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.*,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE

The States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia move this Court for leave to file the enclosed brief as amicus curiae in support of respondents, in opposition to the petition for certiorari, without 10 days' advance notice to the parties of amici's intent to file as ordinarily required by Supreme Court Rule 37.2(a).

In light of the extremely expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice. All parties have consented in writing to the filing of the brief without such notice.

As set forth in the enclosed brief, the undersigned amici States have a strong interest in opposing the petition for certiorari, which asks this court to review the holding below that § 2(c) of Executive Order No. 13,780 likely violates the Establishment Clause, threatens substantial harms, and was properly enjoined. The Executive Order ("EO-2"), signed on Mar. 6, 2017, appears at 82 Fed. Reg. 13,209 (Mar. 9, 2017), and is reprinted at Pet. App. 289a-312a.

The interest of the amici States arises from the fact that enforcement of § 2(c) of EO-2 threatens substantial harm to the amici states and our hospitals, universities, businesses, communities, and residents. And by imposing a federal policy disfavoring Islam on the amici States, § 2(c) violates our profound commitments to religious pluralism.

Consequently, the amici States have a distinct perspective on the harms threatened by the order—

and thus the justifications for enjoining its enforcement—that may be of considerable assistance to the Court. The States have asserted and documented these harms in numerous other cases challenging EO-2[1] and its predecessor, Executive Order No. 13,769 (Jan. 27, 2017), 82 Fed. Reg. 8,977-79 (Feb. 1, 2017) (Pet. App. 277a-288a) ("EO-1").[2]

Moreover, it appears that § 2(c) will soon cease to have effect, and will likely be followed by other executive actions taken to renew or modify it after its expiration. Amici States have a strong interest in avoiding review of the injunction after § 2(c) ceases to have effect, and instead reserving this Court's review for any subsequent executive actions that may be taken to renew or modify it after its expiration.

Pursuant to Supreme Court Rule 37.1, the undersigned amici States therefore seek to file this brief in order to demonstrate that the injunction affirmed by the court of appeals was appropriately crafted to restrain the harms threatened by § 2(c),

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[1] *See* Second Am. Compl., *Washington v. Trump*, No. 17-cv-141 (W.D. Wash. Mar. 16, 2017) (challenge to EO-2 by Washington, California, Oregon, New York, Maryland, and Massachusetts, stayed pending appeal in *Hawai'i v. Trump*), ECF No. 152; Br. for Amici Curiae Illinois et al. (16 States and D.C.), *Hawai'i v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Br. for Amici Curiae Virginia, Maryland, et al. (16 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153.

[2] *See Washington v. Trump*, No. 17-cv-141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (enjoining travel and refugee bans in EO-1); Br. for Amici Curiae Massachusetts, New York, et al. (15 States and D.C.), *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017), ECF No. 58-2; *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *11 (E.D. Va. Feb. 13, 2017) (enjoining travel ban in EO-1 as applied to Virginia).

including the harms to amici States, and also to demonstrate that the decision below is ill-suited to this Court's review at this time.

CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief in opposition to the petition for certiorari.

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INTEREST OF THE AMICI

Amici States New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia submit this brief in opposition to the petition for certiorari.[1] The Court of Appeals affirmed a preliminary injunction that restrained, on Establishment Clause grounds, the enforcement of a section of an Executive Order imposing a 90-day ban on the entry to the United States of nationals from six overwhelmingly Muslim countries. *See* Executive Order No. 13,780, § 2(c) (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Pet. App. 289a-312a) ("EO-2"). That ban affects large numbers of persons seeking entry to work, study, or be with family in the amici States.

