

ORAL ARGUMENT SCHEDULED FOR JANUARY 19, 2021

No. 20-17132

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

NATIONAL ASSOCIATION OF MANUFACTURERS, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. 4:20-cv-4887-JSW
HON. JEFFREY S. WHITE

**BRIEF OF GLOBAL LABOR JUSTICE-INTERNATIONAL LABOR
RIGHTS FORUM AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Global Labor Justice-International Labor Rights Forum (“GLJ-ILRF”) hereby submits the following corporate disclosure statement:

GLJ-ILRF is a not-for-profit organization. It has no parent corporations, it does not issue stock, and no publicly held corporation owns any portion of GLJ-ILRF.

December 15, 2020

s/ Astha Sharma Pokharel _____
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STATEMENT OF INTEREST¹

Global Labor Justice-International Labor Rights Forum (“GLJ-ILRF”) is a non-governmental organization that works transnationally to advance policies and laws that protect decent work and just migration; to strengthen workers’ ability to advocate for their rights; and to hold corporations accountable for labor rights violations in their supply chains. GLJ-ILRF works with trade unions, faith-based organizations, and community groups to support workers and their families.

GLJ-ILRF has an interest in ensuring that the United States adopts immigration policies that are consistent with international human rights standards, and which protect the rights of migrant workers. GLJ-ILRF also has an interest in ensuring that this Court is aware of the first-hand experiences of migrant workers. The June Proclamation runs afoul of international human rights standards and causes significant, irreparable harms to migrant workers, and GLJ-ILRF has an interest in its injunction.

¹ Plaintiffs-Appellees and Defendants-Appellants have consented to this filing. This Amicus Brief is filed upon the authority of the Board of Directors of GLJ-ILRF. Counsel for GLJ-ILRF authored this Amicus Brief in its entirety. No counsel for any party to this appeal has authored this Amicus Brief, in whole or in part, nor has any party to this appeal or their respective counsel contributed money to fund the preparation or submission of this Brief. No entity or person, other than GLJ-ILRF, has contributed funds to cover the costs of the preparation and submission of this Brief.

ARGUMENT

I. Introduction

GLJ-ILRF writes to ensure that this Court is aware of two critical perspectives on the human rights of migrant workers and their families that further demonstrate why it should affirm the district court's order granting Plaintiffs' motion to preliminarily enjoin Presidential Proclamation 10052² ("June Proclamation" or "Proclamation"). First, GLJ-ILRF contends that the United States' international human rights commitments and legal obligations conflict with the Proclamation. In contravention to international human rights commitments, the Proclamation has edged migrant workers, who had relied on the predictability of U.S. immigration policies to invest significant resources into obtaining a work visa, closer to poverty and abuse. The Proclamation has also barred from entry migrant workers who had established their personal and professional lives in the United States and separated workers from their families, including U.S.-born children, without the notice and full and fair process accorded by international human rights law. Second, though the parties' briefs have shed light on the harms experienced by U.S.-based employers, GLJ-ILRF writes to share with the Court the experience of the migrant workers whose lives have been irreparably harmed by this Proclamation.

² 85 Fed. Reg. 38263 (June 25, 2020).

II. This Court Should Consider International Law When Examining the Legality of the Presidential Proclamation.

Under the U.S. Constitution, international human rights treaties are the supreme law of the land,³ which the President has the obligation to faithfully execute.⁴ To the extent that the President derives his authority to issue the Proclamation from section 212(f) of the Immigration and Nationality Act, 8 U.S.C. § 1182(f), the Supreme Court has long held that federal statutes must be read consistently with the United States' obligations under international treaties and customary international law. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (establishing the maxim of statutory construction that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”). This Court must therefore consider the United States' international human rights obligations and enjoin the June Proclamation, which exceeds the lawful bounds of these obligations.

³ U.S. Const. art. VI.

⁴ *Id.* art. II, § 3. *See also Taylor v. Morton*, 23 F. Cas. 784, 786 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, J., on circuit), *aff'd*, 67 U.S. (2 Black) 481 (1862) (“[I]nasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the president, while they continue unrepealed....”).

