No. 16-1436

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, regulation, and rule:

Miscellaneous:

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According to respondents, "[t]his is an important case." Br. in Opp. 1. That is a considerable understatement. At the behest of a single individual (John Doe #1), the divided en banc court of appeals affirmed a global injunction against a provision of an Executive Order of the President that concerns matters of national security and immigration. Respondents do not address the government's arguments for why this Court's review is warranted, see Pet. 33-34; Stay Appl. 18-22, and they do not seriously dispute that the "court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Respondents instead primarily argue that the case is moot and that the decision below is correct. Both arguments are mistaken.

I. THE GOVERNMENT'S APPEAL IS NOT MOOT

Respondents contend (Br. in Opp. 13-15) that the government's appeal of the preliminary injunction becomes moot today, June 14, 2017. As a matter of both the Executive Order, No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), and common sense, a 90-day period that was never permitted to run is not now elapsing. As discussed more fully in the government's accompanying reply in support of its application for a stay, see Gov't Stay Reply Br. 1-4, Section 2(c) provides that entry will be "suspended for 90 days from the effective date of this order." Pet. App. 299a (§ 2(c)). That effective date originally was, as Section 14 provides, "12:01 a.m., eastern daylight time on March 16, 2017." *Id.* at 311a (§ 14). The injunction in this case, however, prevented Section 2(c) from becoming "effective" and "suspend[ing]" entry for 90 days after March 16. Section 2(c)'s 90-day suspension thus will take effect and begin to run only when the injunction in this case, along with the overlapping global injunction at issue in *Trump* v. *Hawaii*, No. 16A1191 (filed June 1, 2017), is lifted or stayed. And if any doubt existed on that score, the President has resolved it in his memorandum clarifying and amending the relevant provisions of the Order. See Memorandum from President Donald J. Trump to Sec'y of State et al., *Effective Date in Executive Order 13780* (June 14, 2017); see also Br. in Opp. 13-14. The government's challenge is not moot.[1]

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[1] If the Court were to conclude that the challenge is moot, the appropriate course would be to grant, vacate, and remand the court of appeals' decision with direction to dismiss the case, including the injunction. Gov't Stay Reply Br. 4 n.2; see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

II. THE DECISION BELOW IS WRONG

A. Doe #1's Challenge To Section 2(c) Is Not Justiciable

Respondents do not dispute that they may seek review of the denial of entry to aliens abroad only to assert violations of respondents' own constitutional rights. See Br. in Opp. 19 ("The doctrine [of consular nonreviewability] does not bar constitutional claims by persons in the United States."). The court of appeals held that Doe #1 has pointed to two supposed injuries that stem from a violation of his own Establishment Clause rights: (1) possible delay in his wife's entry and (2) condemnation of his religious faith. Pet. App. 25a-26a. Respondents fail to show that either putative injury allows Doe #1 to challenge Section 2(c).

1. Doe #1's allegation that Section 2(c) will delay his wife's entry is not ripe for adjudication, because the Order provides that she may seek a waiver as a close family member of a U.S. citizen. Pet. App. 302a-303a (§ 3(c)(iv)). Indeed, in *Kerry* v. *Din*, 135 S. Ct. 2128 (2015), and *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the Court considered the constitutional claim only after the alien abroad had been denied a visa (and in *Mandel*, a waiver). Respondents' only answer is that Doe #1's *condemnation* injury "is immediate and ongoing." Br. in Opp. 19 n.10. By shifting to Doe #1's asserted condemnation injury, respondents implicitly concede that his asserted delay-of-entry injury alone does not satisfy Article III. Moreover, respondents do not address this Court's cases holding that individuals derivatively injured by government action directed at others may not sue under the Establishment Clause, because they have not suffered violations of their *own* religious-freedom rights. See Pet. 16-17 (citing cases).

