No. 17-15589

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII; ISMAIL ELSHIKH,

Plaintiffs – Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; UNITED STATES OF AMERICA,

Defendants – Appellants.

On Appeal from the United States District Court
for the District of Hawaii
(1:17-cv-00050-DKW-KSC)

REPLY OF APPELLANTS IN SUPPORT OF MOTION FOR A STAY PENDING EXPEDITED APPEAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Constitution:

Regulations:

ARGUMENT

I. The Balance Of Harms Strongly Favors A Stay

A. The Injunction Imposes Serious, Irreparable Harm On The Government And The Public

1. Plaintiffs contend that "any 'institutional harm'" from overriding the President's national-security judgment does not constitute "irreparable harm" because it can be redressed on appeal. Opp. 11. That contention is irreconcilable with *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). There, Chief Justice Roberts ruled that a State "suffers a form of irreparable injury" "[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people," and he thus stayed an order invalidating a State's DNA-collection law notwithstanding that the 10,000-plus samples collected the prior year resulted in only a handful of convictions. *Id.* at 1303; *see* Mot. 9-10.

Plaintiffs do not address *King* when disputing the government's irreparable injury, Opp. 11, yet invoke it themselves when alleging (erroneously, *infra* p. x) that the Order irreparably injures Hawaii by undermining the State's antidiscrimination policies, Opp. 18-19. That turns the decision on its head. Compared to a single State's law-enforcement or antidiscrimination policies, the President's Order is of "singular importance" to the Nation; reflects his "unique responsibility" over "foreign and military affairs"; and serves "an urgent objective of the highest order" "in combatting terrorism." Mot. 7-10 (quoting cases). Moreover, demanding

specific evidence of injury is inconsistent with the Order's very nature as a "[p]redictive judgment" and "preventive measure" to improve current vetting procedures. Mot. 8.

2. Regardless, the Order itself contains a detailed recitation of the considerations underlying the President's national-security judgment. Mot. 4-7. Plaintiffs' arguments for why the Order does not "serve[] a genuine national security objective" (Opp. 6) are just a policy disagreement with that judgment.

First, plaintiffs assert that enjoining Sections 2 and 6 does not threaten national security because this "simply preserves the longstanding status quo" and "no recent event—except for the President's inauguration—* * * compels" an immediate reassessment. Opp. 1, 7. But the President's assumption of office is precisely what entitles and obligates him under the Constitution and Acts of Congress to reassess national-security risks and strike the balance that he deems appropriate to protect the country. *Second*, plaintiffs claim that Sections 2 and 6 are not properly tailored to target existing national-security risks, citing amicus briefs of former national-security officials and a draft Department of Homeland Security report. Opp. 7-8. Again, though, the President is entitled to disagree and follow instead the recommendations of the current Attorney General and Secretary of Homeland Security. *Third*, plaintiffs contend that Sections 2 and 6 are not necessary to review the adequacy of existing vetting procedures or to adopt other protective

measures. Opp. 9-11. But the President is entitled to take multiple actions to defend the Nation. That includes suspending practices pending a review of their adequacy, both to ensure that the agencies can focus on the review and to address the risk and uncertainty related to potential terrorist entry pending that review.

3. Plaintiffs argue that the government has been dilatory and will not benefit from a stay. Opp. 5-6. That is incorrect for three reasons.

First, plaintiffs criticize the government for dismissing the appeal of the Revoked Order and deliberating for three weeks before issuing the new Order. Opp. 5. That is hardly a protracted period to consult with numerous agencies, compile additional factual support, and adopt several substantive changes that have materially affected courts' analyses of the Order. *E.g.*, *Sarsour v. Trump*, 2017 WL 1113305, at *11 (E.D. Va. Mar. 24, 2017) ("[The Order] is materially different * * * from [the Revoked Order] and has addressed * * * concerns raised" by courts.); *Washington v. Trump*, 2017 WL 1045950, at *3-4 (W.D. Wash. Mar. 16, 2017) (noting "substantial distinctions" between the Orders).

