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' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE MOTION FOR PRELIMINARY INJUNCTION OF § 6 ON CONSTITUTIONAL GROUNDS**

INTRODUCTION

This Court has jurisdiction to consider Plaintiffs' constitutional claims against § 6 of the Executive Order, and the Court should exercise that jurisdiction if it becomes necessary to do so to prevent irreparable harm. This Court has not made any findings as to whether § 6 violates the Constitution, and § 6's constitutionality is not before the Fourth Circuit. Critically, Defendants have failed to suggest any material way in which this Court's consideration of Plaintiffs' claims would disrupt the Fourth Circuit's review of Defendants' appeal of the injunction against § 2(c)—even though *the* primary concern animating the district court divestment rule is whether a district court's action would interfere with an appellate court's jurisdiction on appeal. There is therefore no jurisdictional impediment to this Court's consideration of Plaintiffs' proposed motion.

Moreover, prudential factors, including the likelihood of irreparable harm to Plaintiffs and their clients, tip the scales sharply in favor of exercising jurisdiction. In the interest of efficiency, however, and in light of the current nationwide injunction against § 6, Plaintiffs agree to a stay of

proceedings seeking a preliminary injunction against § 6, to be lifted if the *Hawai'i* injunction is vacated.

ARGUMENT

1. To begin, Defendants' suggestion that Plaintiffs' proposed motion requests a "third bite at the apple," or that Plaintiffs are acting in an "inequitable fashion," Defs.' Mem. in Opp'n to Pls.' Mot. for Leave, ECF No. 180 ("Opp."), at 1, 9, ignores the government's own responsibility for the fits and starts of this and related litigation.

Plaintiffs' first motion, to enjoin the cut in the Fiscal Year 2017 refugee cap, was filed just after the Ninth Circuit Court of Appeals denied the government a stay of the Western District of Washington's nationwide preliminary injunction of the 90-day nationality ban and 120-day refugee ban. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017). Instead of seeking to enjoin an order already subject to an injunction, Plaintiffs accordingly sought to enjoin the one non-enjoined provision that was still causing irreparable harm.[1]

After the government chose to issue the revised Executive Order on March 6, Plaintiffs informed the Court that they intended to file an amended complaint and a new motion to enjoin the revised order before it was to go into effect. Pls.' Letter Dated Mar. 9, 2017, ECF No. 83. Over the following days, the parties worked diligently to brief and present to the Court as many of the relevant issues as possible in the short window available to do so. On the day the Order was to go into effect, the Court issued an opinion that made various findings of fact, resolved several

[1] Pls.' Mot. for Prelim. Inj. of § 5(d), ECF No. 64. The parties have agreed that this motion, which initially addressed § 5(d) of the January 27 Order, applies to § 6(b) of the March 6 Order. Defendants do not contest that the Court retains jurisdiction to resolve this motion, which remains pending.

disputes between the parties regarding the law, and resulted in a preliminary injunction of § 2(c) of the March 6 Order. Mem. Op., ECF No. 149.

One dispute that the Court expressly did *not* resolve, however, is whether the refugee provisions in § 6 violate the Constitution. Instead, the Court stated in relevant part as follows:

> The Plaintiffs' Establishment Clause and INA arguments focused primarily on the travel ban for citizens of the six Designated Countries in Section 2(c) of the Second Executive Order. The Court will enjoin that provision only. Although Plaintiffs have argued that sections relating to the temporary ban on refugees also offend the Establishment Clause, they did not sufficiently develop that argument to warrant an injunction on those sections at this time.

Id. at 40-41. In other words, instead of deciding whether Plaintiffs are likely to establish that § 6 violates the Establishment Clause, the Court determined that it lacked sufficient information to enjoin that provision at that time. The Court, moreover, said nothing at all about Plaintiffs' other constitutional claim regarding § 6: that it violates the equal protection component of the Due Process Clause of the Fifth Amendment. *See id.* at 38; *see also* First Am. Compl. ¶¶ 222-25, ECF No. 93. In sum, Plaintiffs prevailed as to one section, and the Court essentially reserved judgment as to another; the cases cited by the government involving vexatious or frivolous claims are thus plainly inapposite. *See, e.g.*, Opp. at 9 (citing *F.W. Kerr Chem. Co. v. Crandall Assoc., Inc*., 815 F.2d 426, 429 (6th Cir. 1987) (per curiam)).

