No. 16-1540

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

STATE OF HAWAII, ET AL.

PETITIONERS' RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO ADD PARTY JOHN DOE

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From the filing of their operative complaint five months ago until now, respondents elected to litigate this case on the basis of purported injuries to two plaintiffs: the State of Hawaii and one individual, Dr. Ismail Elshikh. They have known since Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), was issued that Dr. Elshikh's mother-in-law might receive a waiver and a visa under the Order, and they have known since the district court issued its temporary restraining order (TRO) and then its preliminary injunction barring enforcement of Section 2(c) in March 2017 that she might receive a visa through regular processing. Yet neither when they filed their operative complaint in March 2017, when they learned in April 2017 that Dr. Elshikh's mother-in-law's visa-application interview had been scheduled, nor

even when she received a visa on July 16, 2017, did respondents seek to include any other individual plaintiff. Instead, when respondents informed the Court that Dr. Elshikh's mother-in-law had received a visa, they maintained that Dr. Elshikh's standing was "unaffected." Resps. Letter 1 (July 20, 2017) (Resps. July 20 Letter).

Apparently reconsidering that strategy, respondents have now changed course. More than three weeks after Dr. Elshikh's mother-in-law received her visa, and only three days before the government's merits brief was due, they moved for the first time to add an additional, anonymous plaintiff-respondent: John Doe, who asserts that his son-in-law, a Yemeni national, seeks an immigrant visa and would be affected by the Order. Resps. Mot. to Add Party 5 (Mot.); id. Ex. A, at 1-2 (¶¶ 4-10). That request should be rejected. At the threshold, respondents cannot justify their delay in seeking to add Doe as a party now, which would substantially prejudice the government. Respondents have known all along that Dr. Elshikh's claimed family-member injury could become (and now is) moot, and they have been aware of Doe from the start. Yet he was never made a party. Although Hawaii submitted a sealed declaration from Doe for in camera review in connection with Hawaii's challenge to superseded Executive Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (January Order), that sealed declaration and any details regarding Doe were never previously

provided to the government. The government should not now be required to litigate these issues in this Court in the first instance.

Respondents' request to add a party also is unsupported by the precedents they cite. Unlike those cases, and contrary to respondents' assertion (Mot. 5), adding Doe to this case would not "preserve the status quo," but upend it. In the two cases upon which respondents principally rely, the existing plaintiffs' standing was not contested in the courts of appeals (and was called into question in this Court only due to unexpected developments or belated challenges), and the parties to be added had been among the real parties in interest all along and undisputedly had a cognizable stake of their own. None of those things is true here. The government has consistently disputed respondents' ability to assert their claims, including because of the very possibility that has now rendered Dr. Elshikh's asserted family-member injury moot. And Doe's claims have never been part of the case, are not cognizable themselves, and are not materially identical to Dr. Elshikh's. The Court should not permit respondents to sidestep the rules of justiciability by reshaping the litigation at the thirteenth hour. It should deny respondents' motion and decide the case based on the parties and claims properly before it.

I. RESPONDENTS' MOTION IS UNTIMELY AND WOULD PREJUDICE THE GOVERNMENT

Respondents' request should be rejected at the threshold because their delay in seeking to add Doe as a party is unjustifiable and would prejudice the government. As respondents' own authority underscores, appellate courts' "power" to alter the parties at the request of an existing party "should be used in such a way that 'no unfair advantage shall be taken by one party, and no oppression practised by the other.'" Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 833-836 (1989) (quoting Anonymous, 1 F. Cas. 996, 998 (C.C.D. Mass. 1812) (No. 444) (Story, J.)); see Mullaney v. Anderson, 342 U.S. 415, 417 (1952) (allowing addition of plaintiffs that "c[ould] in no wise embarrass the defendant"). Courts considering requests by a nonparty to "intervene" (Mot. 4) similarly consider whether the request is "timely" and would prejudice the opposing party. National Ass'n for the Advancement of Colored People v. New York, 413 U.S. 345, 365 (1973) (quoting Fed. R. Civ. P. 24); see id. at 365-369. Respondents do not and cannot justify waiting until August 7, 2017 -- months into the case, three weeks after Dr. Elshikh's mother-in-law obtained a visa, and just three days before the government's merits brief was due -- to request that Doe be added as a party.

