No. 17-15589

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF HAWAI‘I , et al.,
Plaintiffs-Appellees,
v.

Donald J. TRUMP, et al.,
Defendants-Appellants.

On Appeal from the U.S. District Court for the District of Hawai‘i
No. 17-00050 DKW-KSC
Honorable Derrick K. Watson, U.S. District Court Judge

PROPOSED PLAINTIFFS-INTERVENORS' MOTION FOR LEAVE TO INTERVENE

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MOTION FOR INTERVENTION UNDER RULE 24

Plaintiff-Intervenors (*Ali* Plaintiffs) are visa petitioners, two U.S. citizens and two lawful permanent residents, and their family members who are the beneficiaries of their visa petitions—nationals of Iran, Syria, and Somalia who have applied for an immigrant visa. Collectively, the *Ali* Plaintiffs seek to represent a proposed class of immigrant visa petitioners and visa applicants. They respectfully request that this Court grant leave for them to intervene in the instant appeal, either as of right under Rule 24(a) of the Federal Rules of Civil Procedure or, in the alternative, pursuant to a permissive intervention under Rule 24(b).

On April 6, 2017, undersigned counsel for *Ali* Plaintiffs contacted counsel for both parties. Counsel for the State of Hawai‘i and Ismail Elshikh indicated that they take no position. Counsel for the federal government indicated their clients oppose this request for intervention.

STATEMENT OF THE CASE

Executive Orders

On January 27, 2017, President Donald Trump issued Executive Order 13769 (EO1), entitled “Protecting the Nation from Foreign Terrorist Entry Into the United States.” *See* 82 Fed. Reg. 8977 (Feb. 1, 2017). Section 3 of EO1 suspended entry into the United States of citizens or nationals of Iran, Iraq, Libya, Somalia,

Sudan, Syria, and Yemen—all predominantly Muslim countries—for a minimum of 90 days, allegedly for national security reasons. *Id.* at 8978.

On February 3, 2017, Judge Robart of the Western District of Washington enjoined EO1 in *Washington v. Trump*, No. 2:17-cv-141-JLR, ECF 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 3, 2017). The Government appealed Judge Robart's order and, on February 9, 2017, this Court denied its emergency motion for a stay of the district court's decision pending adjudication of the appeal. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), *reconsideration en banc denied*, 2017 WL 992527 (9th Cir. Mar. 15, 2017). Thereafter, on March 6, 2017, Defendant Trump issued a second Executive Order, to be effective on March 16, 2017, which targeted the same countries identified in EO1, with the exception of Iraq. Executive Order 13780, "Protecting the Nation From Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13209 (Mar. 9, 2017) (EO2). EO2 re-instituted the suspension of visa adjudication and issuance for these countries and re-imposed the ban on entry for those without a valid visa as of March 16, 2017. Following that development, the Government moved to dismiss its appeal in *Washington*. This Court granted that motion. *Washington*, No. 17-35105, ECF 187 (Mar. 8, 2017).

***Ali v. Trump,* No. 2:17-cv-00135 (W.D. Wash. filed Jan. 30, 2017)**

On January 30, 2017, three visa petitioner parents—two U.S. citizens and one lawful permanent resident—and their respective beneficiary children, who each had a pending or approved immigrant visa application, filed a class action in the District Court for the Western District of Washington, challenging Section 3 of EO1 on statutory and constitutional grounds. *See* Complaint—Class Action for Declaratory and Injunctive Relief, *Ali v. Trump*, No. 2:17-cv-00135, ECF 1 (W.D. Wash.). On February 2, 2017, the *Ali* Plaintiffs filed a motion seeking certification of a nationwide class of visa petitioners and beneficiaries who, like themselves, were adversely impacted by EO1, *see Ali*, No. 2:17-cv-00135, ECF 3, and on February 6, 2017, filed a motion for a temporary restraining order (TRO) and preliminary injunction. *See Ali*, No. 2:17-cv-00135, ECF 9.

