UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ, et al. Plaintiffs, v. DONALD J. TRUMP, et al. Defendants.	)	Civil No. 1:20-cv-01419-APM

UNOPPOSED MOTION FOR LEAVE TO JOIN BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Local Civil Rile 7(o)(2), *amicus* respectfully requests leave to file the accompanying *amicus curiae* brief in the above-captioned action in support of Plaintiff's Motion for a Preliminary Injunction. In accordance with Local Civil Rule 7(m), counsel for *amicus* has contacted counsel for the parties in this case, who indicated that they do not oppose this motion.

District courts have inherent authority to grant participation by an *amicus curiae*. *Jin v. Ministry of State Sec*., 557 F. Supp. 2d 131, 136 (D.D.C.2008). Such leave should be granted "if the information offered is timely and useful" or "the non-party movants have a special interest in th[e] litigation as well as a familiarity and knowledge of the issues raised therein that could aid in the resolution of th[e] cases." *Ellsworth Assocs., Inc. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996).

Amicus is a premier trade organization for the global workforce mobility industry. *Amicus's* network includes nearly 6,000 professionals working at over 1,500 organizations across Europe, the Middle East and Africa, Asia, and the Americas. *Amicus*'s members regularly rely on the L-1 nonimmigrant visa category as part of their work. Based on that experience, knowledge, and unique perspective, *amicus* submits its brief to highlight areas of particular concern relating to the challenged Presidential Proclamation's impacts on the L-1 visa category.

CONCLUSION

For the foregoing reasons, *amicus* hereby requests that the Court grant leave to file the attached brief in support of Plaintiffs' Motion for a Preliminary Injunction.

Dated: August 28, 2020

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ, et al. Plaintiffs, v. DONALD J. TRUMP, et al. Defendants.	)	Civil No. 1:20-cv-01419-APM

AMICUS CURIAE BRIEF OF WORLDWIDE EMPLOYEE RELOCATION COUNCIL IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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Worldwide ERC® is the premier trade association for the global workforce mobility industry. Worldwide ERC®'s network includes nearly 6,000 professionals working at over 1,500 organizations across Europe, the Middle East and Africa, Asia, and the Americas. Worldwide ERC® maintains both individual and corporate memberships. Worldwide ERC®'s members represent employers that relocate employees domestically and internationally as well as the service providers that facilitate the transfers. The employers come from virtually every industry, including government, and relocate employees to further critical business objectives. The service providers include, but are not limited to, real estate appraisers, directors and brokers, relocation management companies, talent management consultants, law and tax firms, moving companies, cultural consultants and a range of other specialists skilled at helping assist employees and their families settle into their new locations.

Worldwide ERC® and its members have an interest in ensuring that the provisions of the Immigration and Nationality Act ("INA") are upheld. Because of the experiences of Worldwide ERC® and its members concerning the U.S. immigration systems—and particularly their experience with the L-1 nonimmigrant visa category—Worldwide ERC® submits that the proposed brief could aid the Court's consideration of Plaintiffs' motion for preliminary injunction and other issues in this Matter.

[1] No counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Presidential Proclamation 10052 of June 22, 2020[2] (the "Proclamation") suspends the entry of a wide swathe of individuals seeking to enter the United States using nonimmigrant (*i.e.* temporary) visa types, including the "L-1" nonimmigrant visa.[3] In practical terms, the L-1 visa permits a company to relocate its managers, executives, and "specialized knowledge" workers from operations abroad into the United States. The President purports to use his broad authority under Section 212(f) of the INA, 8 U.S.C. § 1202(f), to overwrite and suspend the L-1, H-1B, H-2B and J-1 occupational visa categories altogether. Plaintiffs here challenge the suspension of all of these visa categories, while this Brief focuses specifically on the L-1 visa category.

Congress has crafted a careful statutory scheme surrounding the L-1 visa, and the relevant agencies have bolstered that scheme with detailed accompanying regulations. L-1 visa holders are not new hires with as-yet limited knowledge about the employing organization or its business. Instead, by statutory and regulatory definition, those visa holders must have been employed abroad with an affiliated company and must occupy either a high-ranking leadership position at the company or have special knowledge about the company's products or business.

Because of these strict requirements that are built into the requirements for the L-1 category, Congress has opted not to place on that category some of the limits found in many other immigrant and nonimmigrant visas, some of which are not subject to the Proclamation.

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[2] *See* Presidential Proclamation No. 10052 of June 22, 2020, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 Fed. Reg. 38263 at § 2(c) (June 25, 2020).

