No. 16-1540 (16A1191)

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Applicants,
v.
STATE OF HAWAII, *et al.*,
Respondents.

RESPONDENTS' MOTION FOR LEAVE TO ADD PARTY JOHN DOE

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Respondents file this motion pursuant to Rule 21 of this Court to request leave to add John Doe as a party. Mr. Doe would join the State of Hawaii and Dr. Ismail Elshikh as Respondents in No. 16-1540.

On July 16, 2017, following the grant of certiorari, Dr. Elshikh's mother-in-law received a visa to come to the United States. She has now booked her travel and is scheduled to arrive in the country on August 12, 2017. Although this development should not affect Dr. Elshikh's standing, Respondents file this motion in an abundance of caution to ensure that any new questions of justiciability do not foreclose the Court from reaching the merits in this important case. Like Dr. Elshikh, Mr. Doe is a Muslim-American and a Hawaii resident personally affected by the Order: Mr. Doe's son-in-law is a national of one of the six countries designated by Section 2(c), and he applied for an immigrant visa before the Order was executed. But unlike Dr. Elshikh's mother-in-law, Mr. Doe's son-in-law has not yet received a visa. That is, Mr. Doe is in precisely the same situation with respect to his son-in-law that Dr. Elshikh was in with respect to his mother-in-law when this Court granted certiorari.

Mr. Doe seeks the same relief as Dr. Elshikh and will present no new arguments on the merits. Granting Respondents' motion will merely preserve the abilities Respondents possessed at the time certiorari was granted to make their claims, while causing no prejudice to the Government. Respondents notified the Government of their intent to file this motion, and the Government stated that it opposes the motion.

I. Mr. Doe's Addition as a Party is Warranted Under this Court's Decisions in *Mullaney* and *NFIB*.

This Court's standard for adding parties to a pending case is well settled. In *Mullaney* v. *Anderson*, the Court granted leave to the respondents to add two new parties after certiorari had been granted and the merits case was being briefed. 342 U.S. 415 (1952). The "standing of respondent union and its Secretary-Treasurer to maintain this suit" had come into "question[]," and "[t]o remove the matter from controversy" and ensure that the Court could reach the question presented, the Court permitted the union to "add as parties plaintiff two of its members." *Id.* at 416-417. In granting the motion, the Court noted that (1) "the addition of these two parties plaintiff" would "in no wise embarrass" the opposing party; (2) the "earlier joinder" of the parties would not "have in any way affected the course of the litigation"; and (3) "[t]o dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration." *Id.* at 417; *see also Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 833-834 & n.8 (1989) (reaffirming *Mullaney*'s analysis and referring to it as an instance where the Court "exercised" its "authority" to ensure "the existence of a justiciable case").

This Court granted a similar motion to add parties just a few years ago, in *National Federation of Independent Business ("NFIB")* v. *Sebelius*, after changed circumstances in the personal life of one of the parties potentially injected a new standing issue into the case. 565 U.S. 1154 (2012). Following the grant of certiorari in *NFIB*, but before the merits briefs were filed, one of the petitioners, Ms. Brown,

filed for bankruptcy and was forced to close her business. *See* Unopposed Motion for Leave to Add Parties Dana Grimes and David Klemencic, *Nat'l Fed. of Indep. Bus.* v. *Sebelius* 2-3, Nos. 11-393, 11-398, 11-400 (filed Jan. 4, 2012). Ms. Brown was a member of the National Federation of Independent Business and a small business owner, and her assertion of standing had turned on the impact of the healthcare law on her business. Although the court of appeals held that both NFIB as an organization and Ms. Brown as an individual had standing to bring their claims, petitioners sought to "pretermit any possible standing concerns arising from [the] recent change in the circumstances of Ms. Brown" and sought leave to add two new parties. *Id.* at 1. The proposed new parties were similarly situated to Ms. Brown: Both were small business owners and members of NFIB, and each had "participated in the litigation . . . in the district court" by filing declarations in support of NFIB's associational standing. *Id.* at 3.

