IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al., Plaintiffs-Appellees, v. DONALD TRUMP, et al., Defendants-Appellants.	No. 17-1351 **PLAINTIFFS-APPELLEES' RESPONSE TO MOTION TO EXPEDITE APPEAL AND SET BRIEFING DEADLINES**

The government has filed a motion that: (1) proposes a schedule for the government's forthcoming motion to stay the District Court's injunction; and (2) asks the Court to set briefing for the underlying appeal on the same proposed schedule.

As explained below, Plaintiffs-Appellees (hereinafter "Plaintiffs") request only a minor modification to the stay motion schedule requested by the government. But Plaintiffs oppose the government's request that the Court yoke the merits briefing to the stay briefing in this case. The government has not provided any reason why the merits briefing should proceed on the same schedule as the stay briefing. Indeed, the entire purpose of stay proceedings is to determine whether interim relief is necessary *while* the Court considers the merits.

I. Plaintiffs' Proposed Schedule on the Stay Motion

As Plaintiffs clearly explained to the government before it filed its motion, they seek only a small modification to the government's proposed schedule on the forthcoming stay motion. Because the government plans to make its motion eight days after the district court issued its decision, Plaintiffs asked to have an equivalent amount of time to respond. Due to the intervening weekend, Plaintiffs' response would be due on Monday, April 3. Plaintiffs also indicated that they were willing, in light of this change, to move the government's reply date from its proposal of April 5 to April 7, but never received a response from the government regarding their proposed dates. (The government neglected to mention Plaintiffs' proposed schedule for briefing the *stay* or proposed date for the government's opening brief on the merits when it referred to Plaintiffs' position, leaving the incorrect impression that Plaintiffs' proposal would leave the government in the dark until May. *See* Mot. 7-8.)

Accordingly, Plaintiffs respectfully request that the Court enter the following schedule on the stay motion, which will result in that motion being fully briefed by the same date requested by the government:

- Stay motion filed Friday, March 24 (same as government request)
- Plaintiffs-Appellees' response due Monday, April 3 (government

requested Friday, March 31)

- Reply due Wednesday, April 5 (same as government request)

While Plaintiffs agree to proceed on this rapid briefing schedule, they note that, as explained more fully below, an injunction covering the same provision as the one at issue here (§ 2(c) of the Executive Order) remains in place and unappealed in Hawai‘i. *See Hawai‘i v. Trump*, --- F. Supp. 3d ---, No. CV 17-00050 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15, 2017). It is therefore difficult to see what practical benefit such expedited stay briefing will yield.

II. Plaintiffs' Opposition to the Government's Proposed Schedule on the Underlying Appeal

1. The government's merits briefing proposal is illogical and unnecessary. If an appellant believes it is inappropriately being harmed by a district court's order, it can seek a stay of the order *pending* appeal. Fed. R. App. P. 8. If the government can demonstrate that a stay is appropriate, the district court's preliminary injunction will be stayed, and any harm to the government will cease. Given that fact, the government's insistence that the merits briefing nevertheless proceed on the same schedule—shortening the Court's 84-day briefing schedule to 19 days—simply does not make sense. Indeed, the entire point of a stay pending appeal is to provide a mechanism

for interim relief, if warranted, *while* the underlying appeal is considered at a more deliberative pace. *Nken v. Holder*, 556 U.S. 418, 427 (2009).

The government cites no case in which this Court or any court has adopted the sort of stay-and-merits-together schedule it proposes here. On the contrary, in every case the government cites involving a stay, the stay motion was briefed and considered *separately* from the merits. *Washington v. Trump*, 847 F.3d 1151, 1158, 1164 (9th Cir. 2017), *reconsideration en banc denied*, 2017 WL 992527 (9th Cir. Mar. 15, 2017); *Kiyemba v. Obama*, 555 F.3d 1022, 1024 n.2 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010); *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007), *vacated*, 553 U.S. 674 (2008); *id.* D.C. Cir. No. 06-5324 (Order Oct. 27, 2006); *id.* D.C. Cir. No. 06-5324 (Order Dec. 1, 2006); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 685 (6th Cir. 2002).

Nor does the government provide any reason why the merits briefing in this case *should* be tied to the stay briefing. Instead, the government states that it "believes that this Court would benefit from receiving briefing on both the government's motion for a stay pending appeal and the merits," and that "[b]ecause the government is prepared to file its appellate brief on a highly expedited basis, it is not necessary to consider the two matters separately." Mot. 6-7. But, obviously, the Court will receive briefing on

both the stay and the merits even if it considers them separately—and to the extent the government's stay motion relies on the government's views of the underlying merits, the government is free to make those arguments in its stay brief. Moreover, one could say the same in any case involving a motion for a stay, yet the Rules and this Court's practice provide for sequential, not simultaneous, briefing of stay motions and merits.

Plaintiffs' ability to fully develop and present their arguments on appeal would be unnecessarily compromised by the government's merits schedule. Likewise, the Court's ability to consider the merits of this case with appropriate deliberation would be needlessly short-circuited under the government's proposed schedule.

