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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAII and ISMAIL ELSHIKH, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; ELAINE DUKE, in her official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No. 1:17-cv-00050-DKW-KSC

PLAINTIFFS' MOTION TO LIFT THE STAY, AND TO INCREASE THE WORD LIMIT AND SET A SCHEDULE FOR BRIEFING ON PLAINTIFFS' FORTHCOMING MOTION FOR A TEMPORARY RESTRAINING ORDER

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PLAINTIFFS' MOTION TO LIFT THE STAY, AND TO INCREASE THE WORD LIMIT AND SET A SCHEDULE FOR BRIEFING ON PLAINTIFFS' FORTHCOMING MOTION FOR A TEMPORARY RESTRAINING ORDER

Pursuant to Local Rule 7.6 for the United States District Court for the District of Hawaii and Rules 7 and 15(a) of the Federal Rules of Civil Procedure, Plaintiffs State of Hawaii (the "State") and Ismail Elshikh (together, "Plaintiffs"), by and through their counsel, respectfully request that the Court lift its Order of April 3, 2017 (the "Stay Order") staying proceedings in this case (Dkt. No. 279). Plaintiffs urge the Court to grant that request so that, on or around October 11, 2017, Plaintiffs may file a Motion for Leave to File a Third Amended Complaint and a Motion for a Temporary Restraining Order enjoining the enforcement of the President's September 24, 2017 Proclamation. Plaintiffs also respectfully move for leave to increase the word limit for the parties' briefs in connection with the forthcoming Motion for a Temporary Restraining Order, and to set a briefing schedule for that Motion.

Following the Court's issuance of a preliminary injunction as to portions of the Executive Order issued on March 6, 2017 ("EO-2"), the Court issued a Stay Order to halt further proceedings in this Court during the pendency of the Government's appeal of the preliminary injunction. While the case was pending before the Supreme Court, however, the President issued a new Proclamation on

September 24, 2017 ("EO-3"). EO-3 replaced EO-2's 90-day bans on entry with indefinite restrictions on entry by foreign nationals from six Muslim-majority countries, as well as North Korea and Venezuela. EO-3's indefinite and unlawful bans on entry will take effect at 6:01 PM Hawaii Standard Time (H.S.T.) on October 17, 2017.

EO-3 perpetuates the legal flaws of its predecessor. It flouts the immigration laws' express prohibition on nationality discrimination, grossly exceeds the authority Congress delegated to the President, lacks any rational connection to the problems it purports to address, and seeks to effectuate the President's promise to bar Muslims from the United States. If allowed to take effect, EO-3, just like EO-2, will inflict grave and irreparable harm on the State of Hawaii, Dr. Elshikh, and countless other Americans whose families, livelihoods, and dignity will be irrevocably damaged by this illegal and unconstitutional order.

Therefore, on October 11, 2017, Plaintiffs plan to file a motion seeking leave to file a Third Amended Complaint challenging EO-3 on statutory and constitutional grounds. Along with that Motion, Plaintiffs intend to file their Third Amended Complaint, as well as a Motion for a Temporary Restraining Order and a Memorandum of Law in Support of the Motion for a Temporary Restraining Order, and supporting declarations.

In advance of those filings, Plaintiffs now respectfully request that the Court lift the Stay Order. Plaintiffs also request that the Court grant the parties leave to file memorandums of law of up to 12,000 words on the forthcoming Motion for a Temporary Restraining Order, with 6,000 words for Plaintiffs' reply brief. Finally, Plaintiffs request that the Court set a briefing schedule for that Motion in which Plaintiffs would submit their Memorandum in Support of the Motion for a Temporary Restraining Order with the Motion by 6:00 AM H.S.T. on October 11, the Government would file its response by 6:00 AM H.S.T. on October 15, Plaintiffs would file their reply by 12:00 Noon H.S.T. on October 16, and all parties would appear at a hearing in this Court with telephonic access available at 9:30 AM H.S.T. on October 17.

