No. 17-190

In the Supreme Court of the United States

DEFENSE DISTRIBUTED, ET AL., PETITIONERS

v.

DEPARTMENT OF STATE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Arms Export Control Act, 22 U.S.C. 2751 *et seq.*, generally prohibits the exportation of "defense articles or defense services designated by the President" without a license issued in accordance with federal regulations. 22 U.S.C. 2778(a)(1) and (b)(2). The Department of State's International Traffic in Arms Regulations (Regulations), 22 C.F.R. Pts. 120-130, designate covered defense articles and defense services, including certain "[t]echnical data" that are "required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles" and that are not in the "public domain." 22 C.F.R. 120.10(a)(1) and (b); see 22 C.F.R. 120.6, 121.1. Petitioners filed suit challenging the application of the Regulations' provisions governing exportation of such technical data to the online distribution to foreign nationals of computer files that enable anyone with a 3-D printer or computer-controlled drill for milling metal objects to produce operable, unregistered, untraceable firearms and firearm parts. The district court denied the injunction on the ground that the balance of equities and the public interest weighed against injunctive relief. The court of appeals affirmed on the same basis. The question presented is as follows:

Whether the court of appeals erred in concluding that the district court did not abuse its discretion by denying a preliminary injunction against enforcement of the Regulations' provisions governing exportation of technical data—including data used to produce unregistered, untraceable firearms and firearm parts—based on the district court's determination that the balance of equities and the public interest weighed against the requested relief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 838 F.3d 451. The order of the district court (Pet. App. 56a-90a) is reported at 121 F. Supp. 3d 680.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2016. A petition for rehearing was denied on March 15, 2017 (Pet. App. 91a-97a). On April 26, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 2, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Arms Export Control Act (AECA or Act), 22 U.S.C. 2751 *et seq.*, authorizes the President, "[i]n furtherance of world peace and the security and foreign policy of the United States," to "control the import and the export of defense articles and defense services" and "to promulgate regulations for the import and export of such articles and services." 22 U.S.C. 2778(a)(1). The Act further authorizes the President to "designate those items which shall be considered as defense articles and defense services" for this purpose by placing them on the "United States Munitions List," and it generally prohibits "export[ing] or import[ing]" such "defense articles or defense services designated by the President * * * without a license for such export or import, issued in accordance with [the Act] and regulations issued under [it]." 22 U.S.C. 2778(a)(1) and (b)(2). The Act directs that

> [d]ecisions on issuing export licenses * * * shall take into account whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.

22 U.S.C. 2778(a)(2).

b. The President has delegated to the Secretary of State his authority under the AECA to designate covered defense articles and defense services (with the concurrence of the Secretary of Defense) and to issue regulations regarding exportation of such articles and services. See Exec. Order No. 13,637, § 1(n)(i), 3 C.F.R. 225 (2014); Exec. Order No. 11,958, § 1(*l*)(1), 3 C.F.R. 80 (1978). Exercising that authority, the Department of

State has promulgated the International Traffic in Arms Regulations (Regulations), 22 C.F.R. Pts. 120-130, which set out the U.S. Munitions List that defines items as defense articles and defense services. The Munitions List includes a wide range of military items that constitute defense articles, such as missiles, warships, tanks, bombers, and fighter planes, as well as firearms and certain firearm components, among many others. 22 C.F.R. 121.1.

In addition to such munitions themselves, the Munitions List designates as defense articles "technical data" that are related to other items on the list. 22 C.F.R. 120.6; see, *e.g.*, 22 C.F.R. 121.1, Category I, (i). The term "[t]echnical data" includes, among other things, "[i]nformation * * * which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles," including "information in the form of blueprints, drawings, photographs, plans, instructions or documentation." 22 C.F.R. 120.10(a)(1).[1]

The definition of technical data "does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities," nor does it include "information in the public domain." 22 C.F.R. 120.10(b). Information in the "[p]ublic domain," in turn, is defined as information "which is published and which is generally accessible or available to the public" in any of a number

