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.

PETITIONERS' RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO ADD PARTIES

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Since filing their operative complaint six months ago, respondents in No. 16-1436 have chosen to litigate their challenge to Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), based on purported injuries to six individuals and three organizations. They have known since the Order was issued that any of the individual respondents' family members who seek a visa might receive a waiver and visa under the Order. Moreover, respondents have known since the district court issued its preliminary injunction in March 2017 that any of those family members might receive a visa through regular processing. Indeed, setting aside the individual respondents whose relatives seek refugee admission or who could not realistically apply for a visa while the Order is in effect, all of the individual respondents' family members had

obtained visas by the time this Court granted certiorari more than two months ago, on June 26, 2017. Gov't Br. 28 n.10. Yet until now, respondents have never sought to introduce new parties in light of these developments. Instead, when the wife of John Doe #1 -- the last respondent whose relative might plausibly have been affected by Section 2(c)'s 90-day entry suspension while it is in effect -- obtained a visa on or about June 22, 2017, respondents insisted that it made no difference. See 16-1436 Resps. Letter (June 24, 2017) (Resps. June 24 Letter).

Belatedly reconsidering that strategy, respondents in this case (like the respondents in No. 16-1540) have now changed course. On September 8, 2017 -- more than two months after Doe #1's wife received a visa, nearly a month after the respondents in No. 16-1540 filed a similar motion, and just one business day before filing their merits brief in this Court -- respondents moved to add two new plaintiffs-respondents: Mohamad Mashta, whose Syrian wife seeks an immigrant visa, and Grannaz Amirjamshidi, whose Iranian mother seeks a nonimmigrant visa. 16-1436 Resps. Mot. to Add Parties (Mot.) 1-3. That request should be rejected. Respondents cannot possibly justify their delay in seeking to alter the parties to the case, which would substantially prejudice the government. Respondents themselves assert that "both Mr. Mashta and Ms. Amirjamshidi could have been plaintiffs from the beginning of this suit," id. at 5, yet neither participated in the case until

now. Moreover, respondents admittedly became aware of Ms. Amirjamshidi nearly a month before seeking leave to add her as a respondent, yet respondents chose to take no action. Id. at 3. The Court should not allow such an approach to reshaping cases that are pending before it on the merits. And the government should not now be required to litigate the justiciability of claims of new parties in this Court in the first instance.

Respondents' request to add new parties also is unsupported by the precedents they cite. In their lead case, Mullaney v. Anderson, 342 U.S. 415 (1952), the existing plaintiffs' standing was not contested in the court of appeals (and was called into question only in this Court in a belated challenge), and the parties to be added had been among the real parties in interest all along and undisputedly had a cognizable stake of their own. Id. at 416-417. None of those things is true here. The government has consistently disputed respondents' ability to assert their claims. The new putative respondents' claims have never been part of the case, and ascertaining whether they are substantially identical to Doe #1's claim would itself require factual analysis without the benefit of any lower-court ruling. The Court should not permit respondents to sidestep the rules of justiciability by reshaping the litigation at this late hour. The Court should deny respondents' motion and decide the case based on the parties and claims before it.

I. RESPONDENTS' MOTION IS UNTIMELY AND WOULD PREJUDICE THE GOVERNMENT

Respondents' request should be rejected at the threshold because their delay in seeking to add Mr. Mashta and Ms. Amirjamshidi as parties is unjustifiable and would prejudice the government. As respondents' own authority underscores, appellate courts' "power" to alter the parties at the request of an existing party "should be used in such a way that 'no unfair advantage shall be taken by one party, and no oppression practised by the other.'" Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 834 (1989) (quoting Anonymous, 1 F. Cas. 996, 998 (C.C.D. Mass. 1812) (No. 444) (Story, J.)); see Mullaney, 342 U.S. at 417 (allowing addition of plaintiffs that "c[ould] in no wise embarrass the defendant"); see also National Ass'n for the Advancement of Colored People v. New York, 413 U.S. 345, 364-369 (1973) (courts considering requests by a nonparty to intervene consider whether the request is timely and would prejudice the opposing party). Respondents cannot justify waiting until September 8, 2017 -- six months after filing their operative complaint, two months after Doe #1's wife obtained a visa and certiorari was granted, and one business day before filing their merits brief -- to request that Mr. Mashta and Ms. Amirjamshidi be added as plaintiffs-respondents.

