

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, Southern Division
(8:17-cv-00361-TDC)

**BRIEF OF PLAINTIFFS-APPELLEES IN OPPOSITION
TO APPELLANTS' MOTION FOR A STAY PENDING APPEAL**

Justin B. Cox
National Immigration Law Center
1989 College Ave. NE
Atlanta, GA 30317
Tel: (678) 404-9119
Fax: (213) 639-3911
cox@nilc.org

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
National Immigration Law Center
3435 Wilshire Boulevard, Suite
1600

Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
Spencer E. Amdur
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org

Cecillia D. Wang
Cody H. Wofsy
American Civil Liberties Union

Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org

Foundation
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org

David Cole
Daniel Mach
Heather L. Weaver
American Civil Liberties Union
Foundation
915 15th Street NW
Washington, DC 20005
Tel: (202) 675-2330
Fax: (202) 457-0805
dcole@aclu.org

David Rocah
Deborah A. Jeon
Sonia Kumar
Nicholas Taichi Steiner
American Civil Liberties Union
Foundation of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
rocah@aclu-md.org

Counsel for Plaintiffs-Appellees

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	2
I. The Government Will Suffer No Irreparable Injury During the Brief Stay Period	3
II. Plaintiffs Are Likely to Prevail on the Merits	8
III. Plaintiffs and the Public Interest Would Be Harmed by Any Stay, Including a Partial Stay	15
CONCLUSION	22

TABLE OF AUTHORITIES

Cases:

<i>Aberdeen & Rockfish R. Co. v. Students Challenging Reg. Agency Procedures</i> , 409 U.S. 1207 (1972).....	16
<i>American Acad. of Religion v. Napolitano</i> , 573 F.3d 115 (2d Cir. 2009).....	13
<i>Adams v. Baker</i> , 909 F.2d 643 (1st Cir. 1990).....	13
<i>Adams v. Vance</i> , 570 F.2d 950 (D.C. Cir. 1978).....	7
<i>Awad v. Ziriax</i> , 670 F.3d 1111 (10th Cir. 2012)	17
<i>Aziz v. Trump</i> , 17-cv-116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017).....	9, 12
<i>Bostic v. Schaefer</i> , 760 F.3d 352 (4th Cir. 2014)	20
<i>Catholic League for Religious & Civil Rights v. San Francisco</i> , 624 F.3d 1043 (9th Cir. 2010)	17
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	9, 11
<i>Comm. on Jud. v. Miers</i> , 542 F.3d 909 (D.C. Cir. 2008).....	7
<i>Covenant Media of SC, LLC v. City of North Charleston</i> , 493 F.3d 421 (4th Cir. 2007)	19
<i>Cray Comms., Inc. v. Novatel Comp. Sys., Inc.</i> , 33 F.3d 390 (4th Cir. 1994)	8
<i>Decker v. O'Donnell</i> , 661 F.2d 598 (7th Cir. 1980)	21

<i>Detroit Free Press v. Ashcroft</i> , 303 F.3d 681 (6th Cir. 2002)	8
<i>Dixon v. Edwards</i> , 290 F.3d 699 (4th Cir. 2002)	21
<i>Edwards v. Aguillard</i> , 482 U.S. 578 (1987)	9
<i>Epperson v. State of Arkansas</i> , 393 U.S. 97 (1968)	8, 13
<i>Evans v. Harnett Cty. Bd. of Ed.</i> , 684 F.2d 304 (4th Cir. 1982)	22
<i>Exodus Refugee Immigr., Inc. v. Pence</i> , 165 F. Supp. 3d 718 (S.D. Ind. 2016), <i>aff'd</i> , 838 F.3d 902 (7th Cir. 2016)	19
<i>Glassroth v. Moore</i> , 335 F.3d 1282 (11th Cir. 2003)	13
<i>Hall v. Virginia</i> , 385 F.3d 421 (4th Cir. 2004)	6
<i>Harmon v. Thornburgh</i> , 878 F.2d 484 (D.C. Cir. 1989)	22
<i>Havens Realty Corp. v. Coleman</i> , 455 U.S. 363 (1982)	19
<i>Hawai‘i v. Trump</i> , No. 17-cv-50, 2017 WL 1011673 (D. Haw. Mar. 15, 2017)	3
<i>Hawai‘i v. Trump</i> , No. 17-cv-50, 2017 WL 1167383 (D. Haw. Mar. 29, 2017)	2, 4, 12
<i>Hunter v. Underwood</i> , 471 U.S. 222 (1985)	11
<i>In re Navy Chaplaincy</i> , 534 F.3d 756 (D.C. Cir. 2008)	17

