**No. 17-1351**

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

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,

*Plaintiffs – Appellees,*

v.

DONALD J. TRUMP, in his official capacity as President of the United States; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,

*Defendants – Appellants*.

On Appeal from the United States District Court
for the District of Maryland (8:17-cv-00361-TDC)

**MOTION OF DEFENDANTS-APPELLANTS FOR A STAY PENDING EXPEDITED APPEAL**


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## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Statutes:**



**Regulations:**



**Other Authorities:**

## INTRODUCTION

The decision below is extraordinary: it enjoins nationwide an action taken by the President of the United States at the height of his powers. Consistent with his constitutional and express statutory authority, the President issued Executive Order No. 13,780 (Mar. 6, 2017). Section 2(c) of that Order temporarily suspends the entry of foreign nationals from six countries that present heightened terrorism-related risks (Iran, Syria, Sudan, Libya, Somalia, and Yemen), subject to case-by-case waivers for undue hardship. Section 2(c) explicitly rests on the President's broad constitutional and statutory authority over the fields of national security, foreign relations, and immigration. Although Section 2(c) is facially neutral with respect to religion, the district court nevertheless enjoined it under the Establishment Clause, based primarily on campaign statements by the President and comments by his advisors.

All of the traditional factors point in favor of a stay of that injunction pending expedited appeal. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The balance of harms tips sharply in favor of a stay: barring effectuation of the President's judgment that Section 2(c) is warranted to protect the Nation's safety threatens the interests of the government and the public (which merge here, *Nken v. Holder*, 556 U.S. 418, 435 (2009)). By contrast, plaintiffs have not identified any meaningful injury that they personally would incur if the Order's 90-day suspension

of entry for certain foreign nationals from six countries goes into effect, let alone any substantial injury if the Order is merely allowed to take effect during the brief period of an expedited appeal. The government also has a strong likelihood of success on the merits of plaintiffs' statutory and constitutional challenges.

Accordingly, this Court should stay the district court's injunction in its entirety pending final disposition of the appeal of that injunction's validity and scope. At a minimum, however, a partial stay is appropriate because the district court's nationwide injunction is vastly overbroad and sweeps far beyond any arguable harm to plaintiffs. Article III and principles of equity require more tailored relief: implementation of Section 2(c) should not be blocked across the entire country, based on the putative injuries of only a few individual plaintiffs (who seek the admission of aliens abroad, who themselves lack any constitutional or statutory right to entry). For those reasons, the government respectfully requests that this Court enter a stay pending this expedited appeal.

## ARGUMENT

### I. The Balance Of Harms Weighs Strongly In Favor Of A Stay

#### A. The District Court's Injunction Imposes Serious, Irreparable Harm On The Government And The Public

A district court has set aside the President's considered judgment of how to protect the Nation. It did so notwithstanding that the President's action was authorized by Act of Congress; was informed by the advice of the Cabinet officials

responsible for legal, national security, and immigration matters; and drew on earlier steps by Congress and the Executive designating the countries at issue based on substantial terrorism concerns.

**1.** Consistent with the President's broad constitutional authority over foreign affairs and national security, Congress expressly authorized the President to restrict or suspend entry of any class of aliens whenever he finds that such entry would be detrimental to the interests of the country. 8 U.S.C. §§ 1182(f), 1185(a). The President exercised that authority here, in consultation with the Secretary of Homeland Security and the Attorney General, to address a national-security risk. In light of evidence that "some of those who have entered the United States through our immigration system have proved to be threats to our national security," the President determined that it was necessary to conduct an immediate review of the adequacy of the Nation's screening and vetting procedures to detect terrorists. Order §§ 1(h), 2(a)-(b).

To facilitate that important review, the President ordered a temporary pause on entry of nationals from six countries that had previously been "identified as presenting heightened concerns about terrorism and travel to the United States" by Congress or the Executive in the context of the Visa Waiver Program. Order §§ 1(a), (b)(i), (d)-(f), 2(c). Congress created that Program to enable nationals of participating countries to seek temporary admission for tourism or certain business

purposes without a visa. 8 U.S.C. §§ 1182(a)(7)(B)(iv), 1187. But Congress later excluded individuals with connections to particular countries from travel under the Program. *Id.* § 1187(a)(12). In 2015, Congress excluded from travel under the Program individuals who are dual nationals of or recent visitors to Iraq and Syria (where "[t]he Islamic State of Iraq and the Levant (ISIL) * * * maintain[s] a formidable force") or countries designated by the Secretary of State as state sponsors of terrorism (currently Iran, Sudan, and Syria).[1] *Id.* § 1187(a)(12)(A)(i)-(ii). Congress also authorized the Department of Homeland Security (DHS) to designate additional countries of concern, such as those that are "safe haven[s] for terrorists" or have a "significant presence" of "foreign terrorist organization[s]," *id.* § 1187(a)(12)(D)(i)-(ii), and in February 2016 DHS excluded recent visitors to Libya, Somalia, and Yemen from travel under the Program.[2]

