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' REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE TO INTERVENE

Matt Adams
Glenda Aldana Madrid
Maria Lucia Chavez
Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98104
(206) 957-8611
(206) 587-4025 (fax)

Trina Realmuto
Kristin Macleod-Ball
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727
(617) 227-5495 (fax)

Mary Kenney
Aaron Reichlin-Melnick
Melissa Crow
American Immigration Council
1331 G Street, NW, Suite 200
Washington, D.C. 20005
(202) 507-7512
(202) 742-5619 (fax)

Attorneys for Proposed Plaintiffs-Intervenors

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. The *Ali* Plaintiffs Sought Intervention at the Earliest Point at Which It Was Reasonable to Do So 2

II. The *Ali* Plaintiffs Have Significant Protectable Interests In the Non-Discriminatory and Constitutional Application of Immigration Laws 5

III. This Court May Address Other Claims that Directly Affect the Protected Interests of the *Ali* Plaintiffs. 8

IV. The *Ali* Plaintiffs' Interests Are Not Adequately Represented. 10

CONCLUSION 12

CERTIFICATE OF COMPLIANCE 13

CERTIFICATE OF SERVICE 14

INTRODUCTION

Nothing in Defendants' opposition counsels against granting the *Ali* Plaintiffs leave to intervene in this appeal pursuant to Federal Rule of Appellate Procedure (FRAP) 24(a) and (b). As U.S. citizen and lawful permanent resident immigrant visa petitioners and immigrant visa applicants from the countries targeted by Executive Order 13780, "Protecting the Nation From Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13209 (Mar. 9, 2017) (EO2), the *Ali* Plaintiffs and putative class members have a distinct and significant interest in the proceedings before this Court. Although they raise many of the same legal claims as the existing plaintiffs in this case, the *Ali* Plaintiffs raise these claims directly on behalf of themselves and others who are similarly situated.

The *Ali* Plaintiffs standing to raise, and interest in bringing, statutory and constitutional challenges to EO2 turn on facts that are significantly different from those of the *Hawai'i* Plaintiffs. These differences are relevant to two key elements of the preliminary injunction under review, as well as its scope: likelihood of success on the merits, particularly with regard to standing; and irreparable harm, particularly with respect to U.S. citizens and lawful permanent residents and their family members abroad. Specifically, the *Ali* Plaintiffs are most appropriately suited to challenge EO2's discriminatory immigrant visa issuance policy and violation of 8 U.S.C. § 1152(a)(1). Furthermore, their constitutionally protected

interests in family, marriage, and child-rearing are distinct from the interests of the existing plaintiffs. Intervention is necessary to protect the *Ali* Plaintiffs' interests. This is true even if this Court limits its review and analysis solely to the Establishment Clause claim relied upon by the district court. However, this Court may decide not to so limit its review, as it has authority to address other claims presented and briefed by the parties below.

ARGUMENT

I. The *Ali* Plaintiffs Sought Intervention at the Earliest Point at Which It Was Reasonable to Do So.

The *Ali* Plaintiffs sought intervention at the earliest point at which it was reasonable to do so. As illustrated below, the *Ali* case and the instant case proceeded on parallel litigation tracks following the issuance of EO2:

State of Hawai'i v. Trump	*Ali v. Trump*
3/6-Issuance of EO2	
3/7-Motion to file amended complaint filed	
3/8-Temporary restraining order (TRO) filed	
	3/10-Amended complaint, TRO and preliminary injunction (PI) motion, and class certification motion filed
3/15-Argument on TRO motion; TRO issued	3/15-Argument on TRO motion
	3/17-TRO stayed pending *Hawai'i* appeal
3/29-District Court converts TRO to PI	
3/30-Defendants file notice of appeal	3/30-Defendants move to stay all proceedings and extend deadlines to answer and respond to class certification

	motion
3/31-Joint motion to expedite briefing filed	
4/3-Court grants expedite briefing motion	
	4/5-Class certification briefing stayed pending *Hawai'i* appeal but court orders Defendants to respond to complaint
	4/6-Motion to intervene in this case filed
4/7-Defendants' opening brief filed	

The *Ali* Plaintiffs filed their motion to intervene one week from the day Defendants filed their notice of appeal in this case[1] and three days after this Court set an expedited briefing schedule.[2] Moreover, they filed it one day after the district court stayed briefing of their motion for class certification, accepting Defendants' arguments that a ruling on that motion (like their TRO and PI motion) was inexorably intertwined with this Court's decision on this appeal.[3]

Defendants mistakenly assert that permitting the *Ali* Plaintiffs to intervene would cause prejudice as they already have filed their principal brief and intervention might delay resolution of the appeal. ECF 53 at 4. In fact, granting the

---

[1] *Hawai'i*, No. 1:17-cv-00050-DKW-KJM, 2017 WL 1167383 (D. Haw. Mar. 29, 2017).