Second, plaintiffs cannot persuasively assert that the government has delayed this litigation. Although plaintiffs fault the government (Opp. 5) for seeking clarification about the TRO's scope and opposing conversion of the TRO into a preliminary injunction, the government's conduct was reasonable and expeditious. Because the TRO appeared to cover certain refugee-related and internal-review-

related provisions of the Order that plaintiffs had not challenged and that did not plausibly injure them, the government properly objected to the inclusion of such overbroad relief within the TRO and the preliminary injunction; moreover, the government's preservation of its objection delayed its appeal by only two weeks. E.R. 1, 25. Plaintiffs also fault the government (Opp. 6) for requesting that its stay motion be briefed simultaneously with the appeal. That appellate briefing was itself rapidly expedited, and the government's view was that this Court will likely benefit from full briefing on these important issues before ruling on the stay—which remains very important to the government as oral argument is still weeks away and a final appellate resolution even further.

Third, plaintiffs argue (Opp. 2) that a stay here will not be effective because another district court has entered a nationwide injunction against Section 2(c). *IRAP v. Trump*, No. 17-361, 2017 WL 1018235, at *17-18 (D. Md. Mar. 16, 2017). But the court there refused to enjoin the rest of the Order, *id.*, and thus a stay here would immediately reinstate Section 6 and the remainder of Section 2. In addition, the government's appeal and stay motion in the Fourth Circuit are fully briefed and oral argument is scheduled for May 8. Opp. 6. Given that timing, plaintiffs cannot leverage unjustified relief by another court to avoid a stay of equally unwarranted relief by the district court here. Both stay requests remain of paramount importance to the government and the public.

B. A Brief Stay Pending Appeal Would Not Impose Any Substantial Harm On Plaintiffs

1. Plaintiffs do not meaningfully respond to the government's showing that Dr. Elshikh's alleged psychological harm from the Order does not even establish standing, much less irreparable injury. Plaintiffs do not dispute the general rule that "abstract stigmatic injury" from invidious discrimination is insufficient because Article III standing requires "personal injury" from the discriminatory treatment. Mot. 11; Opp. 13-14. Instead, plaintiffs argue (Opp. 14-15) that Dr. Elshikh is personally harmed because the Order allegedly conveys a "message" of "condemnation of *[his] own* religion." But plaintiffs' cases each involved a personalized injury from actual government speech rather than an abstract objection to government policy: the plaintiffs in those cases were exposed to (1) expressly religious official speech (2) that was directed towards them by their own local government. Here, by contrast, Sections 2 and 6 say nothing about religion, and their restrictions apply only to aliens abroad.

Moreover, plaintiffs have no answer to the cases (Mot. 11-12) that contradict their message-of-condemnation theory. They ignore both *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010), and *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008). And they fail to distinguish *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). Although they suggest that the challenge to the federal government's transfer of

property to a Christian college merely reflected a non-religious "disagree[ment]" with the transfer decision, Opp. 14, that challenge easily could have been characterized as an objection to the transfer's alleged "message" of "endorsement" of Christianity. *See id.* at 466-68, 486-87.

2. Plaintiffs also assert (Opp. 15-18) that they will suffer irreparable harm because the Order will impede the entry of Dr. Elshikh's mother-in-law, prospective students and faculty at the University of Hawaii, and potential Hawaiian tourists. The district court did not treat these asserted injuries as irreparable harm, E.R. 18-19, 40, and plaintiffs fail to show that they even support standing.