<i>INS v. Chadha</i> , 462 U.S. 919 (1983).....	12
<i>INS v. Legalization Assistance Project</i> , 510 U.S. 1301 (1993).....	7
<i>INS v. St. Cyr</i> , 533 U.S. 289 (2001).....	12
<i>Jackson v. Okaloosa Cty.</i> , 21 F.3d 1531 (11th Cir. 1994)	20
<i>Kerry v. Din</i> , 135 S. Ct. 2128 (2015).....	13
<i>Kiryas Joel v. Grumet</i> , 512 U.S. 687 (1994).....	9
<i>Kleindienst v. Mandel</i> , 408 U.S. 753 (1972).....	12
<i>Kowalski v. Tesmer</i> , 543 U.S. 125 (2004).....	19
<i>Larson v. Valente</i> , 456 U.S. 228 (1982).....	12
<i>Leiva-Perez v. Holder</i> , 640 F.3d 962 (9th Cir. 2011)	19
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	19
<i>McCreary County v. Am. Civil Liberties Union of Ky.</i> , 545 U.S. 844 (2005).....	passim
<i>Moss v. Spartanburg Cty. Sch. Dist. Seven</i> , 683 F.3d 599 (4th Cir. 2012).....	16
<i>Nat’l Audubon Soc’y v. Dept. of Navy</i> , 422 F.3d 174 (4th Cir. 2005)	7

<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	2, 6, 16
<i>Quince Orchard Valley Citizens Ass’n v. Hodel</i> , 872 F.2d 75 (4th Cir. 1989)	3
<i>Rostker v. Goldberg</i> , 448 U.S. 1306 (1980).....	2
<i>Sandford v. R.L. Coleman Realty Co., Inc.</i> , 573 F.2d 173 (4th Cir. 1978).....	22
<i>Sante Fe Independent School Dist. v. Doe</i> , 530 U.S. 290 (2000).....	10, 13, 21
<i>Sarsour v. Trump</i> , No. 17-cv-120, 2017 WL 1113305 (E.D. Va. Mar. 24, 2017)	11
<i>Schweiker v. McClure</i> , 452 U.S. 1301 (1981).....	7
<i>Suhre v. Haywood Cty.</i> , 131 F.3d 1083 (4th Cir. 1997)	21
<i>Texas v. United States</i> , 787 F.3d 733 (5th Cir. 2015)	7, 22
<i>United States v. McVey</i> , 752 F.3d 606 (4th Cir. 2017)	10
<i>United States v. Texas</i> , 136 S. Ct. 2271 (2016).....	22
<i>United States v. Juvenile Male</i> , 670 F.3d 999 (9th Cir. 2012)	15
<i>Village of Arlington Heights v. Metropolitan Housing Dev. Corp.</i> , 429 U.S. 252 (1977).....	9, 11
<i>Washington v. Trump</i> , 847 F.3d 1151 (9th Cir. 2017)	3, 7, 21, 22

<i>White Tail Park, Inc. v. Stroube</i> , 413 F.3d 451 (4th Cir. 2005)	18
---	----

Statutes:

8 U.S.C. § 1152(a)(1)(A).....	14
8 U.S.C. § 1182(f)	15
8 U.S.C. § 1185(a).....	15

Other Authorities:

Department of Homeland Security, <i>Q&A: Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States</i>	6
Michael D. Shear, <i>Trump Administration Orders Tougher Screening of Visa Applicants</i> , N.Y. Times (Mar. 23, 2017)	6
Executive Order No. 13780 (Mar. 6, 2017)	passim

Rules:

Fed. R. Evid. 201(b)	6
L.R. 27(d)(2)(a)	8

INTRODUCTION

The government's stay motion is an exercise in avoidance. It is written as if the Executive Order at issue in this case sprang to life on March 6, 2017 on a blank slate, even though the Order expressly revokes and replaces a prior Executive Order that was the subject of extensive litigation. See Executive Order No. 13780, §§ 1(i), 1(c), 13. And it does not mention the ongoing case of *Hawai'i v. Trump*, in which the district court issued nationwide relief that overlaps with the preliminary injunction at issue here. The government thus avoids acknowledging its own delays in re-issuing the Executive Order and advancing this and related litigation. But in fact, the government has tolerated injunctions of its travel ban Orders for more than seven weeks so far, and since submitting its stay motion in this case has proposed a briefing schedule in *Hawai'i* ensuring that the provision at issue will remain enjoined nationwide for at least four more weeks *regardless of whether this Court grants a stay*. Against this backdrop, any claim that the government urgently needs a stay during this highly expedited appeal beggars belief.