[1] A separate definition of technical data applies to "software." See 22 C.F.R. 120.10(a), 120.45(f). This case concerns data files that are not classified as software.

of forms and locations. 22 C.F.R. 120.11(a).[2] The Regulations define the "export" of technical data to include (*inter alia*) disclosing such data to a foreign person in the United States. 22 C.F.R. 120.17(a)(2).[3]

The Regulations also set out the requirements and procedures for determining whether particular items satisfy the regulatory definitions of defense articles or services and, if so, whether a license should be issued to

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[2] In June 2015, while this litigation was pending, the Department of State issued a notice of proposed rulemaking that proposed (*inter alia*) to amend the definition of "public domain" to clarify that technical data are not in the public domain if they were made available without appropriate authorization from the relevant government entity. 80 Fed. Reg. 31,525, 31,527-31,528, 31,535 (June 3, 2015). As the preamble to the proposed rule explained, this understanding is "not new" but is merely "a more explicit statement of the [Regulations'] requirement that one must seek and receive a license or other authorization from the Department or other cognizant U.S. government authority to release [Regulations-]controlled 'technical data.'" *Id.* at 31,528. The preamble also stated that dissemination of technical data that were made available without appropriate federal authorization is a violation of the Regulations "if, and only if, it is done with knowledge that the 'technical data'" were "made publicly available without" such authorization. *Ibid.*; see *id.* at 31,538. The Department received comments on the proposed rule but has not yet issued a final rule regarding the definition of "public domain." See 81 Fed. Reg. 62,004, 62,007 (Sept. 8, 2016) (adopting final rules regarding other aspects of the proposed rule but deferring action on definition of this and other terms to future proceedings).

[3] In June 2016, the Department of State promulgated an interim final rule modifying the Regulations' definition of "export," which took effect September 1, 2016. See 81 Fed. Reg. 35,611, 35,611 (June 3, 2016) (interim final rule), as amended, 81 Fed. Reg. 62,004 (final rule). That amendment does not materially affect the issues presented here; both before and after that amendment, the Regulations' definition of "export" encompassed disclosure of technical data to a foreign person in the United States. Compare 22 C.F.R. 120.17(a)(2) (2017), with 22 C.F.R. 120.17(a)(4) (2015).

permit their export. Under the "commodity jurisdiction procedure," the Department of State provides, on request, "a determination of whether a particular article or service is covered by the U.S. Munitions List." 22 C.F.R. 120.4(a). Commodity-jurisdiction decisions are subject to an appeal procedure. 22 C.F.R. 120.4(g).

2. Petitioner Defense Distributed is a nonprofit organization that seeks to "promot[e] popular access to arms" by "facilitating global access to, and the collaborative production of, information and knowledge related to the 3D printing of arms," and by "publishing and distributing such information and knowledge on the Internet." Pet. App. 2a-3a. Defense Distributed "create[s] computer files to allow people to easily produce their own weapons and weapon parts using relatively affordable and readily available equipment," employing either "[t]hree-dimensional ('3-D') printing" or "[c]omputer numeric control ('CNC') milling." *Id.* at 4a (citation and internal quotation marks omitted). As Defense Distributed described those technologies to the lower courts, "[t]hree-dimensional ('3-D') printing technology allows a computer to 'print' a physical object" in three dimensions—including "everything from jewelry to toys to car parts." *Ibid.* (citation and internal quotation marks omitted). CNC milling is a similar but "older industrial technology," which "involves a computer directing the operation of a drill upon an object." *Ibid.* (citation and internal quotation marks omitted). Both technologies require a set of instructions, contained in a computer file, that direct the 3-D printer or CNC mill to create the desired object. *Id.* at 4a-5a.

