No. 17-15589

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAIʻI, et al.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
U.S. District Court for the District of Hawaiʻi
17-00050 DKW-KSC
Honorable Derrick K. Watson

PROPOSED PLAINTIFFS-INTERVENORS' MOTION FOR LEAVE TO INTERVENE

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INTRODUCTION

Defendants-Appellants ("Defendants") challenge the State of Hawai'i and Dr. Ismail Elshikh's ("*Hawai'i* Plaintiffs") standing to challenge the refugee ban in Section 6 of Executive Order 13780, "Protecting the Nation From Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13209 (Mar. 9, 2017) ("EO-2"). Appellants' Opening Br. 21–32 (9th Cir. Apr. 7, 2017), ECF No. 23. Proposed Plaintiffs-Intervenors ("*Doe* Plaintiffs") strongly disagree with Defendants' misinterpretation of long-held standing doctrine and support the *Hawai'i* Plaintiffs' ability to challenge both Sections 2 and 6 of EO-2. However, should the Court give credence to Defendants' arguments, the *Doe* Plaintiffs seek to intervene to establish both the cognizable injury suffered by refugees and demonstrate the irreparable harm they will suffer if Section 6 is to take effect.

The *Doe* Plaintiffs include Joseph Doe and James Doe ("*Doe* refugees") and the Episcopal Diocese of Olympia. Joseph and James are former refugees who are now lawful permanent residents of the United States and seek to bring their family members here as refugees. Each fled persecution in his country of origin before coming to the United

States, and each was forced to leave behind his wife and children. Both Joseph and James filed "follow-to-join" I-730 petitions so that their families may join them in the United States. Those petitions were approved in their entirety prior to EO-1. Yet despite this approval, including passing all required security and medical clearances, neither family has been scheduled for travel to the United States because of Section 6 EO-2. These Plaintiffs have suffered serious injury and will continue to suffer should Defendants prevail.

The individual *Hawai'i* plaintiff, Dr. Elshikh, does not use his mother-in-law's family visa petition as a basis to challenge Section 6. Likewise, the proposed *Ali* intervenor-plaintiffs have pending family visa petitions and are also not challenging Section 6. Thus, in the absence of intervention by these *Doe* refugee plaintiffs, there will be no individual challenging Section 6, but only the State of Hawai'i.

Although the *Doe* Plaintiffs' complaint raises a variety of claims, they seek to intervene to address standing and irreparable harm with respect to the Establishment Clause claim already before this Court.[1] If

[1] The *Doe* Plaintiffs' First Amended Complaint also raises claims under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 *et seq.*, Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*,

the Court grants their motion, the *Doe* Plaintiffs would request permission to file only a short, 5-page brief within 48 hours of the Court's order so as to not impede the expedited briefing schedule (or any schedule the Court deems appropriate). In addition, the *Doe* refugees waive any right to file a reply regarding this intervention motion.

The *Doe* Plaintiffs respectfully request that this Court grant leave for them to intervene in the instant appeal, either as of right under Federal Rule of Civil Procedure ("Rule") 24(a) or, in the alternative, pursuant to a permissive intervention under Rule 24(b).[2]

FACTUAL BACKGROUND

This Court is of course familiar with the short but intense procedural history of litigation over Defendants' Executive Orders, and the *Doe* Plaintiffs will not recite that history here.

Administrative Procedure Act, 5 U.S.C. §§ 501 *et seq*., as well Fifth Amendment Equal Protection, Substantive Due Process, and Procedural Due Process claims, U.S. Const. amend. V. *See infra* n.4 (citing to First Amended Complaint).

[2] On April 13, 2017, undersigned counsel for the *Doe* Plaintiffs contacted counsel for both parties. Counsel for the *Hawai'i* Plaintiffs indicated they take no position. Counsel for the federal government indicated their clients oppose this request for intervention.

The *Doe* Plaintiffs filed a complaint based on Defendants' first Executive Order[3] ("EO-1") on February 7, 2017, and amended their complaint in response to EO-2 on March 14, 2017.[4] The *Doe* Plaintiffs seek to represent two classes of people harmed by EO-2, and focus on the second class in this motion, defined as:

> All refugees and asylees, including those who have since adjusted their status to Lawful Permanent Resident, who now reside in Washington, and who have filed I-730 petitions for and await the arrival of their family members who have completed and cleared their final security screenings.

Mot. for Class Certification 8–9, *Doe v. Trump* (W.D. Wash. Apr. 11, 2017), ECF No. 19. An I-730 "follow-to-join" petition allows refugees and asylees to petition to bring spouses and unmarried children under age 21 to join them in the United States. As with the principal refugee's screening process, I-730 beneficiaries are subject to medical

[3] Executive Order 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 8977 (Feb. 1, 2017) ("EO-1").

