proclamation, the State Department has announced that it “will
23 not be issuing H-1B, H-2B, L, or certain J visas, and their derivatives through December 31,
24 2020, unless an exception applies.” Hughes Decl. Ex. 5. DHS similarly announced that the Proc-
25 lamation “directs the Department of Homeland Security . . . to temporarily pause the issuance of

26 _____
27 ²⁰ Plaintiffs’ interests also easily “fall within the zone of interests protected by” the INA.
28 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). American em-
ployers seeking to sponsor noncitizens for explicitly work-based visas are undoubtedly within the
zone of interests that those work-based visa statutes are intended to protect.

1 certain new nonimmigrant visas until December 31, 2020,” along with its intention to “begin im-
2 plementing” that instruction. Hughes Decl. Ex. 3. Defendants have thus stopped the processing
3 and issuance of visas and related paperwork for the affected visa categories. That is unlawful.

4 The Proclamation does not provide Defendants legal authority to adopt the policy of not
5 processing visa applications or petitions. To the contrary, it “suspend[s]” “[t]he *entry* into the
6 United States of any alien seeking entry pursuant to any of the [affected] nonimmigrant visas.”
7 Proclamation § 2 (emphasis added). Likewise, Section 212(f) does not speak to visa issuance at
8 all—only to entry. Entry is distinct from issuance of a visa. *E.g.*, 8 U.S.C. § 1101(a)(13), (26).²¹

9 The Proclamation goes on to instruct the Secretary of State and the Secretary of Homeland
10 Security to “implement this proclamation.” Proclamation § 4(a). But a direction to “implement” a
11 ban on the “entry” of noncitizens does not even purport to authorize Defendants to rescind the
12 statutory authority of consular officers to “issue . . . to a nonimmigrant who has made proper ap-
13 plication therefor, a nonimmigrant visa.” 8 U.S.C. § 1201(a)(1)(B). Nor does it excuse consular
14 officers from their nondiscretionary *duty* under the regulations to adjudicate visa applications by
15 either issuing or refusing the visa. *See* 22 C.F.R. § 41.121(a) (“When a visa application has been
16 properly completed and executed in accordance with the provisions of the INA and the imple-
17 menting regulations, the consular officer *must* issue the visa, refuse the visa, or, pursuant to an
18 outstanding order under INA 243(d), discontinue granting the visa.”) (emphasis added).²²

19 Defendants’ policy of refusing to process applications and petitions for visas is therefore
20 beyond their lawful authority. It should therefore be stayed under the APA (5 U.S.C. § 705) and
21 enjoined as *ultra vires*, regardless of the lawfulness of the Proclamation itself.

22 That is, since the Proclamation does not—indeed, could not—order Defendants to stop
23 processing visa applications, the only means through which Defendants could institute such a

24 ²¹ Prior to 1996, “entry” was a defined term in the INA. *See* Pub. L. 82-414, § 101(a)(13), 66
25 Stat. 163, 167 (1952). In 1996, Congress substituted the concept of “admission” for “entry” in the
26 INA’s definition section (*see* Pub. L. 104-208, § 301(a), 110 Stat. 3009, 3009-575), but many
27 INA provisions still speak of entry.

28 ²² Nor *could* the Proclamation have directed the Departments of State and Homeland Security to
stop processing visa applications and related paperwork—because Section 212(f) itself only au-
thorizes the President to “suspend the *entry*” of specified noncitizens, not to cease processing visa
applications according to applicable laws and regulations.

1 non-adjudication policy is notice-and-comment rulemaking: Whatever the government might call
 2 it, agency action “that effectively amends a prior legislative rule is legislative and must be prom-
 3 ulgated under notice and comment rulemaking.” *Erringer v. Thompson*, 371 F.3d 625, 632 (9th
 4 Cir. 2004). And by directing consular officers not to adjudicate visa applications, Defendants’
 5 actions here “effectively amend[]” the State Department regulation mandating that consular offic-
 6 ers “*must* issue the visa [or] refuse the visa” when an application “has been properly completed
 7 and executed.” 22 C.F.R. § 41.121(a) (emphasis added).²³ For this reason, as well, Defendants’
 8 moratorium on processing visas is unlawful under the APA. *See* 5 U.S.C. §§ 553(b), 706(2)(D).