On March 10, 2017, following the issuance of EO2 on March 6, 2017, the *Ali* Plaintiffs filed an amended complaint challenging EO2, a second motion for a TRO and preliminary injunction, and a second motion for class certification. *See Ali*, No. 2:17-cv-00135, ECF 52, 58; Ex. A (Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction, *Ali*, No. 2:17-cv-00135, ECF 53). The amended complaint challenges sections 1(f), 2 and 3 of EO2, alleging that these provisions violate § 202(a)(1)(A) of the Immigration and

Nationality Act (INA), 8 U.S.C. § 1152(a)(1)(A), the Administrative Procedure Act (APA), the Establishment Clause of the First Amendment, and due process and equal protection under the Due Process Clause of the Fifth Amendment. The amended complaint seeks declaratory, injunctive and mandamus relief. *See id.* ECF 52.

Plaintiffs seek to represent a class consisting of:

> all nationals of countries designated by Section 2 of Executive Order 13780 (currently Iran, Libya, Syria, Somalia, Sudan, and Yemen), who have applied for or will apply for an immigrant visa and the visa petitioners for those nationals; whose visa application adjudication has been or will be suspended or denied, or who have been or will be denied the ability to seek entry into and/or enter the United States, on the basis of Executive Order 13780.

See Ali, No. 2:17-cv-00135, ECF 58.

On March 15, 2017, the District Court heard oral argument on the *Ali* Plaintiffs' motion for a TRO and a preliminary injunction. That same day, the District Court of Hawai'i issued a nationwide TRO against EO2. On March 17, 2017, the District Court stayed consideration of the *Ali* Plaintiffs' motion for a TRO and preliminary injunction for as long as the nationwide TRO, or a preliminary injunction of identical scope, remains in effect in *Hawai'i*. The Court additionally ruled that no other aspect of the case was stayed. *Ali*, No. 2:17-cv-00135, ECF 79.

On March 30, 2017, the Defendants in *Ali* moved to stay all proceedings in the case pending resolution of the appeal to this Court of the preliminary injunction issued in *Hawai'i* and also moved for an extension on their deadline for answering the amended complaint and opposing the motion for class certification. *Ali*, No. 2:17-cv-00135, ECF 85, 86. On April 5, 2017, the District Court heard oral argument on Defendants' motion for an extension of its filing deadlines. The same day, the District Court granted Defendants' motion in part by staying consideration of the *Ali* Plaintiffs' motion for class certification until this Court rules on the pending appeal in *Hawai'i*. *Ali*, No. 2:17-cv-00135, ECF 91.[1]

Hawai'i v. Trump, No. 17-00050 DKW-KSC (D. Haw.)

On February 3, 2017, the State of Hawai'i filed a complaint seeking declaratory and injunctive relief as well as an emergency temporary restraining order against the implementation of EO1. The district court subsequently stayed the proceedings in light of *Washington*. Mr. Ismail Elshikh, an individual plaintiff, joined the State of Hawai'i in its challenge on February 13, 2017. *Hawai'i*, No. 1:17-cv-00050, ECF 37. On March 7, 2017, the State of Hawai'i and Doctor Ismail Elshikh moved for leave to file a second amended complaint seeking declaratory and injunctive relief, this time concerning EO2. *Hawai'i*, No. 1:17-cv-00050, ECF

[1] The District Court also denied the motion for an extension in part, ordering the Defendants in *Ali* to file an answer to the amended complaint by April 14, 2017. *Id.*

58-1. In their complaint, they alleged EO2 violates the Establishment Clause; the Equal Protection Clause of the Fifth Amendment; the substantive due process and procedural due process components of the Fifth Amendment; the Immigration and Nationality Act, 8 U.S.C. § 1152(a)(1)(A); the Religious Freedom Restoration Act; and substantive and procedural aspects of the Administrative Procedure Act. ECF 58-1 at 31-37.

On March 8, the *Hawai'i* plaintiffs moved for a temporary restraining order, ECF 65-1, which the court granted on March 15, 2017, ECF 219. The court found that plaintiffs had met their burden of showing "a strong likelihood of success on the merits of their Establishment Clause claim," irreparable injury, and that the balance of equities and public interest was in their favor. ECF 219. The court did not rule on plaintiffs' remaining claims. ECF 219 at 29 n.11. On March 21, 2017, the plaintiffs moved to transform the TRO into a PI. ECF 238. On March 29, 2017, the court granted their request, largely on the same bases it had granted the TRO. ECF 270. The next day, the Government filed a notice of appeal. ECF 271. On March 31, 2017, the parties in *Hawai'i* filed a joint motion to expedite consideration of the appeal before this Court. No. 17-15589, ECF 12. The Court granted that motion on April 3, 2017. *Id.* ECF 14.