[4] Compl., *Doe v. Trump*, No. 17-00178-JLR (W.D. Wash. Feb. 7, 2017), ECF No. 1; *Id.*, First Am. Compl. (W.D. Wash. Mar. 14, 2017), ECF No. 10 (attached for the Court's convenience as Exhibit ("Ex.") 1 hereto) ("FAC").

evaluations, which expire after six months, and rigorous security screening.

Joseph Doe and James Doe are the proposed representatives for this class. Their stories offer a personal glimpse into the harm created by Section 6 of EO-2—and underscore the importance of the State of Hawai'i's interest in being able to welcome and shelter refugees and their families.

Joseph Doe[5] is a Somali refugee who fled his country's violent civil war with his family, hiding in the forest while trying to reach Kenya on foot. His family was found by armed fighters, and when he was only ten, Joseph Doe witnessed the rape of his pregnant older sister, his mother being beaten as she tried to stop the assault, and his sister bleeding to death. He then spent 22 years of his life in refugee camps in Kenya, where he later lost his parents and the rest of his siblings during a raid by an outside hostile group.

Joseph was granted refugee status in the United States after years of screenings, evaluations, and multiple interviews. After he

[5] *See* Ex. 1, FAC ¶¶ 66–79; *see also* Decl. of Joseph Doe in Support of Pls.' Mot. for Class Certification, *Doe v. Trump* (W.D. Wash. Apr. 11, 2017), ECF No. 25 (attached as Ex. 2).

arrived in the United States, he filed an I-730 "follow-to-join" petition for his wife and children in June 2015. His petition was approved in early January 2017, prior to EO-1, and his wife and children have passed all required security and medical clearances. But because they did not have travel scheduled as of the effective date of EO-2, they are barred from entering the United States by Section 6's suspension of travel under the U.S. Refugee Admissions Program ("USRAP").

James Doe,[6] an Eritrean national, is a refugee with a similarly difficult life story. In 2009, James was confined in an underground prison in Eritrea for months as punishment for expressing his political opinions. He managed to escape and began a six-year journey to obtain refugee status in the United States. His search for refugee protection took him through multiple countries, including Sri Lanka where he was imprisoned for two years because of his nationality. The United Nations was subsequently able to help secure his release and he obtained refugee status in the United States.

[6] *See* Ex. 1, FAC ¶¶ 80–94; *see also* Decl. of James Doe in Support of Pls.' Mot. for Class Certification, *Doe v. Trump* (W.D. Wash. Apr. 11, 2017), ECF No. 26 (attached as Ex. 3).

In July 2015, James filed an I-730 "follow-to-join" petition for his wife and two children, one of whom was born while he was imprisoned, and whom he has never met. James' petition was approved in the fall of 2016, and his family members have passed their final medical and security clearances to join him in the United States. Like Joseph Doe's family, however, James' family had not yet been scheduled for travel as of the effective date of EO-2. His family's travel is therefore subject to Section 6 of EO-2 and, as a result, James Doe's reunion with his family, delayed for so many years and nearly within reach, has been similarly thrown into uncertainty because of Defendants' actions.

The Episcopal Diocese of Olympia (the "Diocese")[7] is also a *Doe* Plaintiff. The Diocese is a local affiliate of the Episcopal Migration Ministries, a voluntary agency that welcomes refugees through a Cooperative Agreement with the U.S. Department of State. The Diocese has operated a refugee resettlement program in the Seattle, Washington area since 1978 and has sponsored the resettlement of more than 15,000 refugees.

[7] *See* Ex. 1, FAC ¶¶ 95–103.

When EO-1 was issued, the Diocesan refugee resettlement office was actively preparing to welcome over 20 refugee families—including families from Syria, Iraq, and Somalia—in the coming days, weeks, and months. As a result of the Diocesan efforts, these refugee families already had domestic arrangements to support their arrival and were approved for travel. These travel plans were abruptly canceled when EO-1 issued. The chaos surrounding both Executive Orders has also required the Diocesan refugee resettlement office to expend additional, unplanned-for resources. Its employees have been working around the clock to address the immediate needs of the families placed in crisis by the Executive Orders and to support family members already in the United States who had been working to welcome them.

As a result of the judicial stay of EO-1, a few of the refugees the Diocese was originally expecting have arrived in the United States. However, as of March 14, 2017, the Diocese was expecting to receive and resettle over 35 families who had not yet arrived. These refugees will not be allowed to enter the United States if EO-2 goes into effect. The resources the Diocese recently expended to welcome these families have now been largely wasted.

LEGAL STANDARD

Under Rule 24(a)(2), a movant seeking to intervene as of right "must demonstrate that four requirements are met: (1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (internal citation omitted). Rule 24 likewise governs an intervention on appeal. *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997).