Defense Distributed offers files for both technologies. Pet. App. 5a. Its 3-D printing files "allow virtually anyone with access to a 3D printer to produce" both

firearms and firearm components. *Ibid.* For example, Defense Distributed offers files to 3-D print a "single-shot plastic pistol called the Liberator," as well as "lower receivers" for AR-15 rifles. *Ibid.* "The lower receiver is the part of the firearm to which the other parts are attached" and "is the only part of the rifle that is legally considered a firearm under federal law." *Id.* at 3a. A lower receiver "ordinarily contains the serial number" of a firearm, "which in part allows law enforcement to trace the weapon," and "the purchase of a lower receiver is restricted and may require a background check or registration." *Ibid.* Defense Distributed's 3-D printing files allow users to create "a fully functional plastic AR-15 lower receiver." *Id.* at 5a. Defense Distributed also sells a "desktop CNC mill" (the "Ghost Gunner"); "[w]ith CNC milling files supplied by Defense Distributed," users of the Ghost Gunner can "produce fully functional, unserialized, and untraceable metal AR-15 lower receivers in a largely automated fashion." *Ibid.*

Defense Distributed "desire[s] to share all of its 3D printing and CNC milling files online, available without cost to anyone located anywhere in the world, free of regulatory restrictions." Pet. App. 5a. In 2012, it began "post[ing] online, for free download by anyone in the world, a number of computer files, including those for the Liberator pistol." *Ibid.* In May 2013, the Department of State sent a letter to Defense Distributed requesting that those files be removed. *Id.* at 5a-6a. The Department of State explained that the posted files potentially included technical data relating to weapons on the Munitions List covered by the Regulations and that posting the files online "for foreign nationals to down-

load constitutes 'export.'" *Id.* at 7a. It accordingly directed Defense Distributed to obtain prior approval for posting the files, in accordance with the Regulations. *Ibid.*

Defense Distributed removed the files and submitted commodity-jurisdiction requests for approval to post them. Pet. App. 7a-8a. It ultimately received approval for some files, but not others. *Id.* at 8a. Defense Distributed itself has not posted new files online since, but has requested Department of State guidance on how to obtain authorization to do so—"includ[ing] the CNC milling files required to produce an AR-15 lower receiver" and "various other 3D printed weapons or weapon parts." *Ibid.* The files Defense Distributed had previously posted online, however, "continue to be shared online on third party sites," including one called "The Pirate Bay." *Ibid.*

3. Defense Distributed—joined by the Second Amendment Foundation, Inc., a nonprofit organization that "promote[s] Second Amendment rights," Pet. App. 3a (collectively petitioners)—commenced this lawsuit against the Department of State and various of its components and officials, alleging (as relevant here) that the Regulations violate the First Amendment. *Id.* at 8a-9a. Petitioners brought both "facial and as applied" challenges, contending that the Regulations' requirement of prepublication approval for privately generated unclassified data constitutes an impermissible prior restraint. *Ibid.* They sought a preliminary injunction "essentially seeking to have the district court suspend enforcement of [the Regulations'] prepublication approval

requirement pending the final resolution of this case." *Id.* at 9a.[4]

The district court denied the preliminary injunction. Pet. App. 56a-90a. Applying the traditional four-factor test for preliminary injunctions, the court determined that petitioners "face a substantial threat of irreparable injury" because "the 'loss of First Amendment freedoms'" itself necessarily "'constitutes irreparable injury.'" *Id.* at 62a-63a (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (opinion of Brennan, J.)). The court held, however, that petitioners had not "met their burden as to the" third and fourth factors—the balance of equities and the public interest—which merge here because the government's stated interest is "protecting the public by limiting access of foreign nationals to 'defense articles.'" *Id.* at 63a, 65a.

As the district court explained, although there is a "public interest in protection of constitutional rights," petitioners "fail[ed] to consider the public's keen interest in restricting the export of defense articles." Pet. App. 64a. They also "fail[ed] to account for the interest—and authority—of the President and Congress in matters of foreign policy and export." *Ibid.* The court thus concluded that preliminary injunctive relief was unwarranted, irrespective of the merits of petitioners' First Amendment claim. *Id.* at 65a. "Nonetheless, in an abundance of caution," the court discussed the merits in what the court of appeals understood to be "dicta" and concluded that petitioners also "ha[d] not shown a substantial likelihood of success" on their First Amendment claim. *Id.* at 12a, 65a, 78a; see *id.* at 68a-78a.