Drawing on these earlier designations by Congress and the Executive, the Order imposed a 90-day suspension of entry of nationals from six of those countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. Order §§ 2(c), 3(a)-(c). As the Order explains, each presents "heightened concerns about terrorism and travel to the United States," because each one "is a state sponsor of terrorism, has been

[1] https://www.state.gov/documents/organization/258249.pdf.

[2] https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program.

significantly compromised by terrorist organizations, or contains active conflict zones." *Id.* § 1(b)(i), (d)-(e). The Order details specific concerns regarding each country that may increase the risk that terrorist operatives or sympathizers from those nations will travel to the United States and may "diminish[] the foreign government's willingness or ability" to provide information necessary to detect potential threats. *Id.* § 1(d)-(e).

The President found that continued entry from those countries while the review is ongoing posed an "unacceptably high" "risk" of "erroneously permitting entry" of foreign nationals seeking to do this Nation harm. Order § 1(f). The Order therefore imposes "a temporary pause on the entry of nationals from [those countries]" in order to facilitate a re-assessment of "current screening and vetting procedures." *Id.* §§ 1(f), 2(a)-(b). But this temporary suspension does not apply, for example, to lawful permanent residents of the U.S. or aliens who are inside the country on the Order's effective date. *Id.* § 3(a)(i), (b)(i). In addition, it expressly provides for case-by-case waivers, permitting aliens who otherwise would be subject to the suspension to enter if a consular officer concludes that "denying [the alien] entry during the suspension period would cause undue hardship" and "entry would not pose a threat to national security and would be in the national interest." *Id.* § 3(c). The Order includes a nonexhaustive list of examples where waivers may be appropriate. *Id.*

**2.** The district court's injunction barring any enforcement of Section 2(c) undermines the President's constitutional and statutory duty to protect the national interest and national security. "[N]o governmental interest is more compelling than the security of the Nation," and "the Government's interest in combatting terrorism is an urgent objective of the highest order." *Haig v. Agee*, 453 U.S. 280, 307 (1981); *Holder v. Humanitarian Law Project (HLP)*, 561 U.S. 1, 28 (2010). The President's assessment of threats to that interest deserves the greatest deference. *See HLP*, 561 U.S. at 33-34; *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). And that is particularly true for Section 2(c) because it reflects the President's "[p]redictive judgment[]" regarding a specific national-security risk. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988). When the Executive adopts "a preventive measure * * * in the context of international affairs and national security," the government "is not required to conclusively link all the pieces in the puzzle before [courts] grant weight to its empirical conclusions." *HLP*, 561 U.S. at 35. By forbidding implementation of Section 2(c) nationwide, the injunction undermines the President's constitutional and statutory responsibility to safeguard the Nation's security and intrudes on the political branches' constitutional prerogatives.

The injunction also causes irreparable injury by invalidating an action taken at the height of the President's authority. *See Washington v. Trump*, No. 17-35105,

slip op. at 1-3 (9th Cir. Mar. 17, 2017) (Bybee, J., dissenting from the denial of rehearing *en banc*) (*Washington* Bybee Dissent). "[T]he President has unique responsibility" over "foreign and military affairs." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993). Rules "concerning the admissibility of aliens" also "implement[] an inherent executive power." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). And because "the President act[ed] pursuant to an express * * * authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

The district court's injunction overriding the President's judgment thus necessarily imposes irreparable harm. Even a single State "suffers a form of irreparable injury" "[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see, e.g.*, *O Centro Espirita Beneficente Uniao de Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002). *A fortiori*, the injunction against the Order here imposes irreparable

injury on the President and the public given "the singular importance of [his] duties" to the entire Nation. *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982).