[3] The Proclamation applied to those who were abroad and who did not have a valid visa or other travel document on the date of its issuance. *See id.* at § 3.

The L-1 visa category does not, for example, have labor market tests and wage requirements[4] or annual numerical limits.[5] As discussed below, Congress has monitored and made changes to the L-1 program periodically to assure that its core function—the transfer of certain personnel between corporate entities—remains intact.

The question presented in this Matter is whether Congress gave the President a blank check to overrule the carefully calibrated scheme that it set up and that prior administrations have added to through a web of regulations. Certainly, as the Supreme Court has acknowledged, Congress granted the President broad authority to bar entry to categories of aliens. *See generally Trump v. Hawaii*, 138 S. Ct. 2392, 2408-09 (2018). Unlike in the prior use of the Section 212(f) authority, however, the President has now chosen to explicitly overrule policy choices that Congress has made. However broad the authority to bar the entry of aliens might be, Congress could not have intended for the President to upset the careful balancing act that Congress has reserved for itself with respect to the L-1 visa category.

And even if the President's authority were theoretically broad enough to override Congress as to the L-1 visa category, the present exercise of that authority is flawed. Unlike the exercise of the Section 212(f) authority that the Supreme Court upheld in *Trump v. Hawaii*, the President here offers not a robust justification with citation to evidence but instead a cursory discussion that does not address the specific visa categories suspended by the Proclamation. The breadth of the Section 212(f) authority does not give the President *carte blanche* to ignore or obfuscate the relevant considerations, as the Supreme Court has more recently explained in cases involving the Deferred Action for Childhood Arrivals (DACA) program and the 2020 census.

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[4] *See generally* INA § 212(a)(5)(A), 8 U.S.C. § 1182(a)(5)(A).

[5] *See, e.g.*, INA § 201(d), 8 U.S.C. § 1151(d); INA § 214(g), 8 U.S.C. § 1184(g).

See Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020); *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

The case for irreparable harm as to all banned nonimmigrant categories is well supported in Plaintiff's filings, but particularly so, as to the L-1 visa category. The President has suspended the entry of critical corporate personnel under the guise of protecting U.S. workers when no such workers are available to fill the positions at issue. His actions risk damage to the competitiveness and market reputation of Worldwide ERC®'s members during the unique economic challenges posed by COVID-19, all of which substantiate a finding of irreparable harm. The President has effectively imposed a U.S. labor market test on the L-1 category, which Congress has put in place for certain other visa types but *not* for the L-1 visa. And the President has proffered only a cursory determination regarding this broad exercise of authority that falls well short of the *Trump v. Hawaii* justification and that ignores several relevant factors. The Proclamation should be enjoined.

I. Congress has already engaged in careful balancing regarding the L-1 category in order to protect U.S. workers.

The modern L-1 nonimmigrant visa category was established in 1970.[6] In its current form the statute defines the category as follows:

> *(L) subject to section 1184(c)(2) of this title, an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;*

[6] *See* Pub. L. 91-225, 84 Stat. 116 (Apr. 7, 1970).

8 U.S.C. § 1101(a)(15)(L).

The statute thus defines two versions of the L-1 visa. The first version, commonly known as the L-1A visa, is available to company personnel who work in an executive or managerial capacity. The second version, commonly known as the L-1B visa, is available to company personnel with "specialized knowledge" of the company and its business. Elsewhere in the INA, Congress has defined various critical terms, including "managerial capacity,"[7] "executive capacity,"[8] and "specialized knowledge."[9] The relevant agencies have, in turn, promulgated extensive regulations outlining the process through which companies can seek L-1 visas and the evidence required.[10]

Congress has thus set forth two major requirements for the L-1 category. First, the employee must have been employed with a company affiliate abroad for a least one year. Second, the employee must either occupy a more senior position within the company or must have specialized knowledge regarding the company that would not be commonly available. Congress could have imposed additional requirements such as labor market protections on the L-

[7] "Managerial capacity" means an assignment in an organization in which the employee manages the organization, or a department, subdivision, function or component of the organization, supervises and controls the work of other supervisory or professional employees, exercises discretion over day-to-day operations, and has significant personnel authority over the unit or function managed. INA § 101(a)(44)(A), 8 U.S.C. § 1101(a)(44)(A).

[8] "Executive capacity" is defined to include an assignment in an organization in which the employee primarily directs the management of the organization or a major component or function thereof, establishes the goals and policies of the organization, ands exercise wide latitude in discretionary decision-making with only general supervision from other in the organization. *See* INA § 101(a)(44)(B), 8 U.S.C. § 1101(a)(44)(B).

