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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

STATE OF HAWAI‘I and ISMAIL ELSHIKH,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his 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

OPPOSITION TO MOTION FOR CLARIFICATION OF TRO

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INTRODUCTION

After full briefing and a lengthy hearing, this Court granted a temporary restraining order enjoining Defendants "from enforcing or implementing Sections 2 and 6 of the Executive Order." (Dkt. 219 at 2, 42). Defendants now ask this Court to "clarify" that the injunction does *not* cover any of Section 6 and most of Section 2. Because this Court has already held that Plaintiffs have met their burden to justify a temporary restraining order with respect to Sections 2 and 6 as a whole—and because Defendants' motion is substantively lacking—this request should be rejected. Plaintiffs respectfully request that this Court either enter a preliminary injunction reflecting the full scope of the temporary restraining order that is now in place, or set an expedited briefing schedule on the question whether such an order should be entered.[1]

1 As Defendants acknowledged in their motion, Mem. at 2 (Dkt. 227-1), the Government has declined Plaintiffs' efforts to agree to a briefing schedule regarding whether the Court should extend the TRO. They have elected instead to wait until the Court decides this motion, *id.* Because this briefing schedule is required by the Court's order, Op. at 43 (Dkt. 219), Plaintiffs have deferred entering a formal motion to convert the TRO into a preliminary injunction. Plaintiffs wish to make clear, however, that they do not believe further briefing is necessary at this point, particularly in light of the merits briefing Defendants have submitted in connection with this motion. Plaintiffs would therefore welcome a decision from the Court converting the TRO to a preliminary injunction without further briefing or proceedings, if the Court believes that is appropriate. Alternately, if the Court believes additional briefing is necessary, Plaintiffs would welcome an expedited briefing schedule from the Court.

BACKGROUND

On March 8, 2017, Plaintiffs the State of Hawaii and Dr. Ismail Elshikh filed a Second Amended Complaint and Motion for Temporary Restraining Order in this case. In no uncertain terms, the Motion "ask[ed] that the Court enter a temporary restraining order enjoining Defendants from enforcing or implementing Sections 2 and 6 of the Executive Order nationwide." (Dkt. 65 at 4). In the brief accompanying that motion, Plaintiffs asked the Court to "enter a nationwide injunction prohibiting the enforcement of sections 2 and 6." (Dkt. 65-1 at 59). The brief explained that "[*b]oth of these sections* are unlawful in all of their applications because," among other reasons, they are "motivated by anti-Muslim animus." (Dkt. 65-1 at 46) (emphasis added). Plaintiffs also explained that "the Executive Order will irreparably harm Hawaii's sovereign interest in preventing the unconstitutional 'establishment' of religion in the state" and that it would harm Dr. Elshikh by "infring[ing]" on "his rights to be free from governmental discrimination based on religion." (Dkt. 65-1 at 50). And in the draft Order filed with the Court, Plaintiffs asked that Defendants be "enjoined *fully* from enforcing or implementing Sections 2 and 6 of the Executive Order." (Dkt. 65-3 at 4) (emphasis added).

In its lengthy response, the Government attempted to defend both Section 2 and Section 6 of the Order. (*See, e.g.*, Dkt. 145 at 5, 11, 19, 37 n. 10). It devoted

an entire separate paragraph of its statutory background section to the refugee program (Dkt. 145 at 5), and it gave Section 6 the same attention that it gave Section 2 by separate heading in describing the revised Executive Order (Dkt. 145 at 11). It also dealt with the suspension of refugees in its argument section. Notably, with respect to the Establishment Clause, Defendants argued that "the operation of *both* suspensions"—that is, both the six country entry suspension and the refugee suspension— "confirms the Order's stated purpose." (Dkt. 145 at 41). Indeed, the Government referred expressly to the fact that the Order "temporarily suspends the Refugee Program globally" as purported evidence that the Order was not motivated by religious animus. (Dkt. 145 at 45).

In its irreparable harm section, the Government did not dispute that the Establishment Clause inflicts harms that are necessarily irreparable. But that was not because it somehow believed Section 6 was not covered by Plaintiffs' request for injunctive relief. To the contrary, the Government argued that "at a minimum, Hawaii has not demonstrated immediate threatened injury from the short, temporary suspensions of entry *and the Refugee Program*." (Dkt. 145 at 48) (emphasis added).

