IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MOHAMMED ABDULLAH TAWFEEQ,	)	
Plaintiff.	)	**Case No. 1:17-cv-353**
v.	)	
U.S. DEPARTMENT OF HOMELAND SECURITY ("DHS"); **JOHN F. KELLY,** Secretary of DHS; **U.S. CUSTOMS AND BORDER PROTECTION** ("CBP"); **KEVIN K. MCALEENAN,** Acting Commissioner of CBP; **CAREY DAVIS,** Port Director, CBP ; **ANDY PRYOR,** Manager, CBP; **SHANA WELLS,** Manager, CBP; **U.S. DEPARTMENT OF STATE** ("Department of State"); **REX WAYNE TILLERSON,** Secretary of State, Department of State.	)	**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

As alleged in the Amended Complaint, Plaintiff continues to suffer harm under a broad Executive Order that (i) applies to Iraqi nationals, (ii) does not exempt lawful permanent residents like Plaintiff, (iii) subjects Iraqis to sweeping and unlawful border scrutiny, and (iv) continues to prevent him from work-required travel. Defendants argue that Plaintiff's Amended Complaint should be

dismissed for lack of standing and mootness. Defendants' Motion fails because it relies on factual assertions inappropriate for a motion to dismiss, disguises factual assumptions as legal arguments, and makes legal arguments unsupported by the law of this Circuit. As such, the Motion should be denied.

Plaintiff Mohammed Tawfeeq is a prominent journalist and Iraqi national who has since 2013 been a lawful permanent resident ("LPR") of the United States. Plaintiff's job requires him to make trips abroad at a moment's notice to some of the world's most dangerous areas, including, for example, areas influenced by the so-called Islamic State of Iraq and Syria ("ISIS"). As an LPR, Plaintiff is entitled to enhanced statutory and constitutional protections. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Among those protections, Section 101(a)(13)(C) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(13)(C), allows Plaintiff to be treated as a "returning resident"—meaning that he does not apply for "admission" when returning to the United States, but rather is treated as a matter of law as if he never departed the United States. While an alien applicant for "admission" bears the burden of proving to an immigration official at a port of entry that he should be admitted, 8 U.S.C. § 1361, a returning resident LPR may only be denied entry if Defendants prove by clear and convincing evidence that he is within one of the

grounds in INA § 101(a)(13)(C) that negates his "returning resident" status. *See Matter of Rivens*, 25 I&N Dec. 623, 625 (BIA 2011).

Two Executive Orders ("EO"s)—one now revoked, and one currently in place—have impeded Plaintiff's ability to travel freely for over three months. Under a January 2017 EO, Defendants turned away LPRs from seven countries, including Iraq, at the U.S. border and as they were attempting to board airplanes bound for the United States, in clear violation of INA § 101(a)(13)(C). Plaintiff himself was permitted to enter the country only after being stopped at the airport by an immigration officer, told that he could be turned away under the EO, and then allowed to proceed only after an unspecified "e-mail" from a supervisor. In other words, Plaintiff was not merely inspected by immigration officials the last time he returned home—he was subject to the admission process, or its de facto equivalent, in clear violation of his statutory rights under INA § 101(a)(13)(C).

The January EO was revoked after numerous lawsuits and replaced by a new EO dated March 6, 2017, that explicitly attempts to cure various defects with the January EO. *See* ECF No. 33-2 at § 1(c), (i). While the March EO removes LPRs and Iraqis from the blanket travel ban, *id.* at §§ 2(c), 3(b)(i), Plaintiff's uncertainty persists due to a new provision of the March EO—Section 4—that states that *all* Iraqi nationals (including LPRs) making an application for "a visa, admission or

other immigration benefit" will be subject to "thorough review" including a consultation with the Secretary of Defense or his designee to see whether they have "connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS." ECF No. 33-2 at § 4. The March EO does not define any of the terms that Section 4 uses (*e.g.* "other immigration benefit"), detail how the alleged additional screening will be administered or who will bear the burden, or specify the implications of that screening for LPRs.

Under any fair reading of the March EO, Plaintiff bears a tangible risk of being subjected to scrutiny akin to an admissibility inquiry—an inquiry that by law does not apply to him. An EO cannot overturn INA § 101(a)(13)(C), but the March EO purports to do just that by threatening to again refuse a proper application of INA § 101(a)(13)(C) to Plaintiff upon any return to the United States. As such: (i) this Court has jurisdiction to hear this case, and (ii) Plaintiff's Amended Complaint has not been mooted by the revised EO.

Defendants now move to dismiss. In their view, Plaintiff has no further cause for concern—a new day has dawned and a new EO has issued. Defendants assure the Court that the EO will not apply to Mr. Tawfeeq because he will not possibly seek "admission" when he returns, for instance, from ISIS-influenced areas of Iraq where he is covering a story. And even if Mr. Tawfeeq were

subjected to additional scrutiny, Defendants say, the idea that he could be impeded or barred from returning home is mere speculation.

