IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII, et al., Plaintiffs-Appellees, v. DONALD TRUMP, et al., Defendants-Appellants.	No. 17-16426

DEFENDANTS-APPELLANTS' OPPOSITION TO EMERGENCY MOTION TO INTERVENE BY U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS

The same day defendants submitted their opening brief in this highly expedited appeal, the U.S. Committee for Refugees and Immigrants (USCRI) moved for leave to intervene. The motion should be denied. USCRI's request for intervention is untimely, because it slept on its rights in district court. Intervention also would cause substantial prejudice to defendants, who would have to respond to evidence that was not presented to the district court and is not properly before this Court. And intervention is unnecessary, because plaintiffs are adequately representing USCRI's interests and because USCRI can present as an amicus curiae its arguments that are not based on improper evidence.

USCRI stood idly by in district court after the Department of State issued the guidance to which USCRI now objects, choosing to rely on plaintiffs to protect

their interests. Only after the Supreme Court granted a partial stay did USCRI seek to intervene in the litigation. But an adverse ruling does not constitute a material change in the nature of an action that warrants allowing an eleventh-hour intervention motion.

This Court has denied untimely motions by other litigants seeking to intervene for the first time in an earlier appeal in this litigation, in the face of similar belated arguments that the parties did not fully represent the putative intervenors' interests. *See Hawaii v. Trump*, No. 17-15589, Order (9th Cir. Apr. 21, 2017) (denying two motions for leave to intervene in previous appeal in this case). The Fourth Circuit has likewise denied a motion to intervene filed on appeal in litigation relating to the same Executive Order challenged here. *See IRAP v. Trump*, No. 17-1351, Order (4th Cir. May 3, 2017) (denying leave to intervene in challenge to same Executive Order). Accordingly, the Court should deny this motion, but allow USCRI to file an amicus brief by the same deadline as appellees file their response brief in this expedited appeal. Denial of intervention will properly allow the Court to focus on arguments that are germane to this appeal and evidence that was timely presented to the district court.

STATEMENT

A. Background

1. On March 6, 2017, the President issued Executive Order No. 13,780, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 13,209 (Mar. 9, 2017). Section 2(c) of the Order suspends for 90 days entry of certain nationals of six countries that present heightened terrorism-related risks, subject to case-by-case waivers under Section 3(c). *Id.* at 13,213, 13,214-15. Section 6(a) suspends for 120 days adjudications and travel under the United States Refugee Admission Program (Refugee Program). *Id.* at 13,215-16. Section 6(b) limits to 50,000 the number of persons who may be admitted as refugees in Fiscal Year 2017. *Id.* at 13,216.

2. The State of Hawaii and Dr. Ismail Elshikh brought suit, alleging that Sections 2 and 6 of the Order exceed the President's statutory authority and also violate due process and the Establishment Clause. The district court entered a nationwide TRO barring enforcement of Sections 2 and 6 of the Order in their entirety, which it subsequently converted to a preliminary injunction. On appeal, this Court affirmed in part and vacated in part the preliminary injunction. *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017).

3. Prior to this Court's ruling, the government filed an application with the Supreme Court seeking a stay of the district court's preliminary injunction

pending this Court's consideration and disposition of the government's appeal and, if this Court affirmed, pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court. *See Trump v. Hawaii*, No. 16A1191 (S. Ct.).

This Court subsequently decided the appeal in *Hawaii v. Trump*, and granted the parties' joint motion for expedited issuance of the mandate. The government then filed a supplemental memorandum in the Supreme Court, renewing its request for a stay and urging the Court to grant certiorari in both this case and in *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017), and to hear the cases in tandem.

4. On June 26, 2017, the Supreme Court granted certiorari in both cases and granted in part the stay applications. *IRAP v. Trump*, 137 S. Ct. 2080, 2082 (2017). The Supreme Court narrowed the scope of the injunctions as to § 2(c), holding that

> The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawaii. In practical terms, this means that § 2(c) may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.

Id. at 2088. "For individuals, a close familial relationship is required." *Id.* The Court cited as an example "[a] foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law." *Id.* "As for entities," the Court explained, "the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Order]." *Id.* The Court gave as examples "[t]he students

from the designated countries who have been admitted to the University of Hawaii," "a worker who accepted an offer of employment from an American company," and "a lecturer invited to address an American audience." *Id.* By contrast, "a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion." *Id.*

The Supreme Court also granted a partial stay of the injunction affirmed by this Court with respect to Sections 6(a) and (b). *IRAP*, 137 S. Ct. at 2089. The Court ruled that Sections 6(a) and (b) "may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States." *Id.* "As applied to all other individuals," however, the Supreme Court held that "the provisions may take effect." *Id.* As the Court explained, "when it comes to refugees who lack any such connection to the United States * * *, the balance tips in favor of the Government's compelling need to provide for the Nation's security." *Id.*

5. Pursuant to a Presidential directive,[1] the Departments of State and Homeland Security began implementing Sections 2(c), 6(a), and 6(b) of the Order on June 29, 2017, three days after issuance of the Supreme Court's stay, and

[1] *See* Presidential Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence, 82 Fed. Reg. 27,965 (June 14, 2017).

commenced enforcement of those provisions at 8:00 p.m. Eastern Daylight Time on that day.

