No. 16A1190

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR STAY PENDING DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND FOR EXPEDITED BRIEFING AND CONSIDERATION

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A divided en banc court of appeals upheld a global injunction against an Executive Order that the President of the United States determined is necessary to protect the Nation's security. Respondents do not question the vital importance of this case, and our reply in support of the petition for a writ of certiorari demonstrates that this Court is likely to grant review and reverse the court of appeals' unprecedented and erroneous decision. Here, we show that respondents have identified no sound reason to allow the district court's sweeping injunction to remain in place pending this Court's review.

1. Respondents' lead argument in opposing both a stay and certiorari is that the government's challenge to the injunction

has become "moot" because Section 2(c)'s 90-day suspension purportedly ended on June 14, 2017. Br. in Opp. 13-15; see Opp. 18.[1] That argument rests on a misreading of the Order and the government's briefing below. And in any event, the President has now clarified that Section 2(c)'s 90-day suspension will not begin to run until the current injunctions are lifted or stayed.

a. Section 2(c) provides that the entry of certain aliens into the United States will "be suspended for 90 days from the effective date" of the Order, which was originally March 16, 2017. Order § 14. By its plain terms, that provision calls for a 90-day period after the effective date during which entry is "suspended." But because Section 2(c) was enjoined before it could take effect, that 90-day suspension has not yet begun to run, and will do so only once the injunctions are lifted or stayed. In other words, the injunctions have effectively delayed or tolled the Order's effective date for purposes of Section 2(c) and the other enjoined provisions.

Respondents err in asserting (Opp. 18) that this common-sense interpretation reflects a change in the government's position. In its stay motion in the court of appeals, the government stated that Section 2(c)'s 90-day suspension "expires in early June." C.A. Doc. 35, at 11 (Mar. 24, 2017). The government was addressing

[1] References to "Br. in Opp." refer to the brief in opposition to the certiorari petition. References to "Opp." refer to the opposition to the stay application.

the assertion by respondent Middle East Studies Association of North America (MESA) that it had standing because Section 2(c) may interfere with a meeting scheduled for November 2017, five months after Section 2(c)'s suspension was set to expire. Id. at 10-11. The government's point was that, if Section 2(c) had been permitted to go into effect as originally scheduled, MESA would not have suffered any cognizable injury. See Davis v. FEC, 554 U.S. 724, 734 (2008) (standing inquiry "focuse[s] on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed"). The government's statement did not address the effect of the injunctions on the running of the 90-day period, much less endorse the exceedingly odd notion that Section 2(c)'s suspension could end before it begins.

b. In any event, even if the Order had been ambiguous on this point, the President has now issued a formal Presidential Memorandum clarifying that Section 2(c)'s 90-day suspension will not begin to run until the current injunctions "are lifted or stayed." Memorandum from President Donald J. Trump to Sec'y of State et al., Effective Date in Executive Order 13780 (June 14, 2017) (Memorandum), https://www.whitehouse.gov/briefing-room/presidential-actions. The Memorandum further provides that, "[t]o the extent it is necessary, this memorandum should be construed to amend the Executive Order." Ibid. That clarification forecloses respondents' mootness argument. Respondents themselves have

conceded (Br. in Opp. 14) that "the President can unilaterally revise" the Order's temporal scope "at any time." Now that he has done so, there is no question that this case presents a live dispute and that a stay would provide meaningful relief.[2]

2. A stay is warranted because the district court's injunction inflicts irreparable injury on the government and the public. Section 2(c) temporarily suspends the entry of certain nationals of six countries because the President determined, in consultation with Cabinet-level advisors, that conditions in those countries (i) "present heightened threats" of terrorism and (ii) "diminish[]" their governments' "willingness or ability to share or validate important information about individuals seeking to travel to the United States." Order § 1(d). The injunction nullifies that national-security judgment and compels the admission into this country of aliens whose entry the President has determined, in the exercise of authority expressly conferred by Congress, "would be detrimental to the interests of the United States." 8 U.S.C. 1182(f).