Amici have a strong interest in respondents' challenge to EO-2, which threatens substantial harm to our hospitals, universities, businesses, communities, and residents while courts adjudicate the lawfulness of § 2(c). Amici's interest extends not only to the Establishment Clause challenge to § 2(c), but also to the other constitutional and statutory challenges raised by respondents' suit and not presented here—arguments that the amici States

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[1] Because of this Court's expedited briefing schedule, it was not feasible to provide 10 days' notice as required by Rule 37.2(a). The parties have consented to the filing of this brief without such notice, and amici States are concurrently filing a motion requesting leave to file this brief.

have made in other cases challenging EO-2[2] and its predecessor, Executive Order No. 13,769 (Jan. 27, 2017), 82 Fed. Reg. 8,977-79 (Feb. 1, 2017) (Pet. App. 277a-288a) ("EO-1").[3]

If allowed to go into effect, EO-2's travel ban will immediately harm the amici States' proprietary, quasi-sovereign, and sovereign interests. It will inhibit the free exchange of information, ideas, and talent between the six designated countries and the amici States, including at the States' many educational institutions; disrupt the provision of medical care at the States' hospitals; harm the life sciences, technology, health care, finance, and tourism industries, as well as innumerable other small and large businesses throughout the States; inflict economic damage on the States themselves through both increased costs and immediately diminished tax revenues; and hinder the States from effectuating the policies of religious tolerance and nondiscrimination enshrined in our laws and our state constitutions.

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[2] *See* Second Am. Compl., *Washington v. Trump*, No. 17-cv-141 (W.D. Wash. Mar. 16, 2017) (challenge to EO-2 by Washington, California, Oregon, New York, Maryland, and Massachusetts, stayed pending appeal in *Hawai'i v. Trump*), ECF No. 152; Br. for Amici Curiae Illinois et al. (16 States and D.C.), *Hawai'i v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Br. for Amici Curiae Virginia, Maryland, et al. (16 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153.

[3] *See Washington v. Trump*, No. 17-cv-141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (enjoining travel and refugee bans in EO-1); Br. for Amici Curiae Massachusetts, New York, et al. (15 States and D.C.), *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017), ECF No. 58-2; *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *11 (E.D. Va. Feb. 13, 2017) (enjoining travel ban in EO-1 as applied to Virginia).

While the amici States differ in many ways, all welcome and benefit from immigration, tourism, and international travel by students, academics, highly skilled professionals, and businesspeople. Moreover, all amici States will face concrete and immediate harms flowing directly from § 2(c) of EO-2 if this Court stays or lifts the preliminary injunctions that have been entered against it.

Amici States file this brief supporting respondents to demonstrate that the injunction affirmed by the court of appeals was appropriately crafted to restrain the harms threatened by § 2(c), including the harms to amici States, and also to demonstrate that the decision below is either moot or otherwise ill-suited to this Court's review at this time.

SUMMARY OF ARGUMENT

The petition should be denied. First, the decision below correctly affirmed the injunction on the grounds that § 2(c) likely violated the Establishment Clause, and that the potential for nationwide harm justified broad nationwide relief. Second, the travel ban that the petition seeks to reinstate is only a few days away from expiring, and its expiration will moot the questions presented by this petition. And even if § 2(c) could be deemed effective past its June 14, 2017, expiration date, certiorari still should not be granted at this juncture for several reasons: (i) the terms of EO-2 make plain that petitioners will in the near future move on to a new policy based on new facts; (ii) consideration of petitioners' issues now would waste judicial resources on piecemeal litigation, because the Establishment Clause challenge to § 2(c) that forms the basis for the injunction entered below

is only one of several challenges to EO-2 contained in the complaint, and the other challenges remain pending for resolution below; and (iii) petitioners' legal issues have been considered by only two courts of appeals, there is no conflict between those courts' holdings, and this Court's consideration of the issues would benefit from further percolation. Any one of these factors is an independently sufficient reason for this Court to deny certiorari.

REASONS FOR DENYING THE PETITION

I. The Decision Below Is Correct.

The Fourth Circuit correctly found that preliminary relief was justified to restrain a likely violation of the Establishment Clause that threatened substantial harm, and that the nationwide scope of the injunction issued by the district court was justified by the nationwide scope of the threatened harm. The decision to issue a preliminary injunction lies within the authority and discretion of the district court where the plaintiff has shown "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Decisions about the scope of a preliminary injunction are also a matter for the district court's sound discretion. *See, e.g., McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 867 (2005).

A. Plaintiffs Have Made a Strong Showing That the Order Violates the Establishment Clause and Threatens Irreparable Harm.