The government's motion also avoids engaging with any of the un rebutted evidence in the record showing that the Orders were enacted with an impermissible purpose, instead urging the Court to disregard that evidence and the district court's findings of fact, based on the widely rejected theory that it is

legally impermissible to consider any such evidence in evaluating these claims. *Compare* Mot. 16-18, with Op. 37-38; *Hawai‘i v. Trump*, No. 17-cv-50, 2017 WL 1167383, at *6 n.4 (D. Haw. Mar. 29, 2017) (collecting cases). Similarly, the government sidesteps the extensive record evidence of harm to both the individual and organizational plaintiffs. *Compare* Mot. 10-15, with Op. 16-18, 38-39, 41-42.

It is the government’s burden to justify the extraordinary interim relief it seeks. Taking the facts and the law as they actually are, the government cannot meet its burden on any element of the stay standard, much less all of them.

ARGUMENT

The government “bears the burden of showing that the circumstances justify” a stay pending appeal, *Nken v. Holder*, 556 U.S. 418, 434 (2009), which is warranted “only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct,” *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). The government must establish the first two stay factors—irreparable harm and likelihood of success—before the Court considers harm to other parties or the public interest. *Nken*, 556 U.S. at 434, 435 (considering third and fourth factors only “[o]nce an applicant satisfies the first two factors”).

I. The Government Will Suffer No Irreparable Injury During the Brief Stay Period

1. The government's actions belie any claim that it will suffer irreparable harm during the brief period for which a stay could actually be meaningful. Since February 9, when the Ninth Circuit denied the government's motion to stay an injunction blocking large parts of the first Executive Order, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), the government has not acted with any alacrity to restore the ban. See *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (movant's delay negates irreparable harm). The government chose to abandon its appeal of the *Washington* injunction (which would have been fully briefed by now). Instead, it took three weeks to draft a replacement Executive Order and reportedly delayed its release to maximize press coverage of an unrelated presidential speech, J.A. 537-38, finally issuing the replacement Order on March 6, 2017, with an effective date of March 16, 2017. Order § 14.

After the district court enjoined § 2(c), the government waited more than a week to file this stay motion, which, on the government's requested schedule, will be fully briefed nearly three weeks after the district court's March 16 order. In Hawai'i, when another district court issued a temporary restraining order enjoining § 2(c) (and other provisions), *Hawai'i v. Trump*, No. 17-cv-50, 2017 WL 1011673 (D. Haw. Mar. 15, 2017), the government declined to appeal or

seek to stay that TRO.¹ Rather, it proceeded before the district court and agreed to extend the TRO by two more weeks. *See Hawai'i*, 2017 WL 1167383, at *9 (converting TRO to preliminary injunction). Today, the government filed a motion with the Ninth Circuit seeking a schedule under which its stay motion will not be fully briefed until April 28. *See Hawai'i v. Trump*, No. 15589, Dkt. 12, at 8 (9th Cir. *filed* Mar. 31, 2017). The *Hawai'i* injunction will therefore remain in effect nationwide for at least another four weeks, during which the government is prohibited from implementing § 2 of the Order nationwide *regardless* of whether this Court stays the order below.

Thus, the government has effectively acquiesced in major portions of the Executive Orders remaining continuously enjoined for at least two and a half months. This approach simply cannot be squared with the government's claim that it needs a stay to prevent irreparable injury, particularly given the short period between the close of briefing on the *Hawai'i* stay motion (April 28) and oral argument on the merits in this case (May 8).

2. The government's stay application also fails to identify any *concrete* injury to the government that would occur in the absence of a stay. For good

¹ In contrast, in *Washington*, the government filed a notice of appeal, motion to stay, and motion for an emergency administrative stay *one day* after the district court issued its TRO. The government could have done the same in *Hawai'i*.

reason: Nothing in the record below, and nothing submitted in support of the stay application, supports such an assertion.

To the contrary, the March 6 Order itself demonstrates that allowing individuals from the banned countries to enter the United States on visas does not pose an unacceptable security risk, because under its own terms, many such persons would be allowed to enter. *See* Order § 3(a)(iii) (holders of visas issued before effective date); *id.* § 3(b)(iv) (dual nationals). The Order’s waiver provision likewise confirms that the visa issuance process is *already* capable of determining whether an individual’s “entry would [] pose a threat to national security.” *Id.* § 3(c).

More fundamentally, the government has offered no *evidence* of any harm. In seeking a stay, the government cannot simply offer *ipse dixit*. And the evidence that is in the record indicates that no such harm exists. A bipartisan group of forty former national security officials concluded that “[b]locking the Order while the underlying legal issues are being adjudicated would not jeopardize national security.” D. Ct. Dkt. No. 123-1 at 29-30 (Amicus); *see* J.A. 93. Similarly, a DHS report concluded that “country of citizenship is unlikely to be a reliable indicator of potential terrorist activity.” J.A. 419.

