IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al., Plaintiffs, v. DONALD TRUMP, et al., Defendants.	Civil Action No.: 8:17-CV-00361-TDC **PLAINTIFFS' MOTION FOR LEAVE TO FILE MOTION FOR PRELIMINARY INJUNCTION OF § 6 ON CONSTITUTIONAL GROUNDS**

INTRODUCTION

The Court has jurisdiction to consider Plaintiffs' challenges to the Executive Order's refugee provisions. Defendants have appealed the Court's injunction of § 2(c), and so the Court lacks jurisdiction over that injunction. But the Court declined to enjoin § 6 at this time, and no party has appealed that decision, and so the Court retains jurisdiction to consider enjoining it. While the legal issues surrounding § 6 and § 2(c) overlap to some degree, such analytical overlap does not divest a district court of jurisdiction. Nor will a ruling on § 6 interfere with the Fourth Circuit's consideration of this Court's order enjoining § 2(c). Accordingly, there is no jurisdictional bar to the Court's consideration of Plaintiffs' constitutional challenges to § 6.

The Court should rule on Plaintiffs' constitutional claims regarding § 6 with the benefit of full briefing. In briefing the previous motion for preliminary injunction, neither party raised the possibility that discriminatory motives could animate § 2(c) but not § 6. This means that, as the Court noted in its March 16 opinion, it has not yet received fully

developed evidence and arguments about whether an objective observer would understand § 6 to have been motivated by the same purpose as § 2(c). The evidence to that effect is voluminous. Plaintiffs' proposed motion would allow the Court to consider it in the first instance.

There is also no prudential reason not to move forward with both of Plaintiffs' challenges to § 6. While that provision is currently subject to a temporary restraining order, there is no guarantee that the TRO will remain in effect. If it does not, Plaintiffs will suffer severe and irreparable harms during the pendency of this litigation. To preserve its ability to render full relief in this case, the Court should consider both of Plaintiffs' claims against § 6 now.

BACKGROUND

On January 27, 2017, President Trump signed an Executive Order (the "January 27 Order") that, among other things, barred entry to the United States by nationals of seven predominantly Muslim countries for 90 days, barred refugee admissions for 120 days, and lowered the number of refugee admissions for fiscal year 2017 from 110,000 to 50,000. Plaintiffs filed this action on February 7, 2017, challenging the Executive Order in its entirety. A district court in Washington enjoined the nationality and refugee bans nationwide on February 3, 2017, and the Ninth Circuit denied a stay. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *stay denied*, 847 F.3d 1151 (9th Cir. 2017).

Because the *Washington* injunction barred enforcement of the nationality and refugee bans—and because federal officials indicated a revised executive order was forthcoming—Plaintiffs moved to enjoin only the reduction in refugee admissions on statutory grounds on February 22, 2017. Pls.' Mot. for Prelim. Inj. of § 5(d), ECF No. 64.

The President subsequently signed a new version of the Executive Order on March 6, 2017 (the "March 6 Order"), and Plaintiffs amended their Complaint and filed a motion to enjoin the March 6 Order in its entirety, including the amended nationality and refugee provisions contained in §§ 2 and 6 of the revised Order, respectively. Pls.' Mot. for Prelim. Inj. of EO, ECF No. 95.

The Court granted Plaintiffs' motion in part on March 16, 2017, enjoining § 2(c) of the Executive Order. Mem. Op., ECF No. 149. The Court held that Plaintiffs were likely to succeed in their claim that a reasonable observer would understand that the primary purpose of the nationality ban in § 2(c) was to discriminate against Muslims, and that it therefore violated the Establishment Clause. *Id.* at 38. The Court declined to enjoin § 6 at that time, explaining that Plaintiffs had not "sufficiently develop[ed]" the argument that the refugee provisions would be similarly perceived. *Id.* at 40-41. Defendants noticed an appeal of the Court's injunction of § 2(c) on March 17, 2017. Notice of Appeal, ECF No. 160.

On March 20, 2017, Plaintiffs filed a letter requesting a pre-motion conference to set a briefing schedule for a motion to enjoin § 6 on constitutional grounds. Pls.' Letter, ECF No. 168. They explained that their motion would rely on the Court's existing legal conclusions with respect to the Establishment Clause and would develop the evidence regarding how an objective observer would understand the purpose of § 6. *Id.* at 1. At the telephonic conference and in a subsequent Order, the Court directed the parties to submit briefs regarding the Court's jurisdiction to decide Plaintiffs' claims against § 6 in light of Defendants' appeal of the § 2(c) injunction. Order, ECF No. 169.