9 **II. THE PROCLAMATION CAUSES DIRECT AND IRREPARABLE INJURIES.**

10 Plaintiffs and the members of the Plaintiff associations have suffered and will continue to
 11 suffer injury if the implementation of the Proclamation is not enjoined. And these substantial inju-
 12 ries are irreparable, requiring preliminary injunctive relief to protect Plaintiffs and their members
 13 from devastating harms the implementation of the Proclamation will inflict before a final judg-
 14 ment in this case.

15 For standing purposes, a plaintiff must have suffered an (1) injury in fact (2) fairly tracea-
 16 ble to the challenged conduct and (3) likely to be redressed by a favorable decision. *Spokeo, Inc.*
 17 *v. Robins*, 136 S. Ct. 1540, 1547 (2016). An association has standing to sue on behalf of its mem-
 18 bers when “(a) its members would otherwise have standing to sue in their own right; (b) the inter-
 19 ests it seeks to protect are germane to the organization’s purpose; and (c) neither claim asserted
 20 nor the relief requested requires the participation of individual members in the lawsuit.” *Oregon*
 21 *Advocacy Center v. Mink*, 322 F.3d 1101, 1109 (9th Cir. 2003).²⁴ Irreparable harm, moreover, is
 22 “harm for which there is no adequate legal remedy.” *East Bay*, 950 F.3d at 1280.

23 **A.** The Proclamation, by purposeful design, injures the Plaintiff associations and their
 24

25 ²³ Consular officers also may not “refuse” visas on the basis of the Proclamation’s entry ban:
 26 “Nonimmigrant visa refusals must be based on legal grounds, such as one or more [of various
 INA provisions], or other applicable law.” 22 C.F.R. § 41.121(a).

27 ²⁴ In the paragraphs below, we demonstrate that members of the Plaintiff associations would
 28 have standing to sue in their own right. The associations seek to protect interests germane to their
 organizational purposes. *See* Baseline Decl. ¶¶ 3-8; Hall Decl. ¶ 5-7. The participation of individ-
 ual members is not required; that said, Intrax is both a U.S. Chamber member and a plaintiff.

1 members. Approximately 300,000 businesses are direct members of the U.S. Chamber—many of
 2 which hire employees in H, J, and L visa categories. *See* Baselice Decl. ¶¶ 2, 4-7.²⁵ The purpose
 3 of the Proclamation is to disrupt these hiring practices. According to the White House, the Proc-
 4 lamation “open[s] up about 525,000 jobs” and “clear[s] out this workspace for Americans.”
 5 Hughes Decl. Ex. 2. Per DHS official Ken Cuccinelli, the Proclamation is an “[u]nprecedented
 6 level of effort by a president to clear the American job market of competition.” *Id.* Ex. 4.

7 The injury purposefully inflicted on businesses over the next six months at least—barring
 8 them from hiring employees from outside the United States via visa categories Congress estab-
 9 lished—is a quintessential irreparable harm, as its effects cannot possibly be undone. Unless the
 10 implementation of the Proclamation is enjoined now, businesses will forever lose opportunities
 11 and productivity. *See, e.g.*, Baselice Decl. ¶¶ 9-12. Further, because employment is durable, if a
 12 company foregoes hiring an individual in the third or fourth quarter of 2020—or locates employ-
 13 ees and operations abroad—that decision will reverberate well beyond 2020. *Id.* ¶¶ 11-12.

14 **B.** While these categorical injuries suffice to establish standing and irreparable injury,
 15 specific, immediate, and irremediable harm is easy to identify across the impacted visa categories.

