No. 17-94

In the Supreme Court of the United States

STAGG P.C., PETITIONER

v.

DEPARTMENT OF STATE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND 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. Petitioner filed suit alleging that the Regulations' provisions governing exportation of technical data violate the First Amendment and sought a preliminary injunction barring "enforc[ement]" of "any licensing or other approval requirements for putting privately generated unclassified information into the public domain." C.A. App. A8. The district court denied the injunction on the ground that, even assuming petitioner were likely to succeed on the merits and would suffer irreparable harm, 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 district court abused its discretion by denying a preliminary injunction against any enforcement of the Regulations' provisions governing exportation of privately generated technical data based on its findings that the balance of equities and the public interest weighed against the requested relief, without adjudicating the merits of petitioner's First Amendment claim.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is not published in the Federal Reporter but is reprinted at 673 Fed. Appx. 93. The opinion and order of the district court (Pet. App. 10a-25a) is reported at 158 F. Supp. 3d 203.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2016. A petition for rehearing was denied on February 17, 2017 (Pet. App. 26a-27a). On May 10, 2017, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 17, 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, 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).

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

of forms and locations. 22 C.F.R. 120.11(a).[1] 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).[2]

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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[1] In June 2015, 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. See Pet. App. 15a; 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).

[2] In June 2016, during the pendency of this litigation, 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 is a U.S. law firm that advises clients on export-control matters. C.A. App. A61. In October 2015, petitioner filed suit alleging (as relevant) that the Regulations violate the First Amendment insofar as they regulate domestic transfers of privately generated unclassified technical data. *Id.* at A2, A71. Petitioner alleged that it wished to give, through its representatives, a public presentation in February 2016, at which it would present data that were "available in the public domain but not approved for release into the public domain" by the federal government. Pet. App. 15a. Petitioner also alleged that it intended to make such data "publicly available on [its] website." C.A. App. A70. Petitioner did not provide further detail about the nature of the data it sought to present or allow the State Department to review the data in order to ascertain whether it in fact constituted technical data covered by the Regulations. Pet. App. 16a. Petitioner instead requested a preliminary injunction "enjoining the enforcement of *any* licensing or approval requirement for releasing privately generated unclassified information into the public domain." *Ibid.*

The district court denied the requested preliminary injunction. Pet. App. 10a-24a. Petitioner, it explained, "ha[d] the burden of demonstrating each of the four prerequisites for the granting of a preliminary injunction: irreparable harm, a likelihood of success on the merits, that the balance of equities tips in its favor, and

that an injunction is in the public interest." *Id.* at 19a & n.39 (citing *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The court stated that petitioner "ha[d] demonstrated irreparable harm," observing that "'[t]he loss of First Amendment freedoms,'" which petitioner alleged, "'constitutes irreparable injury.'" *Id.* at 20a (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (opinion of Brennan, J.)).

The district court did not assess the merits of petitioner's claim because it determined that petitioner "ha[d] not met its burden of showing" the remaining two factors—*i.e.*, "that the balance of equities tips in its favor" and "that an injunction is in the public interest." Pet. App. 23a. The court "recognize[d]" that assessing the merits of a First Amendment claim is often necessary, noting the Second Circuit's prior observation that "'[c]onsideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not dispositive factor.'" *Id.* at 20a (brackets in original) (quoting *New York Progress & Prot. PAC* v. *Walsh*, 733 F.3d 483, 488 (2d Cir. 2013)). In this case, however, the district court concluded that, "[e]ven assuming for the purposes of th[e] motion that [petitioner] ha[d] shown a substantial likelihood of success on the merits of its First * * * Amendment * * * claim[], the balance of the equities and the public interest both require the denial of this preliminary injunction." *Id.* at 21a.

The district court observed that both this Court and the Second Circuit have identified the government's interest in safeguarding national security as "a public interest of the highest order," and this Court's precedent required it "to consider carefully an injunction's adverse impact on the public interest in national

defense." Pet. App. 20a (citations and internal quotation marks omitted). "Granting th[e] injunction" petitioner requested, the court found, "would have very serious adverse impacts on the national security of the United States." *Id.* at 22a. Petitioner "d[id] not seek an injunction cabined to its contemplated republication of protected technical data at a bar association event in February [2016]." *Id.* at 21a. Indeed, petitioner "d[id] not identify the materials" it wished to present, "despite both [the district court's] and the Government's request," thereby "depriving the [government] of the opportunity to end this controversy by confirming its suspicion that the materials [petitioner] wishes to present are not covered by the AECA and [the Regulations]." *Id.* at 16a (citation omitted). Instead, petitioner "s[ought] an expansive injunction barring the enforcement of 'any licensing or other approval requirements for putting privately generated unclassified technical information into the public domain' under the relevant sections of the [Regulations]." *Id.* at 21a (brackets and citation omitted).