**3.** The district court acknowledged that it "should afford deference to national security and foreign policy judgments of the Executive Branch," and disavowed any intention to "second-guess the conclusion that national security interests would be served by the" entry suspension. Op. 35. Yet the court proceeded to do just that. The court opined that defendants "ha[d] not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban," and the Order itself "does not explain specifically why this extraordinary, unprecedented action is the necessary response to the existing risks." Op. 36-37, 40. To the contrary, the Order sets forth in detail the facts and considerations underlying the President's risk assessment. Order § 1(d)-(f), (h)-(i). The district court's conclusion that the Order's stated reasons are insufficient is at bottom a disagreement with the President's predictive national-security judgment.

The district court also expressed doubt that the Order's suspension was actually needed because this measure "has not been deemed necessary at any other time in recent history." Op. 40. But the President was entitled to weigh those risks himself and to strike a different balance than his predecessors. *Washington* Bybee Dissent 21 ("The President's actions might have been more aggressive than those of his predecessors, but that was his prerogative."). Congress and the previous

Administration decided to exclude from travel under the Visa Waiver Program certain aliens with ties to six countries designated because of heightened terrorism concerns. The current Administration has decided to go further and temporarily suspend the entry of nationals of those countries (subject to case-by-case waivers) while the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, reviews the Nation's current vetting procedures. The President is entitled to make his own assessment as to the adequacy of vetting procedures and what level of national-security risk is acceptable.

**4.** The harm caused by the injunction to the government and public interest amply justifies a stay. Courts have vacated injunctions on appeal in light of similar concerns. *See, e.g.*, *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 204-07 (4th Cir. 2005) (invoking separation of powers concerns in vacating preliminary injunction whose scope impinged on national security interests); *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978) (per curiam) (vacating preliminary injunction that directed action by the Secretary of State in foreign affairs, which "deeply intrude[d] into the core concerns of the executive branch"). More generally, courts and Justices have repeatedly granted stays of injunctions to prevent a significant breach of inter-branch comity. *See, e.g.*, *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers) (staying injunction because it likely was "not merely an erroneous adjudication of a lawsuit

between private litigants, but an improper intrusion by a federal court into the workings of a coordinate branch of the Government"); *Schweiker v. McClure*, 452 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers); *Comm. on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam). The district court's injunction similarly should be stayed pending appeal.

### B. A Brief Stay Pending An Expedited Appeal Would Not Impose Any Substantial Harm On These Plaintiffs

By contrast, plaintiffs face no substantial harm if the district court's injunction is stayed. Indeed, the plaintiffs have identified no immediate injury that is likely to occur during the 90-day period of the suspension under Section 2(c), much less during the shorter period of the stay.

**1.** As for the three organizational plaintiffs, the district court did not identify any of them that would suffer even a cognizable Article III injury—let alone substantial harm—as a result of Section 2(c). *See* Op. 12-18 (addressing standing of individual plaintiffs only). On that score, the court was correct. Two of the organizational plaintiffs—the International Refugee Assistance Project (IRAP) and HIAS, Inc.—have asserted claims regarding other provisions of the Order addressing refugees, but the district court declined to enjoin those provisions, Op. 40-41, and they are not at issue in this appeal. The third organization, the Middle East Studies

Association (MESA), alleged that some unspecified members might be prevented by Section 2(c) from traveling to the United States to attend MESA's annual meeting. But that meeting is not scheduled until November 2017, well after Section 2(c)'s 90-day suspension expires in early June.[3] MESA further alleged that one of its members has plans to travel to the United States at some other unspecified future time, but it has not shown with specificity that this member has any "concrete plans" to do so during the suspension. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

**2.** As for the six individual plaintiffs, they too will suffer no concrete, substantial harm if the district court's injunction is stayed. Like IRAP and HIAS, two of the individual plaintiffs, Muhammed Meteab and Ibrahim Mohomed, challenge the Order's provisions addressing refugees and claim that those provisions will prevent their family members from being admitted as refugees. Again, because the district court enjoined only Section 2(c)'s entry suspension, not the refugee provisions, staying the injunction will not affect these two plaintiffs.

The remaining four plaintiffs assert that Section 2(c) will injure them by preventing or delaying entry of their foreign-national relatives seeking visas. But none of those plaintiffs has shown any imminent, substantial harm during the

[3] http://www.mesana.org/annual-meeting/index.html.

90-day pause on entry. One of the plaintiffs, Paul Harrison, seeks entry of his Iranian fiancé. As defendants informed the district court, however, his claim appears to be moot. D. Ct. Doc. 151, 3/16/17 Tr. 30-31, 34. We are informed by the State Department that the fiancé's visa was issued on March 15, 2017, and subsequently collected. In short, the district court properly did not find that Harrison has standing, much less imminent injury.

