

No. 17-1351

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,
Defendants-Appellants.

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

**BRIEF AMICUS CURIAE OF VIRGINIA, MARYLAND,
CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA,
MAINE, MASSACHUSETTS, NEW MEXICO, NEW YORK, NORTH
CAROLINA, OREGON, RHODE ISLAND, VERMONT, WASHINGTON,
AND THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEES'
OPPOSITION TO STAY PENDING APPEAL**

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INTERESTS OF AMICI

The Amici States here urge the Court to deny Appellant-Defendants' motion to stay the preliminary injunction against § 2(c) of Executive Order 13,780 (EO-2). Section 2(c) bans for at least 90 days the entry of nationals from six overwhelmingly Muslim countries. Like its now-rescinded predecessor, Executive Order 13,769 (EO-1), EO-2 was issued to implement as nearly as possible the Muslim-travel ban that President Trump promised as a candidate. Some of the Amici are litigating their own challenges to EO-1 and EO-2.¹ Others have filed amicus briefs supporting those efforts.² All are adversely affected.

Letting the travel ban take effect would irreparably harm the Amici States. It would block entry by students, teachers, workers, and tourists from the six majority-Muslim countries. It would harm our citizens, lawful permanent residents, and resident visa holders, many of whom have family members and loved ones who would be presumptively denied entry. And it would amplify the message of fear and intimidation communicated to our Muslim communities by a

¹ See *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Aziz v. Trump*, No. 1:17cv116, 2017 WL 580855, at *1 (E.D. Va. Feb. 13, 2017) (granting Virginia's preliminary-injunction motion against EO-1).

² N.Y. Amicus Br. (15 States and D.C.), *Washington*, ECF No. 58-2; Ill. Amicus Br. (13 States and D.C.), *Hawai'i v. Trump*, No. 1:17cv00050, 2017 WL 1011673 (D. Haw. Mar. 15, 2017), ECF No. 154-3; Ill. Amicus Br. (16 States and D.C.), *Aziz*, ECF No. 84.

President who has promised to single out Muslims for disfavored treatment.

Accordingly, the stay should be denied.

**ARGUMENT:
DEFENDANTS ARE NOT ENTITLED TO A STAY**

Although Plaintiffs bore the burden in the district court to satisfy the four-factor test to justify the preliminary injunction, Defendants now bear the burden to justify a stay of that injunction pending appeal. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). But Defendants cannot satisfy any of the four factors, let alone all of them. They cannot show that they are “likely to succeed on the merits” or that they “will be irreparably injured absent a stay,” the two “most critical” factors. *Id.* at 434. The stay they request would also “substantially injure the other parties interested in the proceeding” and harm “the public interest.” *Id.*

I. Defendants are unlikely to succeed under the Establishment Clause.

To obtain a stay, Defendants must show they are likely to succeed in their appeal of the preliminary injunction. This Court will “evaluate the district court’s decision to [grant] a preliminary injunction ‘for an abuse of discretion[,] review[ing] the district court’s factual findings for clear error and ... its legal conclusions de novo.’” *League of Women Voters v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014) (citation omitted).

Defendants cannot overcome the clear-error and abuse-of-discretion standards that apply to the district court’s evaluation of the relevant evidence of the

Establishment Clause violation because they introduced no evidence. Although Defendants urge this Court to ignore some of the evidence cited by the district court in support of the preliminary injunction, they do not dispute the *legal consequence* of a finding that President Trump acted with anti-Muslim animus. Put simply, EO-2 violates the Establishment Clause if President Trump's primary purpose in issuing it was to keep his campaign promise to ban Muslims from entering the country. This conclusion is compelled by *McCreary County v. ACLU*, which held that "the secular purpose required has to be genuine, not a sham, and *not merely secondary* to a religious objective," 545 U.S. 844, 864 (2005) (emphasis added), and by *Larson v. Valente*, which reiterated that the government "may not adopt programs or practices ... which "aid or oppose" any religion This prohibition is absolute." 456 U.S. 228, 246 (1982) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)).

The central question on Defendants' appeal of the preliminary injunction, therefore, will be whether the district court abused its discretion when it concluded that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim in light of the abundant evidence showing that anti-Muslim animus *was* the principal driver. But Defendants are unlikely to succeed on that question because the evidence of the President's anti-Muslim animus was overwhelming and un rebutted.

President Trump labeled the policy he announced in December 2015 “Preventing Muslim Immigration.” (J.A.346.) He 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.) He insisted that “Islam hates us.” (J.A.516.) And he supported heavy surveillance of mosques and databases to track all Muslims. (J.A.473.)

The President’s prejudice against Muslims did not disappear on January 20, 2017, when he swore an oath to uphold the Constitution. One week later, in announcing EO-1, the “Protection of the Nation from Foreign Terrorist Entry into the United States,” he said: “We all know *what that* means.” (J.A.403 (emphasis added).) Moreover, EO-1 did not result from the usual process in which the Executive Branch develops national-security policies based on “(1) specific, credible threats based on individualized information, (2) the best available intelligence and (3) thorough interagency legal and policy review.” (J.A.666.) Instead, it was written by White House policy staff without vetting by the Department of Homeland Security, the State Department, the Department of Defense, or the National Security Council. (J.A.384, 397.) Two days after its issuance, presidential advisor Rudolph Giuliani revealed that the President had sought his help to craft a Muslim ban that would withstand judicial scrutiny: “when [Trump] first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’” (J.A.508.)