In order to implement within 72 hours the Supreme Court's limitation of the injunction to individuals "who can credibly claim a bona fide relationship with a person or entity in the United States," the agencies published public guidance on June 29, which was subsequently updated, D. Ct. Doc. 301, Exhs. A, C, and D (July 3, 2017), and current versions of which are available online.[2] The Department of State's guidance made clear that, in determining whether a refugee had a bona fide relationship with an entity in the United States, "[t]he fact that a resettlement agency in the United States has provided a formal assurance for a refugee seeking admission * * * is not sufficient in and of itself to establish a qualifying relationship for that refugee with an entity with the United States." D. Ct. Doc. 301, Exh. C.

[2] See Bureau of Consular Affairs, U.S. Dep't of State, *Important Announcement: Executive Order on Visas* (State Visa Guidance), https://travel.state.gov/content/travel/en/news/important-announcement.html; Bureau of Population, Refugees, and Migration, U.S. Dep't of State, *Fact Sheet: Information Regarding the U.S. Refugee Admission Program* (State Refugee Fact Sheet), https://www.state.gov/j/prm/releases/factsheets/2017/272316.htm; Dep't of Homeland Sec., *Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry into the United States* (DHS FAQs), https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states.

B. Proceedings Concerning the Current Appeal

1. On June 29, 2017, plaintiffs filed a motion in district court to "clarify" the scope of its injunction in light of the Supreme Court's stay ruling. As relevant here, they urged the district court to interpret the ruling to exempt from the Order certain aliens that the government's guidance had interpreted to be covered by the stay.

Namely, plaintiffs argued that the government's guidance erroneously denied that the stay ruling categorically exempts from Sections 6(a) and 6(b) all refugee applicants for whom the State Department has obtained an assurance from a U.S.-based refugee-resettlement agency. An assurance is a contractual commitment between a refugee resettlement organization, and the Department of State, to provide certain services and assistance to the refugee following the refugee's arrival in the United States. In order to facilitate successful resettlement, the Department of State obtains an assurance for *every* refugee who is permitted to travel to this country before the refugee's arrival. The resettlement agency, however, typically has no contact with the refugee until he or she arrives in the United States. Plaintiffs argued that the provision of an assurance should be sufficient for the refugee to satisfy the requirement of a credible claim of a bona fide relationship with a U.S. entity.

The district court denied the motion, ruling that "[b]ecause Plaintiffs seek clarification of the June 26, 2017 injunction modifications authored by the Supreme Court, clarification should be sought there, not here." The district court declined to "upset the Supreme Court's careful balancing and 'equitable judgment,'" or "to substitute its own understanding of the stay for that of the originating Court[]." *Hawaii v. Trump*, CV. No. 17-00050 DKW-KSC, Order, at 5 (D. Haw. Jul. 6, 2017).

On July 6, 2017, plaintiffs appealed, and this Court *sua sponte* dismissed the appeal for lack of jurisdiction, holding that it was neither a final order nor immediately appealable under 28 U.S.C. § 1292(a). *Hawaii v. Trump*, No. 17-16366, Order, at 2 (9th Cir. Jul. 7, 2017), at 2. The Court noted, however, "that although the district court may not have authority to *clarify* an order of the Supreme Court, it does possess the ability to interpret and enforce the Supreme Court's order." *Id.* at 3.

2. On July 7, 2017, plaintiffs moved in district court to enforce or modify the preliminary injunction, raising largely the same arguments raised in their motion for clarification. Notably, refugee resettlement organization HIAS filed an amicus brief in support of the motion, arguing that its experience in resettling refugees gave it special insight into the nature of the relationship between refugees and refugee resettlement organizations, and describing the harms

to refugees that would assertedly result from the government's interpretation of the preliminary injunction as partially stayed by the Supreme Court. D. Ct. Doc. 336-1, at 3-4, 5-6, 11-14, 18-19.

On July 13, 2017, the district court granted the motion in relevant part, modifying the injunction to bar the government from applying Sections 6(a) and 6(b) of the Order to any refugee for whom a resettlement agency in the United States has provided an assurance to the Department of State. *Hawaii v. Trump*, CV. No. 17-00050 DKW-KSC, Order, at 26 (D. Haw. Jul. 13, 2017).