2. The government also does not provide any independent reason why the merits should proceed along the extraordinarily expedited course it proposes. It is true, of course, that the government claims that this case relates to national security, and the district court proceedings in this case and related cases were rapid. But neither of those considerations demonstrates why the case needs to be fully briefed by April 5, or for that matter any time before June 9, as provided under the current scheduling order.

Indeed, the government's conduct since the Ninth Circuit refused to stay the prior iteration of the Executive Order at issue here belies any such

urgency. As the government notes, the *Washington* stay motion was briefed and decided quickly. But, as set forth in Plaintiffs' papers filed below, following that decision the government delayed issuance of the new version of the Order for over a month—in part, according to media reports, as an effort to maximize good press coverage of a speech the President gave. Mot. for a Prelim. Inj., Dkt. No. 95 at 3 & n.2 (citing article entitled "*Trump delays new travel ban after well-reviewed speech*"). Moreover, the government proposes to file its stay motion more than a week after the preliminary injunction was issued on March 16.[1] Its deliberative pace underscores that there is no need for merits briefing to proceed at a breakneck speed that would limit Plaintiffs' ability to respond.

The government's conduct in the *Hawai'i* litigation likewise undercuts its claim that merits briefing must be completed within two weeks. The court in that litigation issued a temporary restraining order that, like the preliminary injunction at issue here, enjoins § 2(c) of the operative version of the Executive Order (as well as other provisions). *Hawai'i*, 2017 WL 1011673, at *17. When the district court in *Washington* issued a TRO enjoining parts of the original Executive Order in early February, the

[1] In *Kiyemba*, by contrast, the government filed its emergency stay motion the *same day* the district court issued its order. *See Kiyemba*, 555 F.3d at 1024 n.2.

government took an interlocutory appeal to the Ninth Circuit, and rapidly sought a stay (which was rejected). Yet the government has not appealed the *Hawai‘i* TRO; on the contrary, it has proceeded before the district court, has agreed to the extension of the TRO, and is currently briefing the State's motion to convert the TRO into a preliminary injunction, set for hearing on March 29. In its acts if not its words, the government has conceded that there is no extreme urgency.

III. Plaintiffs' Proposed Merits Schedule

In light of the foregoing and of the government's opportunity to seek interim relief, Plaintiffs see no need for an expedited merits briefing schedule. Nevertheless, Plaintiffs do not oppose an expedited schedule that permits them a full and fair opportunity to develop their response. Plaintiffs proposed the following schedule to the government on March 21 and now propose it to the Court:

- Defendants-Appellants' Brief, April 12
- Plaintiffs-Appellees' Brief, May 10
- Defendants-Appellants' Reply Brief, May 17

In Plaintiffs' view, this approach will allow the Court to fully consider the merits issues in this case while permitting the government to obtain interim relief if it can make the required showing. Indeed, Plaintiffs'

proposal most closely resembles the briefing schedule established by the Ninth Circuit in the *Washington* litigation—which took into account the national importance of this issue in the context of far more expeditious conduct by the government. *See Washington v. Trump*, 9th Cir. No. 17-35105 (Order Feb. 9, 2017) (establishing a merits briefing schedule, in conjunction with the denial of the government's motion for a stay, that would have been completed 48 days after its denial of the stay). Given the government's lack of celerity since then, a slightly longer schedule—specifically about a week longer—is appropriate.

Dated: March 22, 2017

Respectfully submitted,

/s/ Omar Jadwat

Justin B. Cox
National Immigration Law Center
1989 College Ave. NE
Atlanta, GA 30317
Tel: (678) 404-9119
Fax: (213) 639-3911
cox@nilc.org

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
National Immigration Law Center
3435 Wilshire Boulevard,
Suite 1600
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org
espiritu@nilc.org
keaney@nilc.org
sung@nilc.org

Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
Spencer E. Amdur
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org
lgelernt@aclu.org
hshamsi@aclu.org
hhandeyside@aclu.org
smehta@aclu.org
samdur@aclu.org

Cecillia D. Wang
Cody H. Wofsy
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org
cwofsy@aclu.org

David Cole
Daniel Mach
Heather L. Weaver
American Civil Liberties Union Foundation
915 15th Street NW
Washington, DC 20005
Tel: (202) 675-2330
Fax: (202) 457-0805

dcole@aclu.org
dmach@aclu.org
hweaver@aclu.org

David Rocah
Deborah A. Jeon
Sonia Kumar
Nicholas Taichi Steiner
American Civil Liberties Union
Foundation of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org
kumar@aclu-md.org
steiner@aclu-md.org

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2017, I caused a PDF version of the foregoing document to be electronically transmitted to the Clerk of the Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

Dated: March 22, 2017

Respectfully submitted,

/s/ Omar Jadwat
Omar C. Jadwat

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 1,553 words and has been prepared in a proportionally spaced typeface using Times New Roman in 14 point size.

Dated: March 22, 2017

Respectfully submitted,

/s/ Omar Jadwat
Omar C. Jadwat