The relief petitioner requested thus "would enjoin the application of the [Regulations'] approval mechanism not only to situations where an individual or organization wishes to republish previously disclosed technical data, but to all situations where individuals wished to disclose technical data generate[d] privately but covered by the [Regulations]." Pet. App. 21a-22a. Although the district court was "left to speculate as to the specific technical data that may be in [petitioner's] possession," the court "c[ould] in fact identify other technical data that might be freely republished if [petitioner's] injunction was granted"—for example, "technical data for delivery systems for weapons of mass destruction, such as rockets and missiles"; "technical

data related to chemical and biological agents that could be adapted for use as weapons"; and "digital plans for 3D-printable plastic firearms, undetectable by metal detectors and untraceable without registration and serial number." *Id.* at 22a-23a. Granting the requested injunction, the court explained, would mean that "*any* unclassified technical data leaked to the Internet would be fair game to republish in any forum." *Id.* at 23a. The court accordingly concluded that, even assuming that petitioner had shown a likelihood of success on a First Amendment claim, and notwithstanding the court's determination that petitioner had shown irreparable harm, "[t]he balance of the equities and the public interest both firmly weigh in favor of the Government, and against [petitioner]." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-9a. It "agree[d]" with the district court that the balance of equities and the public interest "required denial of the preliminary injunction." *Id.* at 5a. The court of appeals explained that, because petitioner "elected not to identify * * * the specific content of the material it seeks to publish," and instead

> requested a broad injunction against *any* licensing or other approval requirements for putting privately generated unclassified information *into* the public domain, * * * the district court appropriately assumed the worst case scenario, *i.e.*, that the material at issue might communicate, for example, technical data for delivery systems for weapons of mass destruction, or for chemical and biological agents, or plans for 3D-printable plastic firearms.

Id. at 5a-6a (brackets, citations, and internal quotation marks omitted). "The national security concerns raised by a preliminary injunction that barred the government

from licensing, and thereby controlling, the dissemination of such sensitive information," the court held, "are obvious and significant." *Id*. at 6a.

The court of appeals further explained that the government had "not merely invoke[d] national security" in the abstract, but "ha[d] set forth specific concerns relating to the export of 'technical data.'" Pet. App. 6a. "[A] State Department official explained in a sworn affidavit" that "a preliminary injunction would 'cause significant harm to the national security and foreign policy interest of the United States.'" *Ibid.* (quoting C.A. App. A95). That harm stems from "the potential for '[u]ncontrolled disclosure of technical data on the development, production, or deployment of weapons of mass destruction' or 'the potential release of technical data for delivery systems of' such weapons to 'someone set on creating mass, indiscriminate, civilian casualties' or a 'foreign adversary.'" *Ibid.* (quoting C.A. App. A95) (brackets in original). Without the Regulations' provisions governing the exportation of technical data, the government showed, "the statutory 'limits on arms transfers would be of negligible practical effect because they would leave unregulated the exportation of the technology, know-how, blueprints, and other design information sufficient for foreign powers to construct, produce, manufacture, maintain, and operate the very same equipment regulated in its physical form by the [Regulations]." *Id.* at 6a-7a (quoting C.A. App. A90) (brackets omitted).

"The specificity of the government's contentions," the court of appeals noted, "contrasts sharply with the vagueness of [petitioner's] allegations and its refusal to provide the district court with sufficient information to assess the plausibility of the government's national

security arguments." Pet. App. 8a. Whereas "[t]he government ha[d] articulated specific, concrete damage to national security that could result" from petitioner's requested injunction, petitioner "refuse[d] to disclose to a court the information it wants to shield from [the Regulations]." *Id.* at 7a-8a. The court thus concluded that "the government present[ed] a valid case—unrefuted by [petitioner]—for balancing the equities in [the government's] favor and finding that the public interest weighs against this injunction." *Id.* at 7a.