The district court further based its decision on ample, unrebutted evidence that EO-2 resulted from the same anti-Muslim animus as EO-1. For example, Senior White House Policy Advisor Stephen Miller said that EO-2 would implement the “same basic policy outcome” as EO-1 (J.A.579); White House Press Secretary Sean Spicer said that the “principles of the [original] executive order remain the same” (J.A.379); and President Trump himself admitted that EO-2 was “a watered down version of the first one.”³

Accordingly, the district court did not abuse its discretion in concluding that the evidence “provide[s] a convincing case that the purpose of [EO-2] remains the realization of the long-envisioned Muslim ban.” (J.A.799.) To be sure, another district court recently reached a different conclusion, finding the changes to EO-2 sufficient to purge the taint of religious animus behind EO-1. *Sarsour v. Trump*, No. 1:17cv00120, 2017 WL 1113305, at *12 (E.D. Va. Mar. 24, 2017) (Trenga, J.). But the question is not whether a different judge or even this Court “would, in the first instance, have decided the case differently.” *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc) (citation omitted). Rather, a reviewing court must sustain the preliminary injunction so long as it is within “the sound discretion of the trial court.” *Id.* Because Judge Chuang’s

³ Katie Reilly, *Read President Trump’s Response to the Travel Ban Ruling*, Time (Mar. 16, 2017), <http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/>.

assessment of the merits is amply supported by the evidence that was before him, Defendants cannot carry their burden of establishing that they are likely to succeed on appeal.

Defendants are wrong to insist that the Court must ignore the President's pre-inaugural promises to ban the entry of Muslims. As in *McCreary*, Defendants here "are simply asking [the Court] to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show." 545 U.S. at 866. That approach "bucks common sense," for "reasonable observers have reasonable memories, and our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'" *Id.* (citation omitted). In any event, though the district court properly considered the ban's background, it also relied on statements by Trump, Giuliani, Miller, and Spicer made *after* Trump assumed office.

Defendants also wrongly suggest that no precedent allows a court to determine official motive by examining the statements of a private citizen who is not yet a government actor. In *Washington v. Seattle School District No. 1*, the Supreme Court found evidence of racial motive in the private proponents' campaign statements supporting an otherwise facially-neutral statewide initiative to restrict busing. 458 U.S. 457, 463, 471 (1982). And the Court routinely considers the private citizens' statements in *The Federalist Papers* as "indicative of

the original understanding of the Constitution.” *Printz v. United States*, 521 U.S. 898, 910 (1997). “[C]ommon sense” likewise tells us that Trump’s pre-election promise to ban Muslims is “perfectly probative evidence” of his motive. *McCreary*, 545 U.S. at 866.

The President’s statutory authority to restrict entry by aliens under 8 U.S.C. § 1152(a), though undoubtedly broad, cannot insulate him from this Establishment Clause challenge because, quite simply, Congress cannot authorize the President to violate the Constitution. Even Congress’s “plenary power” over immigration “is subject to important constitutional limitations.” *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). The Establishment Clause is among those critical, “structural protections against abuse of power” that the Framers viewed as “critical to preserving liberty.” *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). Thus, the President’s exercise of delegated power over immigration is *not* “unreviewable” because “what is challenged here is whether [the President] has chosen a constitutionally permissible means of implementing that power.” *INS v. Chadha*, 462 U.S. 919, 940-41 (1983). Targeting Muslims because of their religion is not permissible.

II. Defendants have not shown irreparable harm.

Defendants also cannot show that denying a stay will impose irreparable harm because they introduced no evidence to that effect, nor any evidence to rebut the declaration of Plaintiffs’ National Security Experts that maintaining the status

quo pending litigation “would not jeopardize national security.” (J.A.667.) Here again, the district court did not abuse its discretion in concluding that “Defendants ... have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history.” (J.A.809.)

Instead, Defendants merely ask the Court to take the President’s word for it, notwithstanding abundant evidence that the Executive Order was motivated by religious animus that greatly predominated over any genuine national security concern. This is not the first time that a court has been asked to accept the Government’s national-security justifications on blind faith in the face of serious constitutional problems. *See Korematsu v. United States*, 323 U.S. 214 (1944); U.S. D.O.J., *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases* (May 20, 2011).⁴ That experience teaches that “the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.” *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (vacating conviction based on “substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court”).

⁴ <https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases>.

