No. 16-1540 (16A1191)

IN THE

Supreme Court of the United States

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

REPLY IN SUPPORT OF RESPONDENTS' MOTION FOR LEAVE TO ADD PARTY JOHN DOE

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The Government's opposition marks the consummation of its dogged but unsuccessful attempts to block review of the President's order. In February, facing a lawsuit brought by two States, the Government told the Ninth Circuit that only a person whose relative was subject to the Order could bring suit. *See* Resps. Supp. Br. Opposing the Government's Stay App. 15. Then, when presented with just such a plaintiff in the form of Dr. Elshikh, the Government announced that it was too "speculative" whether his mother-in-law would be denied a visa within the operative 90-day period. *Id.* at 11. Later, when the litigation stretched beyond 90 days, the Government argued that any continuing harms the Order inflicted were irrelevant because the clock would already have run if courts had simply let the Order go into effect. *Id.* at 15. Now the Government refuses a routine motion to add a party—one who is in all material respects identical to Dr. Elshikh when this Court granted certiorari—because Respondents apparently should have predicted five months ago exactly when Dr. Elshikh's mother-in-law would obtain a visa, and somehow identified a plaintiff whose relative would still have a visa application pending at that point. That position finds no support in precedent or the facts. The motion should be granted.

I. Respondents' Motion is Timely.

The Government's principal ground for objecting to Respondents' motion is that it cannot imagine any "plausible justification" why Respondents did not add Doe as a plaintiff sooner. Opp. 5. The reason is simple: Respondents did not know until July 16 when Dr. Elshikh's mother-in-law would obtain a visa—let alone

obtain admission—and adding a plaintiff before then would have been a wasteful and likely futile gesture that would have exposed Doe to unnecessary risk.

The Government's own recitation of the facts reveals as much. From the outset of the litigation until mid-July, it was entirely unclear when Dr. Elshikh's mother-in-law would receive a visa. When the travel ban was first implemented, she was informed that her visa application was "on hold" indefinitely. Dist. Ct. Dkt. 66-1, ¶ 4 (Decl. of Ismail Elshikh). On March 2, the Government told her that it had resumed processing, but it did not set a date for her visa interview until April 14. *Id.* When that interview finally happened, on May 24, she was told that her application needed additional "administrative processing" and so could not be approved. Resps. Opp. to Stay 14. At the end of June, the Government scheduled yet another visa interview for July 7. At that interview, the consular officer told the mother-in-law that she had been approved for a visa, but would need to return on a later date to pick it up. Only on July 16 did she actually obtain an immigrant visa.

This fitful process—typical of the "bureaucratic delays" and "long queues" characteristic of the visa-issuance process, *Scialabba* v. *Cueller de Osorio*, 134 S. Ct. 2191, 2196 (2014) (plurality opinion)—made it impossible for Respondents to identify a plaintiff from the outset who would be able to step into Dr. Elshikh's shoes once his mother-in-law obtained a visa. If Respondents had added a plaintiff whose relative was equally far along in the visa process in March, he or she might have obtained a visa before Dr. Elshikh's mother-in-law, rendering that individual's participation superfluous. Alternatively, if Respondents had added a plaintiff

whose relative had only just begun the process, it is quite certain that the Government would have argued, as it has at every turn, that the claim was unripe. *See, e.g.*, Gov't Supp. Mem. in Support of App. for Stay Pending Appeal 9. Even in April, when the Government now suggests (at 5) that Respondents should have added a plaintiff, Respondents could not confidently predict the outcome of Dr. Elshikh's mother-in-law's interview or the timing of a visa issuance—a caution borne out by the State Department's further and entirely typical delay.

Indeed, by the Government's logic, Respondents had yet more uncertainty to contend with. The Government has maintained throughout this litigation that even the issuance of a visa "does not guarantee admission"; in its view, entry is assured only once a person has been deemed admissible at the border. Gov't Br. 4; *see id.* at 51-52. By that reasoning, Respondents could not know until August 12—the day Dr. Elshikh's mother-in-law was allowed into this country, and four days *after* Respondents filed their motion—whether a new plaintiff was required. It is inconceivable that Respondents could have predicted that date with any precision in March.