Although the Establishment Clause indisputably protects individual rights against both state and federal infringement, one of its original purposes was also to prevent the federal government from interfering with the States on core matters of religion.[4] EO-2 does just that by imposing a federal policy disfavoring Islam on the amici States, in violation of their own profound commitments to religious pluralism.[5]

The Establishment Clause prohibits, among other things, governmental action motivated by a religious primary purpose. *See, e.g.*, *McCreary*, 545 U.S. at 864; *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987); *see also Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Proffering a facially legitimate motive is not sufficient. The government must show that the identified purpose is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864; *see also id.* at 865 n.13; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

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[4] *See*, *e.g.*, Joseph Story, 2 *Commentaries on the Constitution of the United States* § 1879, at 633-34 (5th ed. 1891); Akhil Reed Amar, *The Bill of Rights* 32-42, 246-57 (1998).

[5] As the Fourth Circuit correctly recognized, despite the executive's broad authority in the immigration arena (Br. for Amici Curiae Texas et al. in Support of Pet. 7-14), "that power is still 'subject to important [and independent] constitutional limitations'" (Pet. App. 40a-41a (quoting *Zadvyas v. Davis*, 533 U.S. 678, 695 (2001))).

In evaluating purpose, courts seek to ascertain the "official objective" of government action from "readily discoverable fact[s]," including "the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act." *McCreary*, 545 U.S. at 862 (quotation marks omitted). Although courts should refrain from "judicial psychoanalysis of a drafter's heart of hearts," *id.*, they must take into account the action's "historical context" and "the specific sequence of events leading to [its] passage," *Edwards*, 482 U.S. at 595. Like any other objective observer, courts have "reasonable memories" and cannot "turn a blind eye to the context in which [the] policy arose." *McCreary*, 545 U.S. at 862, 866 (quotation marks omitted).

Two days after the President signed EO-1, the predecessor and model for EO-2, presidential advisor Rudolph Giuliani revealed that the President had sought his help to craft a "Muslim ban" that would withstand judicial scrutiny. (J.A. 508.) Shortly before the President issued EO-2—and in the aftermath of the federal court injunctions against the implementation of EO-1—Senior White House Policy Advisor Stephen Miller said that EO-2 would reflect the "same basic policy outcome for the country" as EO-1 and contain "mostly minor technical differences" in order to address the federal courts' constitutional concerns with EO-1. (J.A. 339, 579.) And White House Press Secretary Sean Spicer said that the "principles of [EO-1] remain the same." (J.A. 379.)

It was no abuse of discretion to interpret these comments as tending to show that both EO-1 and EO-2 were driven predominantly by anti-Muslim animus rather than genuine security concerns. *See* Pet. App. 52a-56a; J.A. 383-384, 397, 665-666. And, as the Fourth

Circuit correctly observed, this animus is confirmed by a litany of anti-Muslim statements by then-candidate Trump that were both "closely related in time" and "specific and easily connected to" EO-1 and EO-2. (Pet. App. 60a; *see id.* 48a-50a.) In December 2015, then-candidate Trump announced an immigration policy labeled "Preventing Muslim Immigration" that urged "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on." (J.A. 341; *see also* J.A. 346.) He advocated heavy surveillance of mosques and databases to track all Muslims. (J.A. 473.) And throughout the campaign, he reiterated his belief that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." (J.A. 522.) In July 2016, in response to public criticism, Trump stated that he would reframe his proposed restrictions on Muslim immigration to incorporate a focus on nationality. Trump explained that this was not a "rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim." (J.A. 481; *see also* J.A. 798.)

Contrary to the concern raised by petitioners (Pet. 29-30), this case does not present the question of whether statements that are unrelated or too remote in time may be considered in ascertaining purpose. Here, all of the statements relied upon by the courts below were directly related to banning Muslim immigration, and in many cases were virtually contemporaneous with the issuance of EO-1 and EO-2. The campaign statements made by candidate Trump were also fairly considered by the courts below

because they were consistent with, and give relevant context to, the statements that he has made since taking office. *See Edwards*, 482 U.S. at 595; *McCreary*, 545 U.S. at 862, 866. Moreover, unlike a statute, which is the act of a collective body, and therefore presents some difficulties in discerning legislative intent from the statements of individual legislators, the Executive Orders at issue here are the acts of a single official, and there is no such barrier to treating his statements as probative of his intent in promulgating those orders. Under this "highly unique set of circumstances" (Pet. App. 61a), the lower courts did not abuse their discretion in considering all of the President's statements of anti-Muslim animus.