3. On July 14, 2017, defendants filed a motion requesting the Supreme Court to clarify its stay ruling concerning the issues presented in this appeal, along with an application for a temporary administrative stay of the district court's modified injunction. On July 19, 2017, the Supreme Court denied the motion in a summary order, but stayed the district court's modified injunction pending resolution of the government's appeal to this Court "with respect to refugees covered by a formal assurance." *Trump v. Hawaii*, No. 16-1540 (16A1191), Order (S. Ct. July 19, 2017). Justice Thomas, Justice Alito, and Justice Gorsuch would have stayed the district court's modified injunction in its entirety.

4. At no point during all that did USCRI seek to participate in this litigation as an intervenor or amicus curiae to protect its rights—not when the government issued its guidance on June 29, or when plaintiffs filed their motion to

clarify on the same date, or when plaintiffs appealed the denial of that motion to this Court on July 6, or when they refiled in the district court as a motion to clarify on July 7, or when the government sought a stay from the Supreme Court on July 14. Instead, USCRI waited to move to intervene until after the parties had jointly moved for expedited briefing on defendants' appeal from the district court's modified injunction and this Court had granted that motion and set a briefing schedule. Pursuant to that schedule, defendants timely filed their opening brief on July 27, 2017—the same day USCRI filed its motion to intervene. Appellees' brief is due August 3, 2017, and the reply brief is due August 9, 2017.

ARGUMENT

I. USCRI IS NOT ENTITLED TO INTERVENTION AS OF RIGHT.

To establish that intervention as of right is warranted, a movant must show, *inter alia*, that it "timely move[d] to intervene," and that its "interest [is not] adequately represented by existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). USCRI cannot satisfy either of these prerequisites.

A. USCRI's Motion to Intervene is Untimely

1. On June 29, 2017, the Department of State published public guidance interpreting the Supreme Court's ruling that Sections 6(a) and (b) of the Order may take effect with respect to foreign nationals or refugees seeking admission to the United States who have "a bona fide relationship with a person or entity in the

United States." An amended version of the guidance was issued on July 3, 2017. *See* D. Ct. Doc. 301, Exh. C. That public guidance made clear that, in the government's view, the fact that a refugee resettlement organization has provided an assurance to the Department of State on behalf of an refugee does not, by itself, establish a qualifying bona fide relationship between the refugee and a U.S. entity that brings the refugee within the scope of the preliminary injunction as partially stayed by the Supreme Court. *See id.*

USCRI elected not to move for leave to intervene in the district court to challenge that guidance when it was issued on June 29, 2017. Nor, as laid out above, did it seek to participate in any way at any of the multiple prior steps in the litigation over the guidance. Instead, USCRI waited until July 27, 2017—the date defendants filed their opening appeal brief—to seek intervention.

USCRI's intervention motion is plainly untimely, would disrupt the briefing and consideration of this highly expedited appeal, and could cause substantial prejudice by introducing new arguments that were not presented to or ruled upon by the district court. Any such new arguments would be presented without the opportunity for the parties to develop an appropriate record in district court, and would unfairly require defendants to respond to those arguments for the first time in this litigation in a reply brief on appeal. USCRI also seeks to rely on new evidence that was not presented to the district court, in the form of a declaration

executed by USCRI's President and Chief Executive Officer attached to the motion. USCRI should not be allowed to supplement the record at this late date, and allowing USCRI to intervene would unfairly deprive the government from developing an appropriate factual response to that declaration. The motion to intervene may be denied on this basis alone, without the need to consider the other factors an applicant must show in order to demonstrate a right to intervene on appeal. *See League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997).

2. USCRI argues that it believed its rights were protected by the district court's modified injunction prior to the Supreme Court's July 19 stay order. Those rights were placed at issue, however, by the guidance the Department of State issued on June 29, which USCRI failed to independently challenge in district court as a party or intervenor. "A party must intervene when he knows or has reason to know that his interests might be adversely affected by the outcome of litigation." *United States v. Alisal Water Corp.*, 370 F.3d 915, 923 (9th Cir. 2004) (quotation marks, citation omitted); *see also Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990) (intervention motion untimely where prospective intervenor delayed in moving for intervention even though she knew the lawsuit was pending and "that part of the relief sought" might adversely affect her interests).

USCRI was on notice that its rights could potentially be at stake at the time plaintiffs moved in district court to clarify the injunction. Indeed, another refugee resettlement agency, HIAS, participated in proceedings before the district court as amicus curiae in order to make arguments that USCRI now seeks to make as intervenor. USCRI, in contrast, made no effort to involve itself in the litigation.