The Government also argued that this Court should limit any injunctive relief to "address at most [Dr. Elshikh's] mother-in-law's ability to enter the country" and "particular individuals with whom [Hawaii] shows it has a close

existing relationship." (Dkt. 145 at 53). The Government pointedly did *not* suggest that the Court could or should parse Sections 2 and 6 if it determined that a wider form of injunctive relief was appropriate. In fact, the Government quoted the Ninth Circuit's holding that the "Executive was 'far better equipped' to revise" the Executive Order. (Dkt. 145 at 54).

This Court rejected the Government's arguments with respect to the Establishment Clause, the harm inflicted by the Order, and the necessary scope of the injunction. Accordingly, on March 15, 2017, the Court entered a Temporary Restraining Order that applied to both Sections 2 and 6 of the Order without qualification. (Dkt. 219 at 2, 42).

When the Court issued its opinion, it also directed the parties to agree on a briefing schedule to determine whether the TRO should be extended. Instead, and over Plaintiffs' objections, the Government brought a motion asking the Court to "clarify" that the TRO enjoining Sections 2 and 6 applies only to Section 2(c). Mem. at 2 (Dkt. 227-1). Plaintiffs oppose that motion and welcome any steps this Court may wish to take to expedite the proceedings to accommodate the urgency the Government has previously expressed, *see* n. 1, *supra*.

ARGUMENT

The Government's motion is predicated on a series of mischaracterizations. Chief among them is its erroneous assertion that its motion—which asks the Court

to substantively alter the scope of the relief it ordered just three days ago—is merely a motion to "clarify" the existing TRO. A motion requesting such dramatic relief in the absence of changed circumstances is wholly procedurally improper and the previously raised and waived arguments Defendants attempt to advance in support of its motion are not properly before the Court.

But procedure is only half of the Government's problem; there is also no merit to its assertions that the injunction—whether viewed as a TRO or preliminary injunction—should be narrowed to cover Section 2(c) alone. This Court's well-reasoned opinion and Supreme Court precedent hold the opposite. Further, the provisions in Section 2 and in Section 6 are intertwined and do not readily admit to parsing, and Plaintiffs have already presented an ample factual and legal basis for an injunction of both Sections in full. Plaintiffs therefore respectfully request that the motion be denied, and respectfully suggest that this Court consider whether further briefing on the merits of its injunction are necessary at this time.

1. The Government's Motion for "Clarification" Contains Several Misrepresentations.

As a preliminary matter, the Government's motion contains several errors that must be corrected. First, the Government asserts that it is seeking "clarification" of the existing TRO, but then requests that the Court radically alter the Order by cutting its scope in half and then carving away at the remainder. That

plainly is not a "clarification." In fact, the Government is improperly seeking to modify the existing TRO based on arguments it has already raised or waived.

Second, the Government repeatedly mischaracterizes Plaintiffs' prior claims with respect to both standing and the merits. As to standing, the Government asserts that Plaintiffs' "claims of harm principally relate to Section 2(c)." Mem. at 5-6 (Dkt. 227-1). It then entirely ignores numerous references in Plaintiffs' TRO briefing to the Establishment Clause harms inflicted by the Order on both Hawaii and Dr. Elshikh. Perhaps most egregiously, the Government claims that Dr. Elshikh "asserts that he will be harmed by the application of Section 2(c), which he claims will preclude his mother-in-law from entering the United States." *Id.* at 6 n.3. This Court already told the Government that this contention "is *not true*. Dr. Elshikh alleges direct, concrete injuries to both himself and his immediate family that are independent of his mother-in-law's visa status. These alleged injuries have already occurred and will continue to occur once the Executive Order is implemented and enforced—the injuries are not contingent ones." Op. at 26-27 (Dkt. 219) (emphasis added).

As to the merits, the Government's contentions are, if anything, less accurate. It suggests that Plaintiffs addressed Section 6 only twice in their TRO briefing of the constitutional arguments. That is just wrong. Plaintiffs' motion for a TRO addressed and quoted the Ninth Circuit's holding regarding the Due Process

rights of refugees. (Dkt. 65-1 at 23, 38). Plaintiffs did not say more because they did not need to. As they pointed out in reply after the Government attempted to sweep the refugee issue under the rug (Dkt. 145 at 37 n.10), the Ninth Circuit had *already held* that refugees have viable Due Process claims and had *already upheld* a TRO obtained by States vindicating those rights. (Dkt. 191-1 at 14-15 (quoting *Washington, et al. v. Trump et al.*, 847 F.3d 1151, 1166 (9th Cir. 2017))). More to the point, Plaintiffs stated outright that their Establishment Clause arguments applied to both Sections 2 and 6; "[b]oth of these sections are unlawful in all of their applications" because they are "motivated by anti-Muslim animus." (Dkt. 65-1 at 46). And Plaintiffs specifically cited the President's statement regarding refugees as evidence of the animus. (Dkt. 65-1 at 43). There was no ambiguity as to the scope of Plaintiffs' Establishment Clause claims.