Plaintiffs have conferred with counsel for the Government. By correspondence on October 6, 2017, the Government consents to Plaintiffs' request to lift the stay in order to challenge EO-3. The Government also consents to Plaintiffs' request to increase the word limit for the briefing that the parties will file in connection with the forthcoming Motion for a Temporary Restraining Order. The Government opposes Plaintiffs' suggested briefing schedule and has requested that Plaintiffs relay to the Court Defendants' alternative suggestion, which is included below, *see* pp. 12-13, *infra*.

Reopening these proceedings and allowing Plaintiffs to challenge EO-3 will enable the State of Hawaii to act to protect its sovereign interests, its educational institutions, and its residents and employers, and it will enable Dr. Elshikh to vindicate his rights to reunite with his family members—many of whom remain in Syria—and to be free of an unconstitutional establishment of religion. Thus, there is good cause for this Court to lift the stay. Moreover, increasing the word limit to 12,000 words for briefs on the Motion for a Temporary Restraining Order is necessary in order to fully air the legal issues implicated by EO-3. The Court approved the same request during the last round of TRO briefing in this case, and Plaintiffs request that it do the same here. Finally, Plaintiffs' proposed briefing schedule will ensure that briefing on the Motion for a TRO is completed before EO-3 is scheduled to go into effect at 6:01 PM H.S.T. on October 17, 2017.

FACTUAL AND PROCEDURAL BACKGROUND

On February 3, 2017, the State of Hawaii filed a Complaint (Dkt. No. 1) and a Motion for Temporary Restraining Order (Dkt. No. 2) in this Court. The Complaint and TRO Motion sought injunctive relief from President Trump's first Executive Order ("EO-1"). EO-1 barred individuals from seven Muslim-majority countries and all refugees from entering the United States. The same day that Hawaii filed its Complaint, the District Court for the District of Washington entered a nationwide temporary restraining order that enjoined Defendants from

implementing EO-1. *See Washington v. Trump*, 2:17-cv-141 (W.D. Wash.). On February 7, 2017, this Court entered an Order staying the case (Dkt. No. 27).

On March 6, 2017, President Trump signed EO-2. EO-2 revoked EO-1, and replaced it with a substantially similar order that suspended the entry of foreign nationals into the United States from six Muslim-majority countries for 90 days, halted the admission of refugees to the United States for 120 days, and capped annual refugee admissions at 50,000.

Following the issuance of EO-2, this Court lifted the stay that it had previously entered on February 7, and it granted leave for Plaintiffs to file a Second Amended Complaint challenging EO-2 (Dkt. No. 59-1). The Court also permitted the parties to file briefs of up to 12,000 words in connection with the Motion for a Temporary Restraining Order filed by Plaintiffs (Dkt. No. 60-1). After receiving briefing, the Court granted the TRO request (Dkt. No. 219) and then converted the TRO to a preliminary injunction (Dkt. No. 270), thereby enjoining the Government from implementing the 90-day travel ban, the 120-day refugee ban, and the 50,000-refugee cap. On April 3, 2017, the Court issued an Order (the "Stay Order") granting the parties' joint motion for a stay of further proceedings related to EO-2 pending the disposition of the Government's appeal of the preliminary injunction (Dkt. No. 279). The Ninth Circuit upheld this Court's injunction, and the Supreme Court granted the Government's petition for certiorari

and partially stayed the injunction for the pendency of the Court's consideration of the case. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

On September 24, 2017, before the Supreme Court was able to resolve the Government's appeal of the preliminary injunction, President Trump issued a new Proclamation, EO-3, that replaces the 90-day travel ban in EO-2 with an indefinite travel ban. Effective October 17, 2017, at 6:01 PM H.S.T., Section 2 of EO-3 indefinitely bars nationals of six Muslim-majority countries—Iran, Libya, Syria, Yemen, Somalia, and Chad—from entering the United States as immigrants. Foreign nationals of those countries also may not enter the United States with certain types of nonimmigrant visas. In addition to the six Muslim-majority countries targeted by EO-3, EO-3 also bars entry by North Korean nationals and certain Venezuelan government officials.