III. The June Proclamation Upends Global Commitments to Ensure Access to Regular and Safe Channels for Migration.

Due to violence, poverty, climate change, and rising inequality, an estimated 258 million live outside their country of birth by both chosen and forced migration, of which 164 million are migrant workers.⁵ In 2019, over 17% of the U.S. labor force,⁶ or approximately 1.42 million workers,⁷ was foreign born. Recognizing the opportunities and risks of growing transnational migration, states have entered international and regional agreements that aim to better manage migration flows by placing the protection of human rights at the center of policy considerations.⁸ In 2018, 165 states endorsed the Global Compact for Safe, Orderly, and Regular Migration (“Global Compact”) and affirmed a “unity of purpose” that emphasizes

⁵ Int’l Labour Org. [ILO], *ILO Global Estimates on International Migrant Workers: Results and Methodology* 5 (2018).

⁶ News Release, Bureau of Lab. Stat., U.S. Dep’t of Lab., Foreign-Born Workers: Labor Force Characteristics—2019, at 2 (May 15, 2020), <https://www.bls.gov/news.release/pdf/forbrn.pdf>.

⁷ Daniel Costa & Jennifer Rosenbaum, Econ. Pol’y Inst., *Temporary Foreign Workers by the Numbers: New Estimates by Visa Classification* (2017), <https://files.epi.org/pdf/120773.pdf>.

⁸ See G.A. Res. 73/195, Global Compact for Safe, Orderly, and Regular Migration (Dec. 19, 2018) [hereinafter Global Compact]; Inter-Am. Comm’n H.R. Res. 04/19, Inter-American Principles on the Human Rights of Migrants, Refugees, Stateless Persons and Victims of Trafficking (Dec. 7, 2019); European Comm’n, *Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a New Partnership Framework with Third Countries Under the European Agenda on Migration*, COM 385 (June 2016); African Union (A.U.), *The Migration Policy Framework for Africa*, Executive Council, Ninth Ordinary Sess., June 25-29, 2006, Banjul, The Gambia, A.U. Doc. EX.CL/276 (IX).

the primacy of human rights.⁹ The Global Compact urges states to develop “well-informed and planned” migration laws and policies that create access to regular and safe channels for migration with the aim of “respecting, protecting and fulfilling their human rights” and facilitating “labour mobility and decent work.”¹⁰

The Convention on the Rights of the Child (“CRC”), signed by the United States in 1995, is a source of international norms related to the human rights of children.¹¹ The Committee on the Rights of the Child, which monitors implementation of the CRC, has interpreted the treaty to require states to make accessible “regular and non-discriminatory migration channels....”¹² Under

⁹ The United States was one of only six countries not to endorse the Global Compact. Press Release, United Nations, World Leaders Adopt First-Ever Global Compact on Migration, Outlining Framework to Protect Millions of Migrants, Support Countries Accommodating Them, U.N. Press Release DEV/3375 (Dec. 10, 2018).

¹⁰ Global Compact, *supra*, ¶¶ 12, 21. *See* Convention Concerning Migration for Employment (Revised) (ILO No. 97), *adopted* July 1, 1949, 120 U.N.T.S. 71; Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO No. 143), *adopted* June 24, 1975, 1120 U.N.T.S. 323; Convention Concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (ILO No.118), *adopted* June 28, 1962, 494 U.N.T.S. 271; Convention Concerning Decent Work for Domestic Workers (ILO No.189), *adopted* June 16, 2011, 2955 U.N.T.S. 407.

¹¹ *See Ropers v. Simmons*, 543 U.S. 551, 577 (2005); *Graham v. Florida*, 560 U.S. 48, 81 (2010).