ARGUMENT

The *Ali* Plaintiffs and the proposed class members they seek to represent move to intervene as this Court will likely dispose of some of their claims in its consideration of the instant case, in a way that may impair or impede *Ali* Plaintiffs and proposed class members' interests. *See generally* Fed. R. Civ. P. 24. Both *Ali* and *Hawai'i* challenge the same Executive Order, seeking both preliminary and permanent injunctive relief. While the claims presented by the State encompass the claims presented by the movants, the *Ali* Plaintiffs and the class members they seek to represent bring an alternative, and critical, perspective with respect to such matters as Plaintiffs' standing, the irreparable harm Plaintiffs are able to demonstrate in seeking preliminary injunctive relief, and the zone of interests affected by the statutory claims raised in support of the motions for preliminary injunctive relief.

Rule 24 of the Federal Rules of Civil Procedure governs an intervention on appeal. *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997). In determining whether intervention is appropriate, this Court "follow[s] 'practical and equitable considerations' and construe[s] the Rule 'broadly in favor of proposed intervenors,' . . . because a liberal intervention policy 'serves both efficient resolution of issues and broadened access to the courts.'" *Wilderness Soc'y v. U.S. Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2010) (citations omitted).

The *Ali* Plaintiffs and the class members they seek to represent satisfy the requirements for intervention as of right under Rule 24(a)(2). Alternatively, they also satisfy the requirements for permissive intervention under Rule 24(b)(1), (3).

I. THE *ALI* PLAINTIFFS ARE ENTITLED TO INTERVENE AS OF RIGHT PURSUANT TO RULE 24(a)(2).

This Court examines four factors to determine whether a party may intervene as of right under Rule 24(a)(2):

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

United States of America v. Aerojet Gen. Corp., 606 F.3d 1142, 1148 (9th Cir. 2010) (citations omitted). The *Ali* Plaintiffs satisfy each requirement. They filed this motion only three days after this Court ruled that it would expedite its consideration of this appeal; a central issue in the appeal is the legality of Section 2 of EO2, which would irreparably harm all named Plaintiffs and untold thousands of proposed class members if not enjoined; and the distinct interests of Plaintiffs and proposed class members would otherwise not be adequately represented. *See* Exs. B, C (Declarations and Exhibits in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, *Ali*, No. 2:17-cv-00135, ECF 10-25, 54-57).

A. The *Ali* Plaintiffs' Motion Is Timely.

Courts weigh three factors in determining whether a motion to intervene is timely: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002) (citation omitted). The *Ali* Plaintiffs' motion to intervene is timely under all three factors.

First, and most significantly, there has been *no delay* by the *Ali* Plaintiffs. They are filing this motion at the first point in the litigation at which it was reasonable to do so. It comes only 3 days after this Court agreed to expedite consideration of the appeal, and just one week after the District Court in Hawai'i converted the TRO to a preliminary injunction and Defendants filed the appeal. *Hawai'i*, No. 17-15589, ECF 14 (9th Cir. Apr. 3, 2017); *Hawai'i*, No. 1:17-cv-00050, ECF 270, 2017 WL 1167383 (D. Haw. Mar. 29, 2017). Moreover, it comes one day after the district court in *Ali* held that it would stay consideration of the motion for class certification until after this Court resolves the appeal of the preliminary injunction at issue in *Hawai'i. Ali*, No. 2:17-cv-00135, ECF 91.

The present appeal is the first point in the *Hawai'i* litigation at which the *Ali* Plaintiffs' interests were implicated. This Court is likely to reach, at a minimum, the question of whether Section 2 of EO2 violates the Establishment Clause, and if

it does, that decision will be binding on Plaintiffs and proposed class members. *See United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (indicating that a "change of circumstances, which suggests that the litigation is entering a new stage" can be a factor that "militate[s] in favor" of intervention); *United States v. Alisal Water Corp*., 370 F.3d 915, 921 (9th Cir. 2004) ("Prior cases suggest that a party's interest in a specific phase of a proceeding may support intervention at that particular stage of the lawsuit."). For this reason, the fact that this motion is filed during an appeal does not render it untimely, particularly given the extraordinary nature of the proceedings in this case and the expedited basis on which this Court is hearing the appeal.