A. Respondents have known since the Order was issued six months ago that each of the individual respondents' family members

seeking a visa (whose applications would otherwise be considered while the Order was in effect) might receive a waiver and a visa once the Order took effect. See J.A. 1430 (§ 3(c)(iv)); D. Ct. Doc. 122, at 7-8, 17 (Mar. 13, 2017). And they have known since the district court entered its preliminary injunction that any of those family members might receive a visa without a need for a waiver. Indeed, at every stage of this litigation, respondents have been reminded of this prospect, as one individual respondent's family member after another obtained a visa. Respondent Paul Harrison's fiancé received a visa the same day the court held a hearing on respondents' motion for a preliminary injunction. Mot. 1. Respondent John Doe #3's wife received a visa the week before oral argument in the court of appeals. Ibid. Finally, respondent Doe #1's wife received a visa on or about June 22, 2017, four days before this Court granted certiorari and a stay. Resps. June 24 Letter. Yet rather than seek to add any additional party during that entire timeframe, respondents did nothing.

Respondents do not attempt to justify that extreme delay. Nothing prevented Mr. Mashta or Ms. Amirjamshidi from joining the suit earlier. Indeed, respondents assert that both "could have been plaintiffs from the beginning of this suit." Mot. 5. But neither one ever did become a plaintiff. Respondents assert that they "first learned of Ms. Amirjamshidi on August 12, 2017," and "of Mr. Mashta on August 31, 2017." Mot. 2-3. But respondents

make no effort to demonstrate that they were unable to identify those or any other would-be additional plaintiffs until then. Rather, as respondents' June 24 letter reflects, until now they have been content to proceed on the basis of the existing parties and to argue that those parties' claims are still justiciable. Whatever respondents' reasons for rethinking their strategy now, they should not be permitted to undo that strategic choice at this late stage. Moreover, even if respondents could show that they were previously unable to identify additional plaintiffs, they do not explain why they waited nearly a month after identifying Ms. Amirjamshidi before seeking leave to add her as a party.

B. Permitting respondents to add Mr. Mashta and Ms. Amirjamshidi as parties at this late stage of the proceedings would prejudice the government. First, the government has made arguments in its opening brief (Gov't Br. 30, 80) that are predicated on the mootness of Doe #1's asserted delay-of-entry injury. Its brief reasonably relied on the jurisdictional facts that had existed for many weeks, of which all parties had been fully aware. Respondents' tardy attempt to change those facts just before filing their merits brief does not preserve the case as it had been, but significantly reshapes it.

Second, although respondents argue (Mot. 6) that "the addition of Mr. Mashta and Ms. Amirjamshidi to this case would not add any new issues," adding those individuals would inject new

facts never presented to the lower courts. Neither Mr. Mashta nor Ms. Amirjamshidi previously participated in this case in any capacity. Their allegations of purported injuries based on the anticipated exclusion of foreign-national family members have never previously been disclosed to the government or presented to and passed upon by the lower courts.

Allowing these putative new respondents to join the case now would likely require the parties to litigate further factual issues relevant to their standing in this Court in the first instance. As the lower-court litigation in this case to date illustrates, additional details regarding individual plaintiffs' foreign-national family members may bear on the likelihood that they will be affected by the Order. For example, because Jane Doe #2 seeks a visa for her sister, her sister likely faces a multi-year wait before an immigrant-visa number becomes available and thus cannot plausibly be expected to be affected by Section 2(c)'s entry suspension. See Gov't Br. 28 n.10. So too here, additional facts might shed light on whether Mr. Mashta's or Ms. Amirjamshidi's relatives would likely have received a visa during the original 90-day suspension under Section 2(c) but for the Order, or are likely to do so for the limited period that Section 2(c) remains operative. See pp. 13-16, infra. The need for factual development counsels against adding these proposed new parties in this Court.

II. THIS COURT'S PRECEDENT DOES NOT SUPPORT ADDING THE PROPOSED NEW PARTIES IN THESE CIRCUMSTANCES

A. Respondents' request to add Mr. Mashta and Ms. Amirjamshidi as parties in this Court is not supported by this Court's precedent and would mark a significant extension beyond what has previously been permitted in the decisions of this Court that respondents cite. Respondents principally rely (Mot. 3-7) on Mullaney, supra, in which this Court permitted the addition of a party. The circumstances in that case, however, differ substantially from those here in at least two key respects.

First, the defendants in Mullaney had not questioned the original plaintiffs' standing in the court of appeals, and uncertainty arose unexpectedly for the first time in this Court. "[T]he standing of [the plaintiff] union" to represent its members had been undisputed below, and the defendant "questioned" it "for the first time" in this Court. 342 U.S. at 416. Permitting the addition of a party ensured that an unexpected, late-breaking question as to justiciability would not frustrate the Court's ability to decide the issues properly presented to it. Here, by contrast, the government has contested the justiciability of respondents' claims at every step. Indeed, that is one of the questions the Court agreed to resolve. And the event that rendered the claims of Doe #1 and other individual respondents moot -- the receipt by their relatives of visas -- was hardly unanticipated.