Petitioners have never disputed the existence of these statements or their contents. They have instead suggested (Pet. 20-23) that the courts below erred in failing to recognize that an executive action in the immigration context must be sustained so long as there is a "facially legitimate and bona fide reason" for the action. As the Fourth Circuit noted, however, the same statements that convincingly demonstrate § 2(c)'s anti-Muslim purpose also amount to a showing that the proffered reason for this provision is not, in fact, "bona fide." Pet. App. 42a. A reviewing court may therefore "look behind" the challenged action to assess whether the "facially legitimate" reason was in fact the governmental actor's true, primary motive. Pet. App. 42a; *see Kerry v. Din*, 135 S. Ct. 2128, 2139-41 (2015) (Kennedy, J., concurring in the judgment).

The courts below correctly viewed the explicit and consistent statements in the record here as "the exact type of 'readily discoverable fact[s]'" that may be used to determine a government actor's true purpose. Pet. App. 51a (quoting *McCreary*, 545 U.S. at 862). The

Fourth Circuit explained that "EO-2 cannot be read in isolation from the statements of planning and purpose that accompanied it, particularly in light of the sheer number of statements, their nearly singular source, and the close connection they draw between the proposed Muslim ban and EO-2 itself." Pet. App. 52a. Thus, having performed the required inquiry into purpose without "prob[ing] anyone's heart of hearts," the Fourth Circuit correctly held that the statements, "taken together, provide direct, specific evidence of what motivated both EO-1 and EO-2: President Trump's desire to exclude Muslims from the United States," as well as his "intended means of effectuating the ban[] by targeting majority-Muslim nations instead of Muslims explicitly." Pet. App. 51a.

Accordingly, because the context and historical background of EO-2 demonstrate that it has the primary purpose and effect of conveying the message that Islam is a disfavored religion, respondents established the requisite likelihood of success on the merits here. And when a party colorably "alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006); *see also American Civil Liberties Union of Ill. v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986); *cf. American Civil Liberties Union of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 445 (6th Cir. 2003), *aff'd*, 545 U.S. 844 (2005) (presuming irreparable harm where plaintiffs were likely to succeed on merits of Establishment Clause claim); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986) (same).

B. The Preliminary Injunction Was Proper and Was Appropriately Tailored to § 2(c)'s Violations and Threatened Harms.

The Fourth Circuit also correctly found that the district court did not abuse its discretion in entering a preliminary injunction or in concluding that a nationwide injunction was necessary in view of the nature of the constitutional violation and the harms to be avoided. The injuries that enforcement of § 2(c) threatens to the State amici exemplify the public interests affected by the travel ban, support the balance of the equities struck by the district court, and demonstrate the appropriateness of restraining § 2(c)'s application nationwide. *See Winter*, 555 U.S. at 20. See *infra* 12-17.

Petitioners argue (Pet. 31-33) that the injunction is overbroad and should be narrowed to bar application of § 2(c) only as to the wife of respondent John Doe #1, the sole respondent whose standing was adjudicated by the Fourth Circuit. But the nationwide injunction was appropriate and necessary to safeguard not only Doe #1 and all similarly situated U.S. persons seeking entry into the country for their relatives,[6] but also to prevent the immediate, systemic harms that enforcement of § 2(c) would cause. Those harms include injuries to the amici States as well as to our state institutions, businesses, communities, and citizens.

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[6] Contrary to the assertion of the amici States in support of petitioners (Texas Amicus Br. 4-7), neither the courts below nor respondents relied on any extraterritorial injuries for irreparable harm.

This Court has long recognized that where "there has been a systemwide impact [there may] be a systemwide remedy." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977). "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937); *see also Porter v. Lee*, 328 U.S. 246, 250-52 (1946) (finding that landlord had "engaged in violations" of federal rent regulations supported "broad injunction" restraining landlord from prosecuting eviction proceedings against *all* tenants, rather than the respondents only). District courts exercising their equity jurisdiction thus enjoy broad and "'sound discretion' to consider the 'necessities of the public interest' when fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (equity courts "should pay particular regard for the public consequences" when fashioning an injunction). Accordingly, petitioners are simply incorrect to assert that equitable relief should be limited to redressing only a particular plaintiff's "own cognizable injuries." Pet. 31.