¹² Comm. on the Protection of the Rts. of All Migrant Workers and Members of Their Families & Comm. on the Rts. of the Child, *Joint General Comment No. 4: State Obligations Regarding the Human Rights of Children in the Context of International Migration in the Countries of Origin, Transit, Destination, and Return*, ¶ 31, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017).

international law, the United States has a good faith obligation to respect the protections set forth in the CRC and must refrain from actions that would defeat the treaty's object and purpose.¹³

The June Proclamation forsakes the United States' global commitments, including the CRC, with reckless abandon. With a view to ensuring a worker and family centered definition of "safe and regular" migration, international experts have advised states to undertake due diligence, including human rights impact assessments, before adopting new policies on migration.¹⁴ But there is no evidence that the U.S. government conducted human rights due diligence, and nowhere within the June Proclamation does the President even acknowledge the United States' international obligations or the Proclamation's human rights impacts. The Trump Administration not only failed to identify and mitigate human rights impacts on migrant workers and their families before enacting the June Proclamation, it has disregarded the human rights abuses occasioned by the change in policy. As a result, the June Proclamation has created far-reaching and pervasive

¹³ Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

¹⁴ Global Compact, *supra*, ¶ 21. See Human Rts. Council Res. 23/20, U.N. Doc. No. A/HRC/RES/23/20, ¶ 3 (June 23, 2013) (Resolution on the Human Rights of Migrants); Glob. All. Against Traffic in Women, *Reclaiming Migrant Women's Narratives*, <https://gaatw.org/publications/Reclaiming%20Migrant%20Women's%20Narratives.pdf>.

human rights impacts that contravene the United States' global commitment to ensure access to safe and regular channels of migration.

IV. By Eliminating Entire Channels of Migration, the June Proclamation Undercuts Human Rights Protections Afforded to Migrant Workers and Their Families.

“It is an accepted maxim of international law that every sovereign nation has the power” to decide on the criteria for entry and expulsion of non-nationals.¹⁵ This prerogative is subject, however, to the state’s legal obligations that flow from human rights treaties and customary international law.¹⁶ The United States has committed to international treaties that attend to the vulnerabilities of temporary foreign workers and enshrine protections of the rights to due process and family life.¹⁷ In violation of these commitments, the June Proclamation has exacerbated

¹⁵ *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

¹⁶ *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1274-77 (9th Cir. 2020) (finding that a U.S. Department of Justice rule which barred applicants from seeking asylum who enter the United States without inspection is unreasonable in light of the United States’ human rights treaty obligations.). *See* Hum. Rts. Comm., *General Comment No. 15: The Position of Aliens Under the Covenant*, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994) (establishing that “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise”) [hereinafter HRC General Comment No. 15].

¹⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol]; International Covenant on Civil and Political Rights art. 13, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171

foreign workers' vulnerabilities to exploitation and abuse, barred from entry, without due process, workers who have continuously resided lawfully in the United States for many years on employment visas, and separated families, including children from their parents.

A. The June Proclamation Exacerbates Migrant Workers' Vulnerabilities to Economic Exploitation, Poverty, and Trafficking.

Many migrant workers affected by the June Proclamation have invested money and time, and incurred opportunity costs to secure lawful employment in the United States.¹⁸ Despite their diligent efforts to fulfill work visa requirements and receive approvals of visa petitions by the United States Citizenship and Immigration Services ("USCIS"), the June Proclamation arbitrarily bans their entry to the United States.

[hereinafter ICCPR]; American Declaration of the Rights and Duties of Man art. V, O.A.S., Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser.LV/I.4 Rev. (1965) [hereinafter American Declaration]. Although the American Declaration is not a binding treaty, it is a source of legal obligation for every member of the Organization of American States (OAS), and the United States is a member of the OAS. Charter of the Organization of American States art. 112, Apr. 30, 1948, 2 U.S.T. 2416, 119 U.N.T.S. 3, Protocol of Amend. Feb. 23, 1967, 21 U.S.T. 607.

¹⁸ In 2019, the United States admitted 601,594 H-1B visa holders, 548,717 J1 visa holders, and 129,120 H-2B visa holders. *Yearbook of Immigration Statistics 2019, Table 25. Nonimmigrant Admissions by Class of Admission: Fiscal Years 2017 to 2019*, U.S. Dep't Homeland Sec. (last published Oct. 28, 2020),

<https://www.dhs.gov/immigration-statistics/yearbook/2019/table25>.