2. Respondents focus on Doe #1's asserted condemnation injury. They rely (Br. in Opp. 16, 18) on domestic cases in which U.S. citizens were directly exposed to explicitly religious displays or speech in public places like a courthouse, public park, or city council meeting. But respondents do not dispute that Section 2(c) is not explicitly religious, and it applies only to aliens abroad, not U.S. citizens.[2] Their claim is only that, by allegedly discriminating against aliens abroad on the basis of their religious faith, Section 2(c) sends a message of condemnation to *respondents* (as well as to all Muslims in the United States, and perhaps even all those offended by the Order's putative message). No case holds that type of injury cognizable, and recognizing such injury would be contrary to *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), and *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), cert. denied, 556 U.S. 1167 (2009).

On respondents' approach, virtually any government action could be recharacterized as sending a message of condemnation (or endorsement). Respondents say (Br. in Opp. 17) that Doe #1 is personally affected by the Order because it applies to his wife. But any such effect would have nothing to with Doe's *condemnation* injury, which stems from the Order's supposed message to

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[2] This case is also unlike *Sessions* v. *Morales-Santana*, No. 15-1191 (June 12, 2017), which upheld third-party standing for a U.S. resident who was denied U.S. citizenship based on the gender of his now-deceased U.S. citizen-parent. Slip op. 6-7. By contrast, the relative in this case is not a U.S. citizen but an alien abroad who lacks constitutional rights in connection with her admission, she is alive, the challenged provision has not yet been applied to her, and that provision does not impose a direct personal injury on the U.S. resident who is challenging it.

him—not its alleged impact on his wife's entry. Respondents also suggest (*id.* at 18 n.9) that the rule of *Allen* v. *Wright*, 468 U.S. 737 (1984)—*i.e.*, only "'those persons who are personally denied equal treatment' by the challenged discriminatory conduct" may sue to redress its "stigmatizing injury"—is limited to the equal-protection context. *Id.* at 755 (citation omitted). This Court, however, applied that rule to Establishment Clause claims in *Valley Forge*. See 454 U.S. at 485-486. Respondents offer no legal basis for their Establishment Clause exceptionalism.

3. Respondents do not dispute that the court of appeals relied only on Doe #1's standing. And they do not rely on any of the other individual plaintiffs. See Pet. 15 n.7. Respondents instead argue (Br. in Opp. 18-19, 32-33) that the organizational plaintiffs have justiciable claims—even though neither court below so held. Of the three organizations, two resettle refugees. See Gov't C.A. Br. 25. The Order's refugee provisions are not at issue here, and those groups cannot assert third-party standing (Br. in Opp. 18-19) on the ground that some unidentified clients also happen to be petitioning for visas for unidentified relatives. As for the remaining group (the Middle East Studies Association), respondents continue to assert (*id.* at 19) that one member may be unable to attend an annual meeting in November 2017. But standing is measured as of the commencement of the action. See *Davis* v. *FEC*, 554 U.S. 724, 732-733 (2008). And when this suit was filed, Section 2(c) would have expired today—long before that conference.

B. Section 2(c) Is Lawful

1. Section 2(c) does not violate the Establishment Clause

a. In the court of appeals, respondents argued that their constitutional challenge to the Order's exclusion of aliens abroad is not subject to *Mandel*'s standard. Resps. C.A. Br. 35-38. Respondents all but abandon that contention in this Court. Br. in Opp. 21 n.11. Just days ago, this Court reiterated that *Mandel*'s test—whether Section 2(c)'s national-security purpose is "facially legitimate and bona fide," 408 U.S. at 770—constitutes "minimal scrutiny (rational-basis review)." *Sessions* v. *Morales-Santana*, No. 15-1191 (June 12, 2017), slip op. 15. Apart from a passing footnote, respondents do not dispute that Section 2(c)'s national-security purpose based on risks presented by countries that sponsor or shelter terrorism (Pet. 6-7) is facially legitimate. Nor do they dispute that Section 2(c)'s temporary suspension of entry bears a rational relation to that objective. Br. in Opp. 23 n.13.[3] It therefore is facially bona fide as well. That should be the end of the analysis under *Mandel*'s deferential standard of review.

Respondents distort *Mandel*, insisting that "it is appropriate to 'look behind' the explanation on the face of [the] order" because they allege bad faith. Br. in Opp.