Finally, there is no prejudice to either party. Plaintiffs-Appellees take no position on intervention. While Defendants oppose the motion, they will not be prejudiced by having to litigate new or additional claims, because the questions on appeal will largely remain the same. Finally, this motion is made within days of this Court setting the briefing schedule, and three weeks in advance of the Defendants' scheduled reply.

B. The *Ali* Plaintiffs Have A Significant Protectable Interest In The Outcome Of This Appeal.

An applicant for intervention must have a "significantly protectable interest," meaning that "(1) it asserts an interest that is protected under some law, and (2) there is a relationship between its legally protected interest and the

plaintiff's claims." *State ex. rel. Lockyer v. U.S.*, 450 F.3d 436, 440-41 (9th Cir. 2006) (citation and internal quotation marks omitted). The central concern is whether the intervenors "will suffer a practical impairment of [their] interests as a result of the pending litigation." *Id*. at 441 (rejecting as not determinative such "technical distinctions" as whether the proposed intervenor has an enforceable right).

The *Ali* Plaintiffs seek to intervene to protect their own and class members' rights. In particular, as set forth in their Amended Complaint and their Motion for a TRO and Preliminary Injunction, they seek non-discriminatory and constitutional application of the immigration laws. *See* Amended Complaint—Class Action for Declaratory and Injunctive Relief, *Ali*, No. 2:17-cv-00135, ECF 52; Ex. A. More specifically, like the *Hawai'i* plaintiffs, the *Ali* Plaintiffs claim that EO2 violates the Establishment Clause of the First Amendment. All of the *Ali* Plaintiffs and an untold number of proposed class members will suffer irreparable harm if EO2 is not enjoined. *See id*.; Ex. B.

The *Ali* Plaintiffs have an interest in ensuring that their interests are fully presented with respect to their claim that EO2 is unconstitutional. This is particularly the case given that the *Ali* Plaintiffs present distinct interests—as they are the immigrant visa applicants and the family member petitioners who are directly affected by EO2. Moreover, they and their attorneys have a responsibility

to represent the proposed class members who are similarly situated. *Cf.* Fed. R. Civ. P. 23(g)(2)(A) advisory comm. nn. (Am. 2003)("[A]ttorney who acts on behalf of the class before certification must act in the best interests of the class as a whole."); *Staton v. Boeing Co.*, 327 F. 3d 938, 960 (9th Cir. 2003) ("[C]lass attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed." (quoting *In re GMC Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995)). Moreover, the *Ali* Plaintiffs also moved for a preliminary injunction on March 10, 2017. Exs. A and B. The District Court refrained from ruling on the motion in explicit reliance on the order issued by the district court in *Hawai'i. Ali*, No. 2:17-cv-00135, ECF 91. Any decision by this Court may have an immediate impact on the status of the pending visa applications for the *Ali* Plaintiffs, and could have a binding effect on their motion for preliminary injunctive relief, as well as their claim for permanent injunctive relief.

The congruence of the claims in the two lawsuits demonstrates the strong relationship between the interests of the *Ali* Plaintiffs and the *Hawai'i* plaintiffs' claims, and favors intervention. *See, e.g.*, *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d 980, 986-87 (9th Cir. 2008) (holding intervention proper where "an issue [the intervenor] raised in one proceeding …. lands in another proceeding for disposition"); *United States v. Oregon*, 839 F.2d 635, 638

(9th Cir. 1988) (granting intervention where "an appellate ruling will have a persuasive stare decisis effect in any parallel or subsequent litigation"). Because this suit directly impacts the immediate relief provided to the *Ali* Plaintiffs, and may directly determine the merits of the *Ali* Plaintiffs' claims for injunctive relief, they have a significant protectable interest in the outcome of this case.

C. The Disposition Of This Action May Impair the Ability of the *Ali* Plaintiffs and Proposed Class Members To Protect Their Interests in Lawful Immigrant Visa Processing.

The *Ali* Plaintiffs and proposed class members are "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect [their] interest." Fed. R. Civ. P. 24(a)(2). Here, the advisory committee notes to Rule 24(a) are instructive: "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24 advisory comm. nn. (Am. 1966).