The *NFIB* petitioners contended that the addition of the new parties was "appropriate" under *Mullaney* because it would simply prevent Ms. Brown's changed circumstances from imperiling the Court's jurisdiction, while causing no prejudice to the Government. *Id.* at 4. Pointing to the factors articulated by the Court in *Mullaney*, the petitioners demonstrated: First, that adding the proposed parties would "in no wise embarrass" the Government, given that both small business owners had filed declarations in the district court and their claims of standing were "materially indistinguishable" from Ms. Brown's before she filed for bankruptcy, *id.* at 3-5; second, that the earlier joinder of the parties "would not have

'in any way affected the course of the litigation'"; and third, that if "standing concerns" pertaining to Ms. Brown prevented the Court from reaching the merits, it would require plaintiffs to "'start over in the District Court'" and thereby "'entail needless waste and run[] counter to effective judicial administration.'" *Id.* at 5 (citing *Mullaney*, 342 U.S. at 416-417 (alteration in original)). Based on these considerations and without issuing an opinion, the Court granted the petitioners' motion. *NFIB*, 565 U.S. at 1154.

These cases are not the only relevant examples. This Court has drawn on similar principles to those expounded in *Mullaney* and applied in *NFIB* in granting other motions to add parties or to intervene, both at the petition and merits stages, to avoid newly presented standing questions from potentially jeopardizing a case. *See Gonzales* v. *Oregon*, 546 U.S. 807, 807 (2005) (granting motion to intervene filed by terminally-ill patients, to alleviate potential mootness issues after eleven of the original patient-respondents died); 1A West's Fed. Forms, Supreme Court § 315 (5th ed.) (ninth example) (providing excerpts from *Gonzales* intervention motion); *Rogers* v. *Paul*, 382 U.S. 198, 198-199 (1965) (granting motion to add two students as parties, after one of the original plaintiffs had graduated and another entered his final school year); *cf. Banks* v. *Chicago Grain Trimmers Ass'n, Inc.*, 389 U.S. 813, 813 (1967) (granting spouse of deceased's motion to intervene to petition the court to review the denial of his death benefits).

Mullaney, NFIB, and these further examples demonstrate that the addition of Mr. Doe is appropriate in this case. Permitting the addition of Mr. Doe would in

no way "embarrass" or prejudice the Government. His addition is designed merely to preserve the status quo in this litigation that has existed since Respondents filed their First Amended Complaint on February 13, 2017. *See* Dist. Ct. Dkt. 37. Since that time, the case has featured a plaintiff who—among other things—has a family member who would be subject to Section 2(c), if that provision were allowed to go into full force. Therefore, the Government has consistently focused its briefing with respect to jurisdiction on the standing of an individual plaintiff with a family member who could be excluded by Section 2(c). Permitting Mr. Doe to enter ensures that those arguments remain relevant; it does not introduce any new jurisdictional issues with which the Government must grapple.

Indeed, Mr. Doe is a precise substitute for Dr. Elshikh in this respect. When Respondents filed their Second Amended Complaint on March 8, 2017, challenging the President's revised Order of March 6, 2017, Dr. Elshikh represented that his mother-in-law was a national of one of the six countries designated by Section 2(c) of the Order (Syria), that she had an active application for an immigrant visa which was filed in September 2015, and that days earlier, their family was informed by the National Visa Center that her application was "proceeding to the next stage of the process" and would soon involve an interview. Dist. Ct. Dkt. 66-1, ¶ 4 (Decl. of Ismail Elshikh).

Mr. Doe's present circumstances are nearly identical: Mr. Doe's son-in-law is a national of one of the six countries designated by Section 2(c) of the Order (Yemen), he has a pending application for an immigrant visa which was filed

(coincidentally) in September 2015, and just recently, Mr. Doe's family was informed by the U.S. Citizenship and Immigration Service that his son-in-law's visa application had "clear[ed]" the first stage of the process and was proceeding towards the interview stage. *See* Decl. of John Doe, ¶¶ 4, 7, 8, 9 (attached hereto as Exhibit A).