While the proposed intervenor bears the burden of showing those four elements are met, "the requirements are broadly interpreted in favor of intervention." *Montana Wilderness Ass'n*, 647 F.3d at 897; *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) ("In general, we construe Rule 24(a) liberally in favor of potential intervenors."). In addition, this Court's review is "guided primarily by practical considerations, not technical distinctions." *Berg*, 268 F.3d at

818 (internal quotation marks and citation omitted). "[A] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (citing *United States v. City of Los Angeles*, 288 F.3d 391, 397–98 (9th Cir. 2002)).

Alternatively, permissive intervention under Rule 24(b)(1)(B), as this Court has "often stated," requires "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Freedom from Religion Found., Inc., v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011) (citing *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992)).

ARGUMENT

I. The *Doe* Plaintiffs Satisfy the Requirements for Intervention as of Right.

A. The *Doe* Plaintiffs' Motion is timely.

Timeliness with respect to motions to intervene "is a flexible concept," *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004), which is "determined by the totality of the circumstances facing would-be intervenors[.]" *Smith v. Los Angeles Unified Sch. Dist.*,

830 F.3d 843, 854 (9th Cir. 2016). Three factors guide determination of timeliness: "(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." *Id.* (citation omitted).

The *Doe* Plaintiffs' motion is timely under the totality of the circumstances. The circumstances surrounding this litigation are unusual, and all parties have been working constantly to keep up with a rapidly changing factual and legal landscape since Defendants issued EO-1 on January 27, 2017.

The *Doe* Plaintiffs' motion follows the district court's recent orders making clear that this appeal would impact scheduling and likely also merits issues before it. Stipulation and Order at 1–2, *Doe v. Trump* (W.D. Wash. Apr. 11, 2017), ECF No. 18. Moreover, this appeal is only two weeks old. Order, *Hawai'i*, No. 17-15589, (9th Cir. Apr. 3, 2017), ECF No. 14. Given the totality of the circumstances here and the flexibility of the standard, the *Doe* Plaintiffs' motion is timely. *Cf. United States v. State of Or.*, 745 F.2d 550, 553 (9th Cir. 1984) (holding intervention was timely fifteen years after litigation began).

The *Doe* Plaintiffs are cognizant of the expedited briefing schedule in this appeal and, as noted above, waive their reply to this motion. And if the motion is granted, they will request only that they be permitted to file a short, streamlined brief addressing the *Doe* Plaintiffs' standing and irreparable harm arguments within 48 hours of the Court granting this motion or on whatever schedule the Court deems appropriate.

Nor is there prejudice to either party. Plaintiffs-Appellees take no position on intervention. Although Defendants oppose the motion, they will not be prejudiced by having to litigate new or additional claims.

B. The *Doe* Plaintiffs have a significant protectable interest in the outcome of this appeal.

At its core, the "significant protectable interest" test asks whether the intervenors "will suffer a practical impairment of [their] interests as a result of the pending litigation." *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006).

There is no question that the *Doe* refugees and the putative class have a protectable interest in the appeal at bar, as does the Diocese: if the Court does not continue the injunction of Section 6 of EO-2, Defendants will stay all travel for already approved and cleared I-730 applicants for at least 120 days.

The *Doe* Plaintiffs will suffer concrete harms if the injunction is lifted. Every day Joseph Doe and James Doe are denied the ability to be reunited with their wives and children is a cognizable harm. Defendants do not—and cannot—refute that EO-2 bars lawful residents of the United States with otherwise-approved I-730 follow-to-join petitions from being reunited with their spouses and children when all that remains after the lengthy vetting process is formal scheduling of transit. *See* EO-2 § 6(a) ("The Secretary of State shall suspend travel of refugees into the United States" and exempting only "refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State"). And Defendants, in challenging *Hawai'i* Plaintiffs' third-party standing, acknowledged that lawful permanent residents do have "first party" constitutional rights. *See* Appellants' Opening Brief at 30 (9th Cir. Apr. 7, 2017), ECF No. 23.

Similarly, if the Court finds that the *Hawai'i* Plaintiffs cannot meet the "irreparable harm" prong of the injunction analysis, that decision could damage the *Doe* Plaintiffs' case. *Doe* Plaintiffs have a significant interest "in adjudicating an issue [they have] raised in one proceeding that lands in another proceeding for disposition." *In re*

Estate of Ferdinand E. Marcos Human Rights Litig., 536 F.3d 980, 986–87 (9th Cir. 2008) (finding the "significant interest" test met and distinguishing an intervenor's interest in simply obtaining a favorable opinion or influencing a proceeding in which they possess only a collateral interest with an intervenor protecting their interests where adjudicated in another proceeding).