[9] "Specialized knowledge" requires special knowledge of either the company's products or of the processes and procedures of the company. *See* INA § 214(c)(2)(B), 8 U.S.C. § 1184(c)(2)(B).

[10] *See generally* 8 C.F.R. § 214.2(l).

1 category but chose not to do so because the L-1 visa was design as to preclude adverse effects on U.S. workers through its definition.

Congress's decision to omit these other more onerous requirements speaks volumes, especially since it has taken subsequent action to prohibit L-1 visa holders from replacing U.S. workers in more carefully targeted circumstances. In 2004, for example, Congress passed the L-1 Visa (Intracompany Transferee) Reform Act of 2004[11] to ensure that L-1B specialized knowledge workers were not used outside of their intended intracompany purpose. That Act added a new INA section to curtail the use of L-1B workers placed onto the worksites of companies other than the petitioning employer.[12] Congress thus placed limits on the L-1B visa category only to the extent that the position in question was not truly an internal position that was open only to existing employees of the petitioning organization.

Congress has thus been mindful of the impacts on U.S. workers from the L-1 visa category. Congress has a variety of tools at its disposal—from category definitions, numerical

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[11] That Act was included as part of the Consolidated Appropriations Act, 2005. *See* Pub. L. 108-447, 118 Stat. 2809, 3351 (Dec. 8, 2004) at § 401 *et seq.*

[12] *See* INA § 214(c)(2)(F), which states:

> *(F) An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 1101(a)(15)(L) of this title and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 1101(a)(15)(L) of this title if-*
>
> > *(i) the alien will be controlled and supervised principally by such unaffiliated employer; or*
> >
> > *(ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.*

8 U.S.C. § 1184(c)(2)(F).

limits, labor market tests—to curtail any misuse of the L-1 visa category that might adversely affect U.S. workers. Congress has made the determination that L-1 employees do not compete with U.S. workers because those L-1 employees already occupy internal positions that are not open to U.S. workers and for which finding a U.S. worker might be difficult or impossible. When Congress has detected potential misuse, it has altered aspects of the L-1 visa program to curtail that misuse.

II. Section 212(f) of the INA provides no authority to the President to override Congress's policy decisions regarding the U.S. workforce.

The Supreme Court has acknowledged that Congress has granted the President broad—but not limitless—authority to bar the entry of classes of aliens under INA Section 212(f).[13] In 2017, the President used that authority to bar the entry of many individuals based on their country of origin as an explicit exercise of the President's national security powers,[14] and the Supreme Court upheld that exercise of the Section 212(f) authority in the *Trump v. Hawaii* case. *See Trump v. Hawaii*, 138 S. Ct. at 2411. The present ban differs from that prior exercise in several critical ways.

a. The Proclamation relates to economic concerns, not the national security-related issues that motivated prior similar exercises of the 212(f) authority.

[13] Section 212(f) of the INA states, in relevant part:

> ***(f) Suspension of entry or imposition of restrictions by President***
>
> *Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.*

8 U.S.C. § 1182(f).

[14] *See* Presidential Proclamation No. 9645 of Sept. 24, 2017, 82 Fed. Reg. 45161 (Sept. 27, 2017).

The Proclamation here is motivated not by national security-related concerns but instead on the adverse domestic *economic* effects of the Covid-19 crisis. An economic basis for action is inherently weaker. *See Trump v. Hawaii*, 138 S. Ct. at 2409 (noting that the President need not "link all of the pieces of the puzzle" before courts grant weight to conclusions involving international affairs and national security) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010)).

The present use of the 212(f) authority does not comport with prior uses. Those prior uses have been limited to the following categories: (i) national security; (ii) foreign policy (e.g., sanctioning international misconduct by individuals or organizations); and (iii) emergency mass migration events.[15] The INA, consistent with the Constitution, provides the President great latitude when it comes to dealing with national security, foreign policy, or emergency mass migration issues. The proposed use of Section 212(f) here, however, falls into none of those categories.

b. The Proclamation rebalances the economic factors that Congress has already explicitly considered.

Unlike in *Trump v. Hawaii*, this exercise of the President's Section 212(f) authority improperly rebalances the factors on which Congress has explicitly spoken. *See Trump v. Hawaii*, 138 S. Ct. at 2411 ("We may assume that § 1182(f) does not allow the President to expressly override particular provisions of the INA."). The Proclamation here impairs certain visa categories for the explicit reason that Congress found the categories to be acceptable. Those categories have been designed legislatively to account for domestic labor market considerations, and Congress set forth its conclusions and requirements in detail.