USCRI does not argue that it was unaware of this litigation in district court. Instead, it argues that its intervention motion is timely because the Supreme Court's order changed the nature of this action. But rather than changing the nature of this action, that order merely provided interlocutory relief to one side of the dispute: indeed, the stay just restored the status quo that existed between June 29 (when the government issued its guidance) and July 13 (when the district court granted the plaintiff's request for a modified injunction). An entity like USCRI with an alleged interest in a question being litigated cannot sit on the sidelines until a court rules against its favored position, and only then seek to intervene to bolster that position on appeal. "To hold otherwise would encourage interested parties to impede litigation by waiting to intervene until the final stages of a case." *Alisal Water Corp.*, 370 F.3d at 924.

Furthermore, the cases USCRI cites (Mot. 12, 15) do not remotely suggest that the Supreme Court's stay order can constitute the kind of "changed circumstances" that may render an otherwise tardy intervention motion timely.

Both *Smith v. Los Angeles Unified School District*, 830 F.3d 843 (9th Cir. 2016), and *United States v. State of Oregon*, 745 F.2d 550 (9th Cir. 1984), involved material changes in the government policy that allegedly impaired the prospective intervenor's interests, rather than the kind of adverse interlocutory ruling on which USCRI relies here. *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003), and *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), are equally inapposite; they merely recognize that when "the potential scope of an action is narrowed by amended pleadings or court orders, or when an existing party expressly and unequivocally disclaims the right to seek certain remedies, the court may consider the case as restructured rather than on the original pleadings in ruling on a motion to intervene." *City of Los Angeles*, 288 F.3d at 399; *see Arakaki*, 324 F.3d at 1083. Neither of those cases suggests that a prospective intervenor who knows that a district court case implicates its interests may intervene for the first time on appeal by arguing that an adverse interlocutory ruling by a higher tribunal constitutes "changed circumstances."

Finally, USCRI separately argues that its motion is not untimely because it did not "fail[] to intervene after it knew, or reasonably should have known, that its interests were not being adequately represented." Mot. 13 (quoting *Los Angeles Unified Sch. Dist.*, 830 F.3d at 857). But USCRI's attempt to pin the blame for its delay on plaintiffs fares no better than its attempt to pin the blame on the Supreme

Court. USCRI suggests it is better positioned than plaintiffs to explain "the precise nature of the relationship between refugees and resettlement agencies that provide their formal assurances," Mot. 14-15, but that was no less true when the Department of State issued the guidance that USCRI seeks to challenge, and yet USCRI chose not to move for leave to intervene below. This delay should bar USCRI's untimely attempt to intervene on appeal.

B. USCRI's Interests are Adequately Represented by Plaintiffs.

Adequacy of representation is determined by considering whether "(1) the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) the present party is capable and willing to make such arguments; and (3) a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086. "When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises," and "a compelling showing should be required to demonstrate inadequate representation." *Id.*

As noted, USCRI chose not to move for leave to intervene in the district court to challenge the Department of State guidance that it argues adversely affects its interests. Throughout the earlier stages of these proceedings, USCRI had no objection to allowing plaintiffs—who USCRI concedes "have litigated this case with skill and tenacity," and have "ably pointed out the hardships the Executive

Order places on all refugees," Mot. 13 n.1—to represent its interests, notwithstanding any differences in plaintiffs' ability to "fully explain" those interests, Mot. 8. USCRI does not suggest that plaintiffs have suddenly become inadequate to defend those same interests, or have lost interest in doing so, merely because they were unsuccessful in opposing entry of a stay pending appeal by the Supreme Court. Regardless, it is clear that USCRI and plaintiffs share the same ultimate objective for this appeal; that a presumption arises that plaintiffs will adequately represent USCRI's interests; and that USCRI has not overcome that presumption. *See Arakaki*, 324 F.3d at 1086. And this is especially true insofar as USCRI seeks to bolster plaintiffs' position by introducing new evidence that was not before the district court.

II. USCRI Also Should Not Be Granted Permissive Intervention

For essentially the same reasons, USCRI also should not be granted permissive intervention (which is discretionary). USCRI's unwarranted delay in seeking to intervene in this litigation, and the consequent prejudice to defendants and disruption of this highly expedited appeal, preclude permissive intervention. *See League of Latin American Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). Furthermore, as noted, USCRI can present its views to the Court as amicus curiae. Permissive intervention would merely provide USCRI with an opportunity

to submit a longer brief improperly raising new arguments and evidence that were not presented below.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court deny the motion for leave to intervene on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2017, I electronically filed the foregoing Opposition by using the appellate CM/ECF system.

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

/s/ Sharon Swingle
Sharon Swingle

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(g)(1), I hereby certify that the foregoing Opposition complies with the type-volume limitation in FRAP 27(d)(2)(A). According to Microsoft Word, the Opposition contains 3,762 words and has been prepared in a proportionally spaced typeface using Times New Roman in 14 point size.

/s/ Sharon Swingle
Sharon Swingle