By nullifying a measure that the President has deemed necessary to protect the Nation against terrorism, the injunction

[2] Even if respondents' mootness argument were correct, it would not justify the denial of relief. This Court's "established practice" when a federal civil case "has become moot while on its way here or pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950); see Stephen M. Shapiro et al., Supreme Court Practice § 19.5, at 970-971 (10th ed. 2013).

undermines "an urgent objective of the highest order." Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010) (HLP). The court of appeals dismissed that injury based primarily on its assertion that the government "is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing restrictions likely to be found unconstitutional." Pet. App. 68a (brackets, citation, and internal quotation marks omitted). Respondents do not defend that reasoning, which improperly conflates the merits with the balance of harms. Stay Appl. 34. And respondents' various alternative attempts to minimize the harm to the government and the public are unpersuasive.

a. Rather than directly addressing the government's showing of irreparable harm, respondents begin by asserting (Opp. 20-23) that the government has been dilatory. But as we have explained, the government has moved with dispatch at every step of the process. Stay Appl. 34-35. The President issued the revised Order less than three weeks after the government informed the Ninth Circuit that he intended to do so -- hardly an unreasonable length of time for an interagency process that culminated in a revised Order reflecting material substantive changes and detailed factual findings. After the district court entered a preliminary injunction, the government filed an immediate notice of appeal and then filed both its opening brief and a motion for a stay within a week. Id. at 35. The government also proposed a highly expedited

schedule under which both the merits and the stay would have been fully briefed in just two weeks, but respondents objected and the Fourth Circuit adopted a longer schedule. Ibid. Finally, the government filed a certiorari petition and sought a stay in this Court just one week after the Fourth Circuit issued its decision.[3]

Respondents cite no case in which this Court (or one of its Members) has deemed such expedited litigation to be dilatory. To the contrary, in the case on which respondents rely (Opp. 20), the government waited "more than seven weeks" after the district court's decision before seeking a stay and "requested and received a 30-day extension" in this Court. Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers). Even then, Justice Blackmun emphasized that the delay was "certainly not dispositive." Id. at 1318; see Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (granting stay despite applicant's "eight-week delay" in seeking relief). Here, the government's expeditious conduct only reinforces the need for a stay.

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[3] Respondents also criticize (Opp. 21-22) the government's failure to immediately appeal the temporary restraining order (TRO) entered in the Hawaii litigation. But the government cannot be faulted for asking the Hawaii district court to clarify and narrow the scope of relief before converting the TRO to an appealable preliminary injunction -- particularly because the district court itself invited briefing on the conversion and the Ninth Circuit ultimately agreed with the government that the injunction was overbroad. See Hawaii v. Trump, No. 17-15589, 2017 WL 2529640, at *26, *29 (9th Cir. June 12, 2017).

b. The district court's injunction nullifying the President's national-security judgment imposes irreparable harm on the government and the public. Even a single State "suffers a form of irreparable injury" "any time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people." King, 567 U.S. at 1303 (citation omitted). That harm is magnified here given "the singular importance of the President's duties" to the entire Nation, Nixon v. Fitzgerald, 457 U.S. 731, 751 (1982), and the government's overriding interest in "combatting terrorism," HLP, 561 U.S. at 28.

Respondents attempt (Opp. 26) to distinguish King on the ground that the district court's injunction bars the government only from "implementing a single directive" and does not prevent it from undertaking other related steps. But the same was true in King: The decision at issue there barred Maryland from implementing a DNA-collection program that had led to fewer than ten convictions in the prior year, but left the State free to pursue any number of other measures to improve law enforcement and protect public safety. See 567 U.S. at 1301-1302.

More broadly, respondents err in attempting to minimize as "abstract institutional injury" (Opp. 26) the harm that the government and the public suffer when a district court's nationwide injunction interferes with the Executive Branch's administration of the laws. Members of this Court have often concluded that the

balance of equities favors a stay where, as here, an injunction is claimed to be "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." INS v. Legalization Assistance Project, 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers); see, e.g., Heckler v. Lopez, 463 U.S. 1328, 1336-1337 (1983) (Rehnquist, J., in chambers). Those considerations have special force when the injunction at issue runs against a policy adopted by the President of the United States and when that policy concerns immigration and national security, areas where "the President has unique responsibility." Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993).