The Government suggests (at 1-2) that it would have been costless for Respondents to simply include numerous plaintiffs from the start, in the hopes that the timing would work out just right. But the members of Hawaii's small Muslim community quite rightly did not believe that participation in this lawsuit would be without cost. Dr. Elshikh has been the target of numerous smears and threats since he joined this suit. *See* Mot. 9. Even individuals who proceed anonymously,

like Doe, have reason to fear that they might be identified and find themselves and their families—many of whom are attempting to escape dangerous regions of the world—subjected to harassment and retaliation. *See* Mot. Ex. A, Decl. of John Doe ¶ 14 (describing Doe's fear of "public reprisals"); Dist. Ct. Dkt. 15, at 3-6, 8-9 (describing similar fears by others). Contrary to the Government's blithe suggestion (at 1), it was quite proper for Respondents to "elect[]" not to subject individuals to this burden when their participation might be redundant.

The Government's further suggestion (at 5) that Respondents have engaged in unwarranted delay since July 16 is inexplicable. As soon as Respondents learned that Dr. Elshikh's mother-in-law had obtained a visa, they diligently contacted several associations and individuals in Hawaii who had previously indicated that the travel ban would personally affect them and their families. After multiple discussions, Doe—who had already attested to his concerns about participating even as a declarant—courageously chose to become a plaintiff. He assembled a declaration by August 3; Respondents informed the Government on August 4; and Respondents prepared and filed the instant motion by August 8. Adding a plaintiff to a suit of this significance and public visibility takes time. The Government offers no basis for its assertion that Respondents could have acted with greater dispatch, and there is none.

II. Adding Doe as a Party Will Not Prejudice the Government.

The Government is also wrong that adding Doe will prejudice the Government. Doe is in every respect materially identical to Dr. Elshikh at the time

certiorari was granted: He too is a Muslim-American whose relative is a national of one of the six countries covered by Section 2(c) of the Order, Doe Decl. ¶¶ 1-4; his relative is also seeking a visa to immigrate to the United States, *id.* ¶¶ 7-9; and by impairing Doe's ability to reunite with his relative, the Order denigrates and disadvantages him, as it does Elshikh, because of his religion, *id.* ¶ 13. Adding Doe to the case will not alter the legal issues before the Court in any respect; it will simply preserve the status quo when this Court granted review. *See* Mot. 5-6.

The Government obfuscates this point by tossing out a series of supposed distinctions between Doe and Elshikh, each more irrelevant than the last. It notes (at 14-15) that Dr. Elshikh's mother-in-law had been scheduled for a visa interview at the time certiorari was granted, whereas the Government has only approved Doe's son-in-law's visa petition. Each relative's precise position in the administrative process, however, makes not a whit of difference: Both plaintiffs' relatives have taken concrete steps to travel to this country—indeed, each has a visa petition approved by the Government—and so both plaintiffs have standing to challenge the Government's action denying their relatives entry. *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 564 (1992).

The Government also asserts (at 9) that Doe is different because it is "exceedingly unlikely that Doe's son-in-law would be affected by the Order." It is unclear in what respect the Government contends this marks a difference from Elshikh. For months, the Government has persistently argued that "it is speculative whether Section 2(c)'s 90-day entry suspension even would apply to [Dr.

Elshikh's] mother-in-law," given that she might "not receive a visa (if at all) until after the expiration of Section 2(c)'s 90-day period." Gov't C.A. Br. 29; *see also* C.A. Stay App. 12-13. The Government cannot make the very same (meritless) argument about Doe and pass it off as a novel reason for denying him standing.

Last, the Government claims (at 15) that Doe, unlike Elshikh, has not claimed that the Order denigrates him as a Muslim. That is just false. His declaration says that he "feel[s] 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." Doe Decl. ¶ 13.