16 **L-1.** Microsoft Corporation, a member of plaintiffs the NAM, the U.S. Chamber, and
 17 TechNet (Chen Decl. ¶ 1), “utilizes L visas for key intracompany transfers.” *Id.* ¶ 12. As one cur-
 18 rent example, Microsoft currently seeks to transfer a French national, who has worked for the
 19 company since 2011, from France to the United States. *Id.* ¶¶ 16-17. He was slated to lead a team
 20 of 25 new software engineers in 2020, with growth to 50 engineers in 2021. *Id.* ¶ 17. Because the
 21 Proclamation will bar his entry indefinitely, he remains in France, so Microsoft had to change
 22 course and hire 10 software engineers there instead. *Id.* ¶ 18 “This disruption to Microsoft’s busi-
 23 ness planning will have lasting effects” because, “[o]nce a team is established overseas, it will be
 24 difficult and unduly disruptive to relocate the team’s key personnel to the U.S., as Microsoft had
 25 hoped and planned.” *Id.* ¶ 19. This example is far from unique—Microsoft details three other in-

26 _____
 27 ²⁵ *See also* Chen Decl. ¶¶ 1, 11-12 (a U.S. Chamber member, Microsoft hires employees via the
 28 H-1B and L-1 visa categories); Brown Decl. ¶¶ 1, 7-8 (same regarding Amazon); Brummel Decl.
 ¶¶ 2, 5 (Brummel Lawn & Landscape, a U.S. Chamber member, hires H-2B workers); O’Gorman
 Decl. ¶¶ 10, 13 (Gentle Giant, a U.S. Chamber member, hires H-2B workers and J visitors).

1 individuals who, but for the Proclamation, would transfer to the United States now via L-1 visas. *Id.*
2 ¶¶ 23-25, 26-27, 28. Only an immediate injunction can remedy these harms.

3 **H-1B.** Amazon.com, Inc., a member of the U.S. Chamber (Brown Decl. ¶ 1), hires certain
4 workers on H-1B visas. *Id.* ¶¶ 4, 8-9. An Amazon employee, who is a senior manager with Ama-
5 zon’s Transportation Operations Management (TOM) team, traveled abroad to visit family prior
6 to the Proclamation. Because he was abroad when the Proclamation issued, and because he re-
7 quires a new H-1B stamp to reenter the country, he is now unable to return to his home and place
8 of employment within the United States. *Id.* ¶¶ 10-12. This is disrupting Amazon’s business oper-
9 ations, and an injunction would remedy this direct and otherwise irreparable harm. *Id.* ¶¶ 11-12.

10 Similarly, on June 10, 2020, Microsoft hired an individual, holding an approved Microsoft
11 H-1B petition, to move to the U.S. to become a “Senior Program Manager.” Chen Decl. ¶ 29. The
12 Proclamation bars his relocation to the United States, and it substantially interferes with his work
13 for the company. *Id.* ¶¶ 30-31. Another Microsoft employee has lived in the U.S. since 2009, and
14 he joined Microsoft in 2015. *Id.* ¶ 33. He and his family were outside the United States, visiting
15 family and holding cultural and religious ceremonies for a newborn child, when the Proclamation
16 was announced. *Id.* ¶ 34. The family now cannot return to their home, resulting in medical com-
17 plications for a child who is removed from established care in Washington. *Id.* ¶ 36.

18 **H-2B.** Singing Hills Landscape, a U.S. Chamber member (Leman Decl. ¶ 2), is currently
19 petitioning for 25 H-2B laborers to enter the U.S. on October 1, 2020. *Id.* ¶ 14. But for the Proc-
20 lamation, Singing Hills—which has a long history of hiring H-2B workers (*id.* ¶¶ 5-6)—would
21 hire some or all of these 25 workers in two months. If Singing Hills cannot bring in these work-
22 ers, the labor deficit will cause approximately \$400,000 in 2020 revenue loss. *Id.* ¶ 15. This loss
23 is irreparable. *See Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir.
24 2001) (“[T]hreatened loss of prospective customers ... certainly supports a finding of the possibil-
25 ity of irreparable harm.”). Because Singing Hills cannot obtain necessary labor, it has also fore-
26 gone hiring domestic workers for three specific management positions. Leman Decl. ¶¶ 18-19.