Temporary workers, such as H-2B and J-1 visa applicants, typically are recruited for employment in the United States through a network of private labor recruiters that charge workers fees to be considered as a job candidate, to complete necessary paperwork and receive a job offer, and to arrange local and international travel.¹⁹ Although international guidelines prohibit the charging of recruitment fees and related costs to migrant workers,²⁰ such fees and costs (including visa processing and transportation fees), remain a common and coercive aspect of the process to secure H-2 or J-1 visas, requiring low-wage foreign workers to invest significant financial resources and take out loans.²¹ This system of recruitment often leaves migrant workers “with high levels of debt...rendering them vulnerable

¹⁹ The Int’l Lab. Recruitment Working Grp., *The American Dream up for Sale: A Blueprint for Ending International Labor Recruitment Abuse* 7, https://www.aft.org/sites/default/files/wysiwyg/international_labor_recruitment_abuse.pdf.

²⁰ Convention Concerning Private Employment Agencies (ILO No. 181) art. 7, ¶ 1, adopted June 19, 1997, 2115 U.N.T.S. 249; ILO, *General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs* 27 (2019) (I. Scope, No. 1).

²¹ In a survey of Mexican workers seeking H-2 visas to work in the United States, 58% of respondents paid a recruitment fee and 47% of respondents reported taking out high interest loans to cover their pre-employment expenses. Centro de los Derechos del Migrante, *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change* 4-5 (2013), https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf. On average, workers paid \$590 in fees. *Id.*

to abuse and exploitation.”²² Yet workers make these investments and forego domestic employment opportunities, relying on established channels of labor migration and the prospect of U.S. employment to pay off their loans and provide for their families.²³

Amicus curiae GLJ-ILRF estimate that the Proclamation banned from entry thousands of visa applicants who had fulfilled the requirements for admission to the United States for temporary employment.²⁴ As the data shows, U.S. employers

²² Comm. on the Protection of the Rts. of All Migrant Workers & Members of Their Fams., *General Comment No. 1: Migrant Domestic Workers*, ¶ 9, U.N. Doc. CMW/C/GC/1 (Feb. 23, 2011) (noting that “[s]tates of employment share the responsibility for regulating and monitoring recruitment and placement processes”).

²³ Centro de los Derechos del Migrante, *supra*, at 22.

²⁴ To arrive at a conservative estimate of the number of H-2B workers impacted by travel restrictions, including the Proclamation, which is only a fraction of all workers impacted, *amicus curiae* has reviewed data related to labor certification and visa issuance of Mexican H-2B applicants, who represent about 75% of all H-2B applicants. *Nonimmigrant Visa Statistics*, U.S. Dep’t St.—Bureau Consular Affairs, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html> (last visited Nov. 3, 2020). As labor certifications are often issued the quarter before the workers’ visas are approved, *amicus curiae* compared the number of labor certifications issued by the Department of Labor in the April-June 2020 quarter to Mexican H-2B applicants (8,000), *Employment and Training Administration: Foreign Labor Certification: Performance Data*, Dep’t Lab., <https://www.dol.gov/agencies/eta/foreign-labor/performance> (last visited Nov. 3, 2020) (select “H-2B FY2020 Q3.xlsx” under OFLC Program and Disclosures), with the number of H-2B visas issued to Mexican applicants in July 2020 (112) and August 2020 (62), immediately following the June Proclamation, *Monthly Nonimmigrant Visa Issuance Statistics*, U.S. Dep’t St.—Bureau Consular Affairs, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa->

had already petitioned for visas for many of these workers who were relying on employment in the United States for a measure of financial stability. The June Proclamation upended these workers' plans without prior notice and after most employers and workers had properly applied and secured approval from USCIS.

Included below are examples that are typical of the experiences of temporary workers irreparably harmed by the June Proclamation. Pseudonyms are used to protect their identities, and documentation supporting their claims are on file with *amici curiae*.