In any event, insofar as the Government intends to argue that one of these niggling differences deprives Doe of standing, Respondents have not prejudiced the Government's ability to do so. The Government has already made versions of some of these arguments in contesting the standing of the *IRAP* plaintiffs. *See* Gov't Br. 28 n.10. It has developed those arguments in its lengthy response to this motion, and it will have a merits reply brief in which it can develop them further. That is more than adequate opportunity to address these issues in full.[*]

[*] The Government's suggestion (at 8) that Doe's joinder would necessitate further "factual" development is lacking. This case was decided on the papers at the preliminary injunction stage, without either side claiming there was a need for discovery. Nor was the Government deprived of the opportunity to oppose Doe's filing of an *in camera* declaration in the District Court. *Id.* As the Government admits, *it* moved to stay the case four days after that motion was filed. *Id.* If it wished to oppose the motion, it had (and forwent) ample opportunity to do so.

III. Adding Doe is Consistent with This Court's Precedents.

The Government is unable to identify any respect in which adding Doe would mark a departure from the numerous cases, dating back six decades, in which this Court has granted motions to add parties after certiorari was granted. *See* Mot. 2-5. Just as in those cases, joinder would not "embarrass" the Government, would not have "affected the course of the litigation" had it occurred earlier, and would prevent a "needless waste" of judicial resources. *Mullaney* v. *Anderson*, 342 U.S. 415, 416-417 (1952).

The Government fixates largely on one supposed difference: In prior instances, it claims, the standing of the original plaintiff was "undisputed below." Opp. 10. That is incorrect. For one thing, because standing is a jurisdictional issue, courts have an independent obligation to analyze whether it is present at every stage of the litigation. In several of the cases in which parties were added in this Court, the lower courts had engaged in critical discussions of the various' plaintiffs' standing. *See, e.g.*, *Florida* v. *U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011); *Oregon* v. *Ashcroft*, 368 F.3d 1118, 1121 & n.2 (9th Cir. 2004). Indeed, in *Rogers* v. *Paul*, 382 U.S. 198 (1965) (per curiam), the court of appeals had ruled that the original plaintiffs "were *without* standing," and this Court allowed the petitioner to substitute new parties regardless. *Id.* at 200 (emphasis added).

Furthermore, the Government is wrong that it did not contest standing in any of those cases. In *Gonzales* v. *Oregon*, the Government sought to dismiss the suit on the ground that the original plaintiffs lacked standing altogether. *See*

Defendants' Opp. to Plaintiffs' Mot. for Preliminary Injunction, *Oregon* v. *Ashcroft*, No. CV 01-1647, 2001 WL 34963870 (D. Or. Nov. 16, 2001). This Court still allowed the substitution of a new plaintiff at the Supreme Court. *Gonzales* v. *Oregon*, 546 U.S. 807 (2005); *see also Florida*, 648 F.3d at 1243 (noting that "[t]he [G]overnment claims that the state plaintiffs do not have standing" to challenge the individual mandate).

The Government's remaining grounds for distinguishing prior cases are meritless. It claims (at 11) that the new parties in those cases "were already directly connected to the case" because they had some connection to an organizational plaintiff. As it concedes, that is not true of every case, *see* Opp. 12 n.2, and in any event it is irrelevant for jurisdictional purposes, since the fact that an organization has standing does not mean that each of its members does. *See Summers* v. *Earth Island Inst.*, 555 U.S. 488, 494-496 (2009). The Government also recycles its specious claims that it was not "unanticipated" when Dr. Elshikh's mother-in-law would obtain a visa, and that Doe is meaningfully distinguishable from Elshikh. Opp. 11, 13-15. Neither contention grows truer with repetition.

In the end, the Government's true reason for opposing Respondents' motion is plain: it is attempting to ensure that its Order, which was enjoined by both courts of appeals to consider it, can escape meaningful judicial review. As Respondents will explain in their brief on the merits, the issuance of a visa to Dr. Elshikh's mother-in-law does not render Dr. Elshikh's claims moot. But the Government nonetheless hopes that this "late-breaking question as to justiciability [will] frustrate the

Court's ability to decide the issues properly presented to it." Opp. 10. This Court should follow its precedents and eliminate that risk. Respondents' motion to add a party should be granted.

Respectfully submitted,

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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 Reply in Support of Respondents' Motion for Leave to Add Party John Doe was served via electronic mail and Federal Express on August 22, 2017 on:

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