Because the Court did not decide Plaintiffs' constitutional claims regarding § 6, and because Plaintiffs have not cross-appealed, the constitutionality of § 6 is simply not before the Fourth Circuit. Indeed, Defendants' own briefing before the Fourth Circuit confirms as much. On appeal, Defendants have taken pains to ensure that the Fourth Circuit *not* consider the constitutionality of the refugee provisions. Defendants' opening brief, for example, presents "*the*" issue on appeal as: "Whether the district court abused its discretion in entering a nationwide preliminary injunction barring enforcement of Section 2(c) of the Order." *See* Appellants' Br. at 4, *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. Mar. 24, 2017), ECF No. 36, J.R. 17 (emphasis added). Defendants' brief goes on to explain to the Fourth Circuit that the

provisions in § 6 are "not at issue" in the appeal. *Id.* at 11, 25, J.R. 24, J.R. 38. Defendants made the same representation in their concurrently filed Motion for a Stay Pending Expedited Appeal. *See* Appellants' Mot. for a Stay Pending Expedited Appeal at 10, *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. Mar. 24, 2017), ECF No. 35, J.R. 88 ("[O]ther provisions of the Order addressing refugees . . . are not at issue in this appeal"). Defendants cannot have it both ways, arguing to this Court that it lacks jurisdiction to consider the "propriety of preliminary injunctive relief" from § 6 because that question is on appeal to the Fourth Circuit, Opp. at 5, while simultaneously representing to the Fourth Circuit that those very portions of the Order are "not at issue" in the appeal before it.[2]

2. Defendants cite no authority for their theory that an appeal of one matter decided in an order divests the district court of jurisdiction over other matters that were mentioned in the same order, but not decided or appealed.[3] Nor have they identified any case in which a district court was divested of jurisdiction to take an action where, as here, it was clear that such action would not affect the appellate court's disposition of the appeal. And Defendants have made no effort to articulate how this Court's resolution of the Plaintiffs' claims against § 6 would impact the Fourth Circuit's disposition of the appeal of the injunction over § 2(c). In fact, Defendants' have conceded that an injunction of § 6 would not hamper the appeal, because they have taken the position that the Court *does* have jurisdiction over Plaintiffs' statutory motion. By contrast, every case invoked by Defendants involved the propriety of the district court retaining jurisdiction over issues that were actually pending before the court of appeals. *See* Opp. at 2-3.

For example, in *Lewis v. Tobacco Workers' International Union*, 577 F.2d 1135 (4th Cir. 1978) (cited Opp. at 2), the Fourth Circuit simply held that "the district court lost its power to

[2] Defendants also maintain that the harm caused by § 6 is "precisely what is at issue in the Fourth Circuit," Opp. at 4, despite having argued to the Fourth Circuit that § 6 and § 2(c) cause distinct harms. *See* Appellants' Mot. for a Stay Pending Expedited Appeal at 10-11, J.R. 88-89.

[3] Indeed, Defendants make no argument at all for how this Court is divested of jurisdiction to consider Plaintiffs' equal protection claim as to § 6, which the Court expressly did not address with regard to any provisions of the Order. *See* Mem. Op. at 38.

vacate" the very injunction that was on appeal once "the notices of appeal were filed." *Id.* at 1139. That analysis underscores why Defendants' argument fails in this case: this Court has not made any determination regarding the legality of § 6, has not ordered any relief requiring the Defendants to act or refrain from acting with respect to § 6, nor has it rejected Plaintiffs' claims on the merits as to § 6. *Lewis*' holding is therefore inapposite.

District 2, Marine Engineers Beneficial Association v. Falcon Carriers, Inc., 374 F. Supp. 1342 (S.D.N.Y. 1974) (cited Opp. at 4) in fact illustrates why this Court *has* jurisdiction despite the overlap between the appeal and proceedings in this Court. There, the district court held that it retained jurisdiction to decide whether an "oral side agreement" was arbitrable, even though the plaintiffs had appealed the court's order declining to enjoin defendants pursuant to the operation of that same side agreement. Although the existence and effect of the side agreement formed the basis of both the plaintiffs' appeal and the defendants' motion to stay arbitration of the side agreement, the district court held that the plaintiffs' appeal of the court's denial of injunctive relief did not "divest the court of all jurisdiction in this case." *Id.* at 1345. To the contrary, the court held that its denial of the plaintiffs' preliminary injunction motion did not implicate a decision on whether the side agreement was arbitrable, and that it therefore had jurisdiction to entertain the defendants' motion to stay arbitration of the side agreement. The same is true here.