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[4] Petitioners also asserted violations of the Second and Fifth Amendments. Pet. App. 8a. Those claims are not at issue here.

4. The court of appeals affirmed. Pet. App. 12a-20a.[5]

a. The court of appeals held that the district court did not abuse its discretion in denying the preliminary injunction based on its finding that petitioners had not carried their burden on "two of the three non-merits requirements," *i.e.*, "the balance of harm and the public interest." Pet. App. 17a-18a; see *id.* at 12a. Petitioners, the court noted, failed both in the district court and on appeal "to give *any* weight to the public interest in national defense and national security." *Id.* at 13a. Although recognizing that "[o]rdinarily" protecting constitutional rights "*would* be the highest public interest," the court explained that "the State Department has asserted a very strong public interest in national defense and national security." *Ibid.* That "stated interest in preventing foreign nationals—including all manner of enemies of this country—from obtaining technical data on how to produce weapons and weapon parts is not merely tangentially related to national defense and national security; it lies squarely within that interest." *Id.* at 13a-14a.

The court of appeals held that the district court did not abuse its discretion in concluding that "the public interest in national defense and national security is stronger here" than petitioners' asserted interests. Pet. App. 16a. As the court of appeals explained, if a preliminary injunction were granted, petitioners "would legally be permitted to post on the [I]nternet as many * * * files as they wish," including files "for producing AR-15 lower receivers and additional 3D-printed

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[5] The appeal and this petition involve only claims against the government agencies and the official-capacity defendants, and this brief is filed on their behalf only. Claims for damages against the individual-capacity defendants are still pending in the district court.

weapons and weapon parts." *Id.* at 17a. The harm caused by such posting, the court continued, would be permanent: even if petitioners did not ultimately prevail, "the files posted in the interim would remain online essentially forever." *Ibid.* This concern, the court noted, "is not a far-fetched hypothetical"; the files initially posted by Defense Distributed remained available on foreign websites, and it "ha[d] indicated they will share additional, previously unreleased files as soon as they are permitted to do so." *Ibid.* Because those files, once released, would remain available indefinitely, "the national defense and national security interest would be harmed forever." *Ibid.* By contrast, if the denial of the preliminary injunction were affirmed and if petitioners eventually prevail on the merits, the harm to them would be only temporary. *Id.* at 16a-17a.

Because it held that "the district court did not abuse its discretion in denying [the] preliminary injunction based on their failure to carry their burden of persuasion on two of the three non-merits requirements for preliminary injunctive relief," the court of appeals "decline[d] to reach" the merits of petitioners' First Amendment claim. Pet. App. 17a-18a; see *id.* at 18a-19a & n.12. It noted that "the district court eventually will have to address the merits, and it will be able to do so with the benefit of a more fully developed record." *Id.* at 19a.

b. Judge Jones dissented. Pet. App. 20a-55a. In her view, publishing technical data on the Internet cannot constitute the "export" of that data, regardless of whether it is accessed by foreign nationals. *Id.* at 33a. Judge Jones also disagreed with the majority's failure to address the merits. *Id.* at 54a. She would have held that the Regulations' licensing scheme violates the

First Amendment and that the balance of harms tips in petitioners' favor, and would have reversed the district court. *Id.* at 37a-49a.