[15] *See* Congressional Research Service, *Presidential Actions to Exclude Aliens Under INA § 212(f)* (May 4, 2020), *available at* https://crsreports.congress.gov/product/pdf/LSB/LSB10458.

The President now, apparently, disagrees with that balancing. Section 212(f) does not, however, give the Executive Branch the authority to preempt these detailed determinations by the Legislative Branch. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) ("The formulation of [immigration policy] is entrusted exclusively to Congress."); *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123 (1967) (holding that "the Congress has plenary power to make rules for the admission of aliens"). The Supreme Court decision in *Trump v. Hawaii* noted that, while the presidential power in this section can include broad classes of aliens, that authority does not permit the President to overwrite legislative provisions wholesale, as is the case here. 138 S. Ct. at 2411.

In *Trump v. Hawaii*, the Supreme Court found the President's use of Section 212(f) complemented the "various inadmissibility grounds based on connections to terrorism and criminal history" because that proclamation promoted "the effectiveness of the [consular visa] vetting process by helping to ensure the availability of such information." *Id.* But there are no deficits of information that the nonimmigrant entry ban would cure here, nor any other way to view the Proclamation as complementary to the L-1 statutory scheme. Rather, the Proclamation stands as an express override of the INA's determination that L-1 visa holders pose no U.S. labor market risk because they do not fill positions that might be open to U.S. workers.

Nowhere is that explicit rebalancing of Congress's carefully crafted provisions more obvious than in guidance that the State Department has issued regarding exceptions to the Proclamation.[16] The administration will now issue L-1A and L-1B visas pursuant to a "national

[16] *See* U.S. Dep't of State, *National Interest Exceptions to Presidential Proclamations (10014 & 10052) Suspending the Entry of Immigrants and Nonimmigrants Presenting a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak* (Aug. 12, 2020), *available at* https://travel.state.gov/content/travel/en/News/visas-

interest" exemption, provided employers meet a higher showing that Congress has required. L-1A visas, for example, will require "senior" management or executive positions and multiple years abroad, instead of the single-year requirement set by statute. L-1B visas will require a showing of "significant and unique contributions" or knowledge in particular industries. None of these requirements is adequately justified, and they are only offered as State Department waiver guidance, not set forth by the President with findings in a Proclamation, as required by INA Section 212(f). The INA represents a careful, thorough, and deliberate balancing of the economic benefits of workers in the affected classifications with the potential adverse domestic labor market effects of admitting those nonimmigrants into the United States to work. The Proclamation and its accompanying "guidance" seek to *rebalance* those same factors.

Federal courts have found that analogous instances of statutory overreach breach even the extremely broad boundaries of section 212(f). In November 2019, for example, the District of Oregon enjoined imposition of mandatory health insurance requirements on immigrants, finding that this use of Section 212(f) "overrode" the "public charge" ground of inadmissibility set forth in the INA, which "enumerates a list of factors that *must* be considered 'at a minimum' in evaluating whether a visa applicant will become a public charge, including: age; health; family status; assets, resources, and financial status; and education and skills." *Doe v. Trump*, 418 F. Supp. 3d 573, 581 (D. Ore. 2019) (citing public charge inadmissibility at 8 U.S.C. § 1182(a)(4)). The District Court determined that the President had unlawfully used Section 212(f) to "override" the public charge inadmissibility ground by converting lack of health insurance into a

news/exceptions-to-p-p-10014-10052-suspending-entry-of-immigrants-non-immigrants-presenting-risk-to-us-labor-market-during-economic-recovery.html.

sole controlling factor and refusing to consider other issues that Congress had identified. *Id.* at 594.

The Ninth Circuit refused to stay that injunction. That Court found that Section 212(f) "does not provide the President with limitless power to deny visas to immigrants based on purely long-term economic concerns." *Doe #1 v. Trump*, 957 F.3d 1050, 1065 (9th Cir. 2020). That Court also held that "in domestic economic matters, the national security and foreign affairs justifications for policy implementations disappear, and the normal policy-making channels remain the default rules of the game." *Doe #1*, 957 F.3d at 1067.

As discussed above, Congress has explicitly ensured that L-1 visa holders do not compete with U.S. workers by limiting that category to only certain individuals—specifically executives, managers, and specialized knowledge workers—with the requisite experience abroad with a related corporate entity. *See generally* 8 USC § 1101(a)(15)(L). The L-1 category only applies to *current* employees of multinational organizations who seek to fill an internal corporate position in the United States. The category does *not* permit a company to hire new job applicants, or lower level workers or those without knowledge and experience concerning the company and its business.