III. Granting the stay will injure the States and their residents.

Allowing the travel ban to take effect also would do irreparable harm to the Nation, including to the Amici States' proprietary, sovereign, and quasi-sovereign interests.⁵ The timing would coincide with the culmination of our public universities' annual recruitment of students and faculty for the fall semester. Even a temporary reinstatement of the travel ban would discourage international candidates in the six countries from accepting offers of admission or employment. "Nearly 40 percent of colleges are reporting overall declines in applications from international students," with the "biggest decline" in applications from the Middle East.⁶ Any reinstatement would materially reduce acceptances as foreign students choose schools in Canada or elsewhere for fear they will be denied entry to the United States.

More than 15,000 students from the six countries attended U.S. colleges and universities during the 2015-16 academic year.⁷ Each prospective student deterred

⁵ Thirteen States and the District of Columbia detailed those harms at length in their amicus brief in *Hawai'i*, ECF No. 154-3.

⁶ Stephanie Saul, *Amid 'Trump Effect' Fear, 40% of Colleges See Dip in Foreign Applicants*, N.Y. Times (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/us/international-students-us-colleges-trump.html?_r=0.

⁷ Inst. of Int'l Educ., *Open Doors Data* (2015-16), <http://www.iie.org/Research-and-Publications/Open-Doors/Data/International-Students/All-Places-of-Origin/2014-16>.

by the travel ban represents, on average, a loss of \$24,930 in annual tuition and fees, plus revenue from student housing and living expenses.⁸ A stay would also harm recruitment of highly qualified faculty and researchers, many in specialized fields. For example, the University of Maryland College Park relies on “more than 200 graduate students, post-doctoral fellows, and faculty from the six ... countries” to staff its science laboratories.⁹

Reinstating the travel ban would also harm the States by chilling tourism, not only by travelers from the six countries, but from other countries whose citizens will see America as unwelcoming. New York City alone anticipated \$600 million in lost tourism sales in 2017 in the wake of the first travel ban.¹⁰ Los Angeles estimated a loss in 2017 of \$220 million.¹¹ Since EO-1 was issued, however, the world has seen the resilience of an American legal system in which

⁸ College Board, *2016-17 Tuition and Fees at Public Four-Year Institutions by State and Five-Year Percentage Change in In-State Tuition and Fees*, <https://trends.collegeboard.org/college-pricing/figures-tables/2016-17-state-tuition-and-fees-public-four-year-institutions-state-and-five-year-percentage>.

⁹ *Hawai'i v. Trump*, No. 17-50, Ex. F at 5 & n.6, ECF No. 154-3.

¹⁰ Patrick McGeehan, *New York Expects Fewer Foreign Tourists, Saying Trump Is to Blame*, N.Y. Times (Feb. 28, 2017), <https://www.nytimes.com/2017/02/28/nyregion/new-york-foreign-tourists-trump-policies.html>.

¹¹ Leo Duran, *Trump's Travel Ban Could Hurt LA's Tourism Industry* (Mar. 7, 2017), <http://www.scpr.org/programs/take-two/2017/03/07/55468/trump-s-travel-ban-could-hurt-la-s-tourism-industr/>.

the judiciary has acted as an effective check on the President's excesses.

Reinstating the travel ban would jeopardize that reassurance and further discourage foreign visitors.

Finally, reinstating the travel ban would injure the States' quasi-sovereign interests in "securing residents from the harmful effects of discrimination" and in protecting "the health and well-being—both physical and economic—of [the States'] residents in general." *Aziz*, 2017 WL 465918, at *5 (quoting *Alfred L. Snapp & Son., Inc. v. Puerto Rico*, 458 U.S. 592, 600 (1982)). Hate crimes against Muslims already were spiking when President Trump was elected,¹² and permitting the travel ban to take effect would reinforce his expression of religious intolerance. Just as state-sponsored segregation allowed "the seeds of race hate to be planted under the sanction of law," *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting), EO-1 and EO-2 have planted the seeds of hate against Muslims under the sanction of Presidential proclamations. Indeed, "[a] majority of the public, 53 percent, say they believe the [revised] travel ban is intended to target Muslims, with just 28 percent saying they don't think that is the aim."¹³

¹² Azadeh Ansari, *FBI: Hate crimes spike, most sharply against Muslims*, CNN (Nov. 15, 2016, 9:56 PM), <http://www.cnn.com/2016/11/14/us/fbi-hate-crime-report-muslims/>.

¹³ Ariel Edwards-Levy, *Trump's New Immigration Executive Order? Largely The Same As The Old One, Americans Say*, Huffington Post (Mar. 10, 2017, 4:36 PM), http://www.huffingtonpost.com/entry/revised-immigration-executive-order-travel-ban-poll_us_58c2fccfe4b0d1078ca6ac78.

IV. The public interest favors denying the stay.

The public interest also strongly weighs against a stay. As this Court said en banc: “upholding constitutional rights surely serves the public interest”; indeed, the government “is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction.” *Centro Tepeyac*, 722 F.3d at 191 (citation omitted).

CONCLUSION

Defendants’ motion for a stay should be denied.

Respectfully submitted,

THE STATES OF VIRGINIA, MARYLAND,
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 2,575 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/

Stuart A. Raphael

CERTIFICATE OF SERVICE

I certify that on March 31, 2017, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/

Stuart A. Raphael