5. The court of appeals denied petitioners' request for rehearing en banc. Pet. App. 91a-92a. Judge Elrod, joined by Judges Jones, Smith, and Clement, filed an opinion dissenting from the denial of rehearing. *Id.* at 93a-97a. In the dissenting judges' view, the panel erred by declining to address the merits and had misapplied the public-interest and irreparable-harm factors of the preliminary-injunction standard to these facts. *Ibid.*[6]

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[6] This Office has been informed by the Department of State that it is currently developing a proposed rule that would remove certain items—including certain commercially available firearms and ammunition—from the Munitions List; such items would remain subject to regulation under the Commerce Control List of the Bureau of Industry and Security in the Department of Commerce. The Department of Commerce is concurrently developing a proposed rule specifying how such items removed from the Munitions List would be regulated under the Commerce Control List. The draft proposed rules are undergoing review and have not yet been published in the Federal Register. See Office of Information & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Office of the President, Update 2017, *Unified Agenda of Federal Regulatory & Deregulatory Actions*, RIN 1400-AE30, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=1400-AE30 (Department of State); *id.* RIN 0694-AF47, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=0694-AF47 (Department of Commerce). If the proposed rules are adopted as final rules, to the extent technical data petitioners wishe to export concern items that would be removed from the Munitions List, they may have the effect of eliminating or substantially modifying the particular prepublication-approval requirements that petitioners challenge here.

ARGUMENT

Petitioners contend (Pet. 25-32) that the court of appeals erred in affirming the denial of a preliminary injunction without addressing the merits and that its decision implicates a disagreement among the courts of appeals. The court of appeals correctly held, however, that the district court did not abuse its discretion by denying an injunction based on its determination that the balance of equities and the public interest weighed against the requested interim relief independently of the merits. That holding does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly determined that the district court did not abuse its discretion in denying the preliminary injunction petitioners requested.

a. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Instead, it "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22. "A plaintiff seeking a preliminary injunction must establish 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." *Id.* at 20.

This Court has made clear that, even if a plaintiff establishes irreparable injury and a likelihood of success on the merits, a preliminary injunction is inappropriate if the plaintiff's irreparable injury "is outweighed" by the balance of equities and the public interest, *Winter*, 555 U.S. at 23—factors that "merge when the Government is the opposing party," *Nken* v. *Holder*, 556 U.S.

418, 435 (2009). In *Winter*, the lower courts had concluded that the plaintiffs were likely to succeed on the merits in challenging the Navy's use of certain sonar technology in training exercises and that they suffered irreparable injury, and the courts entered a preliminary injunction. 555 U.S. at 17-20, 23-24. This Court reversed, concluding that, even if petitioners were likely to succeed on the merits and had shown irreparable harm, the public interest and balance of equities weighed decisively against injunctive relief. See *id.* at 23-31.

As the Court explained, "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32. Independently of the merits, "the balance of equities and consideration of the public interest * * * are pertinent in assessing the propriety of any injunctive relief." *Ibid.* Applying that principle, the Court declined to "address the lower courts' holding" regarding the merits because it determined that, "even if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors." *Id.* at 23-24. "A proper consideration of these factors alone," the Court held, "requires denial of the requested injunctive relief." *Id.* at 23; accord, *e.g.*, *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) (courts are "not mechanically obligated to grant an injunction for every violation of law," and evaluating "commonplace considerations" beyond the merits is "'a practice with a background of several hundred years of history'" (citation omitted)).

b. The lower courts correctly applied those settled principles here. The district court determined that, although petitioners faced irreparable harm based on the alleged violation of their First Amendment rights, they had not "met their burden as to the final two prongs"—the balance of equities and the public interest. Pet. App. 65a; see *id.* at 62a-65a. Petitioners "fail[ed] to consider the public's keen interest in restricting the export of defense articles" and the "interest—and authority—of the President and Congress in matters of foreign policy and export." *Id.* at 64a. The files that petitioner Defense Distributed seeks to export would allow the overseas production of (*inter alia*) "fully functional, unserialized, and untraceable metal AR-15 lower receivers in a largely automated fashion." *Id.* at 5a. The Department of State demonstrated in a detailed declaration that grave harm to national security and foreign affairs would arise if, for example, computer files originating in the United States provided such firearms components or replacement parts to transnational criminal organizations, and allowed foreign nationals to circumvent the firearms laws of our allies. C.A. ROA 571-572 (Aguirre Decl. ¶ 35). As the court of appeals observed, "[t]he district court's decision was based not on discounting [petitioners'] interest but rather on finding that the public interest in national defense and national security is stronger here." Pet. App. 16a.