Finally, and perhaps most troublingly, the Government's motion misrepresents this Court's opinion. The Government suggests that the harms the Court identified could not establish Article III standing with respect to a challenge to Section 6, ignoring the fact that this Court's standing holding with respect to Hawaii was expressly premised on the Ninth Circuit's holding in *Washington v. Trump*. Op. at 19-20 (Dkt. 219). The *Washington* opinion upheld States' standing to seek an injunction of a comparable refugee ban. *See, e.g.*, 847 F.3d at 1168.

Further, the Government entirely ignores *four pages* of the Court's opinion discussing *Dr. Elshikh's* standing to assert "an Establishment Clause violation." Op. at 23 (Dkt. 219). That analysis was in no way limited to section 2(c) of the Order; on the contrary, it expressly held that Dr. Elshikh had standing to challenge "*portions* of the Executive Order"—plural—based on the fact that the Order as a whole "'sends a message to [Muslims] that they are outsiders'" and makes it difficult for Dr. Elshikh "and members of the Mosque [to] associate as freely with those of other faiths." Op. at 24-25 (Dkt. 219) (quoting *Catholic League for Religious & Civil Rights* v. *City & Cty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (en banc)).

On the merits, the Government wrongly claims that the Court "focused its Establishment Clause analysis on the suspension of entry provisions contained in Section 2(c) of the Executive Order." Mem. at 7 (Dkt. 227-1). In fact, the Court explicitly noted—and accepted—Plaintiffs' claim that "the Executive Order causes harm by stigmatizing not only immigrants *and refugees*, but also Muslim citizens of the United States." Op. at 10 (Dkt. 219) (emphasis added). As evidence that the Executive Order's primary purpose was to effectuate a Muslim ban, the Court quoted numerous statements making no distinction whatever between the Executive Order's nationality-based ban and its shutdown of refugee admissions. *See id.* at 33-36 & n.14; *see also id.* at 11 (quoting Second Am. Compl. ¶ 58, n.29,

referring to interview during which the President (falsely) claimed that it was easier for Muslims than Christians to enter the United States as refugees, and objected that this was "very, very unfair"). Furthermore, in identifying several assertions that "certainly call the motivations behind the Executive Order into greater question," the Court quoted the Order's claim that "'two Iraqi nationals admitted to the United States *as refugees* in 2009'" were convicted of "'terrorism-related offenses.'" Op. at 36-37 (Dkt. 219) (emphasis added). In the face of these references and the Court's explicit statement that the TRO covers Section 2 and Section 6, the Government's reading of the Court's opinion as limited to Section 2(c) is hard to understand.

2. The Government's Motion Is Procedurally Improper.

The Government's misdesignation of its motion as a request for clarification is not a mere problem of nomenclature. The Government is, in effect, asking the Court to modify its existing injunction based on a proposed limitation that it could have—but did not—previously seek, and on the basis of arguments this Court has already rejected. The procedural defects are obvious.

As the Ninth Circuit has held, "[a] party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000); *see U.S. ex rel. F.T.C. v. Bus. Recovery Servs.*

LLC, 488 F. App'x 188, 189 (9th Cir. 2012). That standard, embodied in Federal Rule of Civil Procedure 60(b), applies with respect to TROs. In fact, some courts have held that because a TRO is not a final order, the ability to alter or to seek reconsideration is even more limited as it is rooted solely in the court's inherent powers. *Lucero v. Cash*, No. CV 10-3829-CAS OP, 2012 WL 1688543, at *1 (C.D. Cal. May 14, 2012); *see also Saini v. I.N.S.*, 64 F. Supp. 2d 923, 925 (D. Ariz. 1999) (holding that non-final orders may be reviewed only through resort to a court's limited inherent power); *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000) (preliminary injunction cannot be reviewed through Rule 60(b)).

The Government cannot possibly meet that standard. The Government obviously cannot point to any changed factual circumstances since Wednesday. Nor has the law changed in the last three days. The Government is simply dissatisfied with the scope of this Court's holding, but the Government is not entitled to relitigate the TRO immediately after it was issued, and certainly cannot do so in the guise of a "motion for clarification."