First, it is speculative, rather than certainly impending, that any of these individuals would be eligible for entry during Section 2(c)'s 90-day suspension. Mot. 13. Plaintiffs note (Opp. 15) that Dr. Elshikh's mother-in-law has a visa-application interview scheduled for May 24 in Lebanon, but they do not say that she will actually be able to travel there from Syria, which is notable given that she was forced to cancel a May 21 interview in Jordan due to travel conditions in Syria. Elshikh Amicus Br. 8-9, *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017) (ECF No. 146-1). Likewise, although plaintiffs observe (Opp. 17) that eleven students from the covered countries "have been admitted for the 2017-2018 academic year," they have not identified any prospective student who wishes to enter the country during Section 2(c)'s 90-day period. Similarly, plaintiffs assert (Opp. 17-18) that

Hawaiian tourism from the Middle East in January and February 2017 decreased compared to 2016, but they do not explain how this can plausibly be deemed Section 2(c)'s likely effect, given that the data covers a broader geographic area and a broader time period than when the Revoked Order's entry suspension was in effect.[1]

Second, plaintiffs' alleged injuries are not ripe given Section 3(c)'s waiver process. Mot. 13. Plaintiffs respond (Opp. 16) that the waiver process imposes a discriminatory "barrier." But plaintiffs are not personally subject to the allegedly discriminatory barrier, and the aliens abroad who are subject to the entry suspension have no constitutional rights against discrimination concerning entry. Mot. 13. The government thus emphasized (*id.*) that plaintiffs' Establishment Clause claim is also barred by prudential-standing limitations, yet plaintiffs' opposition ignores this fundamental flaw.

Third, plaintiffs are therefore wrong to assert (Opp. 17) that their speculative harms are "virtually identical" to the injuries recognized in *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017). This Court emphasized that the States there had

[1] Plaintiffs also assert that the Order—including provisions beyond Section 2(c)—will "chill" potential students and tourists from trying to enter Hawaii. *See* Opp. 17-18; *infra* pp. 10-11. That asserted harm is not "imminent," "fairly traceable" to the Order, or "redressable" by the preliminary injunction, because it merely reflects "speculat[ion]" about the "personal choice[s]" of unidentified individuals who do not face any "certainly impending" injury caused by the Order. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147, 1151 (2013); *McConnell v. FEC*, 540 U.S. 93, 228 (2003).

specifically identified students and employees who actually "were not permitted to enter the United States" because of the Revoked Order. *Id.* at 1159-60.

3. Hawaii additionally asserts (Opp. 16, 18-19) that the Order impairs various purported sovereign interests. The district court did not rely on these alleged harms to support standing (much less irreparable injury), E.R. 9-10, 40-45, and they are meritless, Gov't Reply Br. 5-6.

4. Finally, even if the Order imposed some cognizable injury on plaintiffs, that would not be sufficient to overcome the national-security interests of the government and the public. That is especially true because the stay would be in effect for a relatively short period during the expedited appeal. Any temporary delay in the potential issuance of a visa to Dr. Elshikh's mother-in-law or to prospective students, faculty, or tourists seeking to enter Hawaii is not irreparable harm and is far outweighed by the terrorism-related concerns considered by the President, Secretary of Homeland Security, and Attorney General.

II. The Government Is Likely To Prevail On The Merits

Plaintiffs' opposition pays scant attention to the merits and distorts the government's position. Plaintiffs do not attempt to refute the government's showing (Mot. 15-18) that their Establishment Clause claim fails under *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). Instead, they claim (Opp. 19) that the President seeks "unreviewable immigration power." The government makes no such

contention. Gov't Br. 35. Rather, in the narrow circumstances when courts review challenges to the political branches' decisions regarding entry of aliens abroad that allegedly violate U.S. citizens' rights, *Mandel* supplies the substantive test that courts are to apply in conducting that limited review. *Id.*; Mot. 16. It is plaintiffs who seek to circumvent that well-established principle.

In any event, plaintiffs' opposition fails to show that they are likely to prevail under domestic Establishment Clause precedent. They offer (Opp. 20) only generalized rhetoric that the government's position "distort[s] * * * the promises of the First Amendment." That Amendment, however, makes no promises to aliens abroad who lack any connection to this country. Likewise, plaintiffs allude without any argument (Opp. 19-20) to statutory and due-process challenges to the Order. As the government shows in its reply brief (pp. 20-28), those contentions lack merit. Plaintiffs' undeveloped, abstract assertions do not justify leaving the injunction in place pending appeal.