A. Respondents have known since the Order was issued five months ago that Dr. Elshikh's mother-in-law might receive a waiver and a visa once the Order took effect, see J.A. 1430 (§ 3(c)(iv));

D. Ct. Doc. 145, at 21-22 (Mar. 13, 2017), and they have known since the district court entered its injunction that she might receive a visa without a need for a waiver. Respondents then learned four months ago, on April 14, 2017, that Dr. Elshikh's mother-in-law's visa-application interview had been scheduled for May 24, 2017. Resps. C.A. Opp. to Stay Mot. 15. Dr. Elshikh's mother-in-law then obtained a visa on or about July 16, 2017. Resps. July 20 Letter 1. Yet rather than seek to add any additional party during any of this time, respondents took no action. It was not until three weeks after the visa issued, virtually on the eve of the government's opening-brief deadline, that they changed course and sought to add Doe.

Respondents offer no plausible justification for their delay. They suggest (Mot. 6-7) that adding a party became "appropriate" only after Dr. Elshikh's mother-in-law scheduled her travel to the United States. But respondents previously asserted that neither his mother-in-law's obtaining a visa nor her arrival would matter. Resps. July 20 Letter 1 ("In respondents' view, Dr. Elshikh's standing will be unaffected even after his mother-in-law enters the country."). In any event, once his mother-in-law received a visa on July 16, 2017, any delay in her entry resulted solely from the timing of her own travel plans and had nothing to do with the Order. Respondents do not and could not contend that identifying Doe caused the delay. As respondents stress (Mot. 7-8), Hawaii

identified Doe, and submitted his declaration for in camera review in the district court in connection with its challenge to the January Order, six months ago.

B. Permitting respondents to add Doe as a party at this late stage of the proceedings would prejudice the government in at least three ways. First, the government has made arguments in its opening brief (Gov't Br. 30, 80) that are predicated on the mootness of Dr. Elshikh's asserted delay-of-entry injury. Its brief reasonably relied on the jurisdictional facts that had existed for weeks, of which all parties had been fully aware. Respondents' attempt to alter those facts nearly on the eve of the government's filing hardly "preserve[s] the status quo." Mot. 5.

Second, although respondents assert (Mot. 7) that they are "not inject[ing] wholly new facts that were not before the District Court," those facts that were before the district court were not shared with the government until now, and respondents now seek to inject additional, new facts. Doe has never participated as a party in this case. See D. Ct. Doc. 1 (Feb. 3, 2017) (original complaint); D. Ct. Doc. 37 (Feb. 13, 2017) (first amended complaint); J.A. 1002-1049 (second amended complaint). His prior involvement consisted only of signing a declaration that was submitted by Hawaii in support of its previous, now-defunct challenge to the rescinded January Order, and that declaration was submitted under seal "for the District Court's in camera review."

Mot. 8 n.1; see D. Ct. Doc. 10, Ex. A (Feb. 3, 2017). Doe's original declaration was not previously provided to the government. The highly generalized descriptions of Doe that Hawaii provided when it submitted Doe's declaration in challenging the January Order revealed only that he "originally is from one of the seven countries" covered by the January Order, D. Ct. Doc. 10, at 2 (¶ 4), and that Doe was "being separated from [a] member[] of [his] immediate family." D. Ct. Doc. 2-1, at 9 (Feb. 3, 2017). They provided none of the (still vague) assertions on which respondents now rely.[1] And Doe's August 3, 2017, declaration asserts further new facts. See, e.g., Mot. Ex. A, at 2 (¶ 9).