Second, the individuals added as parties in Mullaney were already directly connected to the case, and the lower courts' rulings that certain organizational plaintiffs had standing were predicated partly on those individuals. "The original [union] plaintiffs" had "alleged without contradiction that they were authorized by" union members who were not residents of Alaska (whose law was at issue) "to bring th[e] action in their behalf," 342 U.S. at 417, and the lower courts decided the merits, see id. at 416-417. When the union's standing was questioned in this Court, it moved to add two of its nonresident members. Ibid. This Court granted the motion, which "merely put[] the principal * * * in the position of his avowed agent." Id. at 417. By contrast, Mr. Mashta and Ms. Amirjamshidi have no prior connection to this case at all. Neither has participated previously in the case in any capacity. The lower courts' rulings here are not predicated in any way on those individuals and did not pass upon the justiciability of their claims, directly or indirectly. The court of appeals did not hold that any organizational plaintiff, let alone an organization of which Mr. Mashta or Ms. Amirjamshidi is a member, has standing.

Respondents also mention in passing (Mot. 4) this Court's addition of a party in National Federation of Independent Business v. Sebelius, 565 U.S. 1154 (2012) (NFIB), ruling on merits, 567 U.S. 519 (2012). But NFIB is distinguishable for the same

reasons as Mullaney, and respondents offer no argument to the contrary. In NFIB, "the government d[id] not contest the standing of the individual plaintiffs or of the NFIB" in the court of appeals. Florida v. United States Dep't of Health & Human Servs., 648 F.3d 1235, 1243 (11th Cir. 2011), aff'd in part, reversed in part, National Fed'n of Independent Bus. v. Sebelius, 567 U.S. 519 (2012). The standing of an individual plaintiff (Mary Brown) was called into question because she filed for bankruptcy while the case was before this Court. See Unopposed Mot. for Leave to Add Parties Dana Grimes & David Klemencic at 1-2, NFIB, supra (No. 11-393) (NFIB Mot.). Moreover, the new individuals added as parties in NFIB were members of the organizational plaintiff and had "each filed a declaration in support of [the organization's] associational standing," on which the district court's ruling was partly based. Id. at 3. And their declarations were "materially indistinguishable" from that of the individual whose standing the court of appeals upheld. Id. at 4; see id. at 1-4. The addition of those individuals as parties thus "c[ould] in no wise embarrass the defendant," Mullaney, 342 U.S. at 417, and the government in

NFIB "support[ed] th[e] motion" to add them as parties in this Court, NFIB Mot. 1.[1]

B. Respondents do not address either of those critical differences between this case and Mullaney and NFIB. They nevertheless contend (Mot. 5) that the "equitable considerations" this Court addressed in Mullaney support adding new parties here. See Mot. 4-7. Each of respondents' arguments lacks merit.

First, respondents argue that, as in Mullaney, "earlier joinder" of Mr. Mashta and Ms. Amirjamshidi would not have "'affected the course of the litigation,'" Mot. 4 (quoting Mullaney, 342 U.S. at 417), because both of them "could have been plaintiffs from the beginning," Mot. 5. But respondents misread Mullaney. The Court did not hold that adding new parties on appeal is appropriate whenever those new parties could have been made plaintiffs at the outset; otherwise, any party with a claim similar to those of existing plaintiffs could be joined in cases pending before this Court. Rather, the Court explained that, in the circumstances before it, "earlier joinder" of the union members

[1] Respondents' remaining cases are further afield. Respondents cite (Mot. 4) Rogers v. Paul, 382 U.S. 198 (1965) (per curiam), but there the new parties were undisputedly "members of the class represented" by the original plaintiffs. Id. at 199. Respondents also mention Newman-Green, supra, but as they acknowledge (Mot. 4), that case addressed only whether "courts of appeals may dismiss nondiverse parties on appeal in order to ensure subject matter jurisdiction," not the addition of new parties in a belated effort to overcome foreseeable mootness of respondents' claims.

would not "have in any way affected the course of the litigation" because the union members were always the "real part[ies] in interest" and had been represented in the case by the union from the start. Mullaney, 342 U.S. at 417. Adding them "merely put[] the principal * * * in the position of his avowed agent." Ibid. That is not the case here. The fact that Mr. Mashta and Ms. Amirjamshidi might have joined the case months ago, but did not do so, is not a reason to permit their addition now.