Nor did the lower courts accord dispositive weight to "abstract" assertions of national-security interests, as petitioners suggest. Pet. 35. The court of appeals determined that "the State Department's stated interest in preventing foreign nationals—including all manner of enemies of this country—from obtaining technical data on how to produce weapons and weapon parts is

not merely tangentially related to national defense and security," but "lies squarely within that interest." Pet. App. 14a. The court of appeals correctly determined that the district court did not abuse its discretion in finding that those significant public and governmental interests outweighed petitioners' claimed injury. *Id.* at 16a-17a. In any event, any asserted error in the lower courts' factbound analysis of the equities here would not warrant this Court's review.

c. Petitioners contend (Pet. 25-30) that the lower courts nevertheless were required to evaluate the merits of the underlying First Amendment claim and that the court of appeals erred by affirming the denial of the preliminary injunction without doing so. Petitioners are mistaken.

As *Winter* illustrates, a court is not required in all instances to evaluate the underlying merits in ruling on a request for a preliminary injunction if the other factors weigh decisively against relief. 555 U.S. at 23-26. The Court in *Winter* expressly declined to "address" the merits of the plaintiffs' claims because the Court concluded that a preliminary injunction was inappropriate on other grounds. *Id.* at 23-24. Like the lower courts here, the Court in *Winter* held that, even assuming petitioners were likely to prevail on the merits and had suffered "irreparable injury," that "injury [was] outweighed by the public interest and the [government's] interest," *i.e.*, the balancing of equities. *Id.* at 23; see *id.* at 23-26. An analysis of the merits was unnecessary because a preliminary injunction would have been improper in any event.

Petitioners suggest (Pet. 25-30) that analysis of the merits is necessary here because petitioners alleged a First Amendment violation. The constitutional nature

of their claim, however, only further confirms that the course the lower courts adopted was appropriate. By reserving judgment on petitioner's likelihood of succeeding on the merits of its First Amendment claim and resolving the preliminary-injunction motion on other grounds, the court of appeals adhered to the "older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Pearson* v. *Callahan*, 555 U.S. 223, 241 (2009) (citations and internal quotation marks omitted); see *PDK Labs. Inc.* v. *United States Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) (noting "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more").

Petitioners assert (Pet. 27-28) that analysis of the merits is necessary in First Amendment cases because it affects the other three preliminary-injunction factors. Whatever bearing a court's analysis of the merits may have on particular factors in certain circumstances, however, it does not follow that resolving the merits is always required. To be sure, as the court of appeals noted, Pet. App. 11a-12a & n.8, Members of this Court have observed that likelihood of success in First Amendment cases affects analysis of irreparable harm because "[t]he loss of First Amendment freedoms" itself "constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (opinion of Brennan, J.). But the district court here, applying that presumption, stated that petitioner faced irreparable harm, Pet. App. 62a-63a, and the court of appeals did not revisit that conclusion, see *id.* at 11a-12a, 17a-18a. Thus, assuming that a likelihood of success on the merits on a First

Amendment claim would typically also suffice to show irreparable harm, in this case there was no need to address the merits to determine irreparable harm.

Moreover, even if assessing irreparable harm might be thought to require determining (rather than assuming) the likelihood of success on the merits in certain circumstances, analysis of the merits may still be unnecessary if the remaining factors weigh against injunctive relief. That is precisely what the court of appeals determined here. Before discussing the merits in what the court of appeals regarded as "dicta," Pet. App. 12a, the district court had determined that, "[a]ssuming without deciding that [petitioners] have suffered the loss of First * * * Amendment freedoms, they have satisfied the irreparable harm requirement because any such loss, however intangible or limited in time, constitutes irreparable injury," *id.* at 11a-12a; see *id.* at 62a-63a. The court of appeals did not question that assumption. It stated, moreover, that, "[o]rdinarily, of course, the protection of constitutional rights *would* be the highest public interest at issue in a case." *Id.* at 13a. The court of appeals merely concluded that the government had a particularly strong interest in this case, which petitioners had not rebutted, and that the district court did not abuse its discretion in concluding that the government's interest outweighed petitioners' interest. *Id.* at 13a-18a.