ARGUMENT

The Court has jurisdiction over the parts of this case that are not currently before the Fourth Circuit. The government agrees that the Court has jurisdiction to consider

Plaintiffs' challenge to § 6 on statutory grounds. But it maintains that the Court lacks jurisdiction to consider whether that same provision violates the Establishment Clause—an issue that is not currently before the Fourth Circuit. This position is incorrect. An appeal of an interlocutory order does not divest the district court of jurisdiction over provisions that are not the subject of the appeal. The legality of § 6 is not before the Fourth Circuit, because neither party has appealed this Court's decision not to enjoin it. *See* Notice of Appeal, ECF No. 160, at 1 (appealing only the order "enjoining enforcement of Section 2(c)"). An order enjoining § 6 would not interfere with the Fourth Circuit's consideration of the injunction that Defendants have appealed. And while the Fourth Circuit's decision as to § 2(c) might impact this Court's *analysis* of § 6, that kind of analytical overlap does not divest *jurisdiction*. At most, such overlap can, in some cases, support a discretionary stay of proceedings in the district court. As explained below, however, § 6 threatens irreparable harm to Plaintiffs, and so a stay would be inappropriate. *See infra* Part II. The Court should therefore grant Plaintiffs leave to file the requested motion.

I. The Court Has Jurisdiction over Plaintiffs' Challenges to § 6

In general, a notice of appeal "divests the district court of its control over those aspects of the case *involved in the appeal*." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (emphasis added). That principle deprives this Court of jurisdiction to vacate or alter the decision that Defendants have appealed—the injunction of § 2(c)—but nothing more.

An appeal of a preliminary injunction "does not defeat the district court's power to proceed further with the case." *Hunter v. Redmer*, No. JKB-15-2047, 2015 WL 8479211, at *2 (D. Md. Dec. 10, 2015). Instead, other than "the interlocutory order," the rest of the

case "'is to proceed in the lower court as though no such appeal had been taken.'" *Id.* (quoting *Ex parte Nat'l Enameling & Stamping Co.*, 201 U.S. 156, 162 (1906)); *see also Columbus-America Discovery Group v. Atlanta Mut. Ins. Co.*, 203 F.3d 291, 301-02 (4th Cir. 2000) (same); Wright & Miller, Fed. Prac. & Proc. § 3921.2 (3d ed. 2015) (divestment extends to "the very order that has been appealed," but not "decision of the merits"). An interlocutory appeal thus only divests a district court of jurisdiction over the precise order that is on appeal. The Court retains its authority to address provisions that are not before the Fourth Circuit—including whether § 6 should be enjoined on constitutional grounds.

It is true that there is overlap between the law and facts that bear on the two provisions' compliance with the Establishment Clause. But overlapping analyses do not divest jurisdiction; indeed, it is well-settled that a district court has jurisdiction to decide the merits of a case even when the *identical* issues are pending before the court of appeals on review of a preliminary injunction. *See, e.g.*, *Moltan Co. v. Eagle-Pitcher Indus., Inc.*, 55 F.3d 1171, 1174 (6th Cir. 1995); *Society for Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915, 918 (D.C. Cir. 1975); *Hunter*, 2015 WL 8479211, at *2; Wright & Miller, Fed. Prac. & Proc. § 3921.2. That could not be true if analytical overlap divested jurisdiction. A plaintiff's success on the merits is intimately related to her *likelihood* of success on the same claim; an appellate court's resolution of the latter is sure to affect the trial court's resolution of the former. And yet district courts retain jurisdiction to proceed to the merits regarding the exact same provisions. Necessarily, then, they must also retain jurisdiction to consider *different* but related provisions, as is the case here.[1]

[1] Defendants confirm as much in their position that the Court has jurisdiction to consider Plaintiffs' Refugee Act claim challenging § 6(b). Despite the fact that questions of Article III standing to challenge § 2(c) are currently pending before the Fourth Circuit, Defendants

The need to retain jurisdiction is particularly acute where plaintiffs face irreparable harm during the pendency of an appeal. *See* Wright & Miller, Fed. Prac. & Proc. § 3921.2 ("[C]ases involving injunctive relief are apt to present an urgent need for action," especially where the "[d]enial of an injunction can destroy the capacity to grant effective relief after trial."); *Free Speech v. FEC*, 720 F.3d 788, 791-92 (10th Cir. 2013) ("The desirability of prompt trial-court action in injunction cases justifies trial-court consideration of issues that may be open in the court of appeals.") (citation omitted). Indeed, appeals of preliminary injunctions "would come at high cost if the trial court were required to suspend proceedings pending disposition of the appeal." Wright & Miller, Fed. Prac. & Proc. § 3921.2 (cited in *Hunter*, 2015 WL 8479211, at *2). Courts in this circuit have recognized that the divestment rule does not prevent district courts from "maintain[ing] the status quo" during the appeal. *Crutchfield v. U.S. Army Corps of Engin'rs*, 230 F. Supp. 2d 673, 679-80 (E.D. Va. 2002). That concern is precisely borne out here. The legality of § 6 is not before the Fourth Circuit, and § 6 threatens to cause distinct and irreparable harm if the *Hawai'i* TRO were vacated. *See infra* Part II.