There is no doubt that the relief Defendants seek in this case—rejecting the preliminary injunctive relief barring the suspension of entries and immigrant visa issuance for nationals of the six countries—will directly impair the lives of the *Ali* Plaintiffs and all proposed class members, disrupting ongoing and expensive immigrant visa adjudications, suspending entries to the United States, and potentially resulting in indefinite separation of family members and undermining

the stability of U.S. employers. If this Court reverses the district court's order granting injunctive relief, it will immediately subject the *Ali* Plaintiffs and proposed class members to the irreparable harms inflicted by Section 2 of EO2. Moreover, whatever opinion this Court issues as to the merits of the claims presented likely will control the resolution of any future motions for relief for that claim. At that point, the *Ali* Plaintiffs and proposed class may very well have little if any recourse with respect to the claim addressed.

The *Ali* Plaintiffs should not be forced to wait until the conclusion of the *Hawai'i* litigation to vindicate their interests and the interests of the proposed class. Courts have recognized that parties seeking intervention would face a "practical impairment" in asserting their rights once a court has rendered a decision. *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), *vacated on other grounds sub nom. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987) ("The prospect of stare decisis may, under certain circumstances, supply the requisite practical impairment warranting intervention as of right."); *Oregon*, 839 F.2d at 638 ("We have said that such a *stare decisis* effect is an important consideration in determining the extent to which an applicant's interest may be impaired."); *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989) ("Where a party seeking to intervene in an action claims an interest in the very property and very transaction that is the subject of the main action, the

potential *stare decisis* effect may supply that practical disadvantage which warrants intervention as of right."). Because this Court's decision may well set precedent that will be binding on the merits of the *Ali* Plaintiffs' efforts to obtain injunctive relief, the *Ali* Plaintiffs and proposed class members need to press their claims in this Court and in this appeal.

D. The Interests of the *Ali* Plaintiffs and Proposed Class Members Cannot Be Adequately Represented.

The burden under this prong is "satisfied if [the Proposed Plaintiffs-Intervenors] show[] that representation of [their] interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (*citing* 3B J. Moore, Federal Practice 24.09 (1969)). In conducting this inquiry, courts examine: "'(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.'" *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (*quoting Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir.2003)). The *Ali* Plaintiffs and proposed class members meet each factor.

While Defendants argue that the *Hawai'i* Plaintiffs do not have standing to raise the claims presented, in appealing the injunction this Court issued in

Washington, Defendants' counsel acknowledged that persons like the *Ali* Plaintiffs and other individuals directly affected by EO1 would have standing to challenge Defendants' actions.[2] To the extent Defendants now seek to attack the order issued in *Hawai'i* by relying on standing, the *Ali* Plaintiffs are uniquely situated to defend the relief provided by the district court. Moreover, given the motion for class certification pending before the district court in *Ali*, the *Ali* Plaintiffs also present distinct claims as to the scope of the injunction.

Moreover, the *Ali* Plaintiffs, who are themselves petitioners and beneficiaries in the immigrant visa process and represent a putative class of similarly situated individuals, are uniquely placed to raise both the constitutional and the statutory arguments challenging EO2, including the claim that Section 2 conflicts with Congress' prohibition against discrimination as to the "issuance of immigrant visas." 8 U.S.C. § 1152(a)(1)(A) ("Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."). Notably, this Court did not address the statutory claims under the Immigration and Nationality Act in its order denying the federal

[2] *See* Feb. 7, 2017 Oral Argument, *Washington*, No. 17-35105 (9th Cir.), at 24:25-24:41, *available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010885.

Defendants' request to stay the district court's order in *State of Washington v. Trump*. In addition, while the *Hawaii* Plaintiffs raised these arguments, the district court in *Hawai'i* relied solely on the Establishment clause claim in granting preliminary injunctive relief. ECF 270. As individuals who suffered physically, psychologically, and financially because of the EOs, the arguments of the *Ali* Plaintiffs and proposed class members regarding irreparable harm are different from the arguments about harm put forward by the State. The *Ali* Plaintiffs are uniquely situated to present the harm suffered by individual immigrant visa petitioners and the immigrant visa applicants who are facing indefinite separation from children, spouses, parents, siblings, and employees.

Courts have recognized that governmental representation of private, non-governmental intervenors may be inadequate. For example, in *Dimond v. District of Columbia*, the D.C. Circuit held that because the government was responsible for representing a broad range of public interests rather than the more narrow interests of intervenors, the "application for intervention . . . falls squarely within the relatively large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties in certain circumstances." 792 F.2d 179, 192 (D.C. Cir. 1986); *see also Natural Res. Def. Council v. Costle*, 561 F.2d 904, 911-12 (D.C. Cir. 1977) (holding that the

government does not adequately represent private organizations because intervenors' interests are different and more focused).

