

**In The  
Supreme Court of the United States**

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DONALD J. TRUMP, President of the United States, et al.,

*Applicants,*

v.

STATE OF HAWAII, et al.

*Respondents.*

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MOTION FOR PERMISSION TO FILE AS AMICI CURIAE, AND  
BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT,  
DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS,  
NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND  
WASHINGTON, AND THE DISTRICT OF COLUMBIA  
AS AMICI CURIAE IN OPPOSITION TO DEFENDANTS' APPLICATION FOR  
A STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT AND PENDING FURTHER PROCEEDINGS IN THIS COURT

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Dated: November 28, 2017

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The States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia move this Court for leave to file the enclosed brief as amicus curiae in support of respondents, in opposition to the application for a stay, (i) without 10 days' advance notice to the parties of amici's intent to file as ordinarily required by Sup. Ct. R. 37.2(a), and (ii) in an unbound format on 8½-by-11-inch paper.

In light of the extremely expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice. All parties have consented to the filing of the brief without such notice.

As set forth in the enclosed brief, the undersigned amici States have a strong interest in plaintiffs' challenge to the travel ban in Proclamation No. 9645 (Add. 56-67), as well as the outcome of this stay application. Enforcement of the Proclamation's discriminatory ban on entry into the United States of nationals from six overwhelmingly Muslim countries threatens substantial and irreparable harm to the amici states and our hospitals, universities, businesses, communities, and residents. And by imposing a federal policy disfavoring Islam on the amici States, the ban also violates our profound commitments to prohibiting discrimination under our own constitutions and statutes. These harms are similar to the injuries that amici States suffered from the threat of enforcement of the similar temporary entry bans imposed by

two preceding Executive Orders—but the Proclamation’s ban is indefinite and will likely result in graver, more permanent harm.

The amici States thus have a distinct perspective on the harms threatened by the Proclamation—and the need for the preliminary injunction—that may be of considerable assistance to the Court. The States have asserted and documented these harms in numerous other cases challenging the Proclamation’s two preceding Executive Orders,<sup>1</sup> as well as briefs supporting the entry of preliminary injunctions against the previous Orders and the Proclamation at issue here, and briefs opposing any stay of such injunctions.<sup>2</sup>

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<sup>1</sup> See *Washington v. Trump*, No.17-cv-141 (W.D.Wash. 2017); Mass. & N.Y. Amicus Br. (15 States and D.C.), *Washington v. Trump*, No.17-35105 (9th Cir. 2017), ECF No.58-2; *Aziz v. Trump*, 2017 WL 580855 (E.D.Va. 2017).

<sup>2</sup> N.Y. & Ill. Amicus Br. (15 States and D.C.), *Hawaii v. Trump*, No. 17-17168 (9th Cir. Nov. 21, 2017), ECF No.71; N.Y. Amicus Br. (15 States and D.C.), *IRAP v. Trump*, No. 17-2231(L) (4th Cir. Nov. 16, 2017), ECF No.90; N.Y. & Ill. Amicus Br. (15 States and D.C.), *Hawaii v. Trump*, No. 17-17168 (9th Cir. Oct. 31, 2017), ECF Nos.15, 23; N.Y. Amicus Br. (17 States and D.C.), *Trump v. IRAP* and *Trump v. Hawaii*, Nos.16-1436, 16-1540 (U.S. Sept. 18, 2017); N.Y. Amicus Br. (15 States and D.C.), *Trump v. Hawaii*, No.16-1540 (U.S. July 18, 2017); Va. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos.16-A1190, 16A-1191 (U.S. June 12, 2017); N.Y. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos.16A-1190, 16A-1191 (U.S. June 12, 2017); Ill. Amicus Br. (16 States and D.C.), *Hawaii v. Trump*, No.17-15589 (9th Cir. Apr. 20, 2017), ECF No.125; Va. & Md. Amicus Br. (16 States and D.C.), *IRAP v. Trump*, No.17-1351 (4th Cir. Apr. 19, 2017), ECF No.153.

Pursuant to Supreme Court Rule 37.1, the undersigned amici States therefore seek to file this brief in order to support respondents' showing that the injunction entered by the district court was proper in view of the Proclamation's violations of law and actual and threatened harms, and that no further stay should be granted beyond the partial stay already entered by the Ninth Circuit.

### CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief in opposition to the application for a stay.

Dated: New York, New York  
November 28, 2017

Respectfully submitted,  
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## INTRODUCTION AND INTERESTS OF AMICI

The States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia submit this brief as amici curiae in opposition to defendants' application to stay a preliminary injunction partially restraining them from enforcing a discriminatory ban on entry into the United States. The portion of the injunction that defendants ask this Court to stay (the rest having already been stayed by the Ninth Circuit) restrains enforcement of the ban against certain "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." (Stay Application Add.1 (quoting *Trump v. IRAP*, 137 S.Ct. 2080, 2088 (2017))). Defendants seek the stay for the duration of their appeal of the preliminary injunction in the Ninth Circuit, plus any possible future proceedings in this Court.