Petitioners further contend (Pet. 27-28) that the balance-of-equities and public-interest factors themselves cannot be assessed independently of the merits in First Amendment cases. Petitioners' contention cannot be reconciled with this Court's precedent. That the government and the public have an interest in avoiding vi-

olations of the Constitution does not mean that injunctive relief is warranted automatically whenever a plaintiff shows a likelihood of success on the merits. As this Court has explained in the context of stays of removal orders, "[o]f course there is a public interest in preventing aliens from being wrongfully removed." *Nken*, 556 U.S. at 436. "But that is no basis for the blithe assertion of an 'absence of any injury to the public interest' when a stay is granted." *Ibid.* (citation omitted). The government—and thus the public, see *id.* at 435—also frequently has countervailing interests that courts must consider and weigh. See *id.* at 436 (in the removal context, "[t]here is always a public interest in prompt execution of removal orders," because "[t]he continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings [federal law] establishe[s], and permits and prolongs a continuing violation of United States law" (brackets and internal quotation marks omitted)). So too, in the First Amendment context, even if irreparable harm is established or assumed, courts must balance that harm against the injury to the government and the public in each individual case before issuing an injunction.

Petitioners' contrary position would eviscerate the well-settled preliminary-injunction standard as applied in First Amendment cases. Their approach would mean that, once a plaintiff shows a likelihood of success on the merits, the remaining three factors—irreparable harm, balance of equities, and public interest—are necessarily satisfied as well. That approach would replace *Winter*'s familiar four-factor test, see 555 U.S. at 20, with a single inquiry into the merits of a plaintiff's First Amendment claim. And it would contravene this Court's teaching that injunctive relief "does not follow from success on

the merits as a matter of course." *Id.* at 32; accord *Romero-Barcelo*, 456 U.S. at 313.

2. Petitioners err in contending (Pet. 26-32) that the decision below implicates a lower-court conflict. The courts of appeals generally agree on the standard a plaintiff must satisfy to obtain a preliminary injunction, which places the burden on the movant to demonstrate that each factor supports relief. See *Sindicato Puertorriqueño de Trabajadores* v. *Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012) (per curiam); *New York ex rel. Schneiderman* v. *Actavis PLC*, 787 F.3d 638, 650 (2d Cir.), cert. denied, 136 S. Ct. 581 (2015); *Stilp* v. *Contino*, 613 F.3d 405, 409 (3d Cir. 2010); *WV Ass'n of Club Owners & Fraternal Servs., Inc.* v. *Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009); Pet. App. 9a-10a; *Liberty Coins, LLC* v. *Goodman*, 748 F.3d 682, 689-690 (6th Cir. 2014), cert. denied, 135 S. Ct. 950 (2015); *D.U.* v. *Rhoades*, 825 F.3d 331, 335 (7th Cir. 2016); *Child Evangelism Fellowship of Minn.* v. *Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1000 (8th Cir. 2012); *Vivid Entm't, LLC* v. *Fielding*, 774 F.3d 566, 577 (9th Cir. 2014); *Verlo* v. *Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016); *Scott* v. *Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010); *Pursuing Am.'s Greatness* v. *Federal Election Comm'n*, 831 F.3d 500, 505 (D.C. Cir. 2016).

