October 5, 2017

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Donald J. Trump, et al. v. International Refugee Assistance Project, et al.*, No. 16-1436
Letter Brief of Respondents

Dear Mr. Harris:

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT

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On September 24, 2017, the President signed a proclamation imposing an indefinite ban on certain nationals of eight countries. *See Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*, 82 Fed. Reg. 45161 (Sept. 24, 2017) ("EO-3"). Pursuant to the Court's order of September 25, 2017, plaintiffs in the above-captioned case respectfully submit this letter brief addressing whether, or to what extent, EO-3 renders this case moot.

This case is not moot. Plaintiffs retain an all-too-real stake in the outcome of the case. The 90-day ban on their relatives has now been converted into an indefinite ban with the potential to separate their families, and thousands of others', for years. And the religious condemnation of the earlier Executive Order is not dissipated by EO-3, which—despite some new window dressing—continues to relay a message of disparagement to the plaintiffs and other members of their faith.

Moreover, even if the Court were to conclude that the government had voluntarily ceased the challenged conduct, the government has not met its "heavy burden" of demonstrating that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). To the contrary, the President has already repeated his wrongful behavior in EO-3, and has also made clear his preference to reinstate an even broader ban. Br. of Respondents 6 & n.8, 40 n.20. Accordingly, the case is not moot and the Court

should reschedule it for argument.

Even if Court were to determine that the government's appeal is moot, vacatur is inappropriate. Any mootness would be the result of the government's own choices. The government controlled the timing of the prior ban, and adjusted it at its pleasure. *See* June 14 Memorandum, J.A. 1442. It chose not to seek expedited merits review of the preliminary injunction. Instead, the government sought and received a stay and a schedule that allowed it to impose the entire 90-day Section 2(c) ban before this Court could decide the merits of the appeal, and then chose, about two weeks before oral argument, to issue a new ban proclamation. Where the appealing party's own conduct moots an appeal, the exceptional equitable remedy of vacatur is not warranted. The decision of the court below should be left intact.

In the alternative, the Court could conclude that even though the case is not moot, resolving the merits at this juncture may not be in the interests of judicial economy, and therefore it could dismiss the writ of certiorari as improvidently granted. EO-3 raises questions that this Court may prefer the lower courts to pass on in the first instance.

BACKGROUND

This Court granted certiorari to consider the district court's preliminary injunction of Section 2(c) of the Executive Order signed March 6, 2017. J.A. 1416-1440 ("EO-2"). As set forth more fully in the plaintiffs' merits brief, that order was itself a continuation of the basic policy and characteristics of the original Executive Order ("EO-1"). *See* Br. of Respondents 1, 3-7.

EO-3, issued on September 24, 2017, represents yet another step in the same progression from the President's promises of a Muslim Ban, to EO-1, and then to EO-2. It continues to impose bans on five of the six countries subject to Section 2(c) of EO-2: Iran, Libya, Somalia, Syria, and Yemen. It adds a ban on yet another Muslim-majority country, Chad. It also includes two non-Muslim-majority nations, North Korea and Venezuela, but their inclusion barely alters the overall effect of the ban. Virtually no North Korean nationals obtain U.S. visas even in the absence of a

ban.[1] And the narrow ban on tourist and similar visas for Venezuelans applies *only* to certain government officials and their family members. EO-3 § 2(f)(ii).

The new ban varies in the extent to which it bars the entry of individuals on nonimmigrant visas: All nonimmigrants from Syria are banned, for example; most from Iran; only some from Yemen; and none from Somalia. But the ban imposes the same across-the-board ban on immigrants from the six Muslim-majority nations (along with the near-empty set of immigrants from North Korea). EO-3 § 2.

The combined effect of Section 2(c) of EO-2, and the preliminary injunction and stay previously ordered in this case, was that as of September 23, 2017, nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen who lacked "a credible claim of a bona fide relationship with a person or entity in the United States" were banned. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam). EO-3 immediately imposes its ban on those who were banned on September 23 and are also in one of the categories banned by EO-3. EO-3 establishes an effective date of October 18 for application of its ban to all other individuals. EO-3 § 7.

EO-3 transforms what the government previously sought to portray as a "pause," Br. of Petitioners 7, 8, 45, 47, 50, 65, 66, into an indefinite ban. For plaintiffs and their clients and members, EO-3 represents potential permanent separation from loved ones, including spouses, children, parents, and siblings. And it continues to send the President's message of condemnation of Islam, a religion that he said "hates us." J.A. 766.

ARGUMENT

I. THIS CASE IS NOT MOOT.

"Article III of the Constitution restricts the power of federal courts to 'Cases' and 'Controversies.'" *Chafin v. Chafin*, 568 U.S.

[1] *See Trump's Latest Travel Order Still Looks a Lot Like a Muslim Ban*, FiveThirtyEight (Sept. 28, 2017), *available at* https://fivethirtyeight.com/features/trumps-latest-travel-order-still-looks-a-lot-like-a-muslim-ban/.