The underlying case is a challenge by the State of Hawaii and other plaintiffs to Proclamation No.9645: the third in a series of presidential orders executed this year that imposed discriminatory bans on the entry into the United States of nationals from six overwhelmingly Muslim countries.<sup>1</sup> The

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<sup>1</sup> See Proclamation No.9645, §2(a)-(c),(e),(g)-(h) (Sept. 24, 2017), 82 Fed.Reg. 45,161 (Sept. 27, 2017); see also Executive Order No.13,780, §§2(c), 6(a)-(b) (Mar.

United States District Court for the District of Hawaii (Watson, J.) issued a preliminary injunction partially enjoining the ban based on plaintiffs' showing of irreparable injury absent an injunction, the balance of the equities, and plaintiffs' strong showing of likely success on the merits of their claims under the Immigration and Nationality Act.<sup>2</sup> (Add.3-44.)

Consistent with the stay this Court previously granted defendants in litigation challenging the Proclamation's predecessor travel bans, *see* 137 S.Ct. at 2088, the Ninth Circuit granted defendants a partial stay as to foreign nationals lacking "a credible claim of a bona fide relationship with a person or entity in the United States" (Add.1). Defendants' request to stay the remaining portion of the injunction should be denied because they have not demonstrated that such a stay is warranted. Indeed, their request directly conflicts with this Court's balancing of the equities in *IRAP*.

Amici offer the perspective and experience of 15 additional sovereign States and the District of Columbia. Like its predecessors, the Proclamation's entry ban gravely and irreparably harms our universities, hospitals,

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6, 2017) (Add.45-55); Executive Order No.13,769, §§3(c), 5(a)-(c), (e) (Jan. 27, 2017), 82 Fed.Reg. 8,977 (Feb. 1, 2017).

<sup>2</sup> The injunction does not cover provisions barring entry of a limited number of government officials from Venezuela and all North Korean nationals. *See* Proclamation §2(d),(f).

businesses, and residents. The injunction—even as narrowed by the Ninth Circuit’s stay—provides critical protection against those injuries.

Amici States thus have a strong interest in plaintiffs’ challenges to the Proclamation’s entry ban, as well as the outcome of the stay application. Indeed, many of us have brought suits challenging the two preceding Executive Orders on the grounds that certain aspects of those Orders violated the Establishment Clause and various other constitutional and statutory provisions.<sup>3</sup> We have also previously filed briefs as amici curiae in this and related cases, including briefs supporting the entry of preliminary injunctions against the previous Orders and the Proclamation at issue here, and briefs opposing any stay of such injunctions (including in this Court).<sup>4</sup>

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<sup>3</sup> Many of the amici States challenged the March Order in *Washington v. Trump*, No.17-cv-141 (W.D.Wash. 2017). They challenged the January Order in *Washington v. Trump*, No.17-cv-141 (W.D.Wash. 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); Mass. & N.Y. Amicus Br. (15 States, D.C.), *Washington v. Trump*, No.17-35105 (9th Cir. 2017), ECF No.58-2; *Aziz v. Trump*, 2017 WL 580855 (E.D.Va. 2017).

<sup>4</sup> N.Y. & Ill. Amicus Br. (15 States, D.C.), *Hawaii v. Trump*, No. 17-17168 (9th Cir.), ECF No.71; N.Y. Amicus Br. (15 States, D.C.), *IRAP v. Trump*, No. 17-2231(L) (4th Cir.), ECF No.90; N.Y. & Ill. Amicus Br. (15 States, D.C.), *Hawaii v. Trump*, No. 17-17168 (9th Cir.), ECF Nos.15, 23; N.Y. Amicus Br. (17 States, D.C.), *Trump v. IRAP*, *Trump v. Hawaii*, Nos.16-1436, 16-1540 (U.S. Sept. 2017); N.Y. Amicus Br. (15 States, D.C.), *Trump v. Hawaii*, No.16-1540 (U.S. July 2017); Va. Amicus Br. (16 States, D.C.), *Trump v. IRAP*, Nos.16-A1190, 16A-1191 (U.S. June 2017); N.Y. Amicus Br. (16 States, D.C.), *Trump v. IRAP*, Nos.16A-1190, 16A-1191 (U.S. June 2017); Ill. Amicus Br. (16 States, D.C.), *Hawaii v. Trump*, No.17-15589 (9th Cir.), ECF No.125; Va. & Md. Amicus Br. (16 States, D.C.), *IRAP v. Trump*, No.17-1351 (4th Cir.), ECF No.153.

All of amici States benefit from immigration, tourism, and international travel by students, academics, skilled professionals, and businesspeople. The disputed provisions of the Proclamation—like the previous bans—significantly disrupts the ability of our States’ public universities to recruit and retain students and faculty, impairing academic staffing and research, and causing the loss of tuition and tax revenues, among other costs. The Proclamation also disrupts the provision of medical care at our hospitals and harms our science, technology, finance, and tourism industries by inhibiting the free exchange of information, ideas, and talent between the designated countries and our States, causing long-term economic and reputational damage. In addition, the ban has made it more difficult for us to effectuate our own constitutional and statutory policies of religious tolerance and nondiscrimination.