To the government's knowledge, the only other court of appeals to address the application of that standard in the context of a First Amendment challenge to the International Traffic in Arms Regulations reached the same conclusion as the court of appeals here. In *Stagg P.C.* v. *United States Department of State*, 673 Fed. Appx. 93 (2d Cir. 2016), petition for cert. pending, No. 17-94 (filed July 17, 2017), the court of appeals affirmed

the denial of a preliminary injunction barring enforcement of the Regulations on First Amendment grounds. See *id.* at 95-97. Like the court of appeals here, the Second Circuit in *Stagg* concluded that the district court did not abuse its discretion in denying injunctive relief based on the plaintiff's failure to carry its burden of persuasion with respect to the balance of harm and the public interest, making analysis of the merits unnecessary. See *ibid.*

Petitioners point (Pet. 26-29) to language in lower-court rulings emphasizing the importance of the likelihood-of-success analysis in First Amendment cases in assessing other stay factors—particularly irreparable injury. The district court stated that petitioners had demonstrated irreparable injury based on the First Amendment nature of its claim, Pet. App. 62a-63a, and the court of appeals did not disagree, see *id.* at 11a-12a & n.8. The court of appeals further noted that, "[o]rdinarily," petitioners' claimed First Amendment injuries would be paramount, but in the equitable balance in these circumstances they were simply outweighed. *Id.* at 13a. Petitioners identify no case holding that analysis of the merits of a First Amendment challenge is necessary even if a court concludes that the balance of equities and the public interest would weigh against injunctive relief for independent reasons in any event.

Petitioners cite (Pet. 26) one case, *Sindicato Puertorriqueño*, *supra*, in which a court of appeals reversed a district-court ruling for failing to address the merits. The circumstances the First Circuit confronted in that case, however, differed critically from those here. In *Sindicato Puertorriqueño*, a labor union challenged a campaign-finance law as a violation of the First Amend-

ment. 699 F.3d at 6-7. The district court denied an injunction without addressing the merits, finding that the plaintiffs had not demonstrated irreparable injury, and it found that the balance of equities and public interest weighed against relief with "little explanation of what harm the public would suffer." *Id.* at 7. The First Circuit reversed, holding (as relevant) that, because "irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim," it was "incumbent upon the district court to engage with the merits." *Id.* at 11. It further explained that the district court's only "stated reason" for not addressing the merits—the need for a more complete record and further factual development—was unfounded given the nature of the plaintiffs' challenge. *Ibid.*

The First Circuit's decision does not conflict with the decisions below. The district court here—applying the same presumption the First Circuit endorsed—stated that petitioners demonstrated irreparable harm, Pet. App. 62a-63a, and the court of appeals did not revisit that determination, see *id.* 11a-12a, 17a-18a. A central reason that the First Circuit held that analysis of the merits was needed in *Sindicato Puertorriqueño* is therefore inapposite. Moreover, in contrast to the district court's cursory analysis of the remaining stay factors in *Sindicato Puertorriqueño*, 699 F.3d at 7, the district court and the court of appeals here each addressed the balance-of-equities and public-interest factors in detail. Pet. App. 13a-18a, 63a-65a. Further review is not warranted.

3. Petitioners briefly address (Pet. 32-34, 40-41) the merits of their underlying First Amendment challenge and suggest that this Court grant review to address that

issue. That issue does not independently warrant certiorari because, as the court of appeals held, even if petitioners were likely to succeed on the merits, that would not affect the outcome. The court of appeals declined to reach the merits precisely because it would not change the bottom-line conclusion that the district court did not abuse its discretion in denying the preliminary injunction. Pet. App. 12a, 18a-19a. Petitioners also assert no lower-court conflict on this issue.

In any event, the absence of any ruling from the court of appeals on what it described as "novel legal questions" involving the merits makes the case a poor vehicle for deciding those questions here. Pet. App. 19a. As this Court has observed, it is "'a court of review, not of first view,'" and it ordinarily "declin[es] to consider * * * in the first instance" issues not adjudicated by the court below. *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (citation omitted) (declining to address whether regulation of speech "survived First Amendment scrutiny" because lower court had not address the issue). It should adhere to that course here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[*] The Solicitor General and the Acting Assistant Attorney General are recused in this case.