Consistent with these principles, the Fourth Circuit found no error in the district court's issuance of a nationwide injunction. Pet. App. 71a-73a (citing *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308-09 (4th Cir. 1992)). As the experiences of the amici States show, the Establishment Clause violation at the heart of § 2(c) jeopardizes public interests

throughout the country. The district court appropriately considered and addressed those harms in issuing its preliminary injunction.

Harms to Universities, Hospitals, and Businesses. Section 2(c) will block the admission of nationals from the six designated countries who seek entry to be faculty and students at our public universities, doctors at our medical institutions, employees of our businesses, and guests who contribute to our economies when they come here for family visits or for tourism. Although some of these people already have visas, EO-2 nonetheless harms them and the States. Single-entry visa holders will be unable to participate in professional obligations or religious observances that require travel outside the United States. Those whose visas expire during the term of the travel ban will face obstacles to renewal that could jeopardize their studies or employment. And those whose visas are still effective during the period of the travel ban will be unable to receive visits from their parents, spouses, children, and other relatives. Others who have planned to come here to study, teach, or provide health care or other services, but who have not yet secured a visa, will not be able to come to our States at all. Many will simply look for alternative placements in other, more welcoming countries.

The loss of such students and workers places the amici States' institutions and businesses at a competitive disadvantage in the global marketplace, particularly where those students and workers

possess specialized skills or training.[7] State educational and medical institutions that have relied on accepted offers of employment from individuals and scholars in the designated countries—who now may be unable or unwilling to come—will face unexpected and critical staffing shortages, and additional costs and administrative burdens. These disruptions will translate to uncertainty in academic programs and threats to the provision and quality of health care services that will put our communities at risk.[8]

The States will also suffer direct economic harms from the travel ban, including the elimination of significant sources of taxes and other revenues. For example, a recent survey by the Institute of International Education found that "[m]ore than 15,000 students enrolled at U.S. universities during 2015-16 were from the 6 countries named in [EO-2]," and nationwide, "these students contributed $496 million to the U.S. economy, including tuition, room and board and other spending."[9] Because only single-entry visas are permitted for two of the countries, and because the required visas are valid only for relatively short periods, most students have to apply for a new visa during the course of their academic studies. In particular:

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[7] *See, e.g.*, New Amer. Econ., *The Contributions of New Americans in Illinois* 13 (Aug. 2016) (internet). (For authorities available on the internet, full URLs are listed in the table of authorities.)

[8] *See Immigrant Doctors Project*, https://immigrantdoctors.org/; *see also* Anna Maria Barry-Jester, *Trump's New Travel Ban Could Affect Doctors, Especially in the Rust Belt and Appalachia*, FiveThirtyEight (Mar. 6, 2017) (internet).

[9] Institute of Int'l Educ., *Advising International Students in an Age of Anxiety* 3 (Mar. 31, 2017) (internet).

- students from Somalia are issued single-entry visas that are valid for 3 months;
- students from Libya are issued single-entry visas that are valid for 12 months; and
- students from Iran, Sudan, Syria, and Yemen are issued multiple-entry visas, but visas for Iran and Syria have a validity period of only two years, while the validity period is only 12 months for Yemeni students and 6 months for Sudanese students.[10]

In other words, foreign students on single-entry visas who have relied on the existing preliminary injunctions—whether to return home for the summer, conduct research in other countries, or travel abroad for other reasons—face the prospect of being denied a visa to reenter the United States. Although EO-2 gives consular officers discretion to waive the travel ban for students from the six countries, the discretionary nature of the review process means students have no assurance of readmission. EO-2 does not describe the process for applying for a waiver, does not specify the timeframe for receiving one, and does not set any concrete guidelines beyond providing a list of circumstances in which waivers "could be appropriate," EO-2 § 3. The ultimate decision whether to issue a waiver is committed entirely to "the consular officer's or the [Customs and Border Protection] official's discretion." *Id.*

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[10] U.S. Dep't of State, Bureau of Consular Affairs, *Reciprocity and Civil Documents by Country* (search by country and visa types F and M) (internet).