3. The Government's Motion Fails on the Merits.

Even if the Court examined the merits, the Government's request to narrow the injunction would fail. As Plaintiffs argued and this Court held, the Order as a whole, and Sections 2 and 6 in particular, embodies a policy motivated by religious

animus. Allowing any part of one or both of these sections to stand perpetuates the perception that the Executive may make policy predicated on hostility to a particular faith and stigmatizes Muslim citizens like Dr. Elshikh. This Court properly held that such a result is expressly foreclosed by the Establishment Clause.

The Government's arguments about the appropriate scope of an Establishment Clause injunction have also been rejected by the Supreme Court. In *Church of Lukumi Babalu Aye v. City of Hialeh*, 508 U.S. 520, 540 (1993), the Supreme Court held that even when parts of a challenged policy appear well-tailored to a secular purpose, they must nonetheless be "invalidated" where it is clear that the policy as a whole has "as [its] object the suppression of religion." As discussed below, that does not mean that every element of Sections 2 and 6 would be unconstitutional if it were enacted outside the context of a discriminatory ban. As Justice Kennedy explained in *Lukumi*, a court "need not decide whether" apparently neutral policies might "survive constitutional scrutiny if [they] existed separately." *Id.* The Court's Order merely reflects the commonsense principle that the enjoined policies certainly cannot withstand that scrutiny as part of a policy motivated by religious animus.

Declining to enjoin Section 6 and part of Section 2 would also be contrary to the basic command that the "usual function of [emergency relief] is to preserve the

status quo ante litem." *Tanner Motor Livery, Ltd.* v. *Avis, Inc*., 316 F.2d 804, 808 (9th Cir. 1963). That status quo is an immigration system unfettered by the provisions of Sections 2 and 6.

It would be particularly illogical to enjoin only parts of the ban in this case. As the Government itself acknowledges, the different components of Sections 2 and 6 are inextricably linked. The Government itself explains that, while "Section 2(c) contains the 90-day suspension-of-entry provision * * * [t]he remainder of Section 2 sets forth a process by which the President will make an *additional determination* about whether any restrictions on entry are necessary for certain foreign nationals or categories of foreign nationals." Mem. at 4 (Dkt. 227-1) (emphasis added). In other words, the remainder of Section 2 is designed to help the President extend his discriminatory ban on entry to additional countries and for additional periods of time. Since the Court found a high likelihood that the ban was motivated by discriminatory animus, Op. at 36 (Dkt. 219), the provisions for extending that ban are surely infected by the same animus, and inflict the same Establishment Clause harms.

Likewise, all of the provisions of Section 6 are components of an integrated process for "suspend[ing]" and "review[ing]" refugee admission rules. Mem. at 5 (Dkt. 227-1). As noted, the Court found a high likelihood that the President was changing refugee admissions rules to effectuate a Muslim ban. Op. at 36 (Dkt.

219). Every piece of that integrated process is an outgrowth of the same poisonous root, and was properly barred.

Further, the factual record Plaintiffs have developed in this case amply supports this Court's finding that Plaintiffs are likely to succeed on the merits of their claim that *all* of the Order—including its refugee provisions in Section 6—was motivated by discriminatory animus towards Muslims. As Plaintiffs' Complaint documented, President Trump's repeated pledges throughout the presidential campaign to curb the admission of refugees were integrally interlinked with his rhetoric about the threat of Muslims. Months before he even came up with his proposal for "a total and complete shutdown of Muslims entering the United States" in December 2015, Second Am. Compl. ¶ 38 (Dkt. 64), President Trump was decrying the admission of Muslim refugees. On July 11, 2015, he claimed (falsely) that Christian refugees were being prevented from coming to the United States, while "[i]f you are Islamic * * * it's hard to believe, you can come in so easily." *Id.* ¶ 36. In September 2015, he referred to the Syrian refugees the Obama Administration had accepted for 2016 as "a 200,000-man army" that "could be ISIS," and vowed, "if I win, they're going back!" *Id.* ¶ 37. In July 2016 he said: "[U]nder the Clinton plan, you'd be admitting hundreds of thousands of refugees from the Middle East with no system to vet them, or to prevent the radicalization of the children and their children. Not only their children, by the

way, they're trying to take over our children and convince them how wonderful ISIS is and how wonderful Islam is and we don't know what's happening." *See id.* ¶ 43 n. 19 (linking to July 2016 speech).