Moreover, the preliminary injunction has not prevented the government from taking other actions to address security concerns. Recently, for example, the government has instituted new visa screening procedures and banned large electronics from the cabins of certain flights to the United States.²

3. The government's irreparable-harm claim instead rests on abstract assertions of institutional injury that cannot justify a stay pending appeal. *Nken*, 566 U.S. at 433-36 (rejecting any categorical presumption of irreparable injury). Rather than identifying any actual, tangible harm to anybody or anything during the brief period at issue, the government instead argues that the very act of blocking the Order "necessarily imposes irreparable harm" by "overriding the President's judgment," "undermin[ing] the President's constitutional and statutory responsibility," or "intrud[ing] on the political branches' constitutional prerogatives." Mot. 6-7. But the government cites no case actually adopting its

² Michael Shear, *Trump Administration Orders Tougher Screening of Visa Applicants*, N.Y. Times (Mar. 23, 2017), <https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html>; Department of Homeland Security, *Fact Sheet: Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States*, <https://www.dhs.gov/news/2017/03/21/fact-sheet-aviation-security-enhancements-select-last-point-departure-airports> (last visited Mar. 31, 2017). The Court may take judicial notice of these recent policy changes. See Fed. R. Evid. 201(b); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004).

theory that preliminary relief against the executive necessarily constitutes irreparable injury.

In fact, that theory has been repeatedly rejected. Such “institutional injury,” to the extent it is cognizable at all, is reparable by a judgment on the merits. *Washington*, 847 F.3d at 1168; *see Texas v. United States*, 787 F.3d 733, 767-68 (5th Cir. 2015) (“[I]t is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect [separation-of-powers] principles.”).³

Nor does the government’s bare assertion of national security concerns create an irreparable injury that automatically justifies a stay. To the contrary, in evaluating whether the extraordinary grant of a stay pending appeal is warranted, courts have frequently found asserted national-security harms insufficient, as even the cases cited by the government show. For example, in *National Audubon Society v. Department of Navy*, this Court *denied* a stay

³ The cases the government cites underscore that there is no *per se* irreparable injury from an injunction against the executive branch. *See INS v. Legalization Assistance Project*, 510 U.S. 1301, 1305-06 (1993) (noting separation-of-powers concerns where court adjudicated case in which it lacked jurisdiction); *Schweiker v. McClure*, 452 U.S. 1301, 1303 (1981) (finding irreparable harm where the order below required “a drastic restructuring of the appeals procedure carefully designed by Congress”); *Comm. on Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (granting stay without addressing irreparable harm); *Adams v. Vance*, 570 F.2d 950, 951, 956 (D.C. Cir. 1978) (finding irreparable harm based on government affidavits because order below would disrupt specific international negotiations).

pending appeal, No. 05-1405 (Order May 19, 2005), even though it eventually ordered the district court, on the merits, to modify its injunction. 422 F.3d 174, 207 (4th Cir. 2005). Similarly, in *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 685, 692-93 (6th Cir. 2002), see Mot. to Expedite at 5, the Sixth Circuit denied a stay pending appeal despite the government’s contention that the preliminary injunction at issue could damage national security. The government has fallen far short of meeting its burden here.

II. Plaintiffs Are Likely to Prevail on the Merits

The government equally cannot meet its burden to show that it is likely to succeed on the merits.⁴

1. The principle that government “may not be hostile to any religion” is “rooted in the foundation soil of our Nation.” *Epperson v. State of Arkansas*, 393 U.S. 97, 103-04 (1968). This command, at its core, requires that government action have a primary secular purpose that is “not merely secondary to a religious objective.” *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 863-64 (2005). And because the “Establishment Clause . . . forbids an official purpose to disapprove of a particular religion,” the Supreme Court

⁴ For its likelihood-of-success argument, the government inappropriately attempts to incorporate its entire merits brief. Mot. 15; cf. *Cray Comms., Inc. v. Novatel Comp. Sys., Inc.*, 33 F.3d 390, 396 n.6 (4th Cir. 1994). The rules allow 5,200 words in each principal brief to address the stay request. L.R. 27(d)(2)(a). As set out in the Court’s scheduling order, Plaintiffs will respond to the government’s merits brief on April 14.

has long instructed that “[f]acial neutrality is not determinative.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 534 (1993); see *Kiryas Joel v. Grumet*, 512 U.S. 687, 699 (1994) (Establishment Clause “analysis does not end with the text of the statute at issue”). The question is whether a reasonable, “objective observer,” aware of the *entire* context of the challenged action, would conclude that the government’s predominant purpose is to inhibit or advance religion. *McCreary*, 545 U.S. at 862-64; see also *Edwards v. Aguillard*, 482 U.S. 578, 586-93 (1987); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-67 (1977).