Congress opted to use the definition of the L-1 visa category to avoid creating competition with U.S. workers. Congress decided that those protections were sufficient to prevent affecting U.S. jobs without the imposition of numerical caps, wage requirements, or prior labor market tests. And when Congress determined that some companies might be misusing the category, it upped those protections. When some companies began using L-1B specialized knowledge workers at third-party client sites, Congress prohibited the issuance of an L-1B visa to any employee coming in from abroad to work at the site of an unaffiliated employer

if the end-client company was actually supervising or controlling the work of the L-1B visa holder. *See* 8 USC § 1184(c)(2)(F).

Section 212(f) does not empower the President to determine through a Proclamation that he disagrees with Congress's labor market determinations with respect to intracompany transfers. Section 212(f) permits the President to amplify Congress's will, as he did in *Trump v. Hawaii* by using that authority to demand additional information so that he could conduct the inadmissibility inquiry required by Congress. Section 212(f) does not, however, permit the President to re-write the INA wholesale according to his whims, as the current Proclamation does.

The L-1 nonimmigrant visa entry ban is more akin to the *John Doe* scenario than to *Trump v. Hawaii*. Barring the entry of L-1 nonimmigrants is under no conceivable reading "complementary" to the L-1 visa scheme. Congress has permitted the transfer of qualified L-1 employers because it determined that that transfer would enhance those companies' U.S. economic performance. Rather, this use of Section 212(f) "overrode" the statutory scheme by assuming that L-1 workers somehow contributed to the unemployment of U.S. workers because of the COVID pandemic. The present use of Section 212(f) falls within the category of impermissible uses that the District Court in *John Doe #1* enjoined.

III. Even if the President had the authority to exercise the Section 212(f) authority according to the Proclamation, he has failed to provide sufficient justification for that exercise.

Section 212(f) by its explicit terms requires that the President "find" that the entry of a class of aliens "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). The Proclamation's "finding" here is woefully inadequate. The entirety of the justification for

the sweeping Proclamation, which affects numerous nonimmigrant visa categories including the L-1, is:

> *For example, between February and April of 2020, more than 17 million United States jobs were lost in industries in which employers are seeking to fill worker positions tied to H-2B nonimmigrant visas. During this same period, more than 20 million United States workers lost their jobs in key industries where employers are currently requesting H-1B and L workers to fill positions.*

Proclamation, 85 Fed. Reg. 38263-64. That justification does not pass muster for several reasons.

First, the Proclamation measures alleged job losses by *industry*, which does not take into account which particular companies have petitioned for an L-1 worker. The use of L-1 visas or indeed other visa types does not vary reliably by industry but instead by other factors. For example, L-1 visas require that the U.S. company have affiliates abroad, whatever the industry involved. *See* Declaration of L. Shotwell at ¶6, attached hereto as Exhibit A.

Second, the justification relies on an aggregate 20-million job loss number without any attempt to tie the losses to the categories at hand. The H-1B and L-1 categories are only, however, available to certain professional positions, in the case of the H-1B visa, and to executive, managerial, and specialized knowledge positions, in the L-1 context. The Proclamation does not explain how the problem it seeks to solve, U.S. job losses, relates in any way to the categories at issue here.

For the Proclamation's barebones "finding" to have any relevance whatsoever to the categories of occupational visa-holders that it actually bars from entry, the Proclamation would have needed to tie that finding to the categories at hand. The "finding" simply does not justify the actions taken here. The President could just as easily have concluded that bringing the necessary executives and managers into the U.S. operations of a multinational company in the L-

1A category would have acted to preserve U.S. jobs, or create new ones, because such employees would help the U.S. entities operate more efficiently.

Amicus curiae Worldwide ERC® does not disagree with the validity of a finding made by the Proclamation, which this Court would owe deference. The issue here is that no "finding" has been made at all, or at least no finding on a topic that relates to the actions taken. Companies do not displace U.S. workers with the L-1 visa. If anything, robbing companies of a full complement of managers, executives, and technical experts who are familiar with their business impairs the efficiency of the U.S. branches of those organizations and further endangers U.S. jobs. *See* Ex. A at ¶15.