Defendants' position relies on an assertion of fact—"here is how Plaintiff will be treated when he returns under the March EO"—that is impermissible in a motion to dismiss. Defendants' position also disregards the language in Section 4 of the March EO, quoted above, that is in direct conflict with INA § 101(a)(13)(C). How is a CBP Officer at a port of entry to resolve the tension between the March EO and applicable law without the declaration of law and issuance of operational instructions contained in the Amended Complaint's plea for relief when inspecting Mr. Tawfeeq on return from a part of the world affected by ISIS? Defendants' assertion that the injury caused by the March EO to him is "speculative" is simply inconsistent with the case law and with common sense.

Finally, Defendants' assertion that the March EO will cure any ills that Plaintiff suffered under the January EO does not square with the mootness laws of this Circuit. The words of Section 4 of the March EO contradict the showing Defendants must make that their unlawful conduct will cease, and the Amended Complaint establishes Defendants' misconduct is capable of repetition but could evade judicial review unless this litigation is maintained. For the reasons that follow, Defendants' Motion to Dismiss should thus be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a prominent journalist for Cable News Network, Inc. ("CNN") specializing in the regions of the Middle East and North Africa. ECF No. 33 at ¶¶ 1-3, 43-49. Since 2013, Plaintiff has been stationed at CNN's Atlanta offices, but he must regularly travel abroad as part of his job duties. *Id.* at ¶¶ 1-3, 50.[1] Plaintiff is an LPR who resides in Atlanta. ECF No. 33 at ¶¶ 40-41.

On January 27, 2017, President Trump signed an Executive Order ("EO") that, *inter alia*, "suspend[ed] entry into the United States, as immigrants and nonimmigrants" aliens from seven nationalities, including Iraq, for a period of 90 days. ECF No. 33 at ¶ 60, 62; ECF No. 33-1 at 3 (§ 3(c)). Subsequent to that EO's issuance, Defendants issued various statements indicating that the EO would be applied to LPRs—*i.e.* immigrants—like Plaintiff. ECF No. 33 at ¶¶ 67-68. On information and belief (and as alleged in other lawsuits around the country), Defendants actually did apply that EO to refuse entry or otherwise impede the travel of numerous LPRs. *Id.* at ¶¶ 78-79.

Defendants then applied the January EO to Plaintiff upon his return to the United States from a trip to Iraq on the evening of January 29, 2017. Specifically,

[1] As discussed *infra*, Plaintiff's allegations should be accepted as true for purposes of Defendants' Motion.

immigration officials at Atlanta Hartsfield/Jackson International Airport informed Plaintiff that he could be denied entry under the January EO and forced him to wait while they obtained an unspecified "e-mail" concerning whether he would be allowed into the United States. *Id.* at ¶¶ 52-59. Plaintiff has alleged that Defendants have no basis for treating him as seeking admission on his return in January. *Id.* at ¶¶ 102-06. The next day, Plaintiff filed the Complaint in this matter seeking relief for the violation of his statutory and constitutional rights. *See* ECF No. 1. In the face of lawsuits around the country, Defendants issued press releases and dubious legal guidance from the White House Counsel that attempted to carve out LPRs from the January EO's travel ban. ECF No. 33 at ¶¶ 71-75; ECF No. 33-5; ECF No. 33-6. The January EO remained in effect—unchanged—through March 16, 2017. ECF No. 33 at ¶¶ 76.

On March 6, 2017, President Trump signed a new EO. ECF No. 33 at ¶ 80; ECF No. 33-2. The March EO had an effective date of March 16, 2017, upon which the January EO was revoked. ECF No. 33 at ¶ 81; ECF No. 33-2 at §§ 13, 14. The March EO has two provisions that relate directly to Iraqis. First, section 1(g) terms Iraq a "special case" due to ISIS's influence over Iraqi territory and the close relationship between Iraq and the United States. *See* ECF No. 33-2 at § 1(g).

Second, section four of the March EO states:

> *Sec. 4. Additional Inquiries Related to Nationals of Iraq. An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership, since Executive Order 13769 was issued, concerning individuals suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS. Such review shall include consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS, as well as any other information bearing on whether the applicant may be a threat to commit acts of terrorism or otherwise threaten the national security or public safety of the United States.*

Id. at § 4. Nowhere does the March EO define any of the terms used (*e.g.* "controlled or formerly controlled by ISIS") or provide information about the "thorough review" contemplated in Section 4. On information and belief, Defendants intend to subject Mr. Tawfeeq to impermissible additional scrutiny under the March EO and impede or bar his return to the United States, rather than following the procedures laid out in the INA. ECF No. 33 at ¶¶ 114-126.

President Trump has also explicitly threatened to revoke the March EO in favor of the January EO, which Defendants previously used to bar LPRs like Plaintiff. ECF No. 33 at ¶¶ 130-133. Because of the substantial uncertainty caused by the EOs, Plaintiff's employer has not permitted him to travel, causing damage to his career. *Id.* at 127-135; ECF No. 33-8.