If this Court grants a complete stay of the injunction, amici States will face further immediate, concrete and likely permanent harms from the disputed provisions of the Proclamation. Accordingly, we have a strong interest in ensuring that the protection provided by the nationwide injunction that is currently in place continues throughout the course of this litigation.

## ARGUMENT

### I. THE PROCLAMATION PERPETUATES, AND MAKES PERMANENT, THE HARM INFLICTED BY ITS PREDECESSOR ORDERS.

#### A. Harms to Amici States' Proprietary Interests.

The disputed provisions of the Proclamation block the entry of all immigrants and most nonimmigrants from six Muslim-majority countries,<sup>5</sup> including those who seek to be students and faculty at our public universities, physicians and researchers at our medical institutions, employees of our businesses, and guests who contribute to our economies when they come here as tourists or for family visits.<sup>6</sup> The provisions thus irreparably harm the work of our state institutions and treasuries.<sup>7</sup> *See Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (recognizing such harms); *Hawaii v. Trump*, 859 F.3d 741, 783 (9th Cir.) (same), *cert. granted*, 137 S.Ct. 2080, *vacated and remanded*, 2017 WL 4782860 (2017).

***Harms to State Colleges and Universities.*** State colleges and universities rely on faculty and students from across the world. By interfering

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<sup>5</sup> Five of these countries were covered under the previous travel bans: Iran, Libya, Somalia, Syria, and Yemen. The sixth country is Chad.

<sup>6</sup> *See* §2(a)-(c), (e), (g)-(h).

<sup>7</sup> All of the amici States support the legal arguments put forth in this brief, although not every specified harm occurs in every State.



with the entry of individuals from the designated countries, the disputed provisions of the Proclamation continue to seriously disrupt our public institutions' ability to recruit and retain students and faculty—causing lost tuition revenue, increased administrative burdens, and the expenditure of additional university resources.<sup>8</sup>

As with the two previous bans, announcement of the Proclamation's ban creates serious doubt about whether faculty from the designated countries will be able to obtain the visas they need to timely assume positions with public universities in amici States.<sup>9</sup> For example, officials at the University of Massachusetts—which typically hires a dozen new employees from the affected countries annually—are concerned that the Proclamation's now indefinite entry ban will result in the University being “permanently unable to hire top-ranked potential faculty, lecturers or visiting scholars from the affected countries, because [the Proclamation] may preclude them from reaching the United States to fulfill their teaching obligations.”<sup>10</sup>

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<sup>8</sup> See Third Am. Compl. ¶¶41, 43-44, 53, 55-56, 80, 93, 105, 107-108, 125, *Washington v. Trump*, No.17-cv-141 (W.D.Wash.), ECF No.198.

<sup>9</sup> See, e.g., *id.* ¶40.

<sup>10</sup> *Id.* ¶93.

The Proclamation's ban also continues to disrupt the ability of our universities to recruit and retain foreign students from the designated countries, imperiling hundreds of millions of tuition dollars and other revenue generated from such students, as well as important academic research projects.<sup>11</sup>

Before this series of bans was implemented, amici States' universities had already made numerous offers of admission 2017-2018 to students from the affected countries and—but for the bans' interference with their continuing admissions process—might have admitted many more.<sup>12</sup> Some schools are continuing to make such offers, including to students from nations designated in the Proclamation. But some of these students have withdrawn applications; others have had to abandon entirely their plans to enroll in our programs; and many have chosen not to apply at all, resulting in a significant decline in international student applications at many of amici States' universities.<sup>13</sup>

Indeed, in this climate of uncertainty and discrimination, forty percent of colleges surveyed across the nation reported a drop in applications from

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<sup>11</sup> *Id.* ¶¶38, 43-46, 53, 57, 86, 94-95, 105, 107, 112.

<sup>12</sup> *Id.* ¶¶43-44.

<sup>13</sup> *Id.* ¶¶37, 46, 53, 122.

foreign students in the wake of the first two bans.<sup>14</sup> Graduate departments in science and engineering have reported that “international student applications for many programs declined by 20 to 30 percent for 2017 programs.”<sup>15</sup> Additionally, 80 percent of college admissions officials surveyed have serious concerns about future application yields from international students.<sup>16</sup> Not surprisingly, countries that are perceived as more welcoming have already seen a jump in applications in this same time period.<sup>17</sup> This drain of highly qualified student talent will continue under the Proclamation.

The ability of state institutions of higher education to retain existing foreign students and faculty is also compromised by the Proclamation’s broad, continuing ban. Amici States’ currently have hundreds of students and faculty members from the targeted countries. For example, Washington State University has 140 such students and 9 faculty members.<sup>18</sup> The University of

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<sup>14</sup> See Kirk Carapezza, *Travel Ban’s ‘Chilling Effect’ Could Cost Universities Hundreds of Millions*, Nat’l Pub. Radio (Apr. 7, 2017) (internet). (For authorities available on the internet, full URLs are listed in the table of authorities.)

<sup>15</sup> Sam Petulla, *Entry Ban Could Cause Doctor Shortages in Trump Territory, New Research Finds*, NBC News (Mar. 7, 2017) (internet).