III. The Nationwide Injunction Is Improper

Plaintiffs offer no valid justification for leaving the vastly overbroad injunction in effect in its entirety pending appeal. Plaintiffs' stay opposition neither defends the injunction's application to the President—which is foreclosed by settled precedent, Mot. 19—nor demonstrates that relief against the President is necessary to prevent irreparable harm. That aspect of the injunction thus should be stayed.

Plaintiffs also do not dispute that Article III and principles of equity require limiting relief to what is "necessary to provide complete relief to [them]." Mot. 20-21. At a minimum, those principles require staying those parts of the injunction that are unnecessary to prevent specific, cognizable, irreparable harm to plaintiffs during the pendency of this expedited appeal. *See, e.g.*, *U.S. Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993) (per curiam). Instead, plaintiffs contend (Opp. 20-22) that enjoining all of Sections 2 and 6 nationwide is necessary to provide them complete relief. That contention fails for two reasons.

First, plaintiffs fail to show how enjoining the numerous portions of Sections 2 and 6 that have no concrete effect on them is necessary to prevent any cognizable, irreparable harm. *Cf.* Mot. 21-22. Plaintiffs do not dispute that multiple provisions of Sections 2 and 6 concern only internal-agency and intergovernmental activities. They fail to show how subsections that, for example, direct federal agencies to conduct internal reviews, make recommendations, and initiate diplomatic communications concretely affect anyone outside the government. Plaintiffs assert (Opp. 22) that "Section 2" in its entirety "chilled tourism to the State." But they fail to show that anything in the Order, much less Section 2's provisions addressing agencies' internal activities and intergovernmental communications, caused tourism to decline. *Supra* pp. 6-7.

Nor do plaintiffs demonstrate how Section 6's refugee suspension and its annual cap—which they barely mentioned below or in their opposition—could plausibly cause them irreparable injury. Dr. Elshikh's mother-in-law does not seek refugee admission, and Hawaii does not explain how the refugee provisions affect its universities or tourism. Gov't Reply Br. 8. Plaintiffs argue that "the Order as a whole," including its refugee provisions, "sends [an] offensive message." Opp. 21 (emphasis omitted). That claimed "condemnation" injury based on application of the Order to other persons is not judicially cognizable, *supra* pp. 5-6; it certainly does not constitute irreparable harm that warrants enjoining Sections 2 and 6 wholesale.[2]

Second, plaintiffs fail to show how enjoining Sections 2 and 6 as to all persons nationwide is necessary to redress any concrete, irreparable injuries to them. They repeat the argument (Opp. 20-21) that applying the Order to other persons sends a harmful message to plaintiffs, but a purported message drawn from application of the Order to others is not cognizable injury. Plaintiffs further assert (Opp. 22) that "uniformity" supports enjoining the Order everywhere, without responding to the government's point (Mot. 24) that uniformity and respect for the political branches'

[2] Plaintiffs incorrectly assert (Opp. 22) that the government provided no "clear indication" below of how to narrow the injunction. To the contrary, the government filed a detailed submission explaining why each subsection of Sections 2 and 6 other than Section 2(c) plainly causes plaintiffs no harm. ECF No. 251, at 4-7, 25-27.

authority strongly supports leaving the Order in place. Their claim (Opp. 22) that "predictability" supports disrupting enforcement of a Presidential order is similarly backwards. Leaving the Order's provisions in effect—with individualized exceptions as to plaintiffs who demonstrate specific, irreparable, cognizable injury—would minimize uncertainty for all. Finally, plaintiffs do not address the Order's express severability clause.

CONCLUSION

Accordingly, this Court should stay the preliminary injunction pending final disposition of the appeal. At a minimum, this Court should grant a partial stay of the injunction insofar as it extends beyond any particular individuals as to whom plaintiffs have made the requisite showing of cognizable and irreparable injury.

Respectfully submitted,

/s/ Jeffrey B. Wall

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APRIL 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 32-3(2). The reply contains 2707 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ Anne Murphy
Anne Murphy

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2017, I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Anne Murphy
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