Allowing Mr. Doe to join as a party would thus place Respondents, collectively, in a position analogous to that which they were in when they initiated this litigation. *Cf.* Gov't Supp. Mem. in Support of App. for Stay Pending Appeal 9-10, *Trump* v. *Hawaii*, No. 16A1191 (filed June 15, 2017) (contending that the proper standing inquiry looks to the standing of the parties "at the commencement of the action"). This would mitigate any unfairness that the passage of time—coupled with the District Court's injunction—would have on Respondents' abilities to present their claims, while presenting no new arguments on the merits.

Mullaney's remaining considerations concerning the addition of parties are also satisfied: Adding Mr. Doe as a party before this point in time would not have "affected the course of the litigation," whereas "dismiss[ing] the present petition" could cause "needless waste" of judicial resources. *Mullaney*, 342 U.S. at 417. It would not have affected the case or any arguments presented to date had Mr. Doe been joined as a formal party earlier because Mr. Doe's standing to challenge the Order as well as the injuries he suffers from it are wholly redundant of those claimed by Dr. Elshikh. *See supra*, at 1, 4-6. It is only *now*—at the current stage of this litigation—that Mr. Doe's joinder has become appropriate because Dr. Elshikh's

mother-in-law has received her visa and is scheduled to enter the country on August 12. Meanwhile, were this Court to deny Respondents' motion, it might unnecessarily introduce an entirely new standing issue into the case. In the extremely unlikely event that this particular standing issue was resolved against Respondents, it would "require the new plaintiffs to start over in the District Court." *Mullaney*, 342 U.S. at 417. That unquestionably would "run[] counter to effective judicial administration," given the extensive briefing and the lengthy opinions that have been authored in this case to date. *See id.*; *see also NFIB*, 565 U.S. at 1154; *Rogers*, 382 U.S. at 198-199.

Finally, Mr. Doe has already been involved in this suit, meaning that his presence will not inject wholly new facts that were not before the District Court. As was true of the proposed new parties in *NFIB*, Mr. Doe was a declarant in the District Court proceedings below. In early February 2017, when the State of Hawaii filed its first complaint challenging the precursor to the current Executive Order, the State submitted three declarations filed by John Doe declarants along with its motion for a temporary restraining order ("TRO"). Dist. Ct. Dkts. 10-1, 10-2, 10-3. As Hawaii explained in its submission of these declarations, each declarant was a resident of the State of Hawaii, and each described how the original Executive Order directly and personally affected their lives as well as their families. *See* Dist. Ct. Dkt. 10, ¶¶ 4-6 (submitting the redacted Doe declarations along with the TRO motion, original copies of which were provided to the District Court for in camera review); Dist. Ct. Dkts. 15 & 15-1, ¶ 4 (requesting in camera review). Mr.

Doe was one of those declarants, and his in camera statement explained how his son-in-law was a national of one of the then-seven designated countries, had applied for an immigrant visa, and would be banned from entering the country under the plain terms of the Order. *See* Ex. B (Mr. Doe's in camera District Court declaration, with his name and signature redacted). Mr. Doe's current attestations about the revised Order's effects on his family are substantively identical. *See* Ex. A.[1]

II. This Court Should Allow Mr. Doe to Proceed Anonymously.

Respondents respectfully request that this Court allow Mr. Doe to proceed as an anonymous party in this Court, in order to protect his and his families' identities. Respondents have therefore attached to this publicly-filed motion Mr. Doe's present declaration, dated August 3, 2017, with his name omitted and his signature redacted. Respondents will also submit to the Clerk's Office, for in camera review, an original, unredacted copy of Mr. Doe's present declaration bearing his name, as well as a copy of Mr. Doe's declaration that was provided to the District Court for review in camera, also bearing his name and signature.