After President Trump issued EO-3, the Supreme Court removed the case from the oral argument calendar and requested additional briefing from the parties regarding whether EO-3 mooted Plaintiffs' challenges to EO-2. Yesterday, Plaintiffs and Defendants filed supplemental briefs on that question in the Supreme Court. In those briefs, Plaintiffs expressed their view that the controversy with respect to EO-2 is not moot, but noted that the Court may wish to dismiss the writ of certiorari as improvidently granted so that the district courts can address the parties' legal dispute in the context of a challenge to EO-3. The Government

disagreed with respect to mootness, and urged the Court to dismiss the case and vacate the decisions below. The Supreme Court has not yet ruled on the issue.

Immediately after EO-3 was issued, and while completing the supplemental briefing before the Supreme Court, Plaintiffs undertook a comprehensive study of EO-3 and its effects on Dr. Elshikh, the State of Hawaii, and other affected entities and individuals. Once Plaintiffs gathered sufficient information to conclude that the new Order would inflict injuries on Plaintiffs that are comparable—and in many instances *greater*—than those inflicted by the prior Executive Orders, they decided to challenge EO-3 and to file this instant motion promptly to apprise the Court of their intentions.

ARGUMENT

A. This Court Should Lift Its Stay Order in Light of EO-3.

A court has inherent power and discretion to lift a stay that it has imposed. *See Crawford v. Japan Airlines*, No. CIV. 03-00451 LEK, 2013 WL 2420715, at *6 (D. Haw. May 31, 2013). "When circumstances have changed such that the court's reasons for imposing the stay no longer exist or are inappropriate, the court may lift the stay." *Id.* (internal quotation marks omitted).

Here, circumstances have changed such that this Court's "reasons for imposing the stay no longer exist or are inappropriate." *Id.* The parties jointly requested a stay to avoid engaging in duplicative proceedings as to the legality of

EO-2 when pending appeals could resolve that question. *See* Joint Motion to Stay District Court Proceedings Pending Resolution of Defendants' Appeal, Dkt. No. 277, at 3. But several months after this Court entered its Stay Order on April 3, the President announced a new Proclamation, EO-3, that supersedes the 90-day travel ban in EO-2. Plaintiffs therefore ask the Court to lift the stay so that they may seek leave to amend their complaint in light of EO-3 and so that they may request a TRO preventing the enforcement of the new Order before it goes into effect at 6:01 PM H.S.T. on October 17, 2017.

Although Defendants' appeal of this Court's preliminary injunction as to EO-2 is still pending in the Supreme Court, it is well within the Court's jurisdiction to lift the stay. An interlocutory appeal strips a district court of jurisdiction only "over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *see* 16 Charles Alan Wright et al., Fed. Prac. & Proc. § 3921.2 (3d ed. 2015). For that reason, the Court may lift the stay to permit Plaintiffs to amend their complaint and challenge EO-3. Indeed, the District Court in *International Refugee Assistance Project v. Trump*, No. 8:17-cv-00361-TDC (D. Md.)—the other case challenging EO-2 that is currently pending before the Supreme Court— has already lifted the stay in order to entertain an amended complaint and TRO request with respect to EO-3.

Moreover, this Court has already lifted a stay once before in an analogous situation in this case. After Plaintiffs filed a Complaint challenging EO-1, this Court issued a stay halting further proceedings on Plaintiffs' challenges to that Order (Dkt. No. 27). One month later, President Trump revoked EO-1 and replaced it with EO-2. In response, the Court lifted the stay so that Plaintiffs could file a Second Amended Complaint challenging EO-2. Now that President Trump has permitted the travel ban in Section 2(c) of EO-2 to expire, and now that Plaintiffs are seeking to challenge the new travel ban imposed by EO-3, the Court should lift the stay here, too.