That uncertainty alone will likely induce students from the six countries designated in EO-2—and many other countries—not to apply to colleges and universities in the United States,[11] or not to accept offers of admission from those educational institutions. Indeed, the climate of uncertainty and discrimination created by the travel ban already appears to be deterring applications and acceptances from international students more broadly. Forty percent of colleges surveyed report a drop in applications from foreign students in the wake of EO-1 and EO-2.[12] And 80% of college registrars and admissions officers surveyed have serious concerns about their application yields from international students.[13] Not surprisingly, countries that are perceived as more welcoming—such as Canada, the United Kingdom, Australia, and New Zealand—have already seen a jump in applications following issuance of EO-1 and EO-2.[14]

Likewise, as a result of the travel ban, an estimated 4.3 million fewer tourists are expected to visit the United States this year, resulting in $7.4 billion in lost revenue, and in 2018, those numbers will increase to 6.3 million fewer tourists and $10.8 billion

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[11] The University of Washington, for instance, received various communications from prospective students from the affected countries expressing anxiety about applying in light of the travel ban. Decl. of David L. Eaton ¶ 5 & Ex. 2, *Hawai'i v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125.

[12] Kirk Carapezza, *Travel Ban's "Chilling Effect" Could Cost Universities Hundreds of Millions*, Nat'l Pub. Radio (Apr. 7, 2017) (internet).

[13] Carapezza, *supra*.

[14] Carapezza, *supra*.

in lost revenue.[15] Such revenues will never be recovered, even if the pending legal challenges ultimately prevail.[16]

Harms to Our Residents and Communities. EO-2 also harms the amici States' ability to protect "the well-being of [our] populace" through our own constitutional and statutory commitments to tolerance and diversity, including through enforcement of our antidiscrimination laws. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982). Our residents and businesses—and, indeed, many of the amici States ourselves—are prohibited by those state enactments from taking national origin and religion into account in determining to whom they can extend employment and other opportunities.[17] EO-2 stands in stark opposition to these core expressions of the States' sovereignty.

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[15] *See* Abha Bhattarai, *Even Canadians are Skipping Trips to the U.S. After Trump Travel Ban*, Wash. Post (Apr. 14, 2017) (internet).

[16] *See* Br. for Amici Curiae Virginia, Maryland, et al. in Opp'n to Stay Applications 6-21; *see also* Br. for Amici Curiae Illinois 5-27, *Hawai'i v. Trump*, *supra* (both discussing in detail amici States' injuries).

[17] *See, e.g.*, Cal. Const. art. I, §§ 4, 7-8, 31; Cal. Civ. Code § 51(b); Cal. Gov't Code §§ 11135-11137, 12900 et seq.; Conn. Gen. Stat. § 46a-60; Ill. Const. art. I, §§ 3, 17; Ill. Comp. Stat. ch. 740, § 23/5(a)(1); *id.* ch. 775, §§ 5/1-102(A), 5/10-104(A)(1); Maine Rev. Stat. tit. 5, §§ 784, 4551-4634; Md. Code, State Gov't § 20-606; Mass. Gen. L. ch. 93, § 102; *id.* ch. 151B, §§ 1, 4; N.M. Const. art. II, § 11; N.M. Stat. § 28-1-7; Or. Rev. Stat. § 659A.006(1); R.I. Gen. Laws § 28-5-7(1)(i); Vt. Stat. Ann. tit. 9, §§ 4500-4507; *id.* tit. 21, § 495; Wash. Rev. Code § 49.60.030(1).

The amici States have a strong interest in ensuring that our "residents are not excluded from the benefits that are to flow from participation in the federal system"—and relatedly, in "securing observance of the terms under which [we] participate in" that system, *id.* at 607-08, including observance of the limits of the Establishment Clause. See *supra* 5. And here the Establishment Clause violations at the heart of § 2(c) and its predecessor provision in EO-1 have contributed to an environment of fear and insecurity among immigrant and minority populations that not only puts additional strain on state and local law enforcement resources, but also runs counter to the amici States' deeply held commitment to inclusiveness and equal treatment.[18]