Second, respondents contend (Mot. 5) that, as in Mullaney, permitting the addition of the proposed new plaintiffs-respondents now is necessary to avoid "waste of judicial resources." See Mot. 5-6. That is incorrect. This Court granted certiorari in part to resolve whether the existing respondents' claims are justiciable -- including whether other events have rendered the case moot. Trump v. International Refugee Assistance Project, 137 S. Ct. 2080, 2086-2087 (2017) (per curiam). Adding new parties now is not necessary to decide that issue. Indeed, the existing respondents continue to argue that their claims are justiciable -- including claims of organizational respondents and individuals whose relatives have not yet received visas or refugee admission. Deciding whether those claims are justiciable would not be a "waste" of this Court's time and resources; it is precisely one of the issues the Court granted review to answer.

The circumstances here differ significantly from those in Mullaney. In the specific context the Court addressed there -- where the union members were real parties in interest and represented by the union all along, and the union's standing to represent them was first challenged in this Court -- as a practical matter adding the union members as parties affected only the case's caption. See 342 U.S. at 417. In those circumstances, the Court held, considerations of avoiding "waste" and promoting efficient "judicial administration" counseled allowing the union members to join the case to address the objection that the defendant belatedly raised in this Court. Ibid. Whatever weight those practical considerations properly carried in those circumstances, they do not justify addition of parties where, as here, those proposed parties have never had any connection to the case and where the events that caused the individual respondents' claims serially to become moot were clearly foreseeable. Unlike Mullaney, the purported "waste" that respondents urge the Court to avoid results from their own litigation choices, not action by petitioners or happenstance.

Third, respondents argue (Mot. 6) that adding Mr. Mashta and Ms. Amirjamshidi would not "add any new issues or require new briefing" because they are purportedly in the same "position" as the respondents whose standing the government has already challenged. Contrary to respondents' contention (Mot. 2),

however, the proposed new parties are not "in the same position as Doe #1" was at the time this case began. Doe #1 asserted that, as of January 9, 2017, his wife's visa application was complete, that he "expected [his] wife's interview to be scheduled in no more than six weeks." J.A. 437. He asserted that he was informed after the Executive Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017), was issued in late January 2017 "that the processing time ha[d] been extended to eight weeks." J.A. 437.

Although it was far from certain whether Doe #1's wife would have been affected by Section 2(c)'s entry suspension during the 90-day period in which it was originally scheduled to operate, her circumstances differ from those alleged regarding Mr. Mashta's wife and Ms. Amirjamshidi's mother. Mr. Mashta asserts that his wife's visa-application interview took place in July 2017. Mot. Ex. A, at 1 (¶ 5). Mr. Mashta does not assert that he had any reason to expect -- at the time the operative complaint in this case was filed in early March 2017 -- that his wife would have had a visa-application interview during the original 90-day window.

Ms. Amirjamshidi asserts that her mother's visa-application interview occurred more than a year ago, on July 7, 2016. Mot. Ex. B, at 1 (¶ 6). She does not allege that she had any reason to expect that she would have received a visa but for the Order within the original 90-day window beginning in March 2017. At the conclusion of the visa-application interview in July 2016,

the consular officer was required either to "issue or refuse the visa." 22 C.F.R. 41.121(a); see also 22 C.F.R. 42.81(a) (immigrant visas). Because Ms. Amirjamshidi's mother evidently did not receive a visa at that July 2016 interview, it likely was refused at that time for reasons unrelated to the Order, which was not issued until the following year.[2] And because (by Ms. Amirjamshidi's own account) approximately eight months passed after the interview before respondents sued to challenge the Order in March 2017, it is entirely possible that the status of her mother's application would have remained unchanged during the 90-day period for reasons unrelated to the Order.

Respondents' own submissions thus suggest that they may not have been similarly situated to Doe #1 with respect to the alleged likelihood that their family members would be affected by Section 2(c) during its original 90-day scope. Adding the proposed new

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[2] A consular officer must refuse a visa application if it appears to the officer (or the officer knows or has reason to believe) that the alien is legally ineligible to receive a visa, or the visa application does not comply with applicable statutes and regulations -- including by failing to supply adequate information to determine the alien's eligibility for the visa. 8 U.S.C. 1201(g), 1202(b) and (d); 22 C.F.R. 41.105, 42.65. When a visa is refused under Section 1201(g) because the consular officer has a reason to believe the applicant may be ineligible for a visa, because the alien presented inadequate information, or because administrative processing is required, the refusal may be overcome if the alien establishes eligibility for a visa to the satisfaction of the consular officer, when additional information is provided, or once the administrative processing is completed. See 9 U.S. Dep't of State, Foreign Affairs Manual 306.2-2(A)(a) (2017); 22 C.F.R. 41.121(c), 42.81(c).

parties thus may well inject "new issues" and "require new briefing," Mot. 6, which counsels strongly against reshaping the case at this late stage.

CONCLUSION

The Motion for Leave to Add Parties should be denied.

Respectfully submitted.

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SEPTEMBER 2017