Respondents incorrectly suggest (Mot. 9-10) that the government acquiesced in the submission of Doe's original

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[1] The relevant paragraph of Hawaii's filing submitting Doe's declaration stated in its entirety:

> 4. Attached as Exhibit A is a true and correct copy of a declaration submitted by a naturalized U.S. citizen who resides in Hawai'i. He originally is from one of the seven countries targeted by Defendant Donald J. Trump's Executive Order of January 27, 2017 (the 'Executive Order'), which is the subject of the Motion. Exhibit A is highly confidential and submitted for in camera review, pursuant to Local Rule 10.2 and the concurrently filed Ex Parte Motion for In Camera Review of Exhibits A, B, and C to Declaration of Douglas S. Chin in Support of the Motion.

D. Ct. Doc. 10, at 2 (¶ 4). Hawaii's original TRO motion challenging the January Order stated that Doe and another anonymous individual "are currently being separated from members of their immediate family but are too fearful of future government retaliation to provide details in a public filing." D. Ct. Doc. 2-1, at 9.

declaration under seal for in camera review in the district court. On February 3, 2017, Hawaii submitted that declaration under seal and filed an ex parte motion for in camera review. D. Ct. Docs. 10, 15. There was no occasion for the government to oppose that request because on February 7, 2017, the court granted the government's request to stay all deadlines in the case. Docket Entry No. 27 (D. Haw.). The district court thereafter granted respondents' ex parte motion for in camera consideration of Doe's declaration without lifting the stay or affording the government an opportunity to respond. D. Ct. Doc. 29 (Feb. 8, 2017). But there was again no need for the government to ask the court to revisit that ruling because, when respondents filed their operative complaint and new TRO motion challenging the new Order on March 8, 2017, respondents neither included Doe as a plaintiff nor relied on any declaration from him. See generally D. Ct. Docs. 64-66.

Third, allowing Doe to join the case now would likely require the parties to litigate further factual issues relevant to Doe's standing in this Court in the first instance. As the lower-court litigation in No. 16-1436 illustrates, additional details regarding individual plaintiffs' foreign-national family members may bear on the likelihood that they will be affected by the Order; for example, because Jane Doe #2 seeks a visa for her sister, her sister likely faces a multi-year backlog and thus cannot plausibly

be expected to be affected by Section 2(c)'s entry suspension. See Gov't Br. 28 n.10. So too here. Based on respondents' own submission, it is exceedingly unlikely that Doe's son-in-law would be affected by the Order while Section 2(c)'s 90-day suspension of entry is in effect. See pp. 13-15, infra. Respondents' motion should be denied on that basis alone. Moreover, additional facts might be necessary to determine whether Doe's son-in-law is the beneficiary of an approved immigrant-visa petition; whether (and if so when) he has actually filed an application for an immigrant visa; whether he would be eligible to receive such a visa; and (if so) the likely timeline for further processing.

* * * * *

Respondents chose the parties and claims they presented to the federal courts. Despite ample opportunity to seek addition of other parties, until now respondents adhered to that choice. The parties therefore litigated, the lower courts decided, and this Court agreed to hear the case on that basis. Respondents should not be allowed to undo that decision and change the landscape now.

II. THIS COURT'S PRECEDENT DOES NOT SUPPORT ADDING DOE AS A PARTY IN THESE CIRCUMSTANCES

Respondents' request to add Doe as a party in this Court is not supported by this Court's precedent and would mark a significant extension beyond what has previously been permitted in the decisions of this Court that respondents cite. Respondents principally rely (Mot. 2-4, 6-8) on two cases in which this Court

permitted the addition of a party, Mullaney v. Anderson, supra, and National Federation of Independent Business (NFIB) v. Sebelius, 565 U.S. 1154(2012). The circumstances in each differ substantially from those here.