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[1] At the time that the State of Hawaii filed its complaint and motion for a temporary restraining order as to the first Executive Order in February 2017, Mr. Doe was willing to participate in the suit, to submit a declaration for the District Court's in camera review, and to have the general allegations of his declaration be described in public documents accompanying his filing. *See* Dist. Ct. Dkts. 10, 10-1, 15 & 15-1. At that time, however, Mr. Doe was not willing to have the full content of his declaration made available to the public. Litigation against the Executive Order was still in its earliest stages, the first Order was in operation, and there was considerable uncertainty and fear about retaliation. *See* Dist. Ct. Dkt. 15, at 8-9. Mr. Doe is now prepared for the content of his declaration to be disclosed to the public, so long as his name and signature remain concealed from public view. *See* Part II, *infra*.

As Mr. Doe attests, he wishes to proceed anonymously because he is "afraid that if [he] identif[ies himself], it could delay [his] son-in-law's visa application" or cause himself, his wife, or his children to be "subject to public reprisals." Ex. A ¶ 14. Two of Mr. Doe's children "are still very young," and he believes they "should not have to face such consequences." *Id.* Mr. Doe's fears of reprisals are all the more heightened given the small size and close-knit nature of Hawaii's Muslim community. Moreover, Mr. Doe has seen how Dr. Elshikh—the imam of his mosque—has been subjected to additional media attention, criticism, and even false accusations, as a result of his public participation in this lawsuit.

This Court has permitted parties to proceed under pseudonyms in many prior cases. *E.g.*, *Roe* v. *Wade*, 410 U.S. 113 (1973); *Poe* v. *Ullman*, 367 U.S. 497, 498 n.1 (1961). Indeed, several of the parties in the consolidated *IRAP* case currently are proceeding under pseudonyms. While there is no Supreme Court rule that speaks to a party's joinder in this Court under a pseudonym, the practice is widely permitted in the lower federal courts to protect parties' privacy. *E.g.*, U.S. Dist. Ct. for the Dist. of Hawaii Local Rule 10.2(f) (permitting parties to file papers "in camera"); *M.M.* v. *Zavaras*, 139 F.3d 798, 802-803 (10th Cir. 1998) (discussing examples of district courts allowing parties to proceed under assumed names); *see also International Union* v. *Scofield*, 382 U.S. 205, 217 n.10 (1965) (recognizing that "the policies underlying" the rules and practices in the lower federal courts "may [also] be applicable in appellate courts"); *Newman-Green*, 490 U.S. at 832 (same). Moreover, in this case, the Government never filed any opposition to Respondents'

motion for in camera review of the Doe declarations, Dist. Ct. Dkt. 15, which the District Court granted for "good cause" shown, Dist. Ct. Dkt. 29. This Court should draw upon the rules and practices that have been developed in the lower courts to permit parties to proceed under fictitious names, and allow Mr. Doe to proceed anonymously here.

Respectfully submitted,

/s/ Neal Kumar Katyal

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CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Neal Kumar Katyal, a member of the Supreme Court Bar, hereby certify that one copy of the foregoing Motion for Leave to Add Party John Doe was served via electronic mail and Federal Express on August 7, 2017 on:

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EXHIBIT A

DECLARATION OF JOHN DOE

I, JOHN DOE, declare as follows:

1. I was originally born in Yemen and am a naturalized U.S. citizen. I have lived in Hawaii for almost 30 years.

2. My wife and all four of my children are U.S. citizens as well, either born in the United States or naturalized. Two of my children are under the age of 14.

3. We are all Muslims, and are members of the mosque where Dr. Ismail Elshikh is imam.

4. One of my daughters is married to a young man from Yemen.

5. They have a young toddler child, who was born in Hawaii and is also a U.S. citizen.

6. My son-in-law fled Yemen to escape the civil war and eventually ended up in Malaysia. My daughter and their child, for the past year and a half have had to go back and forth between Hawaii and Malaysia just to see him.

