No. 17-1194

In the Supreme Court of the United States

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., PETITIONERS

v.

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

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

MEMORANDUM FOR THE RESPONDENTS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Petitioners, who sought and obtained an injunction against enforcement of Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (Proclamation), ask this Court (Pet. 15-20) to grant certiorari to review the Fourth Circuit's decision affirming that injunction, and to truncate merits briefing in this case so that it can be argued together with *Trump* v. *Hawaii*, cert. granted, No. 17-965 (oral argument scheduled for Apr. 25, 2018). Granting review of the primary issues in this case and consolidating it with *Hawaii* likely would have been the appropriate course at an earlier point in time. That is the course the government pursued in the previous round of proceedings before this Court, and as petitioners are aware, the government intended to do so again if the Fourth Circuit had issued an opinion several weeks ago affirming petitioners' injunction.

But as matters now stand, the Court has granted review in *Hawaii* of all of the central legal issues in this litigation, including whether the Proclamation violates the Establishment Clause. Granting review in this case would do nothing more than add the insubstantial question whether petitioners may broaden their injunction to encompass aliens abroad who lack any bona fide relationship to persons or entities in the United States. Although granting the petition would bring no meaningful benefit to this Court's resolution of the issues, it would prejudice the government, which has filed its opening brief in *Hawaii*. Petitioners now propose that, during the same period when the government will be preparing its *Hawaii* reply brief, the government also prepare a full merits response brief in this case (on a somewhat compressed schedule) addressing virtually all of the same issues as its *Hawaii* briefing. There is no good reason to burden the Court or the government in that way. Petitioners may participate as amici in *Hawaii*. The government intends to file a cross-petition for certiorari in this case, and the petition and cross-petition should be held pending the Court's decision in *Hawaii* and then disposed of as appropriate in light of that decision.

1. The government has sought from the outset to enable the Court to resolve the central challenges to the Proclamation once and for all. After the injunctions in this case and *Hawaii* were issued, the government sought expedited consideration in the courts of appeals specifically to enable this Court to consider both cases this Term. C.A. Doc. 28, at 5 (Oct. 24, 2017) (No. 17-2231); Gov't Mot. for Entry of Expedited Briefing Schedule at 2, *Hawaii* v. *Trump*, 878 F.3d 662 (9th Cir. 2017) (No. 17-17168) (C.A. Doc. 5). When the Ninth Circuit partially denied a stay in *Hawaii*, and the Fourth Circuit

had not yet ruled on a stay, the government promptly sought relief in this Court, which stayed both injunctions in full, stating its "expectat[ion] that the Court of Appeals" in each case "w[ould] render its decision with appropriate dispatch." *Trump* v. *IRAP*, 138 S. Ct. 542 (2017); *Trump* v. *Hawaii*, 138 S. Ct. 542 (2017) (same). And after the Ninth Circuit ruled on the merits in late December 2017, the government promptly sought certiorari, see Pet., *Hawaii*, *supra* (No. 17-965), and indicated to petitioners its intention to do the same in this case if the Fourth Circuit affirmed.

When the Fourth Circuit had not issued its ruling by mid-January, however, the *Hawaii* respondents proposed adding a question addressing the Establishment Clause—which the lower courts in *Hawaii* did not address, but the district court here did. The government agreed with that proposal. Cert. Reply Br. at 9-11, *Hawaii*, *supra* (No. 17-965). As the government explained, deciding the Establishment Clause question along with the other issues in the *Hawaii* litigation "would provide much-needed clarity to the government, respondents, and the public." *Id.* at 10. In granting review in *Hawaii*, the Court added the Establishment Clause question, *Trump* v. *Hawaii*, No. 17-965 (Jan. 19, 2018), and the government addressed that question in its merits brief filed a week ago, Gov't Br. at 58-71, *Hawaii*, *supra* (No. 17-965) (Gov't *Hawaii* Br.).