The other three plaintiffs who assert that Section 2(c) will deny visas to their foreign relatives—the wives of John Doe #1 and John Doe #3, and the sister of Jane Doe #2—do not have any substantial injury because any possible harm lacks imminence and is speculative. Although Section 2(c) imposes a 90-day suspension of entry for certain nationals of six countries, it does not suspend consideration of visa applications. And it is far from certain that any of the relatives otherwise would be found eligible for and receive a visa during this appeal's pendency—facts plaintiffs should have been required to show in order to obtain injunctive relief. D. Ct. Dkt. 95-4 ¶¶5-6; 95-5 ¶5; 95-7 ¶10. Plus, to the extent any of their visa adjudications is imminent, the waiver process could well provide the very relief they seek. The Order specifically contemplates the possibility of waivers for "close family member[s]." Order § 3(c)(iv). The waiver process is integrated into the visa-adjudication procedure, and plaintiffs have not shown that it will cause any material delay. A preliminary injunction to redress imminent harm is unnecessary—and thus

staying the district court's injunction pending appeal is especially appropriate—unless and until those plaintiffs' relatives are found eligible for a visa but denied a waiver.

**3.** The district court did not actually identify any concrete injury Section 2(c) would cause to any of these plaintiffs. It reasoned instead that Establishment Clause violations are *per se* irreparable injury. Op. 38-39. But that principle does not excuse the predicate requirement that a plaintiff must identify a constitutionally cognizable injury that he himself is likely to suffer, not one inflicted upon a third party. The cases recognizing that an asserted constitutional violation supports irreparable harm have thus emphasized that a plaintiff must still first identify a specific injury to himself to establish standing. *See In re Navy Chaplaincy*, 534 F.3d 756, 763 (D.C. Cir. 2008) ("[T]he allegation of an Establishment Clause violation is sufficient to satisfy the irreparable harm prong of the preliminary injunction standard" only if "a party has standing to allege such a violation.") (emphasis omitted).

Here, the only individuals who are subject to Section 2(c)'s suspension of entry—aliens outside of, and with no substantial connections to, the United States—cannot claim any rights under the Establishment Clause, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *DKT Memorial Fund v. Agency for Int'l Dev.*, 887 F.2d 275, 285 (D.C. Cir. 1989), or any constitutional rights regarding

entry into this country, *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). And the individual plaintiffs themselves are not being deprived of any Establishment Clause rights, because they are not subject to the Order. *See Navy Chaplaincy*, 534 F.3d at 764 (a plaintiff "complaining about * * * discrimination suffered by other[] [co-religionists], not by the plaintiff himself," lacks standing); *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 606 (4th Cir. 2012) (mother and child lacked standing to challenge school policy awarding academic credit for religious instruction, because they were "seeking to vindicate, not their own rights, but the rights of others").

Plaintiffs attempted below to transform their abstract Establishment Clause objection into concrete harm by alleging "stigmatizing injuries" based on asserted "anti-Muslim animus underlying" the Order. Op. 11. But an "'abstract stigmatic injury' resulting" from the perception that government action "turns [religious adherents] into political outsiders * * * is insufficient to confer standing." *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010) (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)). The Supreme Court has made clear that "stigmatizing injury" from alleged discrimination confers standing only on "those persons who are personally denied equal treatment" by the challenged discriminatory conduct. *Allen*, 468 U.S. at 755; *see Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982) ("[Plaintiffs] fail to identify any personal

injury suffered by them * * * other than the psychological consequence presumably produced by observation of conduct with which one disagrees.").

As this Court likewise has explained, those who are not themselves "targets or victims" of the challenged policy cannot claim injury based on "the bare fact of disagreement with [the] policy, even passionate disagreement premised on Establishment Clause principles." *Moss*, 683 F.3d at 605-06; *see Navy Chaplaincy*, 534 F.3d at 764-65. Plaintiffs suffer no cognizable injury at all, much less substantial injury sufficient to preclude a stay, from mere "abstract knowledge" of an allegedly unconstitutional policy or from supposedly being made to "feel like * * * outsider[s]," where they were not themselves "the targets or victims of this alleged religious intolerance." *Moss*, 683 F.3d at 606.

