The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JUWEIYA ABDIAZIZ ALI, *et al*.,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al*.,

Defendants.

Case No. 2:17-cv-00135-JLR

DEFENDANTS' MOTION TO STAY DISTRICT COURT PROCEEDINGS PENDING RESOLUTION OF APPEAL IN *HAWAII V. TRUMP*

Noted For Consideration:
April 14, 2017

Defendants hereby move the Court to stay district court proceedings in this case pending resolution of Defendants' appeal of the preliminary injunction in *Hawaii v. Trump*, No. 17-cv-50 (D. Haw.). The parties' Joint Status Report and Discovery Plan demonstrates that Plaintiffs intend to seek sweeping and invasive discovery, to which Defendants will object on numerous grounds. As explained below, the Ninth Circuit's decision in *Hawaii* is likely to provide substantial guidance to this Court and the parties in resolving (or eliminating) these discovery

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disputes and Defendants' forthcoming response deadlines. Proceeding in the absence of such guidance would be inefficient, waste the resources of the Court and the parties, and potentially result in inconsistent rulings that would need to be corrected in light of the Ninth Circuit's decision. Moreover, the wide-ranging discovery Plaintiffs seek will undoubtedly impose a heavy burden on Defendants and the Court. Plaintiffs, in contrast, will not be harmed by a brief stay while the Ninth Circuit considers an expedited appeal in *Hawaii*, as the relevant provisions of Executive Order No. 13,780 ("Order") are currently enjoined nationwide. "The high respect that is owed to the office of the Chief Executive," which the Supreme Court has instructed "is a matter that should inform . . . the timing and scope of discovery," *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 385 (2004), warrants a stay here.

BACKGROUND

I. PRIOR PROCEEDINGS IN THIS CASE

Plaintiffs filed an Amended Complaint challenging Sections 1(f), 2 and 3 of the Order and Section 3(c) of the now-revoked Executive Order No. 13,769 ("Revoked Order"). *See* ECF No. 52. Plaintiffs claim both orders violate the U.S. Constitution's Establishment, Equal Protection, and Due Process Clauses, as well as the Immigration and Nationality Act ("INA") and the Administrative Procedure Act ("APA"). *See id.* ¶¶ 172-94. Plaintiffs filed a second class certification motion on the same day. *See* ECF No. 58.

Also on that day, Plaintiffs moved for a temporary restraining order ("TRO") and preliminary injunctive relief against enforcement of the Order. *See* ECF No. 53. On March 15, 2017, in another case, the District Court for the District of Hawaii entered a TRO that enjoined enforcement of Sections 2 and 6 of the Order nationwide. *See Hawaii v. Trump*, No. 17-cv-50, 2017 WL 1011673, at *1 (D. Haw. Mar. 15, 2017). The following day, the District Court for the

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District of Maryland entered a nationwide preliminary injunction against enforcement of Section 2(c) of the Order. *See Int'l Refugee Assistance Project v. Trump* ("*IRAP*"), No. 17-cv-361, 2017 WL 1018235, at *18 (D. Md. Mar. 16, 2017), *appeal docketed*, No. 17-1351 (4th Cir. Mar. 17, 2017).[1] In light of these decisions and the Court's understanding that Defendants would likely appeal them, the Court *sua sponte* stayed consideration of Plaintiffs' TRO motion. "Given the significant overlap of issues between this case and *Hawaii*," the Court reasoned that "the Ninth Circuit's rulings on [the Order] in [*Hawaii*] will [] likely have significant relevance to—and potentially control—the court's subsequent ruling here." *Ali v. Trump*, No. 17-cv-135, 2017 WL 1057645, at *5 (W.D. Wash. Mar. 17, 2017). The Court further noted that this stay would permit the Court to "conserve its resources and . . . benefit from any Ninth Circuit rulings in *Hawai'i*." *Id*.