A. In both Mullaney and NFIB, the defendants had not questioned the original plaintiffs' standing in the courts of appeals, and uncertainty arose in this Court unexpectedly. In Mullaney, "the standing of [the plaintiff] union" to represent its members had been undisputed below, and the defendant "questioned" it "for the first time" in this Court. 342 U.S. at 416. And in NFIB, "the government d[id] not contest the standing of the individual plaintiffs or of the NFIB" in the court of appeals. Florida v. United States Dep't of Health & Human Servs., 648 F.3d 1235, 1243 (11th Cir. 2011), aff'd in part, reversed in part by NFIB, 567 U.S. 519 (2012). The standing of an individual plaintiff (Mary Brown) was called into question because she filed for bankruptcy while the case was before this Court. See Unopposed Mot. for Leave to Add Parties Dana Grimes & David Klemencic at 1-2, NFIB v. Sebelius, No. 11-393 (Jan. 4, 2012) (NFIB Mot.). In both cases, permitting the addition of a party ensured that an unexpected, late-breaking question as to justiciability would not frustrate the Court's ability to decide the issues properly presented to it.

Here, in contrast, the government has contested the justiciability of respondents' claims at every step. Indeed, that is one of the questions the Court agreed to resolve. And the event that prompted respondents to seek to add a new plaintiff -- the receipt by Dr. Elshikh's mother-in-law of a visa -- was hardly unanticipated.

B. 1. In addition, in both Mullaney and NFIB, the individuals added as parties were already directly connected to the case, and the lower courts' rulings that certain organizational plaintiffs had standing were predicated partly on those individuals. In Mullaney, "[t]he original [union] plaintiffs" had "alleged without contradiction that they were authorized by" union members who were not residents of Alaska (whose law was at issue) "to bring th[e] action in their behalf," and the lower courts decided the merits. 342 U.S. at 416-417. When the union's standing was questioned in this Court, it moved to add two of its nonresident members. Ibid. This Court granted the motion, which "merely put[] the principal * * * in the position of his avowed agent." Id. at 417.

In NFIB, the new individuals added as parties were members of the organizational plaintiff and had "each filed a declaration in support of [the organization's] associational standing," on which the district court's ruling was partly based. NFIB Mot. 3. Their declarations also were "materially indistinguishable" from that of

the individual whose standing the court of appeals upheld. Id. at 4; see id. at 2-4. The addition of those individuals as parties thus "c[ould] in no wise embarrass the defendant," Mullaney, 342 U.S. at 417, and the government in NFIB "support[ed] th[e] motion" to add them as parties in this Court. NFIB Mot. 1.

Doe, in contrast, has no connection to this case as it comes to the Court. The lower courts' rulings here are not predicated in any way on Doe, who has never been a party to the case, and whose standing the lower courts never addressed, directly or indirectly. The court of appeals did not hold that any organizational plaintiff, let alone an organization of which Doe is a member, has standing. Although Hawaii submitted a declaration by Doe in support of its motion for a TRO barring enforcement of the January Order, the lower courts had no occasion to consider Doe before the new Order was issued and litigation concerning the January Order was overtaken. In challenging the new Order, until now, respondents had not sought to rely on Doe or his declaration, nor even supplied Doe's original declaration to the government.[2]

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[2] The other cases respondents cite (Mot. 4) are even further afield. This is not a case where the new parties were undisputedly "members of the class represented" by the original plaintiffs, see Rogers v. Paul, 382 U.S. 198, 199 (1965) (per curiam), or a case where the death of parties (whose standing was no longer disputed) prompted the addition of new parties, see Gonzales v. Oregon, 546 U.S. 807 (2005); see Mot. 4; 1A West's Federal Forms, Supreme Court § 315, Ninth Illustration (5th ed. Supp. 2017).

2. Respondents suggest (Mot. 5) that the lower courts have effectively already passed upon Doe's standing because his "circumstances are nearly identical" to those of Dr. Elshikh and make him "a precise substitute." That is wrong. Doe differs from Dr. Elshikh with respect to both injuries Dr. Elshikh asserts: delay in entry of a family member, and a purported message condemning his religion.