The court of appeals accordingly held that, without assessing petitioner's likelihood of success on the merits in the current posture of the case and petitioner's claim of irreparable injury, "the district court did not abuse its discretion when it found that the public interest in maintaining national security weighed against granting a preliminary injunction" and denied the requested injunction on that basis. Pet. App. 8a. Like the district court, the court of appeals observed that, "[i]n these circumstances, where the balance-of-equities and public interest factors weigh so heavily against a preliminary injunction, we need not decide whether [petitioner] is likely to succeed on the merits or to suffer irreparable harm." *Ibid.* The court noted uncertainty, however, regarding the scope of the existing Regulations' application to republication of technical data previously made public without authorization, and it indicated that

on remand the district court may consider whether a narrower injunction might be appropriate. *Id.* at 8a-9a.[3]

ARGUMENT

Petitioner contends (Pet. 18-35) that the district court erred by denying a preliminary injunction without determining petitioner's likelihood of success on the merits, and that the court of appeals' decision affirming that denial implicates a disagreement among the courts of appeals. The court of appeals correctly held, however, that the district court did not abuse its discretion in denying a preliminary injunction based on its finding that the balance of equities and the public interest weighed heavily against granting the categorical relief petitioner sought. That holding does not conflict with

[3] 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 petitioner wishes to export concern items that would be removed from the Munitions List, the rules may have the effect of eliminating or substantially modifying the requirements petitioner challenges.

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 petitioner 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 here correctly applied these principles. The district court "assum[ed] for purposes of [petitioner's] motion" that petitioner is likely to succeed on the merits, and it stated that petitioner "ha[d] demonstrated irreparable harm" because it alleged a "'loss of First Amendment freedoms.'" Pet. App. 20a-21a (citation omitted). Applying the standard articulated in *Winter*, the court concluded that the preliminary injunction petitioner requested was nevertheless unwarranted because "[petitioner] ha[d] not met its burden of showing either that the balance of equities tips in its favor or that an injunction is in the public interest." *Id.* at 23a; see *id.* at 19a & n.39. To the contrary, the court found, those factors "both firmly weigh in favor of the Government, and against [petitioner]," in light of the "very

serious adverse impacts on the national security of the United States" that the government had shown would result from the categorical injunctive relief petitioner requested. *Id.* at 22a-23a. As the court explained, the categorical injunction petitioner requested would enable republication of a wide array of highly sensitive technical information—from data regarding "delivery systems for weapons of mass destruction" to data regarding "chemical and biological agents that could be adapted for use as weapons." *Ibid.*

The court of appeals upheld the denial of the preliminary injunction on the same basis. Pet. App. 5a-9a. The government had "present[ed] a valid case * * * for balancing the equities in [the government's] favor and finding that the public interest weighs against this injunction," and those showings went "unrefuted by [petitioner]." *Id.* at 7a. Applying *Winter*, the court of appeals concluded that "the district court did not abuse its discretion" in finding that those two factors "weighed against granting a preliminary injunction in this case" irrespective of the likelihood of success on the merits of the First Amendment claim presented by petitioner. *Id.* at 8a.

Petitioner identifies no error in those conclusions, much less any error that would warrant this Court's review. Petitioner does not attempt to show that it in fact carried its burden below by submitting evidence to rebut the government's showing of national-security risk. In this Court, petitioner downplays (Pet. 34-35) the national-security risks posed by the exportation of unclassified data. But it does not dispute the lower courts' determination that, because petitioner sought categorical relief and failed to identify the specific tech-

nical data petitioner sought to export, the courts appropriately considered the "worst case scenario." Pet. App. 6a (citation omitted). And petitioner does not contest the district court's determination that the requested injunction would mean that "*any* unclassified technical data leaked to the Internet"—even data about "delivery systems for weapons of mass destruction" or chemical weapons—"would be fair game to republish in any forum without regard to consequences." *Id.* at 22a-23a. Nor does petitioner attempt to refute the gravity of the national-security repercussions that such proliferation would invite. In any event, any asserted error in the lower courts' factbound analysis of the equities here would not warrant this Court's review.

c. Petitioner principally contends (Pet. 26-28) that the lower courts were nevertheless required to evaluate the merits of petitioner's claim and that the court of appeals erred by affirming the denial of the injunction without addressing the merits. That is incorrect.[4]

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

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[4] Petitioner appropriately does not ask this Court to adjudicate in the first instance the merits of its First Amendment claim, which the lower courts did not address. See *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017) ("declin[ing] to consider * * * in the first instance" whether regulation of speech "survived First Amendment scrutiny" because "'[w]e are a court of review, not of first view'" (citation omitted)).

courts here, the Court in *Winter* held that, even assuming petitioner 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.

Petitioner asserts (Pet. 26-28) that analysis of the merits is necessary here because petitioner alleged a First Amendment violation. The constitutional nature of petitioner's 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 courts below 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").