<sup>16</sup> Carapezza, *supra*.

<sup>17</sup> *Id.*

<sup>18</sup> Third Am. Compl. ¶¶35-36.

Massachusetts has 180 similarly situated students and 25 employees.<sup>19</sup> There are 529 such students in the University of California system; 297 at the State University of New York; and 61 at Portland State University.<sup>20</sup>

Many of these students will need to apply for additional visas during the course of their studies because only single-entry visas are permitted from some of the affected countries, and because the visas are valid only for relatively short periods.<sup>21</sup> And those students and faculty members will face obstacles to renewal—if renewal is even possible under the disputed provisions of the Proclamation, which prohibit the issuance of most nonimmigrant visas for nationals of the affected countries.

Thus, if enforcement of those provisions is permitted, certain students who are no longer eligible for student visas (e.g., Syrians) may be required to discontinue their studies. Other students will face the prospect of not knowing whether they may be denied access to the institutions where they are studying, particularly if the Proclamation calls for them to be subject to heightened

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<sup>19</sup> *Id.* ¶¶91, 94.

<sup>20</sup> *Id.* ¶¶53, 58, 108, 124.

<sup>21</sup> U.S. Department of State, Bureau of Consular Affairs, *Reciprocity and Civil Documents by Country* (internet) (search by country and visa types F, M).

vetting (e.g., Iranians and Somalis).<sup>22</sup> Any such visa delays or denials could jeopardize not only these individuals' education or employment, but also any grant funding and research projects that depend on their work.<sup>23</sup>

Individuals whose visas remain valid for a longer duration will also be affected. The presumption of exclusion created by the ban may chill them from participating in educational, professional, or personal obligations that require travel outside the country. And while in the United States, they will face the hardship of being unable to receive visits from overseas parents, spouses, children, and other relatives.<sup>24</sup> Indeed, many faculty members at amici States' universities are contemplating leaving their current positions for opportunities in more welcoming countries in the wake of the Proclamation's now indefinite ban.<sup>25</sup>

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<sup>22</sup> Although the Proclamation gives consular officers discretion to permit entry in individual cases, it does not describe the process for applying for a waiver, specify a time frame for receiving a waiver, or set concrete guidelines for its issuance beyond providing a list of circumstances in which waivers "may be appropriate." §3(c). And there is no reason to believe that waivers are likely to be issued in the ordinary course because the ultimate decision on whether to issue it lies solely within a consular official's discretion. *See id.*

<sup>23</sup> Third Am. Compl. ¶¶36, 42, 55, 91, 94.

<sup>24</sup> *Id.* ¶¶37-38, 54, 78-79, 91, 94, 107, 109-110, 112, 123.

<sup>25</sup> *Id.* ¶¶38, 42, 111.

The foreign-national scholars employed by or recruited by our universities typically have specialized expertise that cannot easily be replaced. Universities that are delayed in or prevented from recruiting international faculty and staff thus suffer significant financial and reputational harm, including delayed or lost federal funding for research efforts.<sup>26</sup> Our educational institutions have needed to expend considerable amounts of scarce resources to make contingency plans for filling unexpected gaps in faculty rosters caused by the exclusion or possible departure of scholars from the designated countries. Despite this effort, there is reason to doubt that our universities will be able to meet all of their needs.<sup>27</sup>

While public universities are always subject to federal immigration law and policy, these successive bans have injured them unexpectedly, by upending with no advance notice the established framework around which they have designed their faculty recruitment and student enrollment processes.<sup>28</sup> As explained above, this has left seats unfilled, tuition dollars irretrievably lost, and important academic programs and research in peril. It has also inhibited

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<sup>26</sup> *Id.* ¶¶38, 43-44, 55, 105-106, 112.

<sup>27</sup> *Id.* ¶55 (California universities’ ability to do so “disrupt[ed]”); *id.* ¶93 (University of Massachusetts’s ability “to hire top-ranked” faculty “severely” impacted).

<sup>28</sup> *See* Petulla, *supra*.

the free exchange of information, ideas, and talent that is so essential to academic life and our state universities’ missions—by causing the loss of students and faculty from the affected nations.<sup>29</sup>

***Harms to State Hospitals and Medical Institutions.*** The disputed provisions of the Proclamation, like the previous bans, have created staffing disruptions in state medical institutions, which employ physicians, medical residents, researchers, and other professionals from the designated countries.<sup>30</sup>

For example, foreign-national residents at public hospitals often provide crucial services, such as caring for some of the most underserved populations in our States.<sup>31</sup> They are assigned to our state university hospital residency programs through a computerized “match” that, after applications and interviews, ranks and assigns candidates to programs nationwide; programs and candidates are advised of match results in the spring of each calendar year and all new residents begin their positions on July 1.<sup>32</sup>

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<sup>29</sup> Third Am. Compl. ¶¶38, 105-106.

<sup>30</sup> *Id.* ¶127.

<sup>31</sup> *Id.* ¶115.

<sup>32</sup> *Id.* ¶116.