Moreover, the reason for the divestment rule—avoiding interference with the appeal—is absent here. A district court loses jurisdiction over an appealed order because "power to dissolve or modify an order pending appeal is power to destroy the jurisdiction of the court of appeals or to force reconsideration." Wright & Miller, Fed. Prac. & Proc. § 3921.2; *see Lewis v. Tobacco Workers' Int'l Union*, 577 F.2d 1135, 1139 (4th Cir. 1978) (describing situations in which a district court order vacating or substantially modifying an injunction would pull the rug out from under a pending appeal). That concern simply does

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concede that this Court retains authority to address closely related questions of standing to challenge § 6.

not exist when a court considers a *separate* provision—one that is not being considered on appeal. Because the provisions are different, "[a] decision in this Court granting or denying injunctive relief . . . will not impede in any way the Fourth Circuit's consideration of the issues on appeal." *Crutchfield*, 230 F. Supp. 2d at 680; *see also id.* (holding that district court had jurisdiction over motion to enjoin a construction project, despite an appeal of the court's decision invalidating the construction permit, because in considering the injunction, the court would not be "called upon to, and need not, alter" the order on appeal).[2]

To be sure, district courts sometimes choose to stay proceedings when an appeal might illuminate other issues in the case. But they do so as a matter of discretion, *see Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 379-80 (4th Cir. 2013), not jurisdiction, and for the reasons described below, the Court should not exercise its discretion to stay any of Plaintiffs' claims against § 6.

II. Prudential and Equitable Factors Weigh in Favor of the Court's Exercise of Jurisdiction over Plaintiffs' MPI

Prudential and equitable factors strongly support the Court's exercise of jurisdiction to consider all of Plaintiffs' challenges to § 6. Most critically, the temporary restraining order in *Hawai'i v. Trump*, ___ F. Supp. 3d ___, No. 17-cv-50 DKW-KSC, 2017 WL

[2] Even as to the appealed order itself, a district court may take a number of actions, so long as they do not interfere with the appeal. *See, e.g.*, *Dixon v. Edwards*, 290 F.3d 699, 709 n.14 (4th Cir. 2002) (district court retained jurisdiction to issue a "limited modification of its injunction" after notice of appeal, because the modification "aided in th[e] appeal"); *Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188, 1190 (4th Cir. 1991) (district court retained jurisdiction to publish a written opinion after notice of appeal, because the order "aid[ed] the appeal by giving this Court a written order to review"); *Union Oil Co. v. Leavell*, 220 F.3d 562, 565-66 (7th Cir. 2000) (district court retained jurisdiction to enforce appealed injunction). Here, a decision on Plaintiffs' proposed motion could not possibly interfere with the appeal of the order enjoining § 2(c). Absent a stay pending appeal, that injunction will remain in place during the appeal regardless of whether or not the Court also enjoins § 6, and regardless of the grounds for enjoining it.

1011673 (D. Haw. Mar. 15, 2017), has halted enforcement of § 6 and is the only thing standing between Plaintiffs and imminent, irreparable harm.[3] Absent this temporary order, the March 6 Order's 120-day refugee ban would go back into effect, and Defendant agencies would revert to acting under a 50,000 ceiling on refugee admissions, effectively freezing the refugee resettlement process, thereby leaving thousands of refugees stranded in dangerous situations and irreparably harming Plaintiffs and their clients.

The irreparable harm that the enforcement of § 6 would inflict on Plaintiffs and Plaintiffs' clients is indisputable. *See* Pls.' Mot. for a Prelim. Inj. of § 5(d), ECF No. 64, at 20-23; Pls.' Reply Mem., ECF. No. 98, at 2-9. Before the *Hawai'i* TRO, the Bureau of Population, Refugees and Migration ("PRM") of the U.S. Department of State drastically cut flight bookings for refugees from well over an average of 2,000 per week to only 400 per week; it also notified refugee resettlement agencies that in compliance with § 5(d) of the January 27 Order, it would further reduce future weekly arrivals based on a program of 50,000 refugee admissions for the remainder of FY 2017. *See* (First) Hetfield Decl. ¶ 11 & Ex. 1 thereto, ECF No. 64-1. In addition, "circuit rides" by USCIS officials to interview and screen refugees had ceased, resulting in a freeze in United States Refugee Admissions Program ("USRAP") for the many thousands of refugees still being processed. Hall Decl. ¶ 22, ECF No. 64-1.

