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. 17-15589

DEFENDANTS-APPELLANTS' OPPOSITION TO MOTION TO INTERVENE BY *DOE* PLAINTIFFS

This highly expedited appeal from the district court's nationwide injunction barring enforcement of Sections 2 and 6 of Executive Order 13,780 is well underway. Defendants filed their principal brief and stay motion on April 7, challenging the district court's rulings that the plaintiffs have standing and are likely to prevail on the merits of their claims, and that the balancing of harms supports preliminary injunctive relief. Plaintiffs' responsive brief and opposition to the stay motion, and any amicus briefs, are due in two days, and the case will be argued shortly thereafter.

Yet another set of plaintiffs in another lawsuit (the *Doe* plaintiffs) now belatedly seeks to intervene in this appeal, presenting claims and legal theories that have never been adjudicated by any district court, much less the district court that entered the preliminary injunction at issue here. The request should be denied.

Permitting eleventh-hour intervention by these new litigants could substantially alter the legal questions before this Court, would be highly prejudicial to defendants, and represents the kind of duplicative litigation that courts disfavor. Nor is intervention necessary to protect the interests of the *Doe* plaintiffs, whose arguments could be effectively brought before the court as amici, and whose asserted interests would be fully protected by moving in district court for preliminary relief if this Court were to vacate or alter the nationwide injunction at issue in this appeal.

STATEMENT

The district court in this case entered a nationwide preliminary injunction on March 29, 2017 barring enforcement of Sections 2 and 6 of the Order. Defendants filed an appeal on March 30, and moved for expedited briefing, which this Court granted on April 3. Defendants filed their principal brief on April 7; plaintiffs' responsive brief and any amicus briefs are due April 21. Oral argument will be held on May 15.

The *Doe* plaintiffs filed their action in U.S. District Court for the Western District of Washington on February 7, 2017. Following issuance of Executive Order 13,780, they filed an amended complaint on March 14. The *Doe* plaintiffs include residents from the six countries identified in Section 2(c) of the Order, who are currently in the United States with expired or soon-to-expire non-immigrant visas and allege that they are unable to visit family abroad or travel for fear of not being

granted a visa to return to the United States; refugees in the United States who have filed applications for family members who seek to enter the United States as refugees; the Episcopal Diocese of Olympia, a religious entity that supports the resettlement of refugees; and the Council on American-Islamic Relations-Washington, a non-profit organization that seeks to promote an understanding of Islam. Proposed Plaintiffs-Intervenors' Motion for Leave to Intervene (Motion), Exh. 1 (First Amended Complaint) 3-5.

The *Doe* plaintiffs did not seek preliminary injunctive relief in district court. Instead, the parties conferred about appropriate next steps in light of the pendency of this appeal as well as other, similar actions pending in the U.S. District Court for the Western District of Washington. *See* Stipulation and [Proposed] Order to Extend Deadlines, *Doe v. Trump*, No. 2:17-cv-00178 (JLR) (W.D. Wash. Apr. 10, 2017).

Following consultation, the *Doe* plaintiffs stipulated in district court that the defendants' deadline to respond to the amended complaint in that action should be extended to April 28 to "permit the parties to benefit from the Court's ruling on the stay motions filed in" *Washington v. Trump*, No. 2:17-cv-00141-JRL (W.D. Wash.), and *Ali v. Trump*, No. 2:17-cv-00135-JLR (W.D. Wash.). Stipulation and [Proposed] Order to Extend Deadlines, *Doe v. Trump*, No. 2:17-cv-00178 (JLR) (W.D. Wash. Apr. 10, 2017). The *Doe* plaintiffs also stipulated that the deadline for defendants to respond to a motion for class certification should be extended "to

permit the parties to benefit from the Ninth Circuit's resolution of the appeal in *Hawaii v. Trump*." *Id.*

Notwithstanding those stipulations, the *Doe* plaintiffs filed a motion to intervene in this appeal late in the evening on Friday, April 14. Their principal justification for seeking to intervene appears to be to substitute themselves as party plaintiffs in case this Court finds persuasive defendants' arguments about why plaintiffs lack standing to challenge Section 6 of the Order. *See* Motion 1 ("[S]hould 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 justify their belated effort to intervene in this litigation by noting that "the district court's recent orders mak[e] clear that this appeal would impact scheduling and likely also merits issues" in their case. Motion 11.

Defendants respectfully oppose intervention.

ARGUMENT

A. In order to establish that intervention as of right is warranted, the *Doe* plaintiffs must show that four requirements are satisfied:

> (1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties.

Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir. 2003). They have not made the necessary showing for any of the four.

1. The *Doe* plaintiffs' request for intervention is untimely. The request was made more than a week after defendants filed their principal brief on appeal, and just days before the deadline for plaintiffs' responsive brief and all amicus briefs. Defendants had no opportunity in their principal brief on appeal to address the distinct factual and legal positions the *Doe* plaintiffs would assert. Because their motion was not timely, this Court need not even consider the other factors governing intervention. *See League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997).