Many programs regularly match residents from the affected countries. If a program's matched residents are precluded from obtaining a visa under the Proclamation, as many of them were under the predecessor bans, the program risks having an insufficient number of residents to meet staffing needs.<sup>33</sup> This continuing uncertainty is of particular concern in view of the indefinite duration of the Proclamation's ban. The practical effect of this dilemma is that our state programs may not be able rank highly-qualified candidates from the designated countries going forward, because there is substantial reason to believe that they will not be able to begin their residencies.<sup>34</sup> Indeed, programs are at this very moment in the process of interviewing candidates for next year's match.<sup>35</sup>

In addition, if current residents who are nationals of the designated countries cannot renew or extend their visas—as the Proclamation threatens—state university residency programs will be unable to continue to employ them; these multiyear programs will then be left with unfilled positions, and further staffing gaps will result.<sup>36</sup> Such disruptions will translate into uncertainty in

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<sup>33</sup> See Petulla, *supra*.

<sup>34</sup> Third Am. Compl. ¶¶60, 115, 127.

<sup>35</sup> *Id.* ¶115.

<sup>36</sup> *Id.*



residency training programs, as well as threats to the quality of health care services.<sup>37</sup> And because patients at our medical facilities must be cared for, our facilities must quickly adapt to any staffing complications resulting from the disputed provisions of the Proclamation—and must spend precious time and resources preparing to do so.<sup>38</sup>

***Diminished Tax Revenues and Broader Economic Harms.*** In addition to losing the tuition and other fees paid by students at our universities, amici States have suffered—and will continue to suffer—other direct and substantial economic losses as a result of the disputed provisions of the Proclamation, just as we did under its predecessors. Every foreign student, tourist, and business visitor arriving in our States contributes to our economies through their purchases of our goods and services and the tax receipts that their presence generates. Despite the present injunction, and those that were issued against the predecessor Orders, this series of successive bans during the past ten months has blocked or dissuaded thousands of individuals—potential consumers all—from entering amici States, thereby eliminating the significant tax contributions those individuals would have made.<sup>39</sup> That lost revenue will

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<sup>37</sup> See *infra* pp.18-20.

<sup>38</sup> Third Am. Compl. ¶59 (shortage of “even one physician” can have “serious implications” in underserved areas).

<sup>39</sup> See *id.* ¶¶31-32, 62, 75, 87-88, 120-121.

never be recovered and the lasting economic damage cannot be undone, even if plaintiffs ultimately prevail.

The contribution of foreign students alone to our States' economies is immense. A survey conducted in the months following the issuance of the initial ban found that "more than 15,000 students enrolled at U.S. universities during 2015-2016 were from the [six] countries named in" the revised Executive Order; more than half of those students attended institutions in amici States and Hawaii; and, nationwide, "these students contributed \$496 million to the U.S. economy, including tuition, room and board and other spending."<sup>40</sup> For example, in both New York and Illinois, nearly 1,000 nationals from the countries designated in the revised Order were studying in 2015-2016 in each State, and they collectively contributed approximately \$30 million to each State's economy.<sup>41</sup> And such figures do not even begin to account for the indirect economic benefits to our States, such as the contributions of international students and scholars to innovation in academic and medical research.

Tourism is also a critical component of amici States' economies. As a result of the successive bans, including the ban announced in the

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<sup>40</sup> Institute of Int'l Educ., *Advising International Students in an Age of Anxiety* 3 (Mar. 31, 2017) (internet).

<sup>41</sup> *See id.* at app. 1.

Proclamation, an estimated 4.3 million fewer tourists are expected to visit the country this year, resulting in \$7.4 billion in lost revenue; in 2018, those numbers will increase to 6.3 million fewer tourists and \$10.8 billion in lost revenue.<sup>42</sup> This reduction results from trips that were prohibited by the parts of the initial bans that were not enjoined, or because individual travelers were deterred by fear that the previous injunctions would be lifted. The now indefinite ban may also lead to the loss of hundreds of thousands of tourism-related jobs held by our residents.<sup>43</sup>

Absent relief from the courts, including interim relief, these broad chilling effects will likely continue.<sup>44</sup> This is hardly surprising in view of defendants' clear message to the world that foreign visitors—particularly those from certain regions, countries, or religions—are unwelcome. Indeed, the disputed provisions of the Proclamation have made this message clearer and more permanent.

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<sup>42</sup> See Abha Bhattarai, *Even Canadians are Skipping Trips to the U.S. After Trump Travel Ban*, Wash. Post (Apr. 14, 2017) (internet); see also Third Am. Compl. ¶¶30-32 (“chilling effect” on tourism in Washington); *id.* ¶¶52, 61 (decreased tourist travel to California and consequent significant losses in tourism revenues).

<sup>43</sup> Third Am. Compl. ¶¶63-64 (Los Angeles tourism board projecting \$220 million loss in tourism revenue in 2017, jeopardizing hundreds of thousands of tourism-related jobs held by City’s residents).

<sup>44</sup> Alana Wise, *Travel to the United States Rose in April, But Industry Remains Wary*, Reuters (June 6, 2017) (internet).