Third, the Proclamation entirely omits relevant factors from its decision-making. In two recent decisions, the Supreme Court recently invalidated two Trump Administration actions that suffered from this flaw. In the first case, the Supreme Court invalidated the insertion of a question regarding citizenship on the 2020 census form because the relevant agency's decision-making could not "be adequately explained" by the agency's proffered decision and because of "a significant mismatch between the decision the Secretary made and the rationale he provided." *Dep't of Commerce v. New York*, 139 S. Ct. at 2575.

Here, the terse, non-company specific, non-position specific finding does not "adequately explain" why a ban on L-1 visas is appropriate to address the goal of protecting the U.S. labor market from foreign workers. Because the L-1 visa ban acts to prohibit U.S. companies from filling senior strategic positions that were only open to pre-existing employees of the organization, there is a "significant mismatch between the decision" of the President to bar L-1 visa holders "and the rationale he provided"—to avoid adverse effects on U.S. workers of L-1 nonimmigrants. As such, the Proclamation's findings fail to justify a ban on L-1 workers.

In the second case involving the Deferred Action for Childhood Arrivals ("DACA") program, the Supreme Court faulted the manner in which the Trump Administration terminated the memoranda providing certain immigration relief to children brought to the United States without authorization by their parents. *See Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891. Noting that the prior Administration had put the policy in place over five years ago, the Supreme Court found that "when an agency rescinds a prior policy, its reasoned analysis must consider the alternatives that are within the ambit of existing policy." *Id.* at 1913 (quotations and alterations omitted). The Court faulted the Administration in particular for acting in an arbitrary and capricious manner by failing to take "reliance interests" into account. *See id.* at 1913 ("When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.") (quotations omitted).

The Proclamation suffers from precisely these same deficits. DHS's predecessor agency promulgated regulations implementing the L-1 visa category that are consistent with the statute, and DHS has enforced them for decades. The suspension of the availability of L-1 visas unquestionably "rescinds" this "prior policy," yet the Proclamation neither considers nor discusses any of the policy "alternatives" that are "within the ambit" of existing L-1 regulations. Companies that rely on the L-1 category to run their U.S. operations are being injured by the Proclamation, *see* Ex. A at ¶15, and it was arbitrary and capricious for the President to fail to take these serious reliance interests into account when promulgating the Proclamation. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of

Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

The current Proclamation contrasts with the proclamation in *Trump v. Hawaii*. That 2017 proclamation did not rescind prior policy but instead complemented the existing statutory regime of determining which aliens are inadmissible. The justification offered in that Matter was, moreover, addressed the relevant topic with a detailed explanation of the ties between the terrorism-related concerns justifying the ban and the actions taken there. This Proclamation, by contrast, fails to consider relevant factors and does not tie the action taken with a relevant justification, as criticized in the Census and DACA cases.

IV. The Plaintiffs have made a strong irreparable harm showing.

Worldwide ERC® and its members have already experienced and will continue experiencing the same types of irreparable harms about which Plaintiffs complain, should this Court not enjoin the Proclamation. In the eyes of Worldwide ERC, the harms from the Proclamation are particularly strong with respect to users of L-1 visas.

The L-1 category is particularly persuasive evidence of Plaintiff's argument that there were no findings in the Proclamation sufficient to justify the entry ban. Congress limited the L-1 visa category to internal senior positions that were being offered to foreign executives and managers who had performed the same or similar roles abroad for at least one year during the prior three years for a directly related entity of the petitioning U.S. employer. By definition, these positions are not open to U.S. workers because they were always a subject of internal company decision making.

Access to L-1s, particularly for L-1A petitions, are critical to the U.S. operations of companies that employ countless U.S. workers. Executives and managers are by definition core

to the U.S. operations of global companies, as they "direct the management of the organization or a major component or function of the organization," 8 U.S.C. § 1101(a)(44)(B), or they "manage the organization, or a department, division, subdivision or major component of the organization," 8 U.S.C. § 1101(a)(44)(A). But in order to qualify for an L-1 visa, such executives or managers must have been employed abroad for an affiliate of the petitioning US entity for at least one year during the past three years in an executive or managerial capacity, thus ensuring that the prospective L-1 visa holder is indeed a tried, true and tested senior employee of the petitioning company. 8 U.S.C. § 1101(a)(15)(L). This prior overseas employment requirement ensures the essential nature of the prospective L-1 employee and limits the category to truly internal candidates for a position.