Second, the State of Hawai'i, as a government entity—as opposed to petitioners for and recipients of immigrant visas—does not and cannot present the same standing and irreparable injury arguments as the *Ali* Plaintiffs. Hawai'i has undoubtedly suffered harm to its proprietary interests, i.e., injury to their public universities. *Washington,* 847 F.3d at 1161 ("We therefore conclude that the States have alleged harms to their proprietary interests traceable to the Executive Order"). The district court appropriately recognized that the individual Plaintiff in *Hawai'i*, had standing to assert an Establishment Clause violation based on allegations that the EOs demonstrate hostility to his religious beliefs. *Hawai'i*, 2017 WL 1167383, at 4. But again, the basis for his standing and the arguments addressing irreparable injury are substantially distinct from those raised by the *Ali* Plaintiffs as immigrant visa applicants and their visa petitioners, including their constitutionally protected interests in marriage, and child-rearing.

Finally, the *Ali* Plaintiffs may offer "necessary elements to the proceeding" the existing parties may not present. As noted above, if the *Hawai'i* Plaintiffs' standing is called into question with respect to the claim at issue, the *Ali* Plaintiffs may be critical to the Court's retaining Article III jurisdiction over that claim. In addition, the *Ali* Plaintiffs and proposed class members are ideally situated to

represent the harm and human suffering that would be caused by EO2. Finally, counsel for the *Ali* Plaintiffs and proposed class members are established immigrant rights organizations; they are intimately familiar with immigration law, including visa adjudication, the national security-related provisions of the INA, the security checks conducted by the U.S. government in conjunction with visa issuance, and, furthermore, with the impact that the EO2 would have on the lives of U.S. citizen and lawful permanent resident petitioners and their beneficiaries. *Accord INS v. National Center for Immigrants' Rights, Inc.,* 502 U.S. 183, 195 (1991) (noting the "complex regime of immigration law"); *Ardestani v. INS*, 502 U.S. 129, 138 (1991) (referring to "the complexity of immigration procedures and the enormity of the interests at stake").

* * * * *

In sum, the vital and distinct interests of the *Ali* Plaintiffs and proposed class members demonstrate that they should be granted leave to intervene. For these reasons, the *Ali* Plaintiffs respectfully request that the Court grant them intervention as a matter of right.

II. PERMISSIVE INTERVENTION IS ALSO APPROPRIATE.

Even if the Court finds that the *Ali* Plaintiffs and the proposed class members are not entitled to intervene as of right, they should nonetheless be permitted to intervene pursuant to Federal Rule of Civil Procedure 24(b). This

Court may allow "'permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common.'" *United States v. City of Los Angeles*, 288 F.3d 391, 403 (9th Cir. 2002) (quoting *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996)). In considering whether to grant permissive intervention, the Court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

As a threshold matter, the *Ali* Plaintiffs' motion to intervene is timely. *See supra* Section I.A. Second, the *Ali* Plaintiffs' claims share substantial questions of law and fact with the case now before this Court, as the *Hawai'i* plaintiffs similarly seek to enjoin EO2 as unlawful and unconstitutional. Third, as discussed above, intervention will not create delay or prejudice the existing parties. *See id*. Adding the *Ali* Plaintiffs as plaintiffs-intervenors at this juncture of the lawsuit will not needlessly increase cost, delay disposition of the litigation, or prejudice the existing parties. The *Ali* Plaintiffs already have presented their arguments in their motion for preliminary injunctive relief, and the Defendants thus have ample time to prepare any additional arguments that may be necessary. Importantly, the participation of the *Ali* Plaintiffs in this lawsuit will offer evidence and arguments from a proposed class of immigrant visa petitioners and beneficiaries who are the

direct targets of EO2 and who have a direct and personal stake in the outcome of this case. Thus, at a minimum, on behalf of themselves and the proposed class, the *Ali* Plaintiffs ask the Court to exercise its broad discretion and grant them permissive intervention.

CONCLUSION

For the foregoing reasons, the Proposed Plaintiffs-Intervenors respectfully request that the Court grant their motion to intervene in this action as Plaintiffs on behalf of themselves and the putative class they seek to represent.

Dated: April 6, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket No. 17-15589

I, Matt Adams, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 6, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Matt Adams

Matt Adams

Date: April 6, 2017