In a nod to the extremely belated posture of their intervention motion, the *Doe* plaintiffs offer to file a merits brief within 48 hours of a ruling on this motion. That would not cure the prejudice to defendants in being required to respond to entirely new theories of standing and irreparable injury for the first and only time in a reply brief on appeal. Furthermore, the government would be forced to do so without the benefit of any district court ruling on the merits of the *Doe* plaintiffs' arguments or even briefing and argument in the district court—which would at least have given the parties an opportunity to develop the record supporting preliminary injunctive relief. This request for intervention comes far too late, would be highly disruptive, and should be denied on those bases alone.

2. The *Doe* plaintiffs also lack a significant, protectable interest in the outcome of this appeal, which will not impair their ability to protect their interests in their pending action in district court. They argue that, if this Court does not continue the injunction of Section 6 of the Executive Order, the family members of plaintiffs Joseph Doe and James Doe could be prevented from traveling to the United States. Motion 12-14, 15-16. As the *Doe* plaintiffs' motion makes clear, however, the basis for such a ruling would be that "the *Hawai'i* Plaintiffs had not established standing or irreparable harm." *Id.* at 14. The *Doe* plaintiffs allege different theories of standing and injury than the plaintiffs in this appeal, and nothing would prevent them from seeking preliminary injunctive relief following the Court's ruling.

The *Doe* plaintiffs assert that seeking preliminary injunctive relief "in their own right in the district court * * * could take months," Motion 14, but the assertion is flatly at odds with the pace of proceedings in these cases. Furthermore, there is no reason to think that injunctive relief would require starting anew. The *Doe* plaintiffs expressly stipulated in district court that other cases pending in the district—including *Ali v. Trump*, No. 2:17-cv-00135-JLR (W.D. Wash.), where a motion for preliminary injunctive relief has been fully briefed and argued—could affect their case. The *Doe* plaintiffs have not shown that a ruling in this case would foreclose timely preliminary injunctive relief enjoining application of Section 6 of the Order.

In addition, this Court should not apply the rules governing intervention in a way that encourages parties to engage in multiple, concurrent litigation involving the same issues. "[T]he general principle is to avoid duplicative litigation" in two federal district courts, in order to further "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)). The *Doe* plaintiffs seek to pursue the same claims, arguments, and relief as intervenors in this appeal that they raise in their lawsuit in district court. That effort should be rejected.

The *Doe* plaintiffs assert that intervention would "allow[] the Court to address all facets of EO-2 in one take, instead of in piecemeal appeals on discrete provisions and claims." Motion 16. That sweeping argument would justify intervention by any litigant or potential litigant who seeks to challenge any aspect of the Executive Order, on any basis. Defendants would be forced to respond to a constantly changing landscape, in which intervenors introduce new factual allegations and legal arguments for the first time in the midst of highly expedited briefing on the merits of the appeal and pending stay motion. That kind of disorderly process would be inefficient and unduly burdensome to the defendants, the court, and the existing plaintiffs in this appeal.

3. The *Doe* plaintiffs also have not shown that existing parties do not adequately represent their interests. Their only contention in this respect is that their factual allegations differ from those of the *Hawaii* plaintiffs. Motion 17. That merely underscores why intervention is inappropriate. They ask this Court to rely on their factual allegations to affirm the district court's rulings on the *Hawaii* plaintiffs' likelihood of success on the merits, standing, and showing of irreparable injury, despite the fact that those factual allegations were not before the *Hawaii* court and had no bearing on its ruling. An intervenor on appeal (especially at this interlocutory stage) should not be permitted to change the nature of the litigation as it has been conducted by the parties. The *Doe* plaintiffs' arguments are at odds with the basic proposition that the Court rules on a case as the parties have chosen to present it. Intervention as of right should be denied.

B. Permissive intervention should also be denied. The *Doe* plaintiffs' unwarranted delay in seeking to intervene in this litigation, and the consequent prejudice to defendants that would result from their eleventh-hour appearance, also preclude permissive intervention. *See League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). Furthermore, the *Doe* plaintiffs can present their views to the Court as amici curiae. Permissive intervention would merely provide the *Doe* plaintiffs with the opportunity to submit a lengthy brief

raising new standing and irreparable injury theories, to which defendants would not be given an adequate and timely opportunity to respond.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court deny the *Doe* plaintiffs' motion for leave to intervene.

Respectfully submitted,

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APRIL 2017

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, I electronically filed the foregoing motion for expedited briefing schedule 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 Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that the foregoing motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(e)(1)(E) and the type-volume limitations of Federal Rule of Appellate Procedure 27(e)(2). The motion contains 1,907 words as calculated by the Microsoft Word (excluding the portions of the motion excluded by Federal Rules of Appellate Procedure 27(a)(2)(B)) and 32(f)), and has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

/s/ Sharon Swingle
Sharon Swingle