Give the senior positions occupied by L-1 visa holders, and their executive or managerial functions at U.S. entities, it is particularly difficult for these employees, upon being assigned to an organization's U.S. operations, to direct, manage, supervise or execute their functions while not present in the United States. Living in a different time zone and performing one's job might be possible for some positions, but these positions are not amenable to that type of remote work. *See* Ex. A at ¶17. If these workers are banned from the U.S. for at minimum six months, and possibly longer (as the Proclamation allows), then the petitioning organization's U.S. market share could be lost, their companies' ability to deliver to U.S. consumers could be impaired, and these companies' reputations and good will could be damaged. *See* Ex. A at ¶17.

These are classic irreparable harm factors. *See Patriot, Inc. v. U.S. Dept. of Housing and Urban Dev't,* 963 F.Supp.1, 5 (D.D.C. 1997) (granting preliminary injunction as "plaintiffs have demonstrated irreparable harm in damage to their business reputation"); *Atlas Air, Inc. v. Int'l Bhd. of Teamsters*, 280 F. Supp. 3d 59, 103–04 (D.D.C. 2017), *aff'd*, 928 F.3d 1102 (D.C. Cir.

2019) (plaintiff made concrete and corroborating showing that it would suffer irreparable reputational harm stemming from labor slowdown resulting dissatisfied customers) citing Wright & Miller, Federal Practice and Procedure: Civil § 2948.1 ("Injury to reputation or goodwill is not easily measurable in monetary terms, and so often is viewed as irreparable."); *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) ("intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm"); *Stuhlbarg Int'l Sales CO. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."); *Brinton Bus. Ventures, Inc. v. Searle*, 248 F. Supp. 3d 1029, 1037 (D. Or. 2017) (plaintiff employer demonstrated irreparable harm in the form of loss of client relationships absent a preliminary injunction).

CONCLUSION

For the foregoing reasons, Amicus Curiae Worldwide ERC® supports Plaintiffs' request that the Court issue a preliminary injunction against the Proclamation.

DATED August 28, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ, et al. Plaintiffs, v. DONALD J. TRUMP, et al. Defendants.	)	Civil No. 1:20-cv-01419-APM

DECLARATION OF LYNN SHOTWELL

I, Lynn Shotwell, declare as follows:

1. I am the current President and Chief Executive Officer of Worldwide Employee Relocation Council ("ERC®"). As a result of my position with the company, I have knowledge of the materials contained here.

2. Headquartered in Arlington, Virginia, Worldwide ERC® is the premier trade association for the global workforce mobility industry. Worldwide ERC®'s network includes nearly 6,000 professionals working at over 1,500 organizations across Europe, the Middle East and Africa, Asia, and the Americas. Worldwide ERC® maintains both individual and corporate memberships.

3. Worldwide ERC®'s members represent employers that relocate employees domestically and internationally as well as the service providers that facilitate the transfers. The employers come from virtually every industry, including government, and relocate employees to further critical business objectives. The service providers include, but are not limited to, real estate appraisers, directors and brokers, relocation management companies, talent management consultants, law and tax firms, moving companies, cultural consultants and a range of other specialists skilled at helping assist employees and their families settle into their new locations..

4. Worldwide ERC®'s members help employers navigate the U.S. immigration system so that they can facilitate the movement of people around the world. [Most of our employer members are multinational organizations, and because of that background, Worldwide ERC® and its members have an interest in ensuring that the provision of the Immigration and Nationality Act ("INA") are administered in accordance with law and that companies retain access to the L-1 visa category as outlined by Congress.

5. For the reasons set forth in Worldwide ERC®'s amicus brief, the suspension of the L-1 visa category will have substantial negative effects on Worldwide ERC® and its members.

6. As outlined in the brief, the L-1 visa category requires that an employer have an existing relationship with the L-1 beneficiary. The beneficiary must have worked for an affiliated company outside of the United States for a period of at least one year out of the last three years. A small subset of employees of an affiliated entity are eligible for an L-1 visa—only company executives and managers (L-1A), and personnel with specialized knowledge (L-1B) of the company and its business.

7. The L-1 visa is used across industries to ensure the movement of qualified personnel. As a general matter, U.S. personnel are not available to fill a role for which a company might use an L-1 visa holder because they would not have spent the requisite time with the company outside of the United States and thus would not have knowledge about how the company functions or the products or services it sells.

8. L-1 personnel thus are not taking a job from a qualified U.S. employee. They bring a different level of knowledge and experience to the table for which no U.S. employee exists.