7. In September 2015, my daughter filed a petition to allow my son-in-law to immigrate to the United States as the spouse of a U.S. citizen.

8. In the summer of 2016, my daughter had an interview with immigration officials for her husband's visa application. They told her that she had completed all the necessary paperwork and would e-mail her if they needed anything else.

9. In late June 2017, my daughter was informed by the U.S. Citizenship and Immigration Services that my son-in-law's immigrant visa application had successfully passed through the clearance stage. The next step is for them to complete his paperwork, and for my son-in-law to then receive an interview at a U.S. embassy overseas. My daughter's attorney estimates that my son-in-law will receive a visa within the next three to twelve months.

10. The issuance of the Executive Order in March 2017 banning entry of the citizens of six predominantly Muslim countries (including Yemen) creates great uncertainty as to whether my son-in-law will be able to come to Hawaii.

11. The rest of my family and I miss my son-in-law very much. We want only to be able to live in Hawaii with my daughter, her husband, and our grandchild, as one big family.

12. I have worked hard to build a life in Hawaii and to become a part of this community.

13. The Executive Order, were it not enjoined, would ban my son-in-law from immigrating to the United States and moving to Hawaii simply because he is of Yemeni descent—because he is a national of a Muslim-majority country. The moment it takes effect, the Order will divide up my family across the world, and prevent my wife and I, as well as our other children, from sharing our daily lives with our daughter, son-in-law, and grandchild. We are a close family, and we are proud

American citizens and Hawaii residents. It is hard not to feel that the Order, in its entirety, discriminates against us—and imposes a concrete hardship upon our family that our neighbors do not have to experience—simply because we are Muslim and because my daughter has married a Muslim from a Muslim-majority country. That is unfair, and it is not right.

14. I have asked my attorney to file this declaration anonymously because I am afraid that if I identify myself, it could delay my son-in-law's visa application even further. Our family's ability to reunify is based entirely this process. I am also afraid that I, my wife, or my children may be subject to public reprisals if my name is publicized. Two of my children who live at home are still very young and should not have to face such consequences.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, August 3, 2017.

[redacted]

[redacted]JOHN DOE

EXHIBIT B

DECLARATION OF [redacted]

I, [redacted], declare as follows:

1. Although I was originally born in Yemen, I am a naturalized U.S. citizen and have lived in Hawaii for 29 years.

2. My wife and all four of my children are U.S. citizens as well, either born in the United States or naturalized.

3. I am a carpenter by trade and also a licensed contractor.

4. My elder daughter is married to a young man from Yemen.

5. They have a one-year-old daughter, who was born in Hawaii and is also a U.S. citizen.

6. My son-in-law fled Yemen to escape the civil war and eventually ended up in Malaysia. My daughter and granddaughter are now with him in Malaysia.

7. In September 2015, my daughter filed a petition to allow my son-in-law to immigrate to the United States as the spouse of a U.S. citizen.

8. In June 2016, my daughter came back to the United States for an interview with immigration officials. They told her that she had completed all the necessary paperwork and would e-mail her if they needed anything else.

9. As far as the family knew, it appeared that my daughter's petition filed on behalf of my son-in-law was progressing well.

10. However, the issuance of the Executive Order banning entry of the citizens of seven predominantly Muslim countries (including Yemen) has created great uncertainty as to whether my son-in-law will be able to come to Hawaii and I believe it is hindering my family's efforts to reunify.

11. The rest of my family and I miss my granddaughter, daughter, and son-in-law very much.

12. I have worked hard to build a life in Hawaii and become a part of this community.

13. I believe that this Executive Order, due to its effect on my son-in-law's efforts to come to Hawaii, is dividing my family and causing us great harm.

I declare the foregoing to be true and correct under penalty of perjury.

DATED: Honolulu, Hawaii, February 2, 2017.