The district court found overwhelming evidence of improper purpose, relying in part on “public statements made by President Trump and his advisors, before his election, before the issuance of the First Executive Order, and since the decision to issue the Second Executive Order.” Op. 26. As a candidate, President Trump repeatedly called for a ban on Muslim immigration. Op. 27-28. He promised multiple times that, if elected, he would implement that policy through a nationality ban. Op. 28-29; *Aziz v. Trump*, 17-cv-116, 2017 WL 580855, at *4-5, *8-9 (E.D. Va. Feb. 13, 2017) (Brinkema, J.). He reiterated these promises after the election, referring back to the statements he had made during the campaign. Op. 28. And within days of assuming office, President Trump signed an Executive Order banning travel from seven countries whose

populations were over 90% Muslim. Op. 4. The Order contained an explicit preference for religious minorities, which President Trump explained was intended to favor Christian refugees. Op. 9. At the time, and indeed for every day of his presidency so far, President Trump’s website—last updated earlier this week—has explicitly called for “preventing Muslim immigration.” Op. 10.

After numerous courts enjoined the first Order, the President revised it to exempt the categories of people whose exclusion had triggered due process concerns from the Ninth Circuit. Order § 1(i). The revised Order also eliminated the Christian preference. *But see McCreary*, 545 U.S. at 873 & n.22 (rejecting attempt to cure Establishment Clause violation by revising policy to achieve facial neutrality); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (same). The President and his closest advisors, however, assured the public that the revised Order contained only “minor technical differences,” and that “[t]he principles . . . remain the same.” Op. 30-31. After it was enjoined, President Trump confirmed that the revised Order was simply a “watered down version of the first order.” Dkt. 56-1, Ex. 4 at 3.

The government’s motion ignores almost all of these findings. *See United States v. McVey*, 752 F.3d 606, 610 (4th Cir. 2014) (district court’s factual determinations reviewed for clear error). Instead, it attempts to move

the goal posts in various novel ways. The Court should not contort settled law to accommodate President Trump’s unprecedented Order.

First, the government suggests that the Court should consider only the motives stated in the Order’s text. *See* Mot. 16-17 (arguing against “second-guessing” the Order’s motives solely because “it is *expressly* aimed at protecting national security”); *id.* at 17 (“[O]nly the *official* purpose of government acts . . . counts for Establishment Clause purposes.”) (emphases added). But the law could not be clearer: “Facial neutrality is not determinative.” *Lukumi*, 508 U.S. at 534. “Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirements of facial neutrality.” *Id.*; *see McCreary*, 545 U.S. at 862; *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985); *Arlington Heights*, 429 U.S. at 266.⁵

Second, the government tries to eliminate any meaningful review by asking the Court to apply the *Mandel* “facially legitimate and bona fide” standard but to excise the “bona fide” portion. *See* Mot. 16-17 (citing

⁵ The district court agreed in *Sarsour v. Trump*, No. 17-cv-120, 2017 WL 1113305 (E.D. Va. Mar. 24, 2017), refusing to limit its review to the four corners of the Order, *id.* at *11, after concluding that the plaintiffs had standing to assert establishment harms, *id.* at *5. Plaintiffs disagree with that court’s ultimate decision on the merits, for the reasons stated in this opposition and Plaintiffs’ forthcoming merits brief.

Kleindienst v. Mandel, 408 U.S. 753 (1972)). Neither step is supported by precedent. The Supreme Court has never applied the *Mandel* standard when enforcing the Constitution’s “absolute” structural bar against religious establishment, *Larson v. Valente*, 456 U.S. 228, 246 (1982)—and courts across the country have roundly rejected the government’s request that they do so in challenges to the Executive Orders in this case. Op. 37-38; *Hawai‘i*, 2017 WL 1167383, at *6 n.4 (citing cases). As these and other courts have recognized, the Supreme Court has frequently applied normal modes of constitutional analysis to cases bearing on immigration matters. See *INS v. St. Cyr*, 533 U.S. 289, 300-01 (2001) (applying Suspension Clause analysis to immigration statute); *INS v. Chadha*, 462 U.S. 919, 941 (1983) (applying normal constitutional analysis to an immigration statute, because even Congress must “cho[ose] a constitutionally permissible means of implementing [its immigration] power”).

Even if *Mandel*’s standard did apply, the result would be the same. See *Aziz*, 2017 WL 580855, at *8 (if government’s proffered reason “has been given in ‘bad faith,’ it is not ‘bona fide,’” and court must determine “whether the proffered reason . . . is the real reason”). As Justice Kennedy explained, courts should examine “additional factual details beyond” the face of the action when there is “an affirmative showing of bad faith.” *Kerry v. Din*, 135 S. Ct. 2128,

2141 (2015) (Kennedy, J., concurring in the judgment); *accord Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009); *Adams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990).