As the courts below correctly recognized, the public interest in avoiding these harms—which flow directly from the Establishment Clause violation shown by Doe #1—would not be addressed by injunctive relief limited to just Doe #1 himself. Enjoining § 2(c) "only as to [p]laintiffs would not cure the constitutional deficiency, which would endure in all Section 2(c)'s applications." Pet. App. 73a. Nor would such an injunction address the "feelings of disparagement and exclusion" and "worries about his safety in this country" that § 2(c) has inflicted on Doe #1, like so many others. Pet. App. 16a. For these

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[18] In the Chicago area alone, 175 hate-related incidents were reported in the first two months of 2017, as compared to 400 hate crimes reported in all of 2016. *See* Marwa Eltagouri, *Hate Crime Rising, Report Activists at Illinois Attorney General's Summit*, Chicago Tribune (Feb. 24, 2017) (internet); *see also* Azadeh Ansari, *FBI: Hate Crimes Spike, Most Sharply Against Muslims*, CNN (Nov. 15, 2016) (internet).

reasons, the courts below did not err in concluding that the protections of a nationwide preliminary injunction were appropriate to provide "complete relief." *See* Pet. App. 73a.

II. The Petition Presents a Poor Vehicle for This Court's Review.

The travel ban in EO-2 § 2(c) will expire by its own terms on June 14, 2017—two days after the deadline this Court set for responses to the petition—rendering the injunction issued by the district court moot.[19] Section 2(c) provides for the entry of nationals from the six designated countries to be "suspended for 90 days from the effective date of this order." EO-2 § 2(c). This 90-day time period was purportedly designed to avoid erroneous admissions of individuals presenting a national security risk while federal officials conduct a global review of visa "screening and vetting procedures." *Id.* § 1(f); *see id.* § 2(a)-(d) (describing global review process). The effective date of EO-2 was March 16, 2017, making June 14, 2017 the travel ban's expiration date. *See id.* § 14.

Even after the enforcement of the travel ban had been preliminarily enjoined by the district courts in this case and in *Hawai'i v. Trump*,[20] petitioners agreed below that "[s]ection 2(c)'s 90-day suspension *expires in early June*." Mot. of Defs.-Appellants for a Stay Pending Expedited Appeal at 11, *IRAP*, CA4 ECF No.

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[19] *See, e.g, In re T.W.P.*, 388 U.S. 912 (1967) (petition for writ of certiorari denied on mootness grounds); *Spurlock v. Steer*, 324 U.S. 868 (1945) (same).

[20] On June 1, 2017, petitioners filed in this Court a motion for a stay of the pending Ninth Circuit proceedings (No. 16-A1191).

257 (emphasis added). And in their petition for certiorari, petitioners have stated that the 90-day period has been running, noting that alleged harms scheduled to occur in November 2017 are irrelevant because the 90-day suspension will have ended by then. *See* Pet. 15 n.7.

Petitioners have also at times suggested that the injunctions entered in this case and in *Hawai'i v. Trump* have tolled the 90-day period, either by tolling the effective date of EO-2 or by suspending federal officials' review of visa procedure and vetting processes. *See* Defs.-Appellants' Resp. to Pls.-Appellees' Mot. for Leave to Supplement the Record at 2-3, *IRAP*, CA4 ECF No. 291. Nothing in any provision of EO-2 suspends or tolls either the 90-day period or EO-2's effective date in the event that the travel ban is halted through court action or some other intervening event. Moreover, even if EO-2 were for some reason to be deemed effective past its June 14, 2017, expiration date, certiorari should still be denied at this stage of the proceedings because the terms of EO-2 make plain that petitioners will soon move on to a revised plan of action based on new facts that will itself moot this dispute over EO-2.

EO-2 requires the Secretary of Homeland Security to report to the President "within 20 days of the effective date of this order," EO-2 § 2(b), what "additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the [Immigration and Nationality Act] in order to determine that the individual is not a security or public-safety threat," *id.* § 2(a). And it provides that after this initial report and the Secretary's request "that all foreign governments that

do not supply such information regarding their nationals begin providing it within 50 days of notification," *id.* § 2(d), the Secretary must submit to President a "list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested," *id.* § 2(e).

Whether petitioners have commenced this process already or will commence it in the near future, the record and policies currently before the Court will soon be outdated. There is no justification for granting certiorari now to review a soon-to-be superseded policy, and certainly no reason to review the propriety of a soon-to-be moot preliminary injunction. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 412-13 (1935) (declining to consider issue mooted by subsequent government action).