II. JOINT STATUS REPORT AND DISCOVERY PLAN

The parties recently filed their Joint Status Report and Discovery Plan, in which Plaintiffs indicated that they intend to seek wide-ranging and intrusive discovery. *See* ECF No. 82. Plaintiffs anticipate conducting discovery on a broad array of topics, including "at least":

> [T]he circumstances leading to Defendants' issuance of Executive Order 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States," 82 F.R. 8977 (Feb. 1, 2017) (EO1) and EO2; the policy and purpose underlying EO1 and EO2; support for statistics and related data contained or referenced in EO1 and EO2; interagency memorandum and directives for implementing the EOs; interagency memorandum and directives responding to injunctive relief directed at the EOs; and documents identifying the number of cases, processing times, and any additional protocol implemented for processing Plaintiffs' and proposed class members' visa applications.

Id. ¶¶ 4(B), 5(E).

[1] On March 24, 2017, in a third case, the district court denied a preliminary injunction motion. *See Sarsour v. Trump*, No. 17-cv-120, 2017 WL 1113305 (E.D. Va. Mar. 24, 2017). The court held the plaintiffs were not likely to succeed on their INA, APA, Establishment Clause, and Equal Protection Clause claims. *See id*.

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Plaintiffs indicated the potential for 30(b)(6) depositions, *id*., and expect Defendants to produce "substantial amounts of [electronically stored information]." *Id*. ¶ 4(C). They anticipate discovery will take approximately eight months to complete. Specifically, they expect the case will be ready for trial by March 2018, with fact discovery to be completed 150 days before trial and expert discovery to be completed 120 days beforehand. *See id*. ¶¶ 4(F), 11.

As Defendants asserted in the Joint Status Report and Discovery Plan and for reasons discussed below (among others), Defendants do not believe any discovery is appropriate in this case—much less the sweeping and intrusive discovery Plaintiffs desire. Defendants, therefore, anticipate many discovery disputes if this case moves forward now.[2]

III. RECENT DEVELOPMENTS IN *HAWAII*

The district court in Hawaii converted its TRO into a preliminary injunction on March 29, 2017. *See Hawaii*, No. 17-cv-50, ECF No. 270. The preliminary injunction prevents Defendants from enforcing Sections 2 and 6 of the Order nationwide. *See id*. Defendants appealed that decision to the Ninth Circuit on March 30, 2017, *see id*., ECF No. 271, and intend to seek expedited review.

STANDARD OF REVIEW

"The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997). That power applies "especially in cases of extraordinary public moment," when "a plaintiff may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Id*. at 707.

[2] Plaintiffs could begin serving discovery at any time, *see* Fed. R. Civ. P. 26(d)(1), and Defendants' responses to Plaintiffs' amended complaint and second motion for class certification, which Defendants also seek to stay via this motion, are currently due on April 3.

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The Ninth Circuit has described various factors that should be considered when evaluating a motion to stay:

> Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among these competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962). As to the last factor, courts frequently grant stays when resolution of another action may "bear upon the case," because a stay is most "efficient for [the court's] own docket and the fairest course for the parties[.]" *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). Where such a stay is considered, the court need not find that the two cases possess identical issues or that resolution of one will control the other; a finding that the cases present substantially similar issues is sufficient. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Leyva*, 593 F.2d at 864.

ARGUMENT

Consideration of these factors warrants a stay of district court proceedings in this case pending resolution of the *Hawaii* appeal.

I. A STAY WOULD PROMOTE JUDICIAL ECONOMY BECAUSE THE NINTH CIRCUIT'S DECISION IN *HAWAII* IS LIKELY TO PROVIDE GUIDANCE ON FORTHCOMING ISSUES IN THIS CASE.

District courts routinely stay proceedings where resolution of an appeal in another matter may provide guidance to the district court in deciding issues before it. *See Landis*, 299 U.S. at 254; *see, e.g.*, *Fed. Home Loan Mortg. Corp. v. Kama*, No. 14-cv-137, 2016 WL 922780, at *8-*9 (D. Haw. Mar. 9, 2016) (granting stay where Ninth Circuit's resolution of related cases "w[ould] likely involve an analysis of" issues that would "provid[e] further guidance" to the district court); *Unitek Solvent Servs., Inc. v. Chrysler Grp. LLC*, No. 12-cv-704, 2014 WL