Angie, who is 27 years old, was born and raised in Bucaramanga, Colombia. After graduating from university with a degree in industrial engineering, she decided to apply to become an *au pair* in the United States and contacted a representative of an American recruitment agency based in Bogotá, Colombia. Over the course of two years, she worked to fulfill requirements for the job and the J-1 visa: she paid for more than a dozen English courses to improve her language skills; completed trainings in childcare and volunteered more than 800 hours at local childcare facilities; underwent medical examinations and a criminal background check; travelled to Bogotá to meet with the representative of the recruitment agency; and obtained a passport. The representative of the recruitment agency charged Angie for their services and she paid over \$2000 in fees and expenses out-of-pocket. In

[statistics/nonimmigrant-visa-statistics/monthly-nonimmigrant-visa-issuances.html](https://www.dhs.gov/statistics/nonimmigrant-visa-statistics/monthly-nonimmigrant-visa-issuances.html) (last visited Nov. 3, 2020). *Amicus curiae* then compared this to the data from 2019, when there were fewer labor certifications issued in the April-June quarter (6,005) to Mexican H-2B applicants, but a far higher number of visas issued to Mexican H-2B applicants in July 2019 (3077) and August 2019 (588), *Monthly Nonimmigrant Visa Issuance Statistics, supra*. This analysis indicates that in the months following the June Proclamation, significantly fewer workers entered each month than the same months the year prior, even though a higher number of jobs were certified than in the previous year. This suggests that several thousand workers were impacted by travel restrictions, including the June Proclamation, in July and August 2020.

May 2020, the recruitment agency matched Angie with a family located in Chapel Hill, North Carolina. The host mother, a professor with two young children, was desperate for help with childcare during the COVID pandemic. Angie immediately made an appointment with the U.S. Embassy—the final step in the long process to obtain her visa. After the June Proclamation was issued, the U.S. Embassy refused to process Angie’s visa application. Angie turned 27 in September 2020 and is no longer eligible for an *au pair* position in the United States. After having passed up opportunities in industrial engineering to pursue a U.S. visa, Angie has an empty bank account and an uncertain future.

International experts have also alerted states, including the United States, to the relationship between restrictive immigration policies, such as the June Proclamation, and the vulnerability of migrants to trafficking.²⁵ Establishing safe and regular migration channels is crucial to preventing human trafficking.²⁶ As a party to international treaties on smuggling and human trafficking,²⁷ the United States has an international obligation to act with due diligence to prevent the abuse

²⁵ Maria Grazia Giammarinaro (Special Rapporteur on Trafficking in Persons, Especially Women and Children), *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children on Her Mission to the United States of America*, ¶ 93(b), U.N. Doc. No. A/HRC/35/37/Add.2 (July 21, 2017) (“With respect to prevention, the Special Rapporteur recommends that the Government... [p]rioritize efforts to design strategies aimed at addressing the root causes of trafficking, including...restrictive immigration policies...”).

²⁶ Maria Grazia Giammarinaro (Special Rapporteur on Trafficking in Persons, Especially Women and Children), *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, ¶¶ 6, 64(c), U.N. Doc. A/HRC/44/45 (Apr. 6, 2020).

²⁷ Trafficking Protocol, *supra*; Protocol Against the Smuggling of Migrants by Land, Sea and Air, *opened for signature* Nov. 15, 2000, 2241 U.N.T.S. 507.

and exploitation of migrant workers.²⁸ The June Proclamation ignored these interests and obligations and thus has exacerbated the vulnerabilities of migrant workers by edging them closer to poverty and desperation, and making them susceptible to human traffickers.

B. The June Proclamation Bars Entry to Long-Time U.S. Residents Without Due Process.

When the Trump Administration issued the June Proclamation, a significant group of workers with valid H-1B status, but expired visas, were abroad, having left the United States temporarily with the intention of returning to their families and communities here. The Proclamation upended the existing statutory framework without notice and rendered the H-1B visa stamping process—usually a non-event for valid H-1B status holders—an obstacle to their reentry. These individuals who have established their personal and professional lives in the United States, and have become key members of their communities, are arbitrarily denied reentry to their place of residence.