27 Gentle Giant Moving Company, a premier moving company and a member of the U.S.
28 Chamber (O’Gorman Decl. ¶¶ 2-4), currently has 83 approved but unfilled petitions for H-2B

1 seasonal workers. *Id.* ¶¶ 10, 15. The sole barrier to these trained employees entering the country is
 2 the Proclamation. *Id.* ¶ 11. Gentle Giant is currently losing business because it lacks the labor it
 3 needs; by foreclosing the hiring of these 83 workers, the Proclamation will cost Gentle Giant ap-
 4 proximately \$8 to \$10 million in lost revenue for the remainder of the calendar year. *Id.* ¶ 16. It
 5 will also preclude Gentle Giant from hiring more domestic workers. *Id.* ¶ 17.

6 **J-1.** Plaintiff Intrax (also a member of the U.S. Chamber) is a leading sponsor of J-1 cul-
 7 tural exchange programs. The Proclamation has shut down five of Intrax’s six programs—its pro-
 8 grams for summer work travel, au pair, intern, trainee, and camp counselor. Schneider Decl. ¶ 6.
 9 Because of the Proclamation, Intrax has been precluded from bringing to the United States more
 10 than 8,200 participants in its programs who were scheduled to arrive between June 24 (the Proc-
 11 lamation’s effective date) and today. *Id.* ¶ 7. The result is a loss of nearly all revenue. *Id.* ¶ 29.
 12 This ongoing economic devastation cannot later be remedied. *Id.* ¶ 30. *See East Bay*, 950 F.3d at
 13 1280 (“[W]here parties cannot typically recover monetary damages flowing from their injury ...
 14 economic harm can be considered irreparable”). Intrax has already furloughed or laid off 40 to
 15 50% of its 300-person domestic staff, and the remaining staff have taken very substantial pay
 16 cuts. Schneider Decl. ¶ 31.

17 All of Alliance Abroad’s J-1 cultural exchange programs have been shut down by the
 18 Proclamation. Bell Decl. ¶ 3; *see also id.* ¶ 1 (Alliance Abroad is a U.S. Chamber member). If the
 19 Proclamation remains through 2020, it will cost Alliance Abroad about \$7.5 million in lost reve-
 20 nue—all of which is irremediable. *Id.* ¶ 5. Alliance Abroad has had to lay-off 87 of 115 staff
 21 members. *Id.* ¶ 7. The State Department’s refusal to process or issue visas is causing additional
 22 harm, because it has rendered recruiting for 2021 virtually impossible. *Id.* ¶ 13. Alliance Abroad
 23 was founded in reliance on an operational J-1 program (*id.* ¶ 9), but if the Proclamation continues
 24 for more than a few months longer, it “will likely have to cease operations.” *Id.* ¶ 17.²⁶

25 The irreparable harms abound: Without L-1s and H-1Bs, Microsoft and Amazon cannot
 26

27 ²⁶ Although the State Department has identified certain national interest exceptions for limited
 28 categories, none of these waivers apply to any of the harms documented here. *See, e.g.,* Bell Decl.
 ¶ 6; Schneider Decl. ¶ 34; Chen Decl. ¶¶ 40-41.

1 build planned development teams at their U.S. headquarters (Chen Decl. ¶¶ 6-9; Brown Decl.
2 ¶¶ 8-15). Without H-2Bs, Gentle Giant cannot hire 83 experienced seasonal workers to generate
3 substantial revenue during busy season (O’Gorman Decl. ¶¶ 16-19); Singing Hills cannot accept
4 new business opportunities (Leman Decl. ¶¶ 15-18); and Brummel Lawn cannot make capital in-
5 vestments (Brummel Decl. ¶ 21). Without J-1s, Intrax and Alliance Abroad will not even have
6 businesses to run (Schneider Decl. ¶ 43; Bell Decl. ¶ 17).

