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 *ALI* PETITIONERS

This Court should deny the motion to intervene filed by the plaintiffs in *Ali v. Trump*, No. 2:17-cv-00135 (W.D. Wash.), who belatedly seek to intervene as parties in this appeal after this Court entered a highly expedited briefing schedule, pursuant to which defendants have already filed their opening brief. For that reason alone, the *Ali* plaintiffs do not meet the standards for intervention on appeal. Nor is it necessary for them to intervene in order to protect their interests; their participation as amicus curiae would permit this Court to consider their legal arguments and any particularized concerns they might have.

Indeed, most of their particularized concerns are not implicated by this appeal. The *Ali* plaintiffs brought their action in the Western District of Washington, where they challenge the lawfulness of additional sections of Executive Order 13,780 (Mar. 6, 2017), that are not at issue in this appeal, making certain factual allegations and

legal arguments that were not reached by the district court in this case and are not relevant here. The *Ali* plaintiffs have fully briefed and argued a motion seeking injunctive relief and, although the district court stayed its consideration of that motion in light of the nationwide injunction at issue in this case, they could renew their request for relief if this Court were to vacate the injunction at issue here. It would be premature for this Court to consider the distinct issues raised in that case before the district court has an opportunity to do so. This highly expedited interlocutory appeal and stay motion provide a poor vehicle for consideration of any unique claims or arguments that the *Ali* plaintiffs might seek to introduce.

STATEMENT

The district court in this matter entered a nationwide preliminary injunction on March 29, 2017 barring enforcement of Sections 2 and 6 of the Order. Defendants filed an appeal the following day. On March 31, defendants filed a consent motion for an expedited briefing schedule; under that briefing schedule, defendants' principal brief on appeal was due April 7. The Court granted that motion on April 3, adopting the schedule proposed by the parties.

The *Ali* plaintiffs did not seek to intervene while this case was in district court, instead pursuing their own separate litigation. The *Ali* plaintiffs are U.S. citizens and lawful permanent residents, and their family members. The U.S. citizens and lawful permanent residents allege that they have filed family visa petitions on behalf

of family members abroad, each of whom is from one of the six countries identified in Section 2(c) of the Executive Order. Their amended complaint challenges Sections 1(f), 2, and 3 of the Order, which are claimed to violate the immigration statutes, the Due Process Clause, the Equal Protection Clause, the Establishment Clause, and the Administrative Procedure and Mandamus Acts. They filed a motion seeking a temporary restraining order or a preliminary injunction, which was fully briefed and argued in district court. The district court subsequently stayed a ruling on the motion in light of the injunction entered in this case by the U.S. District Court for the District of Hawaii, and in anticipation of an appeal in this litigation.

One day before defendants' principal brief was due in this appeal—and three days after this Court had entered the expedited briefing schedule—the *Ali* plaintiffs filed a motion to intervene in this case. Defendants respectfully oppose the motion.

ARGUMENT

Neither the Federal Rules of Appellate Procedure nor this Court's Circuit Rules address intervention on appeal. However, this Court has applied the standard for intervention set forth in Rule 24 of the Federal Rules of Civil Procedure. *See, e.g., In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d 980, 984 (9th Cir. 2008). The putative intervenor bears the burden of demonstrating that he or she has satisfied each of these requirements. *United States v. Alisal Water Corp.*,

370 F.3d 915, 919 (9th Cir. 2004). The *Ali* plaintiffs cannot satisfy the standards for intervention, whether as of right or permissive.

A. A party seeking to intervene as of right must meet four requirements:

> (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). The *Ali* plaintiffs fail to make the necessary showing with respect to any of these elements, let alone all four.

1. First, the *Ali* plaintiffs' motion is untimely. Defendants commenced this appeal on March 30 and immediately sought an expedited briefing schedule with the consent of plaintiffs. Under that schedule, which the Court entered on April 3, defendants' principal brief on appeal was due on April 7. Yet the *Ali* plaintiffs did not move to intervene until April 6, the day before defendant's principal brief was due. Permitting intervention now, after defendants' principal brief has been filed, would prejudice defendants and potentially delay the disposition of this matter. Defendants had no opportunity in their principal brief on appeal to address the distinct factual and legal positions the *Ali* plaintiffs would assert. The failure to make this showing is fatal to the *Ali* plaintiffs' request for intervention, and makes it unnecessary even to consider the other factors for intervention. *See League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) ("[I]f

we find that the motion to intervene was not timely, we need not reach any of the remaining elements of Rule 24.") (brackets and internal quotation marks omitted)

2. Second, the *Ali* plaintiffs do not have a "direct, non-contingent, substantial and legally protectable" interest in the litigation. *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981) (citation omitted). "[A]n undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *Southern Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (quoting *Public Serv. Co. v. Patch*, 136 F.3d 197, 205 (1st Cir.1998)). That is all the *Ali* plaintiffs have.

The *Ali* plaintiffs assert that they have "an interest in ensuring that their interests are fully presented with respect to their claim that [the Executive Order] is unconstitutional." Motion 11. They cite no authority supporting that lax standard for intervention on appeal. The *Ali* plaintiffs' standard would apparently allow any potential plaintiff (presumably anywhere in the country) with a challenge to the Executive Order to intervene in this interlocutory appeal. Allowing intervention by litigants in other cases, in the midst of highly expedited briefing and while this Court considers an expedited motion for a stay pending appeal, carries the potential for unwarranted delay and consequent irreparable harm.