Lifting the stay is especially important here because Plaintiffs will suffer grave harms if they are not able to protect their rights and interests from infringement by EO-3. EO-3 inflicts significant damage to Hawaii's economy, educational institutions, and tourism industry, and it prevents Hawaii from applying its own laws that secure residents from the harmful effects of discrimination. EO-3 also imposes substantial barriers to the reunification of Dr. Elshikh and others with their family members, and inflicts spiritual and stigmatic harms because it is a government policy that conveys a message of hostility to Muslims.

Accordingly, lifting this Court's earlier Stay Order is appropriate and necessary to allow Plaintiffs to protect their rights and interests against incursion

by EO-3. *See, e.g.*, *Crawford*, 2013 WL 2420715, at *6; *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (the proponent of a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else").

B. Plaintiffs Request Leave to File a Brief of Up to 12,000 Words in Support of Their Motion for a Temporary Restraining Order.

To fully air the complex legal issues raised by EO-3, Plaintiffs seek leave to file a Memorandum of Law of up to 12,000 words in support of their forthcoming Motion for a Temporary Restraining Order. In a prior Order in this case, the Court granted the parties' request to file briefs of up to 12,000 words in connection with Plaintiffs' Motion for a Temporary Restraining Order enjoining EO-2 (Dkt. No. 60-1). Plaintiffs respectfully ask that the Court grant the same request here. Should the Court agree to Plaintiffs' request, Plaintiffs ask that the Court grant Defendants leave to file a brief of up to 12,000 words in opposition to the forthcoming Motion for a Temporary Restraining Order, and, consistent with Local Rule 7.5(c), permit Plaintiffs to file a reply brief of no more than half that length (or 6,000 words).

C. Plaintiffs Request that the Court Order a Briefing Schedule to Ensure that the Court May Rule on the Motion for a Temporary Restraining Order Before EO-3 Goes into Effect.

Since EO-3 was issued on September 24, 2017, Plaintiffs have worked diligently to assess its legality and its effects on Dr. Elshikh and the State of

Hawaii. While EO-3's legal defects were immediately apparent, it took time for Plaintiffs to gather the information and evidence necessary to assess the precise consequences of EO-3 for the State of Hawaii's institutions and industries. Once Plaintiffs gathered that information and determined that the Order, like its predecessors, will have grievous effects on (among other things) the State's University and its tourism industry, it began preparations to amend its complaint and move for a TRO. Plaintiffs have filed the instant motion to ensure that the Court is promptly apprised of their plans. However, it will take additional time and resources to prepare the amended complaint, the TRO documents, and the supporting materials.

Further, while gathering information on the impact of EO-3, Plaintiffs have encountered additional individuals and entities directly affected by the Order who may wish to join Plaintiffs' challenge to EO-3. Their addition to the current suit would avoid duplicative litigation, and Plaintiffs hope to add those parties to the case when they file the remainder of their papers on October 11, 2017. Again, though, it will take additional time for these parties to finalize their plans and prepare the necessary documents.

For all of these reasons, it is extremely unlikely that Plaintiffs will be in a position to file their Third Amended Complaint, Motion for a TRO, and the supporting briefing and papers until October 11, 2017. Because EO-3 is scheduled

to go into force at 6:01 PM H.S.T. on October 17, 2017, Plaintiffs respectfully request that this Court enter a briefing schedule in which Plaintiffs would submit their opening brief with the Motion by 6:00 AM H.S.T. on October 11, the Government would file its response by 6:00 AM H.S.T. on October 15, Plaintiffs would file their reply by 12:00 Noon H.S.T. on October 16, and all parties would appear at a hearing in this Court with telephonic access available at 9:30 AM H.S.T. on October 17.