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[3] Respondents' contention (Br. in Opp. 23 n.13) that Section 2(c) is a "religious gerrymander" disregards the Order's explanation that the six countries were chosen based on specific national-security risks previously identified by Congress and the Executive, and ignores Section 2(c)'s exclusion of the overwhelming majority of Muslim-majority nations. Respondents' challenge to collection of data about "honor killings" (*ibid.*) ignores that they are not confined to any religion and that the government has a strong interest in combatting gender-motivated violence. Gov't C.A. Reply Br. 20-21.

21 (citations and emphasis omitted). That is precisely the approach this Court rejected in *Mandel*. Compare 408 U.S. at 770, with *id.* at 778 (Marshall, J., dissenting). Contrary to respondents' argument, *Mandel* was not a dispute over whether the government had "provided enough explanation for its conclusions." Br. in Opp. 22. In dissent, Justice Marshall (joined by Justice Brennan) contended that "the Attorney General's reason for refusing a waiver * * * [was] a sham" because it was affirmatively belied by representations of the Department of State. 408 U.S. at 778. This Court declined to entertain that contention, refusing to look behind the Attorney General's "facially legitimate and bona fide reason" for denying entry (*i.e.*, Mandel's failure to comply with the terms of previous visas). *Id.* at 770. There is no basis for distinguishing *Mandel* from this case.

b. Respondents rely primarily (Br. in Opp. 21-22) on Justice Kennedy's concurrence in *Din*, *supra*. But *Din* involved a claim by a U.S. citizen challenging the denial of a visa to her husband on the ground that due process required that she be provided the facts underlying that determination. In discussing that claim, respondents never grapple with the concurrence's language or logic: it addressed only the hypothetical circumstance where a consular officer's decision to refuse a visa lacked a "bona fide *factual basis*," which might entitle the U.S. citizen to "additional factual details" about the reason for the denial beyond citation of the statutory basis. 135 S. Ct. at 2140, 2141 (emphasis added).

Indeed, as respondents acknowledge, the U.S. citizen in *Din* "did not allege that [the government] had acted with an impermissible purpose." Br. in Opp. 22. The case therefore did not present any question of how courts should evaluate such allegations. And to the extent

the brief discussion in the *Din* concurrence suggests that a U.S. citizen-plaintiff might be permitted in rare circumstances to obtain additional factual details for a consular officer's decision, that type of inquiry does not apply here. See Pet. 24. This case involves a formal national security and immigration determination by the President himself, not a consular officer's fact-based decision in an individual case. And the court of appeals did not hold that the Order lacks an adequate factual basis for Section 2(c)'s temporary suspension.

c. Respondents' Establishment Clause challenge fails even under domestic precedent. Pet. 26-31. They do not dispute that Section 2(c)'s stated national-security purpose is religion-neutral. Respondents instead argue (Br. in Opp. 26-29), based on the opinions of former officials and leaked drafts of internal agency documents, that Section 2(c) is not necessary to national security. But the Constitution and Acts of Congress entrust the *President* with the responsibility of weighing competing priorities and risks and determining the appropriate course in consultation with his Cabinet and other advisors. Pet. 22. The fact that respondents and their amici disagree with the current Executive's judgment does not demonstrate that Section 2(c) aims at an impermissible end.

Respondents' related suggestion that the Order does not reflect the input of the President's advisors is unfounded. The President consulted with multiple Cabinet officials. See Pet. 5-7. And as the Secretary of Homeland Security recently reaffirmed in testimony before Congress, Section 2 has "nothing to do with religion," but rather is "about security for the United States and nothing else"; it focuses on "countries that are either unable or unwilling to help [the government]

validate the identities and backgrounds of persons within their borders"; and the injunctions in this case and the *Hawaii* litigation barring implementation of Section 2(c) and other provisions "prevent[] [the government] from taking steps right now to improve the securit[y] of the homeland." S. Comm. on Homeland Sec. & Governmental Affairs, *The Department of Homeland Security Fiscal Year 2018 Budget Request* (June 6, 2017) (statement of John F. Kelly, at 38:09-39:04, 40:18-40:36), https://www.hsgac.senate.gov/hearings/the-department-of-homeland-security-fiscal-year-2018-budget-request.