These provisions also continue the profound harms that the predecessor bans have inflicted on amici States’ ability to remain internationally competitive destinations for businesses in science, technology, finance, and health care, as well as for entrepreneurs. Even a temporary disruption in our ability to attract the best-qualified individuals and entities worldwide—including from the affected countries—puts the institutions and businesses in our States at a competitive disadvantage in the global marketplace, particularly where the excluded individuals possess specialized skills.<sup>45</sup> And now that the initially temporary bans have become an indefinite ban, defendants’ message of intolerance more deeply threatens amici States’ ability to attract and retain the foreign professionals, entrepreneurs, and companies that are vital to our economies.

Thus, as the experience of amici States shows, our States and our residents have been subjected to widespread, particularized, and well-documented harm from the moment the first ban was announced through today—and likely for the foreseeable future.

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<sup>45</sup> See Third Am. Compl. ¶¶18-23, 33, 51-52, 69-70, 74, 86-87, 113, 118, 120-123.

## **B. Harms to the Amici States' Sovereign and Quasi-Sovereign Interests**

*Decreased Effectiveness of Anti-Discrimination Laws.* The amici States have exercised their sovereign prerogatives to adopt constitutional provisions and statutes protecting their residents from discrimination. These laws prohibit our residents and businesses—and, indeed, many of amici States ourselves—from taking national origin and religion into account when extending employment offers and other opportunities.<sup>46</sup> The disputed provisions of the Proclamation interfere with the effectiveness of these laws by encouraging discrimination against Muslims in general, and nationals of the affected countries in particular.

*Harms to Residents Seeking Medical Care.* Like its predecessors, the Proclamation's ban will harm residents seeking medical care in our States, particularly those in underserved communities. The countries designated in the Proclamation are important sources of physicians who provide health care

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<sup>46</sup> See, e.g., Cal. Const. art.I, §§4,7-8,31; Cal. Civ. Code §51(b); Cal. Gov't Code §§11135-11137,12900 et seq.; Conn. Gen. Stat. §46a-60; 19 Del. Code §710 et seq.; Ill. Const. art. I, §§3,17; 740 Ill. Comp. Stat. 23/5(a)(1); 775 Ill. Comp. Stat. 5/1-102(A); 775 Ill. Comp. Stat. 5/10-104(A)(1); 5 Me. Rev. Stat. §§784, 4551-4634; Md. Code, State Gov't §20-606; Mass. Gen. L. ch.93, §102; Mass. Gen. L. ch.151B, §§1,4; N.M. Const. art.II, §11; N.M. Stat. §28-1-7; Or. Rev. Stat. §659A.006(1); R.I. Gen. Laws §28-5-7(1)(i); 9 Vt. Stat. §§4500-4507; 21 Vt. Stat. §495; Wash. Rev. Code §49.60.030(1).

to our residents, particularly in underserved areas of our States.<sup>47</sup> The current ban will thus impede amici States' efforts to recruit and retain providers of essential primary care, dental, and mental health services.<sup>48</sup> In New York, safety-net hospitals rely heavily on foreign-national physicians.<sup>49</sup> Indeed, many such physicians work in primary care at a time when primary care physicians are in short supply in many areas across the country.<sup>50</sup>

At least 7,000 physicians practicing in the United States attended medical school in one of the six countries designated in the previous Executive Orders (five of which remain designated in the current Proclamation), and these physicians provide 14 million appointments a year, 2.3 million of which are in areas with “a shortage of medical residents and doctors.”<sup>51</sup> When physicians from the designated countries are unable to commence or continue their employment at public hospitals, those staffing disruptions will result in

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<sup>47</sup> See Third Am. Compl. ¶26 (nearly 200 such physicians in Washington); *id.* ¶58 (191 such physicians in California); *id.* ¶114 (500 such physicians in New York).

<sup>48</sup> *Id.* ¶¶27-28, 58, 128-129.

<sup>49</sup> *Id.* ¶¶114, 116.

<sup>50</sup> *Id.* ¶¶27, 58-59, 116, 128-129.

<sup>51</sup> Immigrant Doctors Project, <https://immigrantdoctors.org>; see also Anna Maria Barry-Jester, *Trump's New Travel Ban Could Affect Doctors, Especially in the Rust Belt and Appalachia*, FiveThirtyEight (Mar. 6, 2017) (internet).

serious risks to the quality of our health care services and put the public health of our communities at risk.<sup>52</sup> Even before defendants made permanent the latest version of the ban through issuance of the Proclamation at issue here, researchers had concluded that the federal government’s travel restrictions were likely to hurt the health of millions of Americans who rely on physicians trained in the designated countries.<sup>53</sup>

## **II. DEFENDANTS HAVE NOT DEMONSTRATED THAT AN INTERIM STAY IS WARRANTED.**

In consolidated challenges to the most recent of the Proclamation’s predecessor bans, this Court concluded that defendants failed to meet their burden of showing that a complete stay of the preliminary injunction restraining that ban was necessary to avoid irreparable injury to their interests. Accordingly, the Court issued only a partial stay, permitting defendants to enforce the prior ban against foreign nationals lacking “a credible claim of a bona fide relationship with a person or entity in the United States.” 137 S.Ct. at 2088. In considering the “balance of the equities,” this

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<sup>52</sup> See Third Am. Compl. ¶¶27, 58-59, 116, 128.