As to the alleged delay in entry of a family member, Doe states (based on a hearsay assertion of his "daughter's attorney") that his son-in-law is expected to receive a visa "within the next three to twelve months." Mot. Ex. A, at 2 (¶ 9). No support is offered for that assertion, and it is not entirely clear from respondents' submission precisely where Doe's son-in-law is in the process. There are several steps in the process of applying for an immigrant visa as the alien spouse of a U.S. citizen. First, the U.S.-citizen spouse must file a petition for an alien relative with U.S. Citizenship and Immigration Services (USCIS). 8 U.S.C. 1154; 8 C.F.R. 204.1-204.2; 22 C.F.R. 42.41-42.42. If USCIS approves the petition, the alien must then submit a visa-application form, supporting documents, and fees to the Department of State. 8 U.S.C. 1202; 22 C.F.R. 42.61-42.67. If the Department of State determines that the application is documentarily complete, the alien is scheduled for a visa-application interview with a consular officer at an appropriate embassy or consulate

abroad, 22 C.F.R. 42.62, at the conclusion of which the consular officer informs the alien whether the visa has been approved or refused, 22 C.F.R. 42.71, 42.73, 42.81.[3]

The circumstances of Doe's son-in-law's potential application for a visa cannot be verified because Doe is proceeding anonymously, but Doe's declaration appears to indicate that his daughter was notified that her petition for Doe's son-in-law was approved by USCIS "[i]n late June 2017." Mot. Ex. A, at 2 (¶ 9). (The declaration refers to USCIS's approving the son-in-law's "application," ibid., but it presumably means the daughter's petition. As explained above, USCIS would adjudicate the petition filed by the daughter, but the Department of State would act on a visa application subsequently submitted by Doe's son-in-law.) If that is true, the next step would be for Doe's son-in-law to submit his visa-application form, supporting documents, and fees; once the Department of State determined that his application is documentarily complete, an interview would be scheduled. Doe does not assert that the son-in-law has submitted his visa-application form, supporting documents, and fees; if he has not filed an application, on that ground alone he is not similarly situated to Dr. Elshikh, who asserted that his mother-in-law's visa

[3] See Bureau of Consular Affairs, U.S. Dep't of State, The Immigrant Visa Process, https://travel.state.gov/content/visas/en/immigrate/immigrant-process.html (last visited Aug. 17, 2017).

application had already been submitted before the operative complaint in this case was filed. See J.A. 1276-1277.

In any event, even accepting the unsupported assertion that Doe's son-in-law likely would receive a visa "within the next three to twelve months," Mot. Ex. A, at 2 (¶ 9), that only confirms (1) Doe's son-in-law was never likely to be affected by Section 2(c)'s suspension of entry within the original 90-day period that was scheduled to end in mid-June 2017, which is the relevant period for determining Doe's standing, see Gov't Br. 36-37; Davis v. FEC, 554 U.S. 724, 734 (2008) (standing measured at time suit is commenced); accord Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000); and (2) even now it is exceedingly unlikely that Doe's son-in-law will be affected by the 90-day suspension that went into effect in late June 2017 after this Court partially stayed the injunctions.

As to the alleged "message" injury, Doe (unlike Dr. Elshikh) does not allege in his declarations that the Order gives rise to a message condemning his religion, which the district court had deemed sufficient. Cf. J.A. 1123-1125, 1151-1152. Doe states in general terms that the Order "discriminates" against his family, Mot. Ex. A, at 2-3 (¶ 13), but neither his original district-court declaration nor his new declaration claims that he perceives the Order as thereby communicating to him an anti-Muslim "message." That omission is highly significant, because only the "message"

injury, if it were cognizable at all, could even theoretically support the global injunctions that the lower courts affirmed.

To be sure, Doe's claim also would not be cognizable for all the reasons Dr. Elshikh's claim is not reviewable: Doe cannot obtain judicial review of the alleged exclusion of a son-in-law because Doe cannot plausibly show that the exclusion of such a relative violates Doe's own constitutional rights. Gov't Br. 23-33. That shared, dispositive defect confirms that respondents' efforts to identify a plaintiff with a cognizable, justiciable claim are futile. But it does not make Doe interchangeable with Dr. Elshikh or justify adding him to the case at this late stage.

CONCLUSION

The Motion for Leave to Add Party John Doe should be denied.

Respectfully submitted.

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AUGUST 2017