## II. The Government Is Likely To Prevail On The Merits

A stay also is appropriate because defendants are likely to succeed on their appeal of the district court's injunction. For the reasons discussed above and in the government's opening brief, the district court erred in finding plaintiffs' claim justiciable. The district court further erred in holding that plaintiffs were likely to prevail on two grounds: first, that Section 2(c) exceeds the President's statutory authority; and second, that Section 2(c) violates the Establishment Clause. As explained more fully in defendants' opening brief, neither ground withstands scrutiny.

*First*, Section 2(c) falls squarely within the President's statutory authority. Two separate statutes, 8 U.S.C. §§ 1182(f) and 1185(a), grant the President broad power that encompasses the suspension. The district court actually agreed that Section 1182(f) permits the President to restrict entry of aliens based on nationality, but concluded that another statute, *id.* § 1152(a)(1)(A), prohibits the President from denying immigrant visas based on nationality. Op. 24. The court's interpretation would require aliens who otherwise qualify for immigrant visas to be issued such visas, only to be denied admission upon physical arrival. Congress did not require that senseless result. Section 1152(a)(1)(A) does not prohibit consular officers from taking account of the fact that an alien requesting a visa is validly barred from entering the country under Section 1182(f). *See* 8 U.S.C. § 1201(g). And Congress has made clear that Section 1152(a)(1)(A) does not apply at all to Executive action addressing the "procedures for the processing of immigrant visa applications or the locations where such applications will be processed," *id.* § 1152(a)(1)(B), which encompasses Section 2(c)'s temporary pause on entry. In any event, even if the district court were correct that Section 1152(a)(1)(A) prohibits denying immigrant visas to aliens because they are covered by Section 2(c), it could not support enjoining the suspension of their entry under Section 2(c).

*Second*, plaintiffs are not likely to succeed in challenging Section 2(c) under the Establishment Clause. The Supreme Court has forbidden second-guessing the

Executive's exercise of his broad statutory authority regarding exclusion of aliens so long as it is based on a facially legitimate, bona fide reason. *Mandel*, 408 U.S. at 770. Section 2(c) of the Order easily clears that threshold: it is expressly aimed at protecting national security, and it does so by adopting special safeguards for foreign nationals of six countries that Congress and the Executive previously identified as posing heightened concerns.

The district court declined to apply *Mandel*'s settled standard, opting instead for Establishment Clause case law addressing far-removed issues such as local religious displays. Op. 37-38. The district court's failure to apply directly applicable, dispositive Supreme Court precedent renders its conclusion untenable. Moreover, plaintiffs' Establishment Clause claims fail even under the inapposite precedent the district court applied. The court held that Section 2(c)'s entry suspension is likely unconstitutional based not on anything the Order says or does—Section 2(c) is neutral with respect to religion—but on an improper motive the court inferred primarily from campaign and similar statements. That analysis is directly contrary to Supreme Court case law, which makes clear that only the official purpose of government acts, not inferences drawn from campaign-trail comments, counts for Establishment Clause purposes. *McCreary County v. ACLU*, 545 U.S. 844, 860-64 (2005). As *McCreary* instructed, courts must evaluate whether official action has an improper religious purpose based on the "the 'text, legislative history, and

implementation of the statute,' or comparable official act," not through "judicial psychoanalysis of a drafter's heart of hearts." *Id.* at 862 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). In all events, the earlier statements concerning a "Muslim ban" bear no resemblance to Section 2(c) of the Order, which briefly suspends entry (subject to exceptions and waivers) by nationals from six countries that were previously identified by Congress and the Executive as presenting heightened terrorism concerns and that contain approximately 10% of the global Muslim population.

## III. The Nationwide Injunction Is Improper

Even if some injunctive relief were appropriate, a stay pending appeal nevertheless is warranted because the injunction the court entered is fatally overbroad for at least three reasons. The injunction should be stayed in its entirety until this Court can definitively resolve its validity and scope. At a minimum, the Court should stay the injunction in part for reaching beyond proper bounds.

**A.** The injunction impermissibly purports to enjoin the President himself. It has been settled for 150 years that federal courts generally "ha[ve] no jurisdiction * * * to enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867)). Any injunction here must be confined to run only against federal agencies and officials charged with implementing Section 2(c).

**B.** The district court enjoined Section 2(c) on its face, but plaintiffs have fallen far short of carrying their burden of "establish[ing] that no set of circumstances exists under which the [Order] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). For example, the Order is clearly lawful as applied to foreign nationals with no immediate relatives in the country and no other significant connection to it; as noted, such aliens abroad have no First Amendment rights themselves, and no person in the U.S. can claim that exclusion of such aliens violates the person's own cognizable rights. The district court offered no justification for enjoining the Order's application to persons as to whom it is indisputably valid.