c. Respondents contend (Opp. 23) that the government has not "assert[ed] any concrete or specific security-related need" for a stay. That is wrong. The Order itself describes in detail the considerations underlying the President's determination that, "[i]n light of the conditions in" six countries previously identified by Congress and the Executive Branch as being associated with a heightened threat of terrorism, "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." Order § 1(f); see id. § 1(d) and (e); see also Stay Appl. 8-10. And the Secretary of Homeland Security recently reiterated those concerns and

emphasized that "fully implementing the [Order] would clearly and substantively increase [the Department of Homeland Security's] ability to secure the nation from those who seek to do us harm."[4]

In nonetheless insisting that the government has not identified a "concrete" or "specific" need for the Order, respondents apparently mean that the government has not offered what they regard as sufficient evidence of past terrorist acts by nationals of the six countries covered by Section 2(c) -- countries that are either state sponsors of terrorism or that are compromised by the presence of major terrorist organizations. That demand for a specific showing of past injury is inconsistent with the Order's very nature as a "preventive measure," HLP, 561 U.S. at 35, based on the President's "[p]redictive judgment," Department of the Navy v. Egan, 484 U.S. 518, 529 (1988).

d. Respondents also assert (Opp. 23-24) that the "record evidence" contradicts the President's judgment. But respondents' three types of contrary "evidence" actually reflect nothing more than policy disagreement with the President's national-security determination.

First, respondents invoke (Opp. 23) an amicus brief filed by "former national security officials" and a draft internal report

[4] U.S. Dep't of Homeland Security, Oral Testimony of DHS Secretary Kelly for a House Committee on Homeland Security Hearing (June 7, 2017) (prepared statement of John F. Kelly), https://www.dhs.gov/news/2017/06/07/oral-testimony-dhs-secretary-kelly-house-committee-homeland-security-hearing-titled.

from the Department of Homeland Security. The President, however, is entitled to disagree with those sources and instead follow the final recommendations of his current Cabinet-level advisors, including the Attorney General and the Secretary of Homeland Security -- recommendations that built on country-specific judgments previously made by Congress and the Executive Branch. And that is particularly true where, as here, the question involves a sensitive policy judgment about the degree of acceptable risk. Respondents and their amici disagree with the President's policy judgment, but the Executive is empowered and obligated by the Constitution and Acts of Congress to make that judgment for the Nation.

Second, respondents object (Opp. 23) that the Order is too narrow because it contains limitations and exceptions, including a waiver provision and an exception for individuals who already hold visas. Order § 3. But the Order's accommodation of competing considerations -- including due process concerns identified by courts -- hardly undermines the compelling interests at stake. Even policies that serve interests of the highest order often include limitations or exceptions to protect other important interests.

Third, respondents assert (Opp. 24-25) that the district court's injunction against Section 2(c) does not prevent the government from taking "other actions relating to travel or entry."

But the President is entitled to adopt more than one preventive measure to protect the Nation from a given threat. And the other steps respondents identify do not address the same concerns as Section 2(c). For example, respondents note (ibid.) that the Department of State is implementing new screening procedures that require certain visa applicants to provide additional information to consular officers. See 82 Fed. Reg. 20,956 (May 4, 2017). Those new procedures improve the visa screening process, but seeking additional information from visa applicants themselves addresses a concern different from, and is not an adequate substitute for, ensuring that foreign governments are willing and able to "share or validate important information about individuals seeking to travel to the United States." Order § 1(d).

3. In contrast to the serious irreparable injury that the injunction imposes on the government and the public, a stay would not impose any substantial harm on respondents. Respondents scarcely argue otherwise, devoting barely more than a page of their opposition to the balance of harms (Opp. 28-29). Like the court of appeals, Pet. App. 65a-66a, respondents principally rely (Opp. 28-29) on their assertion that the Order injures them because they perceive it as a "message from the federal government condemning [their] religion." But as the government has demonstrated, that asserted harm from an Executive Order addressed to aliens abroad does not qualify as a cognizable Article III injury to respondents

at all. See Cert. Reply Br. 4-5. It certainly cannot outweigh the governmental and public interests that support a stay.