Petitioner argues (Pet. 27) that analysis of the merits is necessary in First Amendment cases because it "affects the other three preliminary injunction factors." See Pet. 27-28. 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 petitioner

notes (Pet. 24), 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. 20a, and the court of appeals did not revisit that conclusion, see *id.* at 8a. 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 lower courts determined in this case. The district court noted that, under Second Circuit precedent, consideration of the merits often is needed because the merits are frequently "the dominant, if not dispositive factor." Pet. App. 20a. But it determined that evaluating the merits was unnecessary here because, "even assuming" that petitioner "ha[d] shown a substantial likelihood of success on the merits"—and further treating petitioner's asserted "'loss of First Amendment freedoms'" as "'irreparable injury'"—the balance of equities and the public interest still outweighed that purported injury. *Id.* at 20a-21a (quoting *Burns*, 427 U.S. at 373 (opinion of Brennan, J.)). The court of appeals likewise determined that those factors weighed against the requested injunction

irrespective of the merits and petitioner's claim of irreparable injury. *Id.* at 8a.

Petitioner contends (Pet. 27-28) that the balance-of-equities and public-interest factors themselves cannot be assessed independently of the merits in First Amendment cases. According to petitioner, if a court determines that the challenged action likely violates the First Amendment, then "the balance of equities" will necessarily "favor[] an injunction because the government 'is in no way harmed by issuance of an injunction that prevents the state from enforcing unconstitutional restrictions.'" Pet. 24 (citation omitted). For the same reason, petitioner argues, a finding of likelihood of success on the merits means that an "injunction would be in the public interest because enforcement of an unconstitutional law is always contrary to the public interest." *Ibid.* (citation and internal quotation marks omitted); see Pet. 27. Petitioner's contention cannot be reconciled with this Court's precedent.

That the government and the public have an interest in avoiding violations 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 citation 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.

Petitioner's contrary position would eviscerate the well-settled preliminary-injunction standard as applied in First Amendment cases. As petitioner's application of its proposed rule (Pet. 24) demonstrates, it 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. Moreover, although petitioner's argument principally addresses the First Amendment, it asserts (Pet. 25-26) that the same reasoning "applies with equal force to preliminary injunctions sought against laws that are infirm under other constitutional provisions as well." Petitioner's position, if adopted, would upend the settled preliminary-injunction standard for constitutional claims across the board.

2. Petitioner's contention (Pet. 18-26) that the decision below implicates a lower-court conflict is incorrect for similar reasons. 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); Pet. App. 5a; *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); *PCI Transp., Inc.* v. *Fort Worth & W. R.R.*, 418 F.3d 535, 545 (5th Cir. 2005); *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 *Defense Distributed* v. *United States Department of State*, 838 F.3d 451 (5th Cir. 2016), petition for cert. pending, No. 17-190 (filed Aug. 2, 2017), the court affirmed the denial of a preliminary injunction barring enforcement of the Regulations on First Amendment grounds. See *id.* at 458-461. Like the court of appeals here, the Fifth Circuit in *Defense Distributed* concluded that the district court did not abuse its discretion in denying injunctive relief based on "[the plaintiffs'] failure to carry

their burden of persuasion" with respect to "the balance of harm and the public interest," making analysis of the merits unnecessary. *Id.* at 460; see *id.* at 458-460.

Petitioner points (Pet. 19-20) to language in several lower-court decisions indicating that a district court "must" consider the plaintiff's likelihood of success on the merits in ruling on a preliminary injunction. *E.g.*, *Vivid Entm't*, 774 F.3d at 577; *Liberty Coins*, 748 F.3d at 689-690; *National People's Action* v. *Wilmete*, 914 F.2d 1008, 1010 (7th Cir. 1990), cert. denied, 499 U.S. 921 (1991). In context, however, those statements simply reflect that, before a court may award relief, it must first determine that the plaintiff has carried its burden of demonstrating a likelihood of success. Petitioner cites no decision holding that a court always must address the merits before *denying* injunctive relief.

Petitioner also cites (Pet. 20-21) 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. As the district court here noted, however, the Second Circuit has made the same observation. Pet. App. 20a (noting Second Circuit's statement that "consideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not dispositive factor" (quoting *New York Progress & Prot. PAC* v. *Walsh*, 733 F.3d 483, 488 (2d Cir. 2013))). And the district court stated that petitioner had demonstrated irreparable injury based on the First Amendment nature of its claim. *Ibid.*

Petitioner cites (Pet. 20) 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 Amendment. 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 petitioner "ha[d] demonstrated irreparable harm." Pet. App. 20a. The court of appeals declined to revisit that determination. *Id.* at 8a. 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 lower courts here addressed the balance-of-equities and public-interest factors in detail. Pet. App. 5a-8a, 20a-23a. And the courts declined to address the merits because they found that the existing record amply demonstrated that

the balance of equities and public interest weighed against relief. *Ibid.* Further review is not warranted.

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.