**C.** The injunction's broad sweep—enjoining the Order's application to any person, nationwide—violates the well-settled rule that injunctive relief must be limited to redressing the plaintiff's own cognizable injuries. That rule is required by both the Constitution and traditional principles of equity.

Article III demands that "[t]he remedy" sought must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). "The actual-injury requirement would hardly serve [its] purpose * * * —of preventing courts from undertaking tasks assigned to the political branches—if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to

remedy *all* inadequacies in that administration." *Id.*; *see City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

Bedrock principles governing equitable remedies independently support the same requirement that injunctions be no broader than "necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). This Court has repeatedly set aside injunctions that were "broader in scope than that 'necessary to provide complete relief to the plaintiff' and * * * did not carefully address only the circumstances of the case." *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003); *see Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392-94 (4th Cir. 2001); *Ga.-Pac. Consumer Prods. LP v. von Drehle Corp.*, 781 F.3d 710, 715-17 (4th Cir. 2015). That principle applies with even greater force to a preliminary injunction, an equitable tool designed merely to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see Consolidation Coal Co. v. Disabled Miners of S. W. Va.*, 442 F.2d 1261, 1267 (4th Cir. 1971).

The district court's categorical, nationwide injunction is irreconcilable with the fundamental rule limiting injunctions to redressing plaintiffs' injuries. The district court identified only three individual plaintiffs who supposedly have standing because their foreign-national family members may be unable to enter the

country on non-refugee visas. Op. 12-18. Those claimed injuries, if cognizable at all, would be fully redressed by an injunction regarding those plaintiffs' specific family members. None of the plaintiffs can claim any "personal stake" in any relief beyond their own relatives. *Lyons*, 461 U.S. at 101-02; *see Valley Forge*, 454 U.S. at 485-86. The district court's injunction barring enforcement of Section 2(c) as to any foreign national—even those with no ties to persons in the U.S.—thus "is far broader" than "necessary to provide [plaintiffs] complete relief." *Kentuckians for the Commonwealth*, 317 F.3d at 436.

None of the district court's justifications for enjoining Section 2(c) nationwide survives scrutiny. The court asserted that the "Individual Plaintiffs and clients of the Organizational Plaintiffs are located in different parts of the United States." Op. 41. But an injunction addressing the individual plaintiffs' relatives would fully resolve their purported injuries regardless of where they live. And none of the organizational plaintiffs has standing, because none of them identified any members with standing. The court also stated that "an Establishment Clause violation has impacts beyond the personal interests of individual parties." *Id.* The relevant question, however, is not the extent of the Order's "impacts." What matters is the extent of relief necessary to redress injuries to the plaintiffs in this case. *Kentuckians for the Commonwealth*, 317 F.3d at 436. That an allegedly unconstitutional policy affects others not before the Court is no basis to enjoin the policy nationwide. *See Va. Soc'y*, 263 F.3d at 393

(holding that "district court abused its discretion by issuing a nationwide injunction" against the FEC because that scope was unnecessary to provide plaintiffs complete relief and "ha[d] the effect" of interfering with other courts' ability to address same issues).

Finally, the district court asserted that the importance of "uniform immigration law" compelled nationwide relief. Op. 42. That is incorrect. Properly limiting any injunctive relief to the individual plaintiffs before the Court would pose no genuine threat to uniformity. To the contrary, proper respect for uniformity requires leaving the Order's nationwide policy in place, with individualized exceptions for particular plaintiffs who have established irreparable injury from a likely violation of their own constitutional rights. The Order's express severability clause compels the same conclusion. *See* Order § 15(a) (providing that if "the application of any provision [of the Order] to any person or circumstance[] is held to be invalid, * * * the application of [the Order's] other provisions to any other persons or circumstances shall not be affected"). Such appropriately tailored relief would pose significantly less interference with federal immigration policy than enjoining the President's directive nationwide based on the injuries of only a few individual plaintiffs.

## CONCLUSION

For these reasons, defendants respectfully request that the Court stay the district court's preliminary injunction pending final disposition of the appeal. At a minimum, if the Court were to conclude that certain plaintiffs have made the requisite showing of cognizable and irreparable injury, the Court should grant a partial stay of the injunction insofar as it extends beyond such plaintiffs.

Respectfully submitted,

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MARCH 2017

## CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This motion contains 5,162 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ Sharon Swingle
Sharon Swingle

## CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sharon Swingle
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