Although events thus took a different path than the government had anticipated, the end result is what it has sought from the beginning: the opportunity for this Court to resolve all of the central issues concerning the challenges to the Proclamation in the current Term. It is therefore unnecessary to grant review in this case to consider the primary questions petitioners raise in the

petition. The justiciability of their statutory and Establishment Clause claims challenging the Proclamation, the merits of those claims, and whether any injunctive relief should be limited to the particular plaintiffs who challenged the Proclamation are all issues before the Court in *Hawaii*. See Gov't *Hawaii* Br. at 17-76. The usual and appropriate course in these circumstances is to hold this petition pending the Court's decision in *Hawaii*, and then to dispose of the petition as warranted in light of that decision.

2. Petitioners' two proffered reasons (Pet. 15-20) for departing from that practice and requesting duplicative merits briefing on the same issues in a separate case lack merit. First, they suggest (Pet. 17) that this case is a "[b]etter [v]ehicle" to consider the Establishment Clause issue because the lower courts in this case addressed that issue. Pet. 17-20. But the parties in *Hawaii* can address those rulings to the extent they are relevant—as the Court contemplated in adding the Establishment Clause question and as the government has done, *e.g.*, Gov't *Hawaii* Br. at 60-61, 65-71—and the Court can consider them without separately granting review.

Second, petitioners correctly contend (Pet. 15-17) that they seek broader injunctive relief than the *Hawaii* respondents. The district court here did not enjoin application of the Proclamation to aliens abroad who lack any "'bona fide relationship' to a person or entity in the United States." Pet. 15 (citing *Trump* v. *IRAP*, 137 S. Ct. 2080, 2087-2088 (2017) (per curiam)); see Pet. App. 429a-433a. Petitioners cross-appealed that ruling to the Fourth Circuit, which affirmed the scope of the district court's injunction. Pet. App. 70a-73a. In *Hawaii*, the district court's injunction extended to *all* aliens abroad, but the Ninth Circuit narrowed the injunction in that respect,

878 F.3d at 701-702, and the *Hawaii* respondents did not file a cross-petition in this Court.

Review is not warranted in this case solely to consider the application of the Proclamation to aliens abroad who lack a bona fide relationship to any person or entity in the United States, because that question does not merit certiorari. Both the Fourth and Ninth Circuits rejected petitioners' position, and for good reason. This Court previously stayed injunctions against Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017), to the extent they prevented that order from applying to aliens abroad without a bona fide relationship with a U.S. person or entity. *IRAP*, 137 S. Ct. at 2088-2089. If an alien abroad lacks such a relationship, neither he nor any U.S. person could possibly have a justiciable claim to challenge the alien's exclusion. Gov't *Hawaii* Br. at 17-30.

In any event, if the Court, after rendering its decision in *Hawaii*, believes petitioners' request for even broader relief than the Fourth and Ninth Circuits permitted warrants further consideration, it may grant this petition then. This Court's orders staying the injunctions against the Proclamation in full (see *IRAP*, 138 S. Ct. 542; *Hawaii*, 138 S. Ct. 542) mean that there is no urgency. The lack of urgency is confirmed by petitioners' failure to seek this Court's review until now. While awaiting a decision from the Fourth Circuit, and certainly after the government sought and the Court granted review in *Hawaii*, petitioners could have requested certiorari before judgment. We are now a month into the briefing in *Hawaii*, and petitioners' request simply comes too late.

3. Petitioners' request for simultaneous, duplicative merits briefing would unnecessarily complicate the

briefing process and burden the Court and the government. Their proposal (Pet. 20) to file their opening brief when the *Hawaii* respondents file their response brief would force the government—which has already voluntarily accelerated its briefing—to respond to both at the same time and on a truncated timeframe. And their proposal would mean that the Court would receive the government's principal brief, and any amicus briefs supporting the government, in this case only shortly before oral argument. The Court declined the *Hawaii* respondents' request to compress the proceedings in a similar fashion, see Br. in Opp. at 35-36, *Hawaii*, *supra* (No. 17-965), and it should do the same here.

At a minimum, however, if the Court were to grant the petition in this case, it should reject petitioners' proposed schedule. Rather than afford petitioners nearly a month to prepare their opening brief, which in turn would shorten the government's time to prepare a full merits brief in response, the Court should direct petitioners to file their opening brief promptly to minimize disruption of the briefing process and harm to the government and the Court.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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