The Government has informed Plaintiffs that it objects to this schedule, and stated the following:

> Defendants object to plaintiffs' proposed briefing schedule. Defendants do not believe it is either necessary or appropriate for the Court to decide the TRO motion before October 18, because there will be no irreparable injury to plaintiffs from a brief delay in entry from the Proclamation while the issues are adjudicated on a reasonable briefing schedule. Thus, we believe a schedule where defendants file their opposition within 14 days and plaintiffs file their reply within 7 days is appropriate. Any less time for defendants would be prejudicial, especially since plaintiffs have created any urgency by waiting 17 days until after the Proclamation was issued before filing their TRO motion, despite knowing that the Proclamation would take effect after 23 days. Defendants should not be disadvantaged, nor the Court burdened, by plaintiffs' delay. Defendants should therefore be granted a similar time period (14 days) in which to file their opposition to the TRO motion.
>
> If the Court is inclined to have a hearing and/or decide the matter prior to October 18, plaintiffs should be required to file their TRO motion by Tuesday, October 10 (by noon EST), defendants would file their response by Monday, October 16 (by noon EST), and a hearing could be held on the motion on Tuesday, October 17. Indeed, plaintiffs in the *IRAP v. Trump* and *IAAB v. Trump* cases in the District of Maryland have moved expeditiously to file preliminary injunction motions by October 6, and the parties have

already negotiated a similar schedule there, in which a consolidated hearing will be held on October 17.

Plaintiffs believe that the Government's schedule is inequitable and would severely prejudice their interests. The Government's proposed schedule—which provides *two weeks* for the Government's response, followed by another week for Plaintiffs' reply—would not permit briefing to be completed until weeks after EO-3 goes into effect. Allowing EO-3 to be implemented for any period of time would inflict irreparable harm on Plaintiffs. Furthermore, the Government's primary rationale is a claimed need for additional time to prepare its response. But, unlike Plaintiffs, the Government presumably knew about EO-3 long before it was announced on September 24, 2017.

Indeed, in the *International Refugee Assistance Project ("IRAP"*) litigation, the District of Maryland rejected the Government's similar request for an extended briefing schedule that would run well past the effective date of EO-3. The court instead set a schedule similar to the one Plaintiffs propose here, which would allow briefing and a hearing in advance of EO-3's entry into effect at 6:00 PM H.S.T. on October 17. *See* Scheduling Order, *IRAP, et al. v. Trump, et al.*, Civil No. 17-00361, Dkt. 201 (D. Md. Oct. 4, 2017). Moreover, Plaintiffs have proposed a schedule that tracks the earlier one ordered by the Court on March 8 with respect to EO-2 (Dkt. No. 60-1), allowing the motion to be fully briefed and argued so that it can be decided upon before EO-3 takes effect.

The Government's alternative suggestion is also unjustified. That schedule would provide the Government with six full days to respond to Plaintiffs' TRO motion, while leaving Plaintiffs without an express reply period (again unlike this Court's previous March 8 order). That lopsided allocation of time is neither fair nor necessary, particularly given that the legal issues raised by EO-3 are closely similar to the issues that the parties have litigated for over eight months.

Furthermore, the Government's suggestion that Hawaii should have been expected to file simultaneously with IRAP is unwarranted. As a State, Hawaii necessarily requires more time than an organization like IRAP to make the weighty decision to challenge a federal executive order, gather information from state agencies necessary to assemble a complaint, and draft and approve legal filings. Plaintiffs have nonetheless moved with great swiftness, informed this Court and the Supreme Court of their plans as quickly as possible, and ensured that this Court would have essentially the same amount of time to consider EO-3's legality as it did to review their challenges to EO-2.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to lift the stay entered on April 3, 2017, to increase the word limit for the briefing in connection with the forthcoming Motion for a Temporary Restraining Order, and to adopt Plaintiff's proposed schedule for that briefing.

DATED: Washington, D.C., October 6, 2017.

Respectfully submitted,

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