<sup>53</sup> See Maryam Saleh, *Hospitals in Trump Country Suffer As Muslim Doctors Denied Visas to U.S.*, The Intercept (Aug. 17, 2017) (internet).

Court carefully evaluated “the relative harms” to the parties, “as well as the interests of the public at large.” *Id.* at 2087 (quotation marks omitted).<sup>54</sup>

A stay “is not a matter of right,” and the party requesting it “bears the burden of showing that the circumstances justify an exercise of that discretion.” *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). Defendants have once again failed to make the requisite showing that a complete stay is warranted here.

**A. The Harms, Equities, and Public Interest Strongly Favor Denial of the Requested Stay.**

The harms that the Proclamation has inflicted and threatens to inflict on amici States and their residents (*supra*, Point I) are representative of the injuries experienced by plaintiffs here. *See* 556 U.S. at 434 (considering whether a stay “will substantially injure” other interested parties).<sup>55</sup> The

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<sup>54</sup> *See also I.N.S. v. Legalization Assistance Project*, 510 U.S. 1301, 1304 (1993) (O’Connor, J., in chambers) (consideration of stay applications on matters pending before the Court of Appeals must include “balanc[ing] the so-called stay equities”).

<sup>55</sup> These harms also underscore plaintiffs’ standing to sue. As employers, our state universities are in many cases the entities directly petitioning for approval of a potential employee’s entry into the country, bringing them directly within the ambit of the INA. *See* N.Y. Amicus Br. (17 States, D.C.), at 26-30 (discussing that point), Nos.16-1436, 16-1540 (U.S. Sept. 2017). Defendants continue to ignore this fact but appear to concede (Stay App.23 n.8) that only “U.S. persons and entities that the INA does not permit to petition for an alien’s immigration status have no enforceable statutory rights.”



district court correctly found that plaintiffs would be irreparably injured if the Proclamation's disputed provisions were permitted to go into effect, given the threat of "prolonged separation from family members" and the "constraints" that the Proclamation places on Hawaii's ability to recruit and retain certain international students and faculty. (Add.40.) As the Ninth Circuit correctly recognized in prior litigation, these particular injuries "are not compensable with monetary damages" and therefore constitute irreparable harm. 859 F.3d at 782-83.

Consideration of the public interest also favors denying defendants' requested stay. Although defendants assert that the "only concrete harm" here is the exclusion of a few specific individuals (Stay App.37), their series of travel bans has inflicted well-documented, widespread and particularized harms on plaintiffs and many others—including amici States and our residents. As the Ninth Circuit recognized earlier in this litigation, those harms, which the Proclamation renews, included injuries to "state colleges, disrupti[on in] staffing and research in state medical institutions, and reduc[tion of] tax revenues." 859 F.3d at 785; *see also* 137 S.Ct. at 2088 (preserving injunction "with respect to parties similarly situated to" plaintiffs).

The Proclamation's other serious threatened harms include its indefinite obstruction of family visits for the individual plaintiffs and others, including

our States’ residents.<sup>56</sup> As this Court recently recognized, such deprivations may constitute a constitutionally cognizable hardship to the affected U.S.–based persons. 137 S.Ct. at 2087-88; *see also* 859 F.3d at 785 (recognizing that prior injunction served public interest in uniting families). Moreover, the exclusions at issue hinder amici States’ ability to prohibit discrimination under their own constitutions and statutes,<sup>57</sup> and to protect their residents to the extent allowed under other federal laws. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607-08 (1982) (recognizing State’s interests in ensuring its residents are “not excluded from benefits that are to flow from participation in the federal system” and “securing observance of the terms under which it participates in” that system).

These are some of the very same interests that the preliminary injunctions issued in the earlier litigation were designed to protect, and that this Court carefully sought to protect when leaving certain portions of those injunctions in place with respect to “foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.” 137 S.Ct. at 2088. No different result is required now. Indeed, the Ninth Circuit adopted the precise balancing previously struck by this Court.

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<sup>56</sup> *See* Third Am. Compl. ¶¶24-25, 104-105 (examples of Washington and New York residents).

<sup>57</sup> *See supra* p.18.

On the other side of the equation, defendants have not demonstrated that a complete stay of the injunction is necessary to prevent irreparable harm to their interests. Defendants’ generalized claim of harm to national security (Stay App.34-36) is abstract and conclusory—unlike the concrete and particularized harms to amici States and their residents outlined above. For example, defendants have identified no specific urgency warranting immediate implementation of the disputed provisions of the Proclamation, nor do they claim any adverse result from the injunction thus far (or any of the prior injunctions for that matter).