165, 171 (2013). "There is . . . no case or controversy, and a suit becomes moot, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id.* at 172 (internal quotation marks omitted). "But a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party," and "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (internal quotation marks omitted).

The issuance of EO-3 does not render this case moot because it extends rather than eliminates the challenged conduct at issue. And even if EO-3's imposition of a third version of the ban were a cessation of all the challenged conduct, the government has not shown that it is "absolutely certain" that the challenged conduct will not recur. *Friends of the Earth*, 528 U.S. at 189.

First, the case as a whole is not moot. The limited aspect currently before this Court is the government's appeal from the preliminary injunction of Section 2(c) of EO-2. But plaintiffs' suit challenges EO-2 in its entirety—not only Section 2(c)—and that dispute remains live and pending in district court. Moreover, plaintiffs are amending their complaint to add intervening facts regarding EO-3 and to challenge the updated ban.

The injuries plaintiffs assert have, if anything, become more acute because of EO-3. Jane Doe #2 and clients and members of the organizational plaintiffs now face indefinite separation. Plaintiffs remain condemned for their religion, and will be for the indefinite future. The organizational plaintiffs must confront potentially permanent diversion of their resources and impediment of their goals. Plaintiff Middle East Studies Association, for example, will feel the effects of the ban not just on this year's annual meeting, and the associated loss of revenue, but next year's, and in years beyond. Thus, even if the government's actions were to have rendered its own appeal moot, the case as a whole is not. *See* Robert L. Stern, et al., *Supreme Court Practice* 824 (8th ed. 2002) (noting that "one issue in a case, such as the right to an injunction, may become moot" while "another issue . . . may remain live").

Second, the appeal as to Section 2(c) is not moot, because the government has not satisfied the heavy burden imposed on parties who claim a dispute has been mooted by the party's own voluntary cessation of the challenged conduct. "It is well settled that 'a

defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). "If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Id.* (internal quotation marks omitted). Accordingly, voluntary cessation will only moot a case if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (internal quotation marks omitted); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.").

Thus, even where a town had wholly revised a challenged ordinance while a constitutional challenge to it was on appeal, this Court held that the case had not become moot, because the town had not demonstrated that there was no chance that it would revert to its challenged conduct. *City of Mesquite*, 455 U.S. at 289 & n.10. The Court noted that the government could attempt to "show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary," but held nonetheless that the case was not moot. *Id.* at 289 n.10; *see also Comer*, 137 S. Ct. at 2019 n.1.

The only events that might even conceivably render this appeal moot result from the government's own voluntary actions. The government chose to establish a set 90-day period for the Section 2(c) ban. It chose to issue a Presidential Memorandum providing that the ban would go into effect were this Court to stay the injunctions, even absent a ruling on the merits. *See* Br. of Respondents 10-11; J.A. 1442. It chose *not* to seek expedited merits review that could have been completed before the 90-day ban expired. And it chose to issue a proclamation just two weeks before oral argument, imposing yet a third version of its ban. The doctrine of voluntary cessation thus applies.

The government has manifestly failed to show that the challenged conduct will not recur. Indeed, the government is not just "free to return to his old ways." *Friends of the Earth*, 528 U.S. at 189 (internal quotation marks omitted). It has "*already* done so." *Ne. Florida Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993) (emphasis added). EO-

3 extends the bulk of the Section 2(c) ban. It broadly bans nationals of five of the six same countries subject to Section 2(c), a group that remains overwhelmingly Muslim. Because the government voluntarily ceased the narrow conduct at issue but at the same time reinstated effectively the same conduct in a new form, "[t]his is an *a fortiori* case" for rejecting any contention of mootness. *Id.*

That EO-3 is not identical to Section 2(c) does not alter this conclusion. *Jacksonville* lays to rest any suggestion that only the recurrence of the "*selfsame*" ban provision prevents mootness. *Id.* Rather, the question is whether the potential—or, as in *Jacksonville* and here, the actual—new conduct allegedly violates plaintiffs' rights "in the same fundamental way." *Id.*

Jacksonville was a challenge to an affirmative action ordinance. After certiorari was granted, the ordinance was replaced by a significantly different version. The new program altered the set of preferred groups; replaced a set aside with participation goals; and provided five methods, rather than one, to achieve those goals. *Id.* at 661. This Court nevertheless concluded that the "gravamen" of the plaintiffs' claim that they were disadvantaged in city contracting remained the same, so the case was not moot despite the city's "voluntary cessation." *Id.* at 662.