Respondents are left to rely (Br. in Opp. 24-26), as the court of appeals did, on extrinsic material and especially on campaign statements. Such statements are irrelevant because only an "*official* objective" regarding religion can violate the Establishment Clause, *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 862 (2005) (emphasis added). Respondents are wrong to suggest (*id.* at 30-31) that this Court has ever approved reliance on such statements. The plurality opinion in *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 541 (1993), noted a debate at a city-council meeting. See *Glassroth* v. *Moore*, 335 F.3d 1282, 1284-1285, 1297 (11th Cir.) (state chief justice confirmed after taking office that Ten Commandments display was erected for religious purpose), cert. denied, 540 U.S. 1000 (2003). And *Epperson* v. *Arkansas*, 393 U.S. 97, 107-108 & n.16 (1968), and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457, 463 (1982), involved initiative campaigns, in which public debate was more akin to legislative history. See Gov't C.A. Reply Br. 22-23. Respondents do not point to any case that supports impugning an Executive Order that is neutral on its face and in operation based on a candidate's campaign-trail comments.

Respondents' remaining arguments lack merit. Respondents say that the difficulties with relying on campaign statements "apply equally to post-campaign statements." Br. in Opp. 31. That is all the more reason why courts should look to the "text, legislative history, and implementation of the statute," without engaging in any "judicial psychoanalysis" of officials' motives based on extrinsic material. *McCreary*, 545 U.S. at 862 (citation omitted). Finally, respondents assert in passing (Br. in Opp. 31) that they can carry their burden based only on post-inauguration materials, but they do not seriously grapple with the government's showing to the contrary. See Pet. 30-31; Stay Appl. 21.

2. Section 2(c) does not exceed the President's statutory authority

Respondents argue (Br. in Opp. 34-36) that the judgment below can be affirmed on alternative statutory grounds that the court of appeals did not address. But as respondents do not dispute, the limited exception to consular nonreviewability in *Mandel* and *Din* applies to "*constitutional* claims," not statutory claims, by U.S. citizens. *Id.* at 19 (emphasis added). Respondents do not cite any authority for permitting statutory challenges by U.S. citizens to the denial of entry to aliens abroad. In any event, respondents' statutory arguments lack merit for reasons that the government explained below, see Gov't C.A. Br. 27-35, and that the government will address in further briefing on its application to stay the *Hawaii* injunction. Whatever the merits of respondents' statutory arguments, the appropriate course is for this Court to grant certiorari both here and in *Hawaii* and consolidate the cases for argument.

C. The Global Injunction Against Section 2(c) Is Vastly Overbroad

The global injunction here is radically overbroad. Even if Doe #1 had a justiciable challenge, he could not obtain an injunction that invalidates Section 2(c) in all of its applications. Rather, he could obtain at most an order enjoining Section 2(c)'s application to his wife. See Pet. 31-32. Respondents contend (Br. in Opp. 33) that such a tailored remedy would be akin to giving earplugs to the students in *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), or temporarily covering the Ten Commandments display in *McCreary* when the individual plaintiffs visited the courthouse. That is wrong.

Respondents' analogy to cases involving school prayer and religious displays fails because the injury respondents assert is fundamentally different. In *Doe* and *McCreary*, the practice or display was directed to the audience of which the plaintiff was a part. Thus, the injury to the plaintiffs challenging school prayer in *Doe* and the Ten Commandments display in *McCreary* could realistically be redressed only by ending the practice or removing the display altogether. By contrast, any cognizable injury to Doe #1 does not stem from merely observing a government message or display—an untenable theory of injury that, in the context of this Order, would enable anyone claiming offense at the Order to sue. Rather, respondents argue (Br. in Opp. 17 & n.8), and the court of appeals held (Pet. App. 32a-33a & n.11), that Doe #1's purported injury results from the combination of the stigmatizing message he alleges coupled with the Order's potential application to his wife. Because

that purported injury rests on the possible effect of Section 2(c) on his wife's admission, it could be fully redressed by relief limited to her admission.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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JUNE 2017