Third, the government is wrong to fault the district court for taking into account statements made before President Trump’s election. Mot. 17. There is no prohibition against considering those statements, especially in the “highly unique” circumstances of this case. Op. 35; *see, e.g., Glassroth v. Moore*, 335 F.3d 1282, 1284-85 (11th Cir. 2003). The Supreme Court has rejected such formalistic rules for judging intent, admonishing courts not “to ignore perfectly probative evidence,” *McCreary*, 545 U.S. at 866, and not “to turn a blind eye to the context in which [a] policy arose,” *Santa Fe*, 530 U.S. at 315.⁶ President Trump’s unbroken line of pre-inauguration statements is perfectly probative of his own motivation for a policy issued *one week* after inauguration, with no intervening input from any immigration or national security officials. *See* Op. 35; Tr. 44-45 (conceding absence of consultation). No “reasonable observer” would ignore promises made with such specificity and consistency, especially

⁶ Statements by close advisors are also properly included in the “direct and circumstantial evidence” courts must consider. *Lukumi*, 508 U.S. at 540; *see, e.g., id.* at 541 (relying on “significant hostility exhibited by *residents*, members of the city council, and *other* city officials” to review city council ordinance) (emphasis added); *Epperson*, 393 U.S. at 107-09 & n.16 (relying on letters from the public).

when coupled with a fulfilled promise for exactly how to achieve them. *McCreary*, 545 U.S. at 872.

Fourth, a reasonable observer would also not ignore the extensive *post-election* evidence in the record, some of which refers back to the goals and methods promised during the campaign. In December 2016, when asked if he still planned to ban Muslims, President Trump responded, “you know my plans.” Op. 9, 28. Upon reading the Order’s title, he announced, “we all know what that means.” *Id.* See also Op. 8 (current website), 9 (Christian preference), 30-31 (statements after first ban). The government pretends that none of these factual findings even exists.

2. The government has also failed to make a strong showing that it is likely to prevail on the merits of Plaintiffs’ statutory claims. Section 202 of the INA squarely prohibits discrimination “in the issuance of an immigrant visa because of the person’s . . . nationality.” 8 U.S.C. § 1152(a)(1)(A). The Order openly instructs the Department of State to discriminate by nationality in “the visa issuance process.” Order § 3(c). Because Section 202 was enacted after Section 212(f) and is the more specific statute, an order issued under Section 212(f) cannot override Section 202’s clear command. See *United States v.*

Juvenile Male, 670 F.3d 999, 1008 (9th Cir. 2012) (“[T]he later-enacted, more specific provision generally governs.”).⁷

Furthermore, § 2(c) does not regulate “entry” at all, and thus falls outside the authority provided by Section 212(f). *See* 8 U.S.C. § 1182(f) (only allowing the President to “suspend the *entry*” of aliens) (emphasis added). Under the Order, anyone with a visa issued *before* the effective date may enter, Order § 3(a)(iii), and anyone issued a visa *after* the effective date may enter, *id.* § 3(c). Thus, Section 2(c)’s only effect is to regulate visas, not entry. No President has ever tried to use the authority granted by Section 212(f) in such a sweeping way. *See* Op. 21-22; *id.* at 36 (finding that presidents have acted under Section 212(f) only in response to “articulable triggering event[s]”). The government’s broad reading of the statute would give the President virtually unlimited authority to rewrite the immigration laws—even permanently, *see* Order § 2(e), (f)—a result Congress could not have intended.

III. Plaintiffs and the Public Interest Would Be Harmed by Any Stay, Including a Partial Stay

The Court need not evaluate the final two stay factors because the government has not carried its burden on the first two. *Nken*, 556 U.S. at 433-

⁷ The Government also contends that 8 U.S.C. § 1185(a) empowers the President to restrict visa eligibility by nationality, Mot. 16, but that provision similarly cannot negate the later-enacted Section 202, and “[t]he Government has identified no instance in which § 1185(a) has been used to control the immigrant visa issuance process.” Op. 24.

35. In any event, a stay would seriously harm both the organizational and individual plaintiffs. *See* Op. 16-18, 41-42. The district court’s findings of harm and tailoring of relief are entitled to significant deference. *See Aberdeen & Rockfish R. Co. v. Students Challenging Reg. Agency Procedures*, 409 U.S. 1207, 1218 (1972) (noting the high level of deference owed to district court conclusions based “upon a refined factual evaluation of [the enjoined action’s] effect”). Rather than grapple with the serious injuries imposed by the Order, the government attempts to carve the organizational plaintiffs out of this case and to minimize the harms caused by the Order’s condemnation of Plaintiffs’ faith.