Jay was born and raised in Ahmedabad, India. In 2009, he arrived in the United States with a student visa for a masters in STEM, and has lived here with valid H-1B status for more than a decade. One of Jay’s employers submitted a petition for his permanent residency, which was approved in 2016. In September 2019, while Jay waited to adjust status, he welcomed his first child, who was born in the United States. In January 2020, Jay flew to

²⁸ U.N. High Comm’r for Hum. Rts., *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, at 3, U.N. Doc. E/2002/68/Add.1 (May 20, 2002).

India with his wife and U.S. citizen child to take care of his sick parent. Although the visa on his passport had expired, Jay had H-1B status approved until November 2022. After 11 years of residency in the United States, he did not expect the visa process to be controversial. At his visa appointment in January 2020 in Mumbai, he was asked to resubmit documents over email that his employer had previously submitted to USCIS. He did this promptly, with the support of his employer. But in March, the consulate shut down, and the Proclamation was issued soon after. Since then there has been no progress on Jay's visa. Jay has continued to work for his employer across the time zones and with a 70% salary reduction. Facing financial hardship, Jay recently made the difficult decision to move out of his home in the United States and, with his friends' help, move his belongings into storage. Jay feels that the life he worked so hard to create in the United States was suddenly ripped apart for no reason. He desperately wants to return to his friends and community. He also worries that his U.S. citizen daughter has missed several vaccinations which are unavailable in India.

The June Proclamation barred individuals who were residents in the United States from their homes and devastated their lives, families, and communities without full and fair notice and process. Core international human rights treaties, including several ratified or signed by the United States, extend due process protections to expulsion or removal proceedings.²⁹ Indeed, the European Court on Human Rights ("European Court") has extended due process protections to non-nationals who lawfully reside in a state, but temporarily leave and are denied

²⁹ ICCPR, *supra*, at art. 13; Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non-Citizens*, ¶¶ 25, 28, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004); Inter-Am. Comm'n H.R., Report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/II.116/, Doc. 5 rev. 1 corr., ¶ 401 (2002) ("[T]he due process protections under the American Convention and the American Declaration apply not only to criminal proceedings, but also to proceedings for the determination of rights or obligations of a civil, fiscal, labor or any other nature. This includes non-criminal proceedings against non-nationals.").

entry upon return.³⁰ International and regional bodies with jurisdiction over the United States have upheld the rights of migrants facing expulsion to submit reasons against their expulsion and required states to conduct an individualized case assessment.³¹

The June Proclamation separated workers with deep ties to the United States without affording them such protections. Consulates have refused to even process these workers' visa applications, leaving them with no notice of when they might have a decision and be able to return, and without recourse to seek redress for this harm.

Jay has been waiting for a visa since February 2020 and does not know when he can expect a decision and return to his home. When he requests status updates, he receives a boilerplate e-mail from the consulate which points him to two websites that reference the Proclamation and explain that the consulates are only processing certain visas. He has no way to appeal this refusal to process his visa, or to make a case for why he, his wife, and his U.S. citizen child should not be living in limbo, and should have a chance to go back to the United States. Jay has tried to reach out to congressional representatives to no avail. Had they known that this would happen, Jay says they would have remained in United States with his valid

³⁰ See *Nolan v. Russia*, Eur. Ct. H.R., App. No. 2512/04 (Feb. 12, 2009) (concluding that there was “no doubt” that an applicant who had resided lawfully in Russia for many years, was refused re-entry when he returned from a trip abroad, and as a result, was separated from his young son who had remained in Russia with a care provider, was expelled by Russian authorities); *Bolat v. Russia*, Eur. Ct. H.R., App. No. 14139/03 (Oct. 5, 2006).

³¹ Inter-Am. Comm'n H.R., Report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/II.116/, Doc. 5 rev. 1 corr., ¶ 401 (2002); *Expelled Dominicans & Haitians*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶¶ 352-55, 247; *HRC General Comment No. 15*, *supra*, ¶ 9.