As Plaintiffs' Complaint also demonstrated, President Trump's first Executive Order included a refugee provision not only crafted to effectuate his promise to keep Muslims refugees out of the country—but that was discriminatory on its *face*. Section 5 of the January 27 Order suspended the U.S. Refugee Admissions Program for 120 days, but included a carve-out for refugees who were "religious minorit[ies]" in their home countries. *Id.* ¶ 56. Section 5 directed the Secretaries of State and Homeland Security, after USRAP admissions resumed, to "prioritize refugee claim made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of origin." *Id.* ¶ 57. In an interview with the Christian Broadcasting Network on January 27, 2017, President Trump outright admitted that the first Order was intended to create a preference for the admission of Christian refugees. *Id.* ¶ 58.

The new Executive Order attempts to sanitize the prior Order's refugee provision in order to "be responsive to a lot of very technical issues that were brought up by the court." *Id.* ¶ 74(a). Thus, while the new Order still suspends URSAP admissions for 120 days under Section 6, it no longer contains an explicit

carve-out during those 120 days or a mandated preference thereafter for the admission of Christians. *Id.* ¶ 81. But these technical fixes do not eliminate the religious animus that motivated the refugee provisions of the first Order and were apparent on its face or that motivated the revised one. As President Trump said *himself* at a rally after this Court issued its Temporary Restraining Order, the revised Order is just a "watered down" version of the first Order.[2] Removing any doubt as to whether the taint had been dispelled, President Trump said: "This is a watered-down version of the first one. This is a watered-down version." He went on: "And let me tell you something, I think we ought to go back to the first one." Later that night, he also told a television interviewer that it was "very hard" to assimilate Muslims into Western Culture.[3]

Accordingly, this Court's conclusion that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim is just as true as to Section 6 of the Order as to Section 2. Given "[t]hese plainly-worded statements, made in the months leading up to and contemporaneous with the signing of the Executive Order, and, in many cases, made by the Executive himself"—not only about Muslim immigration in general but about Muslim refugees specifically—"[a]ny

2 CNBC, March 15, 2017, http://www.cnbc.com/2017/03/15/trump-may-have-just-dealt-a-blow-to-his-own-executive-order.html.
3 Washington Post, March 16, 2017, https://www.washingtonpost.com/news/the-fix/wp/2017/03/16/donald-trump-explained-twitter-the-universe-and-everything-to-tucker-carlson/?utm_term=.cea6fe975424.

reasonable objective observer would conclude . . . that the stated secular purpose of" Section 6 "is, at the very least, 'secondary to the religious objective' of temporarily suspending the entry of Muslims." Op. at 36 (Dkt. 219) (citation omitted).

Finally, the notion that the Court's Order would preclude Executive Branch consultation or trench on Executive prerogatives is meritless. The Court's Order merely prevents Executive branch action under the auspices of an illegal Executive Order. The Government could engage in appropriate consultations independent of this Order; it simply cannot do so as part and parcel of effectuating the President's promise to implement a Muslim ban. *See Lukumi*, 508 U.S. at 540.

4. The Court May Consider Entering A Preliminary Injunction Or Setting An Expedited Briefing Schedule.

By filing this procedurally and substantively improper motion, the Government has further delayed proceedings in a matter that it has claimed is urgent. The reasons for such delay elude Plaintiffs. Plaintiffs have repeatedly offered to cooperate on a condensed or accelerated schedule for addressing a motion to convert the Court's TRO order into a preliminary injunction. Plaintiffs have also expressed their belief that there is no need for any further proceedings on this matter, because the standards for granting both forms of relief are substantially the same, *Stuhlbarg Int'l Sales Co.* v. *John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001), and the Ninth Circuit viewed the TRO in *Washington* v. *Trump* as

a preliminary injunction, even though that order was issued with less briefing and was supported by a less detailed opinion, 847 F.3d at 1157. Indeed, by immediately appealing the TRO in *Washington* v. *Trump*, the Government indicated its belief that a TRO in that case amounted to a preliminary injunction.

Defendants have resisted Plaintiffs' offers to accommodate the Government's stated view with respect to the exigency of the circumstances. And, as noted above, the resulting absence of a briefing schedule has led Plaintiffs to defer entering a formal motion to convert the TRO to a preliminary injunction, *see* n. 1, *supra*. Nevertheless, in the interests of judicial efficiency and to avoid delay, Plaintiffs would welcome an order from this Court, either taking this opportunity to clarify that the TRO is effectively a preliminary injunction, or to set an expedited briefing schedule on this issue.

CONCLUSION

The Government's motion to narrow the scope of the TRO should be denied. In Plaintiffs' view, the parties have now fully briefed the issues regarding the scope of the injunction that should be in place until the Court decides the merits. Plaintiffs would welcome any further relief this Court sees fit under these circumstances.

DATED: Washington, D.C., March 18, 2017.

Respectfully submitted,

/s/ Neal K. Katyal

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