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12576648, at *4 (D. Haw. Jan. 14, 2014) (same). This approach not only "preserve[s] resources for both the parties and the Court," *id.*, but also "reduce[s] the risk of inconsistent rulings that the appellate court[] might then need to disentangle," *Ali*, 2017 WL 1057645, at *5. "Considerable . . . resources may be wasted if the appellate court's controlling decision changes the applicable law or the relevant landscape of facts that need to be developed" in the case before the district court. *Id*. Indeed, in the prior round of litigation related to the Revoked Order—when this Court had entered a nationwide injunction in *Washington v. Trump*, No. 17-cv-41 (W.D. Wash.), Defendants appealed, and then sought a stay of proceedings in the *Hawaii* case—the *Hawaii* court granted that stay, recognizing that staying proceedings "pending the outcome of appellate proceedings would facilitate the orderly course of justice." *Hawaii v. Trump*, No. 17-cv-50, 2017 WL 536826, at *4 (D. Haw. Feb. 9, 2017).

This Court also recently recognized the value of a stay pending appeal when it *sua sponte* stayed consideration of Plaintiffs' TRO motion. *Ali*, 2017 WL 1057645, at *5. "Because many of the legal arguments Plaintiffs raise[d] in their TRO motion [were] likely to be before the Ninth Circuit in *Hawaii*," the Court determined that "it would waste judicial resources to decide these issues . . . when guidance from the Ninth Circuit is likely to be available soon." *Id*. The Court thus concluded that "[t]he more efficient course" was to "wait for a decision from the Ninth Circuit . . . , which may resolve the primary issues." *Id*. The Court could then "resolve any remaining issues in this case with the benefit of the Ninth Circuit's analysis." *Id*.

Although the stay entered by the Court was limited to Plaintiffs' TRO motion, the same reasoning supports staying all district court proceedings in this case, including any discovery and Defendants' upcoming deadline to respond to Plaintiffs' amended complaint and class certification motion. As with Plaintiffs' TRO motion, the Ninth Circuit's resolution of the

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Hawaii appeal is likely to have "significant relevance to—and potentially control"—this Court's analysis of forthcoming issues in this case. *Id.*

With respect to discovery, Plaintiffs' intentions, as they articulated in the Joint Status Report and Discovery Plan, revealed that there are likely to be numerous disputes regarding the type of evidence (if any) that is relevant to Plaintiffs' claims. The Ninth Circuit's decision in *Hawaii* is likely to provide important guidance to the Court in resolving these disputes. For example, Plaintiffs anticipate seeking internal government records regarding the intent, design, issuance, and effects of the executive orders. Defendants do not believe these records are relevant to Plaintiffs' claims because, under the applicable law, Defendants need only demonstrate a "facially legitimate and bona fide reason" for the Executive's exclusion of foreign nationals. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); *see Fiallo v. Bell*, 430 U.S. 787, 792-96 (1977). Moreover, even if a court could look beyond the four corners of the Order, any review would be limited to "openly available data" that is accessible to an "objective observer," like the law's text or obvious effects, the policy it replaced, official public statements of the law's purpose, or "comparable official act[s];" consideration of internal government documents like those sought by Plaintiffs is not permitted. *McCreary Cty. v. ACLU*, 545 U.S. 844, 862-63 (2005). The Ninth Circuit is likely to examine these issues in the *Hawaii* appeal, because Defendants raised similar arguments in opposing preliminary injunctive relief in that case. The Ninth Circuit's decision, therefore, will likely provide guidance for the parties and the Court in briefing and deciding forthcoming disputes about the scope and nature of any relevant discovery. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) ("[T]he prospect of narrowing the factual and legal issues" counsels in favor of granting a stay.); *Fed. Home Loan*, 2016 WL 922780, at *9

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(granting stay, including of discovery, where appeal of related cases would "help to clarify the issues and questions of law going forward").