If intervention is not granted, and this Court ultimately were to find that the *Hawai'i* Plaintiffs had not established standing or irreparable harm, the *Doe* refugees' *already approved* I-730 petitions will be placed on hold indefinitely. Their only recourse will be to move to enjoin Section 6 in their own right in the district court, a process that could take months. The policies of "efficiency and due process" counsel intervention. *See Wilderness Soc'y*, 630 F.3d at 1179 (citations omitted). After yet another motion to enjoin EO-2, in all likelihood this Court would again have to address Section 6's constitutionality on appeal. In the interests of judicial efficiency, the Court should consider the *Doe* Plaintiffs' injuries during its deliberations here and grant intervention as of right.

C. The disposition of this action may impair the ability of the *Doe* Plaintiffs to protect their interests.

The third factor, closely related to the second, is whether a proposed intervenor is "so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). The inquiry, importantly, is "whether the [court's decision] 'may' impair rights 'as a practical matter' rather than whether the decree will 'necessarily' impair them." *City of Los Angeles*, 288 F.3d at 401. Here, if the Court declines to uphold the injunction of Section 6, the *Doe* refugees will suffer irreparable harm as their I-730 petitions—fully approved, with the beneficiaries awaiting only formal scheduling of travel—languish. They should be allowed to intervene as of right to protect this interest.

The advisory committee notes to Rule 24(a) are instructive: "If 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). The "practical" effect of this litigation is plain: with injunctive relief, the *Doe* refugees can finally receive the long-awaited news that their family

members are scheduled for travel and will soon be joining them here in the United States.

Allowing intervention now also prevents future litigation. It allows the Court to address all facets of EO-2 in one take, instead of in piecemeal appeals on discreet provisions and claims. It also protects the proposed intervenors' interests, as every day without resolution in this case is another day their loved ones cannot rejoin them here in the United States, despite having received prior approval to do so.

D. The *Doe* Plaintiffs satisfy the fourth factor for intervention as of right.

In assessing the fourth factor for intervention as of right—whether a present party will adequately represent an intervenor-applicant's interests—this Court considers "several factors, including whether [a present party] will undoubtedly make all of the intervenor's arguments, whether [a present party] is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected." *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (quoting *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)). The showing required for this factor is

"minimal" and "is satisfied if the applicant shows that representation of its interests 'may be' inadequate[.]" *Id.* (internal citations omitted).

The *Doe* Plaintiffs satisfy this "minimal" requirement because their intervention in this appeal would give the Court the benefit of *Doe* Plaintiffs' facts, which amply illustrate the harm created by EO-2 as it pertains to both Article III standing and the irreparable harm necessitating a preliminary injunction.

The harm inflicted by Section 6 cuts both broadly and deeply. The *Doe* Plaintiffs can attest to the depth of that harm as it affects them as individuals. Thus, "the intervenor offers a perspective which differs materially from that of the present parties to this litigation." *Sagebrush*, 713 F.2d at 528.

The perspective that the *Doe* Plaintiffs bring to this litigation is not otherwise represented by the existing parties, and the *Doe* Plaintiffs thus satisfy the fourth requirement for intervention as of right.

II. Permissive Intervention Is Also Appropriate.

Even if the Court finds that the *Doe* Plaintiffs are not entitled to intervene as of right, they should nonetheless be permitted to intervene pursuant to Rule 24(b). An applicant who seeks permissive intervention

must prove that it meets four threshold requirements: "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Geithner*, 644 F.3d at 843 (citation omitted). The Court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

The first element is easily met, for the *Doe* Plaintiffs bring only constitutional claims and thus offer an independent ground for federal court jurisdiction. *See* Ex. 1, FAC. As discussed above, the *Doe* Plaintiffs also satisfy the remaining three factors. Moreover, the *Doe* Plaintiffs waive their reply on this motion, so all briefing in this matter will continue on schedule and will not delay the May 15, 2017 hearing date.

CONCLUSION

The *Doe* Plaintiffs have demonstrated a practical interest in the outcome here, and allowing their intervention would serve the interests of judicial efficiency. Accordingly, the *Doe* Plaintiffs respectfully request that the Court grant their motion to intervene.

RESPECTFULLY SUBMITTED this 14th day of April, 2017.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,560 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). I relied on the word count of Microsoft Word 2016 in preparing this certificate.

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because the brief—in both its text and its footnotes—has been prepared in 14-point Century Schoolbook font.

I declare under penalty of perjury that the foregoing is true and correct.

s/ Lynn Lincoln Sarko
Lynn Lincoln Sarko

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2017, I electronically filed the foregoing with the U.S. Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I certify that all appellate counsel of record to the parties to this appeal are registered with the Court's CM/ECF system.

s/ Lynn Lincoln Sarko
Lynn Lincoln Sarko