Indeed, defendants’ assertions of harm to national security interests are substantially undermined by several factors. *First*, the terms of the Proclamation itself contain internal inconsistencies that “markedly undermine its national security rationale.” (Add.33-36.) For instance, not every country that failed to meet the Proclamation’s stated criteria is included in the ban—and even with respect to the some of the designated countries, not every category of travelers is presumptively barred from entry (*Id.*) *Second*, the Proclamation itself delayed implementation of its ban for approximately one month, undermining defendants’ suggestion that a short stay of the Proclamation would cause irreparable harm. *See* §7(a) (signed on September 24, but setting effective date as either October 18 or October 24). *Third*, defendants’ assertions fail to account for current immigration law’s

individualized vetting process, which already permits the exclusion of foreign nationals who present a national security concern or about whom defendants lack adequate information.<sup>58</sup> (Add.32-33). Thus, continuing to enjoin the disputed provisions of the Proclamation simply “restores immigration procedures and programs to the position they were in prior to its issuance.” 859 F.3d at 783; *see also Washington*, 847 F.3d at 1168 (finding that interim relief enjoining provisions of first ban “merely returned the nation...to the position it has occupied for many previous years”).

In sum, although this Court recognized in the earlier litigation that national security is a compelling government interest, it found that interest insufficient to justify enforcement of the ban on an interim basis against anyone but “foreign nationals unconnected to the United States.” 137 S.Ct. at 2088. Only there would preventing enforcement “appreciably injure [defendants’] interests without alleviating obvious hardship to anyone else.” *Id.*

The balance of the equities here thus tips decidedly in favor of denying defendants’ request. While defendants have identified no appreciable harm that the injunction (particularly as modified by the Ninth Circuit’s stay) will

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<sup>58</sup> *See, e.g.*, 8 U.S.C. §1182(a)(3) (inadmissibility of aliens for terrorist activities and other security grounds); *id.* §1182(a)(7) (inadmissibility of aliens who fail to meet documentation requirements).

cause to their interests, a complete stay of the district court’s order would allow further irreparable harm to be imposed on amici States and our residents. Accordingly, the status quo should be preserved while this litigation continues.<sup>59</sup>

**B. The Scope of the Injunction Is Proper in View of the Proclamation’s Violations and Actual and Threatened Harms.**

The preliminary injunction entered by the district court was appropriately crafted to restrain the systemic, nationwide harm perpetuated by the disputed provisions of the Proclamation, including the harms to amici States. Although defendants claim that any injunction here must be limited to redressing only plaintiffs’ individual injuries (Stay App.38-40), the numerous actual and threatened harms to amici States exemplify the public interests affected and thus underscore the appropriateness of the injunction’s nationwide scope, as well as the Ninth Circuit’s refusal to stay the injunction in the way that defendants seek.

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<sup>59</sup> For the reasons discussed by plaintiffs (Pl.Opp.), defendants’ request is also not supported by the other relevant factor here—the stay applicant’s likelihood of success on the merits after any possible grant of certiorari, *see Legal Assistance Project*, 510 U.S. at 1304; *Nken*, 556 U.S. at 434. And even if there were room for doubt about the ultimate merits of plaintiffs’ challenge, that still would not outweigh the weakness of defendants’ position on the other stay factors. *See IRAP*, 137 S.Ct. at 2087 (observing that crafting interim relief is “often dependent as much on the equities of a given case as the substance of the legal issues it presents”).

“Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than . . . when only private interests are involved.” *Virginian Ry. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937); *see also United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 496 (2001) (district courts enjoy broad discretion “to consider the necessities of the public interest when fashioning injunctive relief” (quotation marks omitted)).

Consistent with these principles, the Ninth Circuit correctly recognized that the myriad harms flowing from the previous ban—including to “the proprietary interests of the States”—would not be addressed by injunctive relief limited just to plaintiffs because that “would not cure the statutory violations identified, which in all applications would violate provisions of the INA.” 859 F.3d at 788. Thus, a nationwide injunction was “necessary to provide complete relief,” *Madsen v. Women’s Health Ctr. Inc.*, 512 U.S. 753, 765 (1994), in that instance, and the district court properly made the same assessment here (Add.42).

Denial of defendants’ request for a complete stay is also necessary to provide continued relief to amici States from the cumulative effects of defendants’ series of discriminatory bans, which have unleashed substantial disruption and uncertainty that now has no end in sight. The disputed provisions of the Proclamation have exacerbated the harms that amici States,

our institutions, and our residents have experienced, and the current indefinite ban may make these irreparable injuries permanent, particularly if a sweeping stay is granted.

Finally, contrary to defendants' assertion (Stay App.38), the injunction cannot be characterized as "vastly overbroad" in its original form or as modified by the Ninth Circuit's partial stay. Indeed, the equities favoring denial of defendants' stay request are even stronger now than in the previous litigation. Not only have defendants persisted in their failure to provide any concrete evidence of true national security risk (despite having additional time to do so), but the Proclamation's ban is now indefinite and will likely result in permanent—as opposed to temporary—harms to plaintiffs and others who are similarly situated, including amici States and their residents. Thus, the balance of equities does not require a more comprehensive stay of the injunction under the circumstances.

In sum, the district court did not abuse its discretion in fashioning the injunctive relief at issue here, *see American Civil Liberties Union of Ky. v. McCreary County, Ky.*, 545 U.S. 844, 867 (2005), and no further interim relief from this Court is warranted.

## CONCLUSION

This Court should affirm the preliminary injunction.

Dated: New York, New York  
November 28, 2017

Respectfully submitted,

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