That conclusion applies with equal if not greater force here. The government has not ceased its challenged conduct, but has instead extended it. The gravamen of plaintiffs' case remains that the President has unconstitutionally sought to effectuate his promised ban on Muslims, and violated the governing statutes. EO-3 does not change those essential contentions. The continuity between EO-2 and EO-3 is closer and clearer than the relationship between the revoked ordinance and its replacement in *Jacksonville*. EO-3 is framed as the indefinite successor expressly contemplated in § 2 of EO-2; it continues to ban Muslim-majority countries, including five of the same six countries; and it has the same statutory infirmities as EO-2, invoking an untenably broad reading of Congress's delegation of authority in 8 U.S.C. § 1182(f) and violating the prohibition on discrimination on the basis of nationality set forth in 8 U.S.C. § 1152(a)(1)(A). Because the gravamen of plaintiffs' challenge applies to EO-3, and the government has not met its heavy burden of demonstrating with absolute certainty that its challenged conduct will not recur, the

appeal is not moot, and should be rescheduled for argument.[2]

II. IF THE COURT FINDS THE CASE MOOT, VACATUR IS INAPPROPRIATE.

If the Court concludes that the aspect of the case pending before the Court is moot, it should not vacate the judgment below.

Vacatur is an "equitable remedy" that is available only to "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance." *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (internal quotation marks omitted); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950). That remedy is "extraordinary," and may be forfeited by a party's litigation decisions. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("voluntary forfeiture of review" disentitled party from vacatur); *see also Munsingwear*, 340 U.S. at 41 (government not entitled to vacatur where it "slept on its rights").

As already explained, the government's own choices in shaping the bans at issue and litigating this case have resulted in the expiration and replacement of the Section 2(c) ban before this Court could hear the merits of the government's appeal. The government sought an immediate stay of the injunctions issued in this case and No. 16-1540, but notably did not seek an expedited merits briefing and argument schedule that would have permitted a final decision during the 90-day ban period. In fact, the government *conceded* that, if granted, a stay would effectively prevent the Court from considering the merits. Stay Reply 13. It sought, in other words, an order triggering the 90-day ban period knowing full well that the ban would expire before a decision on the merits. The government unilaterally and voluntarily altered the effective date of EO-2 as this Court was considering whether to

[2] This case also falls within "the exception to mootness for acts that are 'capable of repetition, yet evading review." *Friends of the Earth*, 528 U.S. at 170 (citing *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999)). Were the issuance of EO-3 enough to render this case moot, the President could easily do the same with regard to any challenge to EO-3 that reaches this Court; and he could repeat that process indefinitely. *See Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007) (doctrine does not require "repetition of every 'legally relevant' characteristic" of the case).

grant review. And, of course, the government chose the timing of EO-3 itself.

Vacatur is not warranted under these circumstances. To the extent the expiration of the 90-day ban and the signing of EO-3 moot the appeal, that situation is attributable to the government's "voluntary conduct." *Friends of the Earth*, 528 U.S. at 194 n.6 ("[I]t is far from clear that vacatur of the District Court's judgment would be the appropriate response to a finding of mootness on appeal brought about by the voluntary conduct of the party that lost in the District Court."). Like the losing party's decision to settle the case in *U.S. Bancorp*, the government's decisions here to delay merits review while seeking a stay, and to issue a new ban shortly before oral argument "voluntarily forfeited [its] legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering [its] claim to the equitable remedy of vacatur." 513 U.S. at 25; *see also Munsingwear,* 340 U.S. at 41.

III. IN THE ALTERNATIVE, THE COURT MAY PREFER TO DISMISS THE PETITION AS IMPROVIDENTLY GRANTED IN LIGHT OF EO-3.

Because this case is not moot, plaintiffs believe that the proper course is to restore it to the calendar for argument and decision. But the Court may prefer to dismiss the government's petition as improvidently granted in light of EO-3. *See, e.g., Sanks v. Georgia*, 401 U.S. 144 (1971) (dismissing appeal where state repealed virtually all of challenged law after Court noted probable jurisdiction); *Cook v. Hudson*, 429 U.S. 165 (1976) (per curiam) (dismissing writ in light of later-enacted statute).

As set forth above, plaintiffs maintain that EO-3 is invalid for the same reasons that EO-2 was; it delivers on President Trump's unconstitutional promise to ban Muslims, and it exceeds his statutory authority. Still, this Court is "one of final review, not of first view." *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 937 (2015) (internal quotation marks omitted). The lower courts have not had the opportunity to examine how the principles articulated in their earlier opinions apply to EO-3; nor have the parties had the opportunity to brief that question or to present a record on which it could be decided. Plaintiffs recognize that the Court may prefer to have the lower courts address EO-3 in the first

instance, should it find the case in its present posture not to be "a provident expenditure of the energies of the Court." *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 502 (1971) (Harlan, J., concurring). Accordingly, the Court may prefer to dismiss the writ as improvidently granted in light of the government's subsequent conduct. That course would leave adjudication of EO-3 to the lower courts in the first instance, and reserve this Court's review for any review of those decisions, if sought.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Respectfully submitted,

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