Additional considerations further weigh against granting certiorari at this stage of the proceedings. This Court generally declines to exercise its certiorari jurisdiction over interlocutory lower court decisions, even in cases presenting significant constitutional questions.[21] That practice stems from the well-established principle that "piece-meal appellate review is not favored," *Goldstein v. Cox*, 396 U.S. 471, 478 (1970), and ensures that the legal issues

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[21] *See, e.g.*, *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J.) (Establishment Clause issue); *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J.) (Equal Protection Clause issue); *see also Hamilton-Brown Shoe Co. v. Wolf Bros.* , 240 U.S. 251, 258 (1916) (lack of final judgment "alone furnished sufficient ground" for denial of the writ).

presented for resolution to the Court can be evaluated on the basis of a complete record with "the benefit of the [lower] courts' full consideration," *Wrotten v. New York*, 560 U.S. 959, 959 (2010) (Sotomayor, J.). These concerns apply with full force here.

The Fourth Circuit's ruling was limited to affirming "the district court's issuance of a nationwide preliminary injunction as to Section 2(c) of the challenged Executive Order" based only on § 2(c)'s likely violation of the Establishment Clause. Pet. App. 3a, 22a. The Fourth Circuit did not address respondents' other constitutional and statutory challenges to § 2(c) and several other sections of EO-2, which remain to be resolved in the lower courts. Indeed, the decisions below were narrowly framed to avoid irreparable harms only (see *supra* Point I) while the litigation proceeds to a final judgment and a full record is created to support an ultimate determination of respondents' various constitutional and statutory claims.

Contrary to petitioners' suggestions (Pet. 13, 20, 24-27), the Fourth Circuit did not propose any sweeping new rules for review of a facially valid determination by the President—such as authorizing a "wide-ranging search for pretext" based purely "on speculation about officials' subjective motivations." Rather, the Fourth Circuit affirmed the district court's evaluation of record evidence concerning the unusually explicit and on-point statements of the President, his senior advisors, and his official representatives. Petitioners do not dispute that the statements were in fact made by those persons or that courts may consider any evidence of official purpose that can be "gleaned from 'readily discoverable fact.'" Pet. 26-27; *see also* Texas Amicus Br. 15-24.

Petitioners' bare assertion that those statements could have other possible meanings (Pet. 27), even if credited, only underscores why review by this Court is premature at this juncture. This Court "has often refused to decide constitutional questions on an inadequate record," *Ellis v. Dixon*, 349 U.S. 458, 464 (1955), and has a long-standing "policy of avoiding constitutional decisions until the issues are presented with clarity, precision and certainty," *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 576 (1947). To do otherwise risks "the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941).

"[R]eview of an injunction issued by a lower federal court independently of the 'merits' of the issue involved in the case is [thus] not common," *Heckler v. Lopez*, 463 U.S. 1328, 1331 (1983) (Rehnquist, J.), and certainly should not be granted here, where petitioners have failed to show any "special circumstances" warranting a departure from the Court's long-standing reluctance to grant certiorari in interlocutory cases, *see Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007). As the Fourth Circuit correctly concluded, petitioners' purported national security concerns about the preliminary injunction against § 2(c) (*see* Pet. 33-34) are unsupported by the record (*see* Pet. App. 53a), and indeed have been directly contradicted by the President himself, who has asserted that officials "are EXTREME VETTING

people coming into the U.S. in order to help keep our country safe."[22]

In addition, petitioners' legal issues have been considered by only two courts of appeals, there is no conflict between those courts' holdings, and this Court's consideration of the issues would benefit from further percolation.

Accordingly, even if the issues presented by this case involved important, non-moot questions of federal law that might otherwise warrant this Court's review (Pet. 33-34), the current procedural posture of the case makes it a particularly poor vehicle for resolving any such questions at this time. This Court should adhere to its ordinary practice of awaiting a final judgment on the merits, based on a full and complete record, before then determining whether certiorari review is warranted.

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[22]Donald Trump (@realDonaldTrump), Twitter (June 5, 2017 3:44 a.m. PT) (internet).

CONCLUSION

The petition for a writ of certiorari should be denied.

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