[2] *Hawai'i*, No. 17-15589, ECF 14 (9th Cir. Apr. 3, 2017).

[3] Without any support, Defendants assert that the *Ali* Plaintiffs have foregone the opportunity to intervene because they "did not seek to intervene while the case was in district court, instead pursuing their own separate litigation." ECF 53 at 2. Clearly, since both the Washington and Hawai'i district courts heard oral argument on the TROs on the same day, the *Ali* Plaintiffs had no reason to seek to intervene in the Hawai'i district court case at that stage.

motion would not further delay disposition of this matter as all briefing must be completed prior to the Court's hearing set for May 15, 2017. Defendants will have ample time to address the arguments raised by the *Ali* Plaintiffs in their reply brief, as Defendants already have responded to Plaintiffs' claims in the government's opposition to their motion for a TRO and PI.[4]

Although Defendants claim that the *Ali* Plaintiffs raise "distinct factual and legal positions," ECF at 53, the *Ali* Plaintiffs present largely the same legal claims briefed by the parties in *Hawai'i*, including claims under 8 U.S.C. § 1152(a)(1)(A), the Establishment Clause, the Due Process Clause, and the Fifth Amendment's guarantee of equal protection. *See Hawai'i*, No. 1:17-cv-00050-DKW-KJM, ECF 65-1 at 23-44 (motion for TRO); *id.* ECF 145 at 23-47 (Defendants' opposition); *id.* ECF 191 at 2-21 (Plaintiffs' reply in support of their TRO motion).

The "distinct factual and legal position[]" that Defendants prefer not to address is simply that the *Ali* Plaintiffs are individual U.S. citizens and lawful permanent residents who filed immigrant visa petitions for family members from the targeted countries, as well as their family members with pending immigrant visa applications—all of whom face irreparable harm if EO2 does not remain enjoined. These facts do indeed present distinct issues with respect to standing and the scope of the injunction, which is precisely why the *Ali* Plaintiffs satisfy the

[4] *Compare Ali v. Trump*, No. 2:17-cv-00135-JLR, ECF 53 (Plaintiffs' motion for a TRO/PI) *with* ECF 71 (Defendants' opposition to Plaintiffs' motion).

standards for intervention under FRAP 24(a) and (b). *See* ECF 20-1. Moreover, this Court will benefit from the intervention of the *Ali* Plaintiffs as it will be presented with the full spectrum of impacted parties and their respective claims against and harms arising from the enjoined EO2, with respect to the issuance of immigrant visas in the targeted countries and entry of visa holders.

II. The *Ali* Plaintiffs Have Significant Protectable Interests In the Non-Discriminatory and Constitutional Application of Immigration Laws.

Contrary to Defendants' claim that the *Ali* Plaintiffs only have a general interest in this appeal, ECF 53 at 5, as immigrant visa petitioners and beneficiaries, they have a specific and concrete interest in this Court's review of the order preliminarily enjoining EO2, as it directly impacts immigrant visa adjudication and entry into the United States. As discussed in Section IV, *infra*, this interest cannot be adequately represented by the existing parties, as neither the State of Hawai'i nor Mr. Elshikh are immigrant visa petitioners or beneficiaries. Nor do the existing plaintiffs fall as squarely within the zone of interest protected by 8 U.S.C. § 1152(a)(1)(A) as the *Ali* Plaintiffs, as this provision expressly bars discrimination in *immigrant* visa issuance based on, inter alia, "nationality, place of birth, or place of residence." Additionally, the *Ali* Plaintiffs have constitutionally protected interests in marriage, family life, and child-rearing which are directly impacted by EO2, as distinct from existing plaintiffs. *See*, *e.g.*, *Loving v. Virginia*, 388 U.S. 1,

12 (1967); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008).[5] Absent intervention, their ability to protect these interests will be impaired or impeded.

Indeed, as Defendants acknowledge, the government sought to stay proceedings in *Ali* precisely because they argued that this appeal would directly impact *Ali*. *See* ECF 53 at 7. *See also Ali*, 2:17-cv-00135-JLR, ECF 85 at 6-7 (arguing this Court's "resolution of the *Hawaii* appeal is likely to have 'significant relevance to—and potentially control'—[the district court's] analysis of the forthcoming issues in [*Ali*]"); *id.* at 8 ("[T]he Ninth Circuit's decision could change 'the applicable law or the relevant landscape of facts that need to be developed' in such a way that [the district court's] intervening rulings will be nullified or will need to be made anew.") (internal citation omitted); *id.* ECF 93 at 2 ("The question of what [the *Ali* district court] may review in analyzing Plaintiffs' claims is a primary issue before the Ninth Circuit.").