H-1B status. As a result of this uncertainty, Jay has lost significant weight and has begun taking medication for anxiety.

By excluding H-1B workers without an individualized determination, the June Proclamation may also run afoul of the international prohibition against collective expulsion.³²

C. The June Proclamation Unreasonably Interferes with Migrant Workers' Right to Family Life and Threatens Children's Right to Life and Development.

The June Proclamation has separated families in violation of the United States' treaty obligations. Every major international treaty recognizes the right to family life and accords the family unit protection by the state from unreasonable interference.³³ The prohibition on unreasonable interference with the right to

³² See *HRC General Comment No. 15, supra*, ¶ 10; American Convention on Human Rights art. 22(9), *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123; *Mortlock v. United States*, Case 12.534, Inter-Am. Comm'n H.R., Report No. 63/08, ¶ 78 (July 25, 2008); Protocol No. 4 to the European Convention on Human Rights art. 4, *opened for signature* Sept. 16, 1963, 213 U.N.T.S. 222 (Prohibition of Collective Expulsion of Aliens); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 22(1), *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3.

³³ ICCPR, *supra*, at art. 23; Convention on the Rights of the Child arts. 9, 10, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Child Convention]; International Convention on the Elimination of All Forms of Racial Discrimination art. 5, S. Exec. Doc. C, 95-2 (1978), *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD]; Convention on the Elimination of All Forms of Discrimination Against Women art. 16, Dec. 18, 1979, 1249 U.N.T.S. 13 (CEDAW); European Convention on Human Rights art. 8, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (European Convention); American Declaration, *supra*, at art. V.

family life is binding on the United States through its ratification or signature of the ICCPR, CERD, CRC, and American Declaration.³⁴

The Human Rights Committee, which monitors compliance with the ICCPR, recognizes that migrants do not have the right to choose their country of domicile, but once they are allowed to enter the territory, migrants “may not be subjected to arbitrary or unlawful interference with their ... family.”³⁵ The Inter-American Commission on Human Rights (“Inter-American Commission”) has noted that “a rupture in the family unit can occur from the expulsion of one or both [parents] in such a way that separating families due to the violation of immigration laws results in a disproportionate restriction” on the right to family protection under the American Declaration, which is binding on the United States.³⁶ Rulings by international courts and bodies have required states to balance, on the one hand, the significance of the state’s reasons for separation and, on the other hand, the degree of hardship the family and its members would face as result of the separation.³⁷ In

³⁴ ICCPR, *supra*; CERD, *supra*; Child Convention, *supra*; American Declaration, *supra*.

³⁵ *HRC General Comment No. 15, supra*, ¶¶ 6-7.

³⁶ Inter-Am. Comm’n H.R., Res. 63/2018, ¶ 27, Precautionary Measure No. 505-18, Vilma Aracely Lopez Juc de Coc and Others Regarding the United States of America (Aug. 16, 2018) [hereinafter Precautionary Measure No. 505-18].

³⁷ *See Smith v. United States*, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10, ¶ 51 (2010); *Jonny Rubin Byahuranga v. Denmark*, U.N. Hum. Rts. Comm., Communication No. 1222/2003, ¶ 11.7, U.N. Doc. CCPR/C/82/D/1222/2003 (2004).

determining state's positive obligation to reunify families, international bodies and courts have considered the hardship arising from separation, the family members' ties in the host state, and the obstacles to family reunification in the country of origin.³⁸ The June Proclamation fails to consider, much less implement, an approach that balances the family and state interests.