Furthermore, resolution of the *Hawaii* appeal will likely prove helpful in addressing forthcoming privilege disputes and determining the appropriateness of experts. Defendants believe much of the information Plaintiffs seek is protected by various privileges. The Ninth Circuit's decision in *Hawaii* is likely to impact these privilege issues by clarifying, among other things, what type of evidence is relevant to Plaintiffs' claims. Moreover, if the Ninth Circuit determines (contrary to Defendants' arguments) that the *Hawaii* plaintiffs are likely to succeed based solely on the publicly-available information on which they have relied to date, then Plaintiffs here will have no need for privileged information—much less a need that overcomes the Government's interests. The Ninth Circuit also is likely to address Defendants' argument that courts cannot second-guess the President's national-security judgment under 8 U.S.C. §§ 1182(f) and 1185(a), which may obviate any dispute over whether expert witnesses are necessary or appropriate.

The Ninth Circuit's guidance will prove useful in other aspects of this case as well. If the case is not stayed, Defendants would oppose Plaintiffs' motion for class certification and may move for dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[3] For the same reasons that the Court determined the Ninth Circuit's decision in *Hawaii* would be helpful in resolving Plaintiffs' TRO motion, the Ninth Circuit's decision would also be useful to the Court in resolving Plaintiffs' class certification motion and Defendants' possible motion to dismiss.

[3] Concurrently with this motion, Defendants are filing a motion to extend their April 3, 2017, deadline to respond to Plaintiffs' amended complaint and class certification motion until ten days after the Court rules on the instant stay motion.

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In contrast to the benefits to be obtained by awaiting resolution of the *Hawaii* appeal, failure to do so could result in "inconsistent rulings" that will need to be "disentangle[d]." *Washington*, 2017 WL 1050354, at *5. For example, if the Court determined that discovery of internal government materials is relevant to Plaintiffs' claims, but the Ninth Circuit subsequently held that only a facially legitimate and bona fide reason is required, the parties would have wasted resources on irrelevant discovery. Relatedly, if the Court determined that some internal government records are relevant but others are not, and the Ninth Circuit's subsequent decision conflicts with the line the Court drew, the Court would need to reconcile its past decisions. In short, the Ninth Circuit's decision could change "the applicable law or the relevant landscape of facts that need to be developed" in such a way that this Court's intervening rulings will be nullified or will need to be made anew. *Id.*; *see Canal Props. LLC v. Alliant Tax Credit V, Inc.*, No. 04-cv-3201, 2005 WL 1562807, at *3 (N.D. Cal. June 29, 2005). A stay, therefore, is most "efficient for [the court's] own docket and the fairest course for the parties[.]" *Leyva*, 593 F.2d at 863.

II. ABSENT A STAY, PLAINTIFFS' ANTICIPATED DISCOVERY WILL IMPOSE A HEAVY BURDEN ON DEFENDANTS AND THE COURT.

In addition to "simplifying" the "issues, proof, and questions of law" that will likely arise as this case proceeds, a stay also will eliminate "the hardship [and] inequity" Defendants would otherwise suffer "in being required to go forward" without guidance from the Ninth Circuit. *CMAX*, 300 F.2d at 268. And a stay will reduce this Court's burden as well.

The sheer volume of discovery that Plaintiffs anticipate is extraordinary given the nature of this case—*i.e.*, a challenge to the President's authority to exclude foreign nationals. The Supreme Court has instructed that "the Executive's constitutional responsibilities and status are factors counseling judicial deference and restraint in the conduct of litigation against it." *Cheney*,

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542 U.S. at 385. Plaintiffs, however, want the Court to take the exact opposite approach. As explained above, Plaintiffs contemplate seeking broad and intrusive discovery regarding the underlying factual basis, intent, design, issuance, and effects of the Order and the Revoked Order. Plaintiffs expect their discovery to take eight months to complete and to involve written discovery, document requests, and depositions of government officials.

If Plaintiffs are permitted to pursue discovery before the Ninth Circuit resolves the *Hawaii* appeal, it will impose an enormous burden on Defendants. Worse still, that burden may prove entirely unnecessary. Defendants intend to oppose discovery on many grounds, which will require briefing by the parties and decisions by the Court on, among other things, the scope of discovery (if any), the applicability of various privileges, and the appropriateness of depositions of any high-level officers. *See, e.g.*, *United States v. Morgan*, 313 U.S. 409, 421-22 (1941); *Kyle Eng'g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) ("Heads of government agencies are not normally subject to deposition."). Such resource-intensive litigation should not proceed in the absence of guidance from the Ninth Circuit that is likely to inform these discovery issues.