1. The government characterizes Plaintiffs’ harms as “abstract stigmatic injur[ies].” *See* Mot. 14-15. But this is not a case where the plaintiffs simply disagree with far-removed governmental action. Section 2(c) directly affects Muslims in the United States who are petitioning for visas and seeking to be united with family and colleagues. It is Plaintiffs’ own religion and their own community that the Order condemns. Nothing more is required to establish harm under the Establishment Clause. *See Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 605 (4th Cir. 2012) (plaintiffs have cognizable interest “when they are part of the relevant community and are directly affronted”) (quotes and alterations omitted); *Awad v. Ziriax*, 670 F.3d 1111, 1120-23 (10th

Cir. 2012) (plaintiff had standing to challenge provision that “condemns his religious faith and exposes him to disfavored treatment,” even though it was not yet clear how the provision would affect him); *Catholic League for Religious & Civil Rights v. San Francisco*, 624 F.3d 1043, 1048-53 (9th Cir. 2010) (finding standing to challenge purely expressive ordinance targeting plaintiffs’ faith in the county where they lived).⁸

2. Defendants also wrongly suggest the district court held that the organizational plaintiffs were not injured by § 2(c). Mot. 10. To the contrary, the court explicitly found that § 2(c) *would* harm them in fashioning the relief it ordered. Op. 41 (relying on harms to “clients of the Organizational Plaintiffs”).⁹ The government faces a steep burden to overcome that finding.

Unrebutted record evidence confirms the district court’s conclusion that § 2(c) would harm the organizational plaintiffs. IRAP, HIAS, and MESA have hundreds of clients and members from the six countries designated in § 2(c), including a significant number in the United States who are seeking visas for family members and colleagues. See J.A. 263, 267-68, 273-74, 281-83, 297-303. MESA’s members seek to travel to the United States on visas. *Id.* at 298-

⁸ By contrast, in *In re Navy Chaplaincy*, 534 F.3d 756, 763 (D.C. Cir. 2008), see Mot. 13, the plaintiffs did not allege any condemnation injury.

⁹ The reason the court did not separately analyze their standing is that just “one plaintiff with standing renders a claim justiciable.” Op. 12, 18.

300. And both IRAP and HIAS have clients who are petitioning for visas for their loved ones abroad. J.A. 262-63, 267, 273-74, 283; *cf.* Mot. 10 (incorrectly suggesting that IRAP and HIAS challenge only the Order’s refugee provisions). The district court was correct to conclude that these harms justified preliminary relief. Op. 38-39, 40-42.

Contrary to the government’s contention, Mot. 21, the organizational plaintiffs are not relying solely on associational standing, but rather “have asserted injuries to the organizations themselves.” *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) (emphasis omitted); *see id.* at 458-61 (plaintiff asserting organizational standing need not establish standing of specific members). Plaintiffs adduced un rebutted evidence that all three organizational plaintiffs would be injured *in their own right* by § 2(c). *See, e.g.*, J.A. 264-68 (IRAP’s diversion of resources); J.A. 277-81 (HIAS’s financial injuries and diminished services); J.A. 297-303 (MESA’s loss of membership and revenue). All three organizations would be forced to abandon significant investments made to expand capacity or sponsor individuals no longer eligible to enter the United States. J.A. 273, 281-82. These injuries have “perceptibly

impaired” the mission of each organization. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).¹⁰

3. Staying the injunction would harm the individual plaintiffs by prolonging their separation from their loved ones, most of whom remain in dangerous conditions abroad. Op. 14, 15; see J.A. 42-43, 267-68, 282-83, 304-10, 316-22.¹¹

The government asserts that § 2(c) does not affect U.S.-based individuals because they “are not subject to the Order.” Mot. 14. But the pending family

¹⁰ IRAP and HIAS also have third-party standing to vindicate the rights of their clients. Plaintiffs seeking to assert the rights and interests of others must demonstrate a “close relationship with the person who possesses the right,” as well as “a hindrance to the possessor’s ability to protect his own interests.” *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004) (quotation marks omitted). Both elements are plainly met here. See, e.g., *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 730-34 (S.D. Ind. 2016), *aff’d*, 838 F.3d 902 (7th Cir. 2016) (Posner, J.). MESA, moreover, has associational standing based on its members’ injuries. Although the government faults MESA’s declaration for a lack of detail regarding its members, Mot. 11, the question at this “stage[] of the litigation,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), is whether the government can establish that MESA is unlikely to succeed in proving standing at trial. The government cannot clear that hurdle.