The June Proclamation is only one of the latest examples of the Trump Administration's mission to disregard international treaty obligations to the detriment of children's rights. In issuing protective measures on behalf of families separated by U.S. immigration officials at the U.S.-Mexico border, the Inter-American Commission underscored that "children must remain with their families, unless there are compelling reasons, according to their best interests, that may justify the separation from their families. In any case, the separation should be exceptional and temporal."³⁹ Rather than abide by this international obligation, the June Proclamation separated thousands of workers from their families, including

³⁸ *Amrollahi v. Denmark*, Eur. Ct. H.R., App. No. 56811/00, ¶¶ 35-44 (July 11, 2002); *Jeunesse v. The Netherlands*, Eur. Ct. H.R., App. No. 12738/10, ¶¶ 106-09, 115-22 (Oct. 3, 2014); *Sen v. The Netherlands*, Eur. Ct. H.R., App. No. 31465/96, ¶ 40 (Dec. 21, 2001) (available in French); *Tuquabo-Tekle v. The Netherlands*, Eur. Ct. H.R., App. No. 60665/00, ¶¶ 42-52 (Dec. 1, 2005); *Smith*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, ¶¶ 54-60. See also *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (noting that "perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court remains "the interest of parents in the care, custody, and control of their children")

³⁹ Precautionary Measure No. 505-18, *supra*, ¶ 26.

U.S. born children, without an individualized assessment of their circumstances or other minimal due process protections.

International human rights bodies have recognized that the consequences of family separation are dire, especially for children separated from their parents.⁴⁰

Indeed, under certain circumstances, the separation of young children from their parents may amount to cruel, inhuman, and degrading treatment or torture.⁴¹

Rajesh and Sunita met in college in India, married in 2007, and immediately moved to the United States on an H-1B visa so that Rajesh could work at his employer's office. Soon after, the couple had two daughters, both U.S. citizens, who are now 9 and 12 years old. As they adjusted to life in the U.S., they realized that their daughters would have a brighter future in the United States than in India. In 2013, the petition for Rajesh's permanent residency submitted by his employer was approved. The family began to build a life for their daughters in the United States. After Rajesh's father became ill, he went to visit him in India in January 2020. Rajesh had valid H-1B status until 2022, but his visa stamp had expired. He had received H-1B visa stamps at U.S. consulates countless times. The process had always been, in Rajesh's words, a "non-event." But this time the consulate asked him for additional documentation, which Rajesh promptly submitted in February. In March the consulate shut down, and soon thereafter the Proclamation was issued, separating Rajesh from his wife and U.S. citizen children. In March 2020, Sunita had an accident and suffered a serious injury that required her

⁴⁰ See e.g., *id.*, ¶ 28 (identifying that family separation in the migratory context causes "stress, anxiety, frustration, incomprehension, sadness, depression and trauma that may result in physical, mental, spiritual, moral psychological and social harm on the children, and may even be of a long-lasting and irreversible nature, due to its evolutionary and growing state in all these facets").

⁴¹ See Juan Mendez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 80, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) ("[T]he deprivation of liberty of children based on their or their parents' migration status...may constitute cruel, inhuman and degrading treatment of migrant children.").

to get a medical procedure, which turned out to be unsuccessful. She is now in physical therapy and may require additional surgery. Living with chronic pain made it impossible for her to work and incredibly difficult for her to raise the children without Rajesh.

According to Rajesh and Sunita, the separation caused anxiety and depression in their U.S. citizen children. Sunita says that their daughters consistently cried for their father. As a result of the family separation, their 12-year-old developed sleeping problems and told her teacher that she was afraid that someone would knock down their house and kidnap her mother. Sunita told her daughters to pray, but their 9-year-old asked her how god could possibly exist if he would keep her father away for so long, causing him to miss her birthday and her parents' anniversary. Meanwhile, Rajesh felt anxiety, a lack of focus, and a growing despair that everything was out of his control. When he became a father, he promised himself that he would never be away from their children for more than a week; he was separated from them for 10 months. In November, Sunita said, "this family separation is killing me."⁴²

CONCLUSION

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

⁴² In December 2020, Rajesh received his H-1B visa after almost a year of family separation.

December 15, 2020

Respectfully submitted,

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

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I hereby certify that on December 15, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that to my knowledge all participants in the case are registered CM/ECF users so service on them will be accomplished through the appellate CM/ECF system.

December 15, 2020

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