The *Ali* plaintiffs also assert that a decision by this Court could have a "binding effect on their motion for preliminary injunctive relief." Motion 12. That

argument both misunderstands the question before this Court on defendants' interlocutory appeal and demonstrates why the *Ali* plaintiffs should not be treated as a party to this appeal. The very case they cite in support of their argument distinguishes between a putative intervenor's interest "in adjudicating an issue it has raised in one proceeding that lands in another proceeding for disposition," which supports intervention, and "a non-party's interest in avoiding bad precedent," which does not. *Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d at 986-87. Here, the *Ali* plaintiffs' interest is, at most, in avoiding adverse precedent for their own legal claims and theories.

Moreover, the *Ali* plaintiffs' concern about adverse precedent is overblown. Neither a stay pending appeal nor a decision vacating the order in this case would necessarily create binding precedent that fully disposes of the *Ali* plaintiffs' distinct claims, which they emphasize differ both legally and factually from the claims in this case. Defendants seek a stay pending appeal, and reversal, of a preliminary injunction entered by the U.S. District Court for the District of Hawaii, and any decision by this Court in defendant's interlocutory appeal would be of limited duration, as the case below remains pending. Indeed, the *Ali* plaintiffs themselves told the district court hearing their case that this Court's "decision in *Hawai'i* is likely to provide guidance in this case only on a limited set of issues relevant to only one of Plaintiffs' claims—namely, issues of standing, ripeness, and likelihood of

success that relate to their Establishment Clause claim—but not on the merits or ripeness of Plaintiffs' remaining five claims, or their distinct standing arguments." Plaintiffs' Opp. to Motion to Stay Proceedings at 2, Dkt. 92, *Ali v. Trump*, No. 17-135 (W.D. Wash. Apr. 10, 2017). This Court could provide useful guidance to the district court in *Ali* (and defendants believe that a stay of that action is warranted pending this Court's ruling), but it will not necessarily resolve the *Ali* plaintiffs' claims in their entirety.

Furthermore, the *Ali* plaintiffs should not be permitted to pursue two separate cases simultaneously, raising the same claims and seeking the same relief. Outside the context of intervention, a court has discretion to "stay or dismiss a suit that is duplicative of another federal court suit." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). *Curtis* recognized the "complex problems that can arise from multiple federal filings," requiring the court to "consider the equities of the situation." 226 F.3d at 138. That doctrine is "meant to protect parties from the vexation of concurrent litigation over the same subject matter." *Id.* (internal quotation marks omitted). The rules governing intervention should not be invoked to permit or encourage multiple, concurrent litigation by the same parties.

3. The disposition of this action will not as a practical matter impair or impede the *Ali* plaintiffs' ability to protect their interests. They argue that, if this

Court grants the relief defendants seek, that will "directly impair the lives of the *Ali* plaintiffs and all proposed class members" by "disrupting ongoing and expensive immigrant visa adjudications, suspending entries to the United States, and potentially resulting in indefinite separation of family members and undermining the stability of U.S. employers." Motion 13-14. As noted, however, the *Ali* plaintiffs have a pending motion for injunctive relief, which has been fully briefed and argued, before the district court in the Western District of Washington. The district court could promptly rule on that motion (with the benefit of this Court's views) if this Court were to reverse the injunction at issue in this litigation. Furthermore, the *Ali* plaintiffs' own motion asserts that they are differently situated from, and have different arguments for standing than, the plaintiffs in this case. Motion 15-16. They also raise different substantive claims than the Establishment Clause claim that was the basis for the injunction at issue in this appeal. Motion 15-16. All of those arguments would remain available to plaintiffs after a ruling by the Court in this case.

4. For similar reasons, the *Ali* plaintiffs have not shown that their interests are not adequately represented by existing parties. They appear to argue that this prong of the test is satisfied because they wish to make substantive arguments that were not pressed by the plaintiffs in this case or passed on by the district court. The very fact that the nature of their claims, factual allegations, and legal theories are

different from those currently before the Court shows why intervention is inappropriate. At bottom, the *Ali* plaintiffs seek to inject new issues in this appeal to obtain immediate appellate review of their individual claims even before any district court has passed on them. 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 original parties. Any different claims or theories should be introduced in the *Ali* plaintiffs' own case and addressed by the district court in that litigation in the first instance. And, of course, plaintiffs in this case, who are vigorously challenging the Order, more than adequately represent the interests of the *Ali* plaintiffs with respect to the legal issues that overlap. *See* Fed. R. Civ. P. 24(a)(2).

B. Permissive intervention is also unwarranted. As this Court has recognized, permissive intervention also requires a timely request for intervention, and timeliness is analyzed even "more strictly" in the context of permissive intervention that with intervention as of right. *League of United Latin American Citizens*, 131 F.3d at 1308. *A fortiori*, the *Ali* plaintiffs' delay in seeking leave to intervene, with the consequence that defendants have now filed their principal brief on appeal, should also bar permissive intervention.

Furthermore, the *Ali* plaintiffs can present their views to the Court as amici curiae. There is no need to invoke permissive intervention, which would merely

provide an opportunity to submit a lengthy brief to which defendants would not be given an adequate and timely opportunity to respond under the expedited briefing schedule. Notably, when a challenge to now-revoked Executive Order, No. 13,769 (Jan. 27, 2017), was previously before this Court, the Court denied a motion by the State of Hawaii to intervene, instead permitting it to file as amicus curiae. Order, *Washington v. Trump*, No. 17-35105 (Feb. 6, 2017). The Court should do the same here.

CONCLUSION

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

Respectfully submitted,

/s/ Sharon Swingle
SHARON SWINGLE
(202) 353-2689
Attorney, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 7520
Washington, D.C. 20530

APRIL 2017

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 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 FRAP 32(g)(1), I hereby certify that the foregoing corrected motion complies with the type-volume limitation in FRAP 27(d)(2)(A). According to Microsoft Word, the motion contains 2,284 words and has been prepared in a proportionally spaced typeface using Times New Roman in 14 point size.

/s/ Sharon Swingle
Sharon Swingle