Furthermore, despite Defendants' broad claims, *see* ECF 53 at 5, granting intervention by the *Ali* Plaintiffs would not set a precedent allowing any potential

---

[5] Furthermore, "the foremost policy underlying the granting of [immigrant preference] visas under our immigration laws … [is] the reunification of families." *Lau v. Kiley*, 563 F.2d 543, 547 (2d Cir. 1977); *see also Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) ("[T]he humane purpose [of the INA] is to reunite families.").

plaintiff challenging EO2 anywhere in the United States to intervene. Like *Hawai'i*, *Ali* is pending within this circuit and the *Ali* Plaintiffs challenge EO2 based on substantially similar claims. The district court in *Ali* already recognized the connection between the two cases.[6] Furthermore, the *Ali* Plaintiffs have a direct stake in the immigrant visa issuance and entry process. Consequently, the *Ali* Plaintiffs are distinguishable from other potential intervenors, and their motion to intervene meets the standards set forth in FRAP 24.

Defendants' reliance on *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d 980, 986-87 (9th Cir. 2008), to discount the *Ali* Plaintiffs' interest in intervening in this case given its potential to create binding precedent, ECF 53 at 5-6, is misplaced. As noted, the *Ali* Plaintiffs and proposed class members are directly impacted by the preliminary injunction before this Court, as they have filed visa petitions and have pending visa applications. Their interest is not abstract, hypothetical, or attenuated, as was true in *Bethune*, the case relied upon by *Ferdinand. See Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 530-31 (7th Cir. 1988) (explaining that the intervenor was a trade association that had no actual current controversy affected by the litigation, and questioning whether the intervenor even had standing). Moreover, *Bethune* clearly drew a distinction

[6] *See Ali*, 2:17-cv-00135-JLR, ECF 79 at 10 (remarking on the "significant overlap of issues" between both cases); *id.* (noting that "many of the legal arguments Plaintiffs presented in their TRO motion are likely to be before the Ninth Circuit").

between avoiding an unfavorable opinion from a "single district judge"—in which case, intervention was not warranted—and from "the decision of an appellate tribunal"—in which intervention might be warranted. *See id.* at 531-34.

Defendants cite *Curtis v. Citibank, N.A.*, 226 F.3d 133 (2d Cir. 2000), to support their allegation that the *Ali* Plaintiffs are seeking to pursue two separate cases. ECF 53 at 7. That case is inapposite as it involved two separate filings of the same complaint in the same district court. 226 F.3d at 138. That court's reliance on *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), is similarly inapposite; it addresses factors for weighing the contemporaneous exercise of concurrent jurisdiction between a state and federal court as well as between two or more federal district courts. Here, however, there is no request for contemporaneous concurrent jurisdiction because the Western District of Washington has stayed adjudication of the *Ali* Plaintiffs' motion to enjoin EO2 *pending this appeal*. *See Ali*, 2:17-cv-00135-JLR, ECF 79; *see also id.* ECF 91 (staying class certification briefing).

III. This Court May Address Other Claims that Directly Affect the Protected Interests of the *Ali* Plaintiffs.

As Defendants acknowledge, the *Ali* Plaintiffs raise an Establishment Clause claim as well as substantive claims other "than the Establishment Clause claim that was the basis for the injunction at issue in this appeal." ECF 53 at 3, 8.

Significantly, in addition to allowing the Court to consider their standing and harm as it relates to the Establishment Clause claim, allowing intervention by the *Ali* Plaintiffs also would ensure this Court that a plaintiff with standing exists with respect to the other substantive claims presented and briefed before the district court in *Hawai'i*. This is particularly true with respect to the claim that EO2 violates Congress' prohibition against discrimination in immigrant visa issuance in 8 U.S.C. § 1152(a)(1)(A).

It is well established that a reviewing court "can 'affirm the district court on any ground supported by the record,'" including alternative grounds not relied upon by the lower court in issuing a preliminary injunction. *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 608 (9th Cir. 2000). *See also Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1236 n.6, 1239-44 (9th Cir. 2001) (affirming grant of preliminary injunction on narrower grounds, based on claim "not explicitly" identified by the district court, and remarking that "[i]n any case" an "affirmance may be based on any theory argued below") (citing *Spokane Cty. v. Air Base Hous., Inc.*, 304 F.2d 494, 497 (9th Cir. 1962)). *See generally Helvering v. Gowran*, 302 U.S. 238, 245 (1937) ("In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."). Granting intervention would better position this Court to consider the legal claims presented

in support of the underlying motion for preliminary injunctive relief by providing a necessary perspective: that of immigrant visa petitioners and beneficiaries.