¹¹ See also, e.g., *Covenant Media Of SC, LLC v. City of North Charleston*, 493 F.3d 421, 428 (4th Cir. 2007) (not having an application processed in a timely manner is a cognizable injury); *Leiva-Perez v. Holder*, 640 F.3d 962, 969-70 (9th Cir. 2011) (“[I]mportant [irreparable harm] factors include separation from family members.”) (quotation marks omitted). The claims of Plaintiff Paul Harrison are now moot. The State Department emailed Mr. Harrison’s fiancé at 11:13 PM ET on March 15 to let him know that it had shipped him an unspecified document, which turned out to be his visa.

reunification petitions affected by § 2(c) were filed by U.S.-based individuals pursuant to *their* statutory rights to do so. The Order injures these individuals both by separating them from family members and by condemning their faith.

The government’s contention that the waiver process “could well provide the very relief” Plaintiffs seek is equally misplaced. Mot. 12. As the district court held, the waiver process “would delay reunification,” Op. 16—a factual finding supported by the record, J.A. 269, and undisputed by the government. Even if the waiver process did not cause additional delay, it stills forces Plaintiffs, their clients, and their members to submit to a process that imposes a discriminatory barrier. *See, e.g., Bostic v. Schaefer*, 760 F.3d 352, 372 (4th Cir. 2014) (“denial of equal treatment resulting from imposition” of discriminatory barrier constitutes injury-in-fact); *Jackson v. Okaloosa Cty.*, 21 F.3d 1531, 1541 (11th Cir. 1994) (claim against “additional hurdle . . . interposed with discriminatory purpose” is ripe “whether or not it might have been surmounted”).

4. Finally, the Court should reject the government’s request to partially stay the preliminary injunction, which would deny Plaintiffs complete relief. The district court carefully considered the scope of its remedy, with extensive input from the parties. *See* J.A. 736-41, 751-52 (oral argument discussion of the scope of injunction). “[T]he scope of such relief rests within [the district

court's] sound discretion.” *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002).

The district court was correct to enjoin § 2(c) on its face, *contra* Mot. 19, because “the mere passage by the [government] of a policy that has the purpose and perception of government establishment of religion” violates the Establishment Clause. *Santa Fe*, 530 U.S. at 314; *id.* (“Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose.”). The narrowed injunction the government advocates would leave in place a provision that condemns Plaintiffs’ faith and would not address the organizational plaintiffs’ injuries at all. The district court was well within its discretion to decide against granting such inadequate relief. *See Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997) (“[T]he spiritual, value-laden beliefs of the plaintiffs are often most directly affected by an alleged establishment of religion.”) (quotation marks omitted); *Decker v. O’Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (affirming nationwide injunction to remedy a facial Establishment Clause violation).

Moreover, courts have consistently recognized that “a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy.” *Washington*, 847 F.3d at

1166-67 (9th Cir. 2017) (declining to stay nationwide injunction); *see Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015) (affirming nationwide preliminary injunction), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). Here, an injunction limited to the named Plaintiffs underscores the practical difficulties animating this concern because Plaintiffs, their clients, and their members “are located in different parts of the United States.” Op. 41.

Finally, Article III is no barrier to nationwide relief. *See* Mot. 19-20. It is common for courts to strike down unlawful provisions in their entirety. For instance, “[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.” *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); *see also Sandford v. R.L. Coleman Realty Co., Inc.*, 573 F.2d 173, 178 (4th Cir. 1978) (“The settled rule is that . . . the requested (injunctive) relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack.”); *Evans v. Harnett Cty. Bd. of Ed.*, 684 F.2d 304, 306 (4th Cir. 1982).

CONCLUSION

The Court should deny the government’s request for a stay pending appeal.

Dated: March 31, 2017

Justin B. Cox
National Immigration Law Center
1989 College Ave. NE
Atlanta, GA 30317
Tel: (678) 404-9119
Fax: (213) 639-3911
cox@nilc.org

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
National Immigration Law Center
3435 Wilshire Boulevard,
Suite 1600
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org

Respectfully submitted,

/s/ Omar Jadwat
Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
Spencer E. Amdur
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org

Cecillia D. Wang
Cody H. Wofsy
American Civil Liberties Union
Foundation
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org

David Cole
Daniel Mach
Heather L. Weaver
American Civil Liberties Union
Foundation
915 15th Street NW
Washington, DC 20005
Tel: (202) 675-2330
Fax: (202) 457-0805
dcole@aclu.org

David Rocah
Deborah A. Jeon
Sonia Kumar
Nicholas Taichi Steiner
American Civil Liberties Union

Foundation of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
rocah@aclu-md.org

Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 27(d)(2)(a). The brief contains 5,182 words, excluding the parts of the brief excluded by Rules 27(d)(2) and 32(f).

/s/ Omar C. Jadwat
Omar. C. Jadwat

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Omar C. Jadwat
Omar C. Jadwat