9. Indeed, in the experience of Worldwide ERC® and its members, use of an L-1 visa facilitates the creation of additional U.S. jobs. L-1 workers come into the country to direct or manage U.S. affiliate companies, or key components of those companies. The petitioning U.S. company hires a full complement of workers from within the United States. L-1 workers come in to the United States to introduce new products, services or solutions, or to offer services and managerial expertise that allow companies to respond to challenging economic conditions (such as the COVID-19 pandemic) and to help companies grow.

10. Presidential Proclamation 10052 of June 22, 2020 (the "Proclamation") makes several suppositions that do not match the way the L-1 visa category functions in the real world.

11. First, the Proclamation bases its entry ban on the lamentable loss of 20 million American jobs as a result of the pandemic, but the Proclamation only alleges that L-1 visa holders are taking jobs in *industries* that have been affected by the downturn. Worldwide ERC does not disagree with the validity of the Proclamation's finding regarding U.S. job losses in general, but the Proclamation's implicit claim that L-1 workers are backfilling positions that as a result are no longer available to U.S. workers is not based in fact.

12. L-1 visas are used across most U.S. industries, but not every company in such an industry uses L-1 visas – in large part because not all U.S. companies have overseas operations. There is thus no direct causal relationship between U.S. job losses in a particular industry and the fact that some companies in that industry use L-1 employees.

13. Furthermore, the U.S. job loss figure cited in the Proclamation (20 million) is many, many multiples of times higher than the total number of L-1 visa petitions typically approved in a given year by USCIS: 30,000 in FY 2019. USCIS, Summary of Approved L-1 Petitions by Employers FY2019 (February 2020). The reason is that the L-1 visa is by definition

narrow and limited to senior executives and managers, and specialized knowledge workers, with at least one year of prior experience with an overseas affiliate of the petitioning U.S. organization. There is simply no logical scenario whereby L-1 visa holders could have a statistically significant impact on the job loss figure of 20 million, even if these positions in question overlapped.

14. Critically, it is our organization's estimate, based on its experience, that most of the 20 million lost jobs cited by the Proclamation are at less senior levels than would qualify under the L-1A or L-1B visa category. Our estimate coincides with the current research, which shows that U.S. workers filling positions that do not require a college degree have suffered the highest rates of COVID-related job loss. R. Kochhar, Pew Research Center, *Hispanic women, immigrants, young adults, those with less education hit hardest by COVID-19 job losses*, June 9, 2020.

15. Employers do not displace U.S. workers with the senior employees brought in on the L-1 visa. Instead, companies that rely on the L-1 category to run their U.S. operations are being further injured by the Proclamation. Robbing companies of a full complement of managers, executives, and technical experts who are familiar with their businesses impairs the efficiency of the U.S. branches of those organizations and further endangers U.S. jobs.

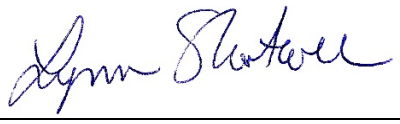
16. Refusing to issue L-1 visas does not create U.S. jobs but instead disrupts those companies that also have overseas operations and makes them less efficient. In practice, if L-1 visas remain unavailable, most L-1 user companies will choose to continue stationing their executives and managers abroad. These employees will be required to direct, manage, supervise or execute their functions while not physically present in the United States.

17. Living in a different time zone and performing one's job might be possible for some positions, but the senior executive and managerial L-1 positions are not amenable to that type of remote work. If these workers are banned from the U.S. for at minimum six months, and possibly longer (as the Proclamation allows), then the petitioning employer's U.S. market share could be lost, their companies' ability to deliver to their U.S. customers could be impaired, and these companies' reputations and good will could be damaged.

18. The COVID-19 pandemic presents precisely the unique economic challenges that require the skills of seasoned senior executives, managers, and internal technical experts that the L-1 visa category allows to enter and work in the United States. Their absence presents a serious risk of imminent and lasting economic harm to the companies that have been deprived of their use at this critical point in time.

I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct.

Dated: August 27, 2020



Lynn Shotwell

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOMINGO ARREGUIN GOMEZ, et al. Plaintiffs, v. DONALD J. TRUMP, et al. Defendants.	)	Civil No. 1:20-cv-01419-APM

[PROPOSED] ORDER GRANTING UNOPPOSED MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Before this Court is the Unopposed Motion for Leave to File Amici Curiae Brief of Worldwide Employee Relocation Council in Support of Plaintiff's Motion for Preliminary Injunction. For good cause shown, it is hereby **ORDERED**, that the Unopposed Motion for Leave to File Amici Curiae Brief is **GRANTED** and hereby **FILED**.

Dated: _____

_____
Honorable Amita P. Mehta
United States District Court Judge