The *Ali* Plaintiffs are critically positioned to ensure this Court that a plaintiff with standing exists and, thus, that it may reach all of the issues developed in the record below. *See, e.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1141 (9th Cir. 2009) (recognizing its "discretion to affirm the district court on any ground supported by the . . . record" but declining to do so because the record was "undeveloped") (internal quotation marks and citation omitted). Because most of the *Ali* Plaintiffs' claims are implicated by this appeal, their unique perspective is crucial to fully understand and address them.

IV. The *Ali* Plaintiffs' Interests Are Not Adequately Represented.

The *Ali* Plaintiffs and the class members they seek to represent bring an additional, and key, perspective with respect to such matters as standing, the irreparable harm they face as immigrant visa petitioners and beneficiaries absent preliminary injunctive relief, the zone of interests protected by 8 U.S.C. § 1152(a)(1)(A), and the appropriate scope of preliminary injunctive relief.

Defendants argue that the *Hawai'i* Plaintiffs do not have standing to present even the Establishment Clause claim.[7] Similarly, Defendants argue that "even if

[7] *See* ECF 23 at 22 ("Hawaii identifies no individual who has 'concrete plans' to come to the University of Hawaii that have been impeded by Section 2(c)."); *id.*

some injunctive relief were appropriate, the nationwide injunction that the district court entered is vastly overbroad." ECF 23 at 56.[8] As discussed above, the *Ali* Plaintiffs, as immigrant visa petitioners and beneficiaries directly harmed by EO2, clearly possess standing—for reasons different from that of the *Hawai'i* Plaintiffs—with respect to all the claims raised in this case. Thus, the *Ali* Plaintiffs seek to intervene to ensure that that their interests are protected, that the Court unquestionably has a plaintiff with standing before it with respect to the claims brought by the *Ali* Plaintiffs, and that the Court's decision reflects their unique interests.

Lastly, Defendants plainly err in asserting that the *Ali* Plaintiffs may adequately protect their interests by simply seeking to participate as amicus curiae. ECF 53 at 1. Filing an amicus brief would not provide an adequate alternative for the *Ali* Plaintiffs, as it would not permit the Court to consider, much less rely upon, their distinct posture with respect to standing, the record of harm, or needs with respect to the scope of injunctive relief.

---

at 35 ("This standing theory is even more speculative and attenuated."); *id.* at 28 ("Dr. Elshikh cannot manufacture standing by 're-characteriz[ing]' his abstract injury from 'government action' directed against others as personal injury from 'a governmental message [concerning] religion' directed towards him.").

[8] *See also* ECF 23 at 59 ("[T]he district court erred by enjoining [Section 2(c)'s entry suspension] as to all persons everywhere, rather than redressing only plaintiffs' particular cognizable injuries that are found to result from a violation of plaintiffs' own rights.").

CONCLUSION

For the foregoing reasons, the Court should grant the motion to intervene.

Dated: April 14, 2017 Respectfully submitted,

s/*Matt Adams*
Matt Adams
Glenda M. Aldana Madrid
Maria Lucia Chavez
Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98104
(206) 957-8611
(206) 587-4025 (fax)

Trina Realmuto
Kristin Macleod-Ball
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727
(617) 227-5495 (fax)

Mary Kenney
Aaron Reichlin-Melnick
Melissa Crow
American Immigration Council
1331 G Street, NW, Suite 200
Washington, D.C. 20005
(202) 507-7512
(202) 742-5619 (fax)

Attorneys for Proposed Intervenors

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d)(2)(C), "a reply produced using a computer must not exceed 2,600 words" except by the court's permission. Ninth Cir. Rule 27-1(1)(d) provides that "[a] reply to a response may not exceed 10 pages." Ninth Cir. Rule 32-3 states:

> If an order or rule of this Court sets forth a page limit for a brief or other document, the affected party may comply with the limit by
> . . .
> **(2)** filing a monospaced or proportionally spaced brief or other document in which the word count divided by 280 does not exceed the designated page limit.

I certify that the foregoing document complies with the applicable type volume limitations. It has been prepared in proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font, and contains 2,703 words, as measured by the program used to prepare the document, excluding the parts exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f).

I further certify, pursuant to Ninth Cir. Rule 32-3, that 2,703 words, divided by 280, does not exceed the designated ten-page limit.

Date: April 14, 2017

s/ Matt Adams

Matt Adams

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 14, 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.

Date: April 14, 2017

s/ Matt Adams

Matt Adams