7 An injunction will redress each of these injuries: It would allow Microsoft and Amazon to
8 move their employees to the United States via L-1 and H-1B visas. It would enable Gentle Giant
9 to add 83 H-2B workers immediately to finish its busy season; Singing Hills to add H-2B workers
10 around October 1 to fulfill its business opportunities; and Brummel Lawn to make capital invest-
11 ments. It would restart the J-1 programs by Intrax and Alliance Abroad, allowing them to resume
12 revenue. And, most fundamentally, it will stop the massive reconfiguration of the labor market,
13 which harms the Plaintiff associations’ members as a whole. Baselice Decl. ¶¶ 4-7, 10-13.

14 C. Defendants’ separate policy refusing to process and issue visas (*see* pages 18-20, *su-*
15 *pra*) causes independent irreparable harm. For example, but for this separate action, Intrax would
16 presently be lining up individuals on J-1 visas to enter the United States on January 1, 2021, it
17 would enter agreements with partner businesses for these individuals, and it would earn revenue
18 as a result. Schneider Decl. ¶ 39. The failure of defendants to process and issue visas before the
19 end of 2020 precludes this conduct. *Id.* If the Court enjoins this independent unlawful behavior,
20 this immediate harm would be remedied, regardless of the lawfulness of the Proclamation itself.
21 *Id.*

22 **III. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST FAVOR AN** 23 **INJUNCTION.**

24 The remaining equitable factors—the balance of equities and the public interest—merge
25 where the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 436 (2009). Here,
26 they sharply favor preliminary injunctive relief.

27 *First*, respecting congressional judgments is in the public interest:
28

1 [W]hen Congress chooses how to address a problem, “[i]t is quite impossible ... to
2 find secreted in the interstices of legislation the very grant of power which Con-
3 gress consciously withheld,” as doing so is “not merely to disregard in a particular
4 instance the clear will of Congress,” but “to disrespect the whole legislative pro-
5 cess and the constitutional division of authority between President and Congress.”

6 *Sierra Club*, 929 F.3d at 707 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579,
7 609 (1952) (Frankfurter, J., concurring). That is, “the public has an interest in ensuring that the
8 ‘statutes enacted by [their] representatives are not imperiled by executive fiat.’” *East Bay*, 950
9 F.3d at 1281. Congress has chosen how to balance the needs of American employers with protec-
10 tion for American labor. *See* pages 8-10, *supra*. Because Congress has not authorized a wholesale
11 repeal of the H, J, or L visa categories, “Congress presumably decided” that this entry ban “was
12 not in the public interest,” which is a factor that weighs heavily here. *Sierra Club*, 929 F.3d at
13 707. That conclusion is especially appropriate in view of the aggressive actions Congress *has* tak-
14 en with respect to COVID-19’s economic repercussions. Similarly, the “public interest is served
15 by compliance with the APA.” *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018).

16 *Second*, the Plaintiff associations represent the interests of their members, which consti-
17 tute a broad cross section of American business. The Plaintiff associations seek relief that is sub-
18 stantially in the public interest—it will ensure that businesses may recover, that they may expand
19 their operations, and that they may hire large numbers of domestic workers. *See, e.g.*, Chen Decl.
20 ¶¶ 10-31; Brown Decl. ¶ 14; Brummel Decl. ¶¶ 8, 20; Leman Decl. ¶¶ 18-19; Schneider Decl. ¶¶
21 29-33; Bell Decl. ¶ 7; O’Gorman Decl. ¶ 17. These interests, which will accrue to the public as a
22 whole, substantially favor the grant of injunctive relief. Basalice Decl. ¶¶ 13-14; Hall Decl. ¶ 7.

23 *Third*, as is “often” the case, the public interest favors preservation of the status quo ante;
24 “a stable immigration system” benefits the Nation, including the myriad stakeholders who rely on
25 operation of the system that Congress created. *Doe #1*, 957 F.3d at 1068.

26 CONCLUSION

27 The Court should grant the motion for a preliminary injunction.
28

1 Respectfully submitted,

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3
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