The Supreme Court has made clear that "[t]he high respect that is owed to the office of the Chief Executive is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Cheney*, 542 U.S. at 385. In the context of this case, that "high respect" warrants a stay that will protect Defendants from the burden of resource-intensive discovery while the Ninth Circuit addresses issues that may inform the appropriateness, scope, and necessity of that discovery. *Id.*; *see, e.g.*, *Rajput v. Synchrony Bank*, No. 15-cv-1079, 2016 WL 6433134, at *5, *7 (M.D. Pa. Oct. 31, 2016) (granting stay where appellate ruling likely would impact "the scope of the issues and discovery needed in th[e] case"); *Bd. of Trustees v. Blue Cross & Blue Shield of Michigan*, No. 13-cv-10416, 2013 WL 5913986, at *2 (E.D. Mich.

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Nov. 4, 2013) (refusing to lift stay where decision in related appeal could render discovery unnecessary); *cf. Curwen v. Dynan*, No. 11-cv-5598, 2012 WL 1237643, at *2 (W.D. Wash. Apr. 12, 2012) (staying discovery where "anticipated cost and burden of the discovery process" was high and it was possible, although "by no means certain," that discovery could be avoided through mediation).

III. PLAINTIFFS WILL NOT BE HARMED BY A BRIEF STAY.

In contrast to the huge (and potentially wasteful) drain on resources that will result if this case proceeds before the *Hawaii* appeal is resolved, Plaintiffs will not suffer any harm from a stay. The relevant provisions of the Order are currently enjoined nationwide. For that reason, this Court already determined that Plaintiffs would suffer only "minimal," "if . . . any," harm from a stay of their TRO motion. *Ali*, 2017 WL 1057645, at *4.

In addition, Defendants intend to seek expedited review of the *Hawaii* preliminary injunction in the Ninth Circuit. Any stay, therefore, will be of limited duration.[4] Particularly given the eight-month time frame Plaintiffs have proposed for discovery, a brief delay to clarify the legal landscape will not harm Plaintiffs. *See Washington*, 2017 WL 1050354, at *4 (relying on "speed with which the Ninth Circuit proceeded in the previous appeal in this case" to support stay); *Unitek Solvent*, 2014 WL 12576648, at *3 (concluding delay was "reasonable" where appeal was "expedited in accordance with Ninth Circuit rules relating to preliminary injunction appeals"). Once the *Hawaii* appeal is resolved, Plaintiffs can seek any necessary and appropriate discovery, guided by the Ninth Circuit's ruling. Under these circumstances, Plaintiffs cannot plausibly claim they will suffer harm from a stay. And, even if Plaintiffs could conceive of some

[4] At Defendants' urging, the Fourth Circuit set an expedited briefing schedule in *IRAP* under which briefing will be completed on April 21, 2017, with oral argument set for May 8, 2017. *See IRAP v. Trump*, No. 17-cv-1351 (4th Cir. Mar. 23, 2017), ECF No. 25.

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harm, it would not outweigh the harm to Defendants from denying a stay—particularly in light of the significant separation-of-powers concerns raised by Plaintiffs' anticipated discovery.

CONCLUSION

For these reasons, the Court should grant Defendants' motion to stay district court proceedings pending resolution of the appeal in *Hawaii v. Trump*.

DATED: March 30, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section

GISELA A. WESTWATER
Assistant Director

/s/ Stacey I. Young
Senior Litigation Counsel
U.S. Department of Justice
Civil Division
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel: (202) 305-7171
Fax: (202) 305-7000
Email: stacey.young@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2017, I electronically filed the foregoing Motion to Stay District Court Proceedings Pending Resolution of Appeal in *Hawaii v. Trump*.

/s/ Stacey I. Young
STACEY I. YOUNG

U.S. DEPARTMENT OF JUSTICE
Office of Immigration Litigation
District Court Section
Washington, DC 20044
Tel: (202) 305-7171