In practical terms, respondents contend (Opp. 29) that allowing Section 2(c) to go into effect would prolong John Doe #1's separation from his wife. That assumes Doe #1's wife would be found otherwise eligible for a visa and then denied a waiver under Section 2(c), notwithstanding the provision of the Order contemplating waivers for foreign nationals who seek to enter the United States "to visit or reside with a close family member" such as "a spouse." Order § 3(c)(iv). And even if that happened, a temporary delay in the entry of Doe #1's wife would not constitute irreparable harm. Cf. Nken v. Holder, 566 U.S. 418, 435 (2009) (holding that even the far more drastic step of removal from the United States "is not categorically irreparable [harm]").[5]

Respondents also assert (Opp. 29) that staying the injunction "would create confusion and disruption" about the suspension's effective date and implementation. The President's Memorandum eliminates any confusion and ensures "an orderly and proper implementation" by specifying that Section 2(c)'s suspension of entry will not be implemented until "72 hours after all applicable injunctions are lifted or stayed." Memorandum.

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[5] Respondents also attempt to invoke (Opp. 29) the organizational respondents' unidentified "clients and members." But neither the district court nor the court of appeals found that the organizational respondents even have Article III standing. Pet. App. 34a, 230a; see Cert. Reply Br. 5.

4. Although the balance of harms tips decisively in favor of a stay, respondents separately contend (Opp. 19-20) that a stay is not warranted because it would "effectively predetermine the merits of th[e] case" by allowing Section 2(c)'s 90-day suspension to run before this Court issues a decision on the merits. But respondents do not cite any decision treating this factor as a bar to a stay where, as here, this Court's well-established four-factor standard for a stay is otherwise satisfied. Indeed, such a rule would effectively prevent this Court or a court of appeals from staying any injunction against a one-time event or a temporary measure of short duration.

5. At a minimum, this Court should stay the district court's sweeping global injunction because it goes far beyond the relief necessary to protect the only respondent the court of appeals found to have Article III standing. "The purpose of a preliminary injunction," after all, "is merely to preserve the relative positions of the parties." University of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) (emphasis added). And both Article III and fundamental equitable principles require that, like any other judicial relief, a preliminary injunction 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); see Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994).

Here, the court of appeals held that a single respondent -- Doe #1 -- has standing to challenge Section 2(c). Pet. App. 34a. Even assuming that Doe #1 has a ripe claim, any cognizable harm he suffers could be eliminated by a preliminary injunction barring the application of Section 2(c) to his wife. See id. at 32a-33a & n.11 (holding that Doe #1 has standing only because the court concluded that the application of Section 2(c) to his wife inflicts a "direct, cognizable injur[y]"). Accordingly, the Court should stay "so much of [the district court's injunction] as grants relief to persons other than [Doe #1]." United States Department of Defense v. Meinhold, 510 U.S. 939 (1993).[6]

Respondents do not dispute that such a narrowed injunction would completely redress the particularized injury alleged by Doe #1, and they also do not identify any precedent or principle that would support the entry of a global preliminary injunction when a narrower injunction would fully protect the only plaintiff whom the court of appeals found to have Article III standing. Instead,

[6] Respondents seek to distinguish Meinhold on the ground that it did not involve an "Establishment Clause harm." Opp. 30 n.14. But Meinhold likewise involved a claim of unconstitutional discrimination: the injunction there rested on equal-protection principles and barred the Department of Defense "from taking any actions against gay or lesbian servicemembers based on their sexual orientation." Meinhold v. United States Dep't of Def., 34 F.3d 1469, 1473 (9th Cir. 1994). The Court's decision in that case stands for the proposition that a district court's grant of injunctive relief should not extend beyond what is necessary to afford relief to the parties with Article III standing. That bedrock principle applies equally here.

respondents contend (Opp. 29-30) that a broader injunction is needed to protect the organizational respondents and "other Muslims throughout the United States" who are not parties to this litigation. But because the organizational plaintiffs lack Article III standing, their asserted injuries cannot justify the injunction. See Pet. App. 34a, 230a; Cert. Reply Br. 5. And here, as in Meinhold, Article III and fundamental equitable principles foreclose the grant of injunctive relief to protect nonparties.

CONCLUSION

The injunction should be stayed in its entirety pending this Court's disposition of the government's petition for a writ of certiorari, and, if review is granted, pending a decision on the merits. At a minimum, the injunction should be stayed as to all persons other than Doe #1's wife.

Respectfully submitted.

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JUNE 2017