In this past week following the *Hawai'i* TRO of § 6, PRM has instructed refugee resettlement agencies to resume normal bookings and has increased weekly arrivals from 400 to 900. Although this current increase in bookings will not allow admissions for FY 2017 to reach the 110,000 refugees the United States had committed to accepting at the beginning of the fiscal year, weekly bookings may rise further if § 6 remains enjoined and PRM has clearer guidance as to the number of refugees it may admit. Predictability in the

[3] The federal government has not yet appealed the *Hawai'i* TRO. Currently the parties are briefing arguments related to the State's motion to convert the TRO into a preliminary injunction, set for hearing on March 29, and the parties have stipulated that the TRO will remain in place until the district court resolves that motion.

United States' refugee admissions may also allow USRAP and its many moving parts to restart and resume more normal operations after weeks of uncertainty that have unduly disrupted the processing and resettlement of refugees. In the meantime, the temporary restraining order of § 6—including its 120-day ban on refugee admissions and its drastic and unprecedented cut to the annual admissions level—means that every week, 500 additional refugees can escape persecution and danger and be resettled to the United States through the process created by Congress.

The public interest and judicial economy also weigh in favor of the court's exercise of jurisdiction over Plaintiffs' motion. Granting Plaintiffs' leave to file the proposed motion would further the orderly resolution of the issues before this Court. In its Memorandum Opinion, ECF No. 149, the Court held that the briefing thus far had not sufficiently developed the arguments specific to the Executive Orders' refugee provisions. The proposed motion would do just that, allowing this Court to rule on that question with the benefit of a full evidentiary record and a less compressed briefing schedule.

There are numerous indications that the disproportionate representation of Muslims in USRAP (and in the global refugee population) was a principal motivation behind including the refugee provisions in President Trump's "Muslim ban" executive order. Indeed, since the Court entered its preliminary injunction, the President has publicly affirmed that the revised Order carries on the intent of the original Order, whose refugee provisions *facially* discriminated on the basis of religion. Hours after the TRO of §§ 2 and 6 was issued in *Hawai'i*, President Trump stated at a rally in Nashville as follows:

> A judge has just blocked our executive order on travel and refugees coming into our country from certain countries. The order [U.S. District Judge Derrick Watson] blocked was a watered-down version of the first order that was also blocked by another judge and should have never been blocked to start with. This new order was tailored to the dictates of Ninth Circuit's—in my opinion—flawed opinion.
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> . . . .

> Remember this. I wasn't thrilled, but the lawyers all said, "oh, let's tailor it." This is a watered-down version of the first one. This is a watered-down version. And let me tell you something—I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place.[4]

Plaintiffs' proposed motion will develop the arguments and record necessary for the Court to decide whether the refugee provisions are part of the Orders' broader effort to exclude Muslim immigrants from the United States, and would be understood as such by the reasonable observer. This Court should be the one to rule on that question in the first instance. *See Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717, 727 (4th Cir. 2000) ("[F]actual questions are properly considered by the district court in the first instance.").

At a minimum, the prudential and equitable concerns outlined above weigh in favor of allowing the parties to brief the motion for the Court's consideration on a reasonable briefing schedule while Defendants' appeal is pending at the Fourth Circuit. This will allow the case to continue forward and enable the Court to decide, depending on developments in *Hawai'i* and the Fourth Circuit, whether and when to rule. *See, e.g.*, *Hunter*, 2015 WL 8479211, at *2.

CONCLUSION

For the reasons outlined above, Plaintiffs respectfully request that this Court grant them leave to file a motion for a preliminary injunction on § 6 on constitutional grounds, to be considered at the same time as their fully-briefed motion to preliminarily enjoin § 6(b) on statutory grounds.

Respectfully submitted,

Dated: March 24, 2017

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[4] The full video of President Trump's speech is available at https://www.youtube.com/watch?v=x2hzpyy4X1s; the above-cited portion occurs between 20:00 and 25:45 of the video.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2017, I electronically filed the foregoing Motion for Leave to File Motion for Preliminary Injunction of § 6 on Constitutional Grounds using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

/s/ Nicholas Espíritu
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