Defendants' reliance on *Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817 (5th Cir. 1989), likewise fails to further their argument. Opp. at 2. There, the Court merely held that a district court generally cannot examine "new evidence or arguments *on the injunction* while the validity *of the injunction* is on appeal." *Id.* at 820 (emphases added); *see FTC v. Enforma Nat. Prods., Inc.*, 362 F.3d 1204, 1215 n.11 (9th Cir. 2004) (cited Opp. at 3 n.2) (prohibiting district court from taking action that "move[s] the target" for the appeal) (internal citations omitted). That holding is plainly irrelevant here, where the injunction on appeal is an injunction of § 2(c) of the Executive Order, and Plaintiffs wish to present additional evidence and arguments on a different section of the Executive Order—§ 6—which is not on appeal, as the government agrees. Indeed, as the Fifth Circuit explained in *Coastal Corporation*, the general rule was meant to place a "limit on the

district court's power to modify an injunction pending appeal, where the effect of its order would be to oust the appellate court's jurisdiction." *Id.* at 819; *see also* Pls.' Mot. for Leave to File Mot. for Prelim. Inj. of § 6 on Constitutional Grounds at 6-7, ECF No. 177. That concern is simply not present here.[4]

3. As Plaintiffs previously explained, exercise of the jurisdiction this Court retains is particularly appropriate when necessary to maintain the status quo and to prevent irreparable harm. *Id.* at 6. As of now, a nationwide injunction issued by a district court in Hawai'i prevents Defendants from implementing § 6. *See* Order, *Hawai'i v. Trump*, No. 17-00050 (D. Haw. Mar. 29, 2017) (converting temporary restraining order into preliminary injunction), J.R. 104-127. Defendants have appealed that decision to the Ninth Circuit on an expedited briefing schedule, with the appeal and motion for stay pending appeal to be fully briefed by April 28, 2017.

Defendants' suggestion that it "makes sense to wait for guidance from the Fourth Circuit's resolution of the pending appeal," Opp. at 13, wholly ignores the irreparable harm that would befall Plaintiffs and their clients if the *Hawai'i* injunction against § 6 were vacated. Plaintiffs therefore respectfully request that the Court grant leave to file the requested motion. That said, because the *Hawai'i* injunction is currently protecting Plaintiffs from § 6, Plaintiffs are agreeable, should the Court be so inclined, to a stay of proceedings against § 6—both briefing of the requested motion and decision on Plaintiffs' statutory motion—and request that the Court lift the stay and set an expedited briefing schedule if Plaintiffs lose the protection of the *Hawai'i* injunction. That course of action will both preserve judicial and litigant resources and ensure that Plaintiffs can seek protection from the irreparable harm § 6 would cause if allowed to go into effect.

[4] Similarly misplaced is Defendants' assertion that Plaintiffs, in filing a motion for a preliminary injunction of § 6 on constitutional grounds, would be asking this Court for a "modification" of the order up on appeal. Opp. at 3. Not so. Plaintiffs' motion would ask for a new order, and Defendants make no argument as to why that would constitute a "modification." Nor is the rule prohibiting modification of the injunction a "one-way ratchet." Opp. at 9. The injunction *of § 2(c)* can be neither expanded nor contracted (nor vacated) in the district court while it remains on appeal.

CONCLUSION

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

Respectfully submitted,

Dated: April 5, 2017

/s/ Melissa S. Keaney
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

Justin B. Cox (Bar No. 17550)
National Immigration Law Center
1989 College Ave. NE
Atlanta, GA 30317
Tel: (678) 404-9119
Fax: (213) 639-3911
cox@nilc.org

† Appearing *pro hac vice*

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

/s/ David Rocah

David Rocah (Bar No. 27315)
Deborah A. Jeon (Bar No. 06905)
Sonia Kumar (Bar No. 07196)
Nicholas Taichi Steiner (Bar No.19670)
American Civil Liberties Union Foundation of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
rocah@aclu-md.org
jeon@aclu-md.org
kumar@aclu-md.org
steiner@aclu-md.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2017, I electronically filed the foregoing Plaintiffs' Reply Memorandum in Support of their 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/ Melissa S. Keaney