ARGUMENT

Defendants now move to dismiss Plaintiff's Amended Complaint under Fed. R. Civ. P. 12(b)(1) on two closely-related grounds. First, Defendants claim that Plaintiff lacks standing because his injuries are "conjectural and hypothetical" and rest on an "attenuated chain of possibilities." ECF No. 36-1 at 17-18. Second, Defendants assert that Plaintiff's claims relate to the revoked January EO and are thus moot. *See id.* at 19-22. Defendants also state that the EO does not apply to Plaintiff because Plaintiff would not seek "admission" upon return from abroad, a contention that Plaintiff assumes goes to both standing and mootness. *See id.* at 22-24. Defendants' standing and mootness arguments fail.[2]

I. Legal Standards

In the Eleventh Circuit, "it is extremely difficult to dismiss a claim for lack of subject matter jurisdiction." *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1260 (11th Cir. 1997). With regard to standing, Defendants correctly identify two types of 12(b)(1) motions: (1) facial motions in which the

[2] Defendants make the unfounded argument that the Department of State should be dismissed. ECF No. 36-1 at 1 n.1. Plaintiff has properly alleged numerous facts about that agency's participation in the EO's implementation. *See, e.g.*, ECF No. 33 at ¶¶ 30-31, 68, 71. Defendants even attach to their own Motion a press release highlighting the Department of State's role in drafting the EO. ECF No. 36-3 at 2.

Court assumes the complaint is true (as with a 12(b)(6) motion) and determines whether the Plaintiff has properly alleged standing, and (2) factual motions in which the Court can examine extraneous materials and need not accept Plaintiff's allegations as true. *See Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990). Defendants fail, however, to specify which type of motion they raise here.

Defendants appear largely to accept Plaintiff's well-pled allegations as true, although at times the Motion impermissibly questions those allegations. *See, e.g.*, ECF No. 36-1 at 4 (complaining that Plaintiff "speculates" about delay caused by the January EO). Plaintiff thus assumes for purposes of this response that Defendants intend to levy a facial challenge. As such, this Court should assume that Plaintiff's allegations are true and "presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998); *Lawrence v. Dunbar*, 919 F.3d 1525, 1529 (11th Cir. 1990) (on a facial attack "allegations in [the] complaint are taken as true for purposes of the motion").

Defendants also, however, attach to their Motion two additional documents—(1) a letter from the Attorney General and Department of Homeland Security ("DHS") Secretary Kelly and (2) a DHS press release—relating to the March EO. Consideration of these documents, which Defendants apparently

intend to offer as proof regarding how Plaintiff will be treated under the March EO, *see id.* at 11, are permissible only on a *factual* motion to dismiss. Factual motions to dismiss should not be entertained when the facts at issue—in this case how Defendants' agents have implemented or will implement the March EO—implicate the merits of Plaintiff's cause of action. *See Morrison v. Amway Corp.*, 323 F.3d 920, 925-28 (11th Cir. 2003). If the Court is inclined to treat Defendants' motion as a factual challenge, Plaintiff believes that the Court should grant discovery and/or an evidentiary hearing to probe these apparently disputed facts concerning the March EO's implementation. *See Lawrence*, 919 F.2d at 1529-30 (faulting the district court for resolving a factual 12(b)(1) motion on the basis of an affidavit without "further jurisdictional discovery or an evidentiary hearing"); *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir. 1981) ("[T]he district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss.").

On mootness, Defendants bear the steep burden of convincing this Court that President Trump's voluntary withdrawal of the January EO renders Plaintiff's case moot. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (defendant bears the "burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected

to recur"); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007) ("The formidable, heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." (quotations omitted)).

II. Plaintiff Has Properly Pled Standing.

"The requirements for standing in declaratory judgment actions are the same in other cases." *Drew v. Safeco Ins. Co. of Ill.*, 578 Fed. Appx. 954, 957 (11th Cir. 2014). Plaintiff must show "(1) injury in fact, (2) a causal link between the defendant's conduct and the injury, and (3) that a favorable verdict will likely redress the injury." *Id.* Plaintiff's allegations demonstrate standing here.

A. Injury

Standing "requires only a minimal showing of injury," whether past or imminent. *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008). For imminent future injury, the plaintiff must establish "a realistic danger of sustaining a direct injury as a result of" a law's "operation or enforcement" but "does not have to await the consummation of the threatened injury to obtain preventive relief." *Id.* at 1161. Injury requirements are met when a "law is aimed directly at" Plaintiff if his "interpretation of the [law] is correct," and absent good reason to believe that the law will not be enforced against him.

Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392-93 (1988). The government's attempt at narrowly construing an executive order "does not limit…standing to challenge a law that is subject to multiple interpretations." *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081, at *8 (N.D. Cal. Apr. 25, 2017) (finding standing to challenge prospective application of an executive order from Pres. Trump relating to immigration enforcement).

Defendants first complain that Plaintiff's injuries are "conjectural and hypothetical" and based on an "attenuated chain of possibilities." ECF No. 36-1 at 17-18. They are wrong. Plaintiff cannot travel because he does not know if he will be permitted to re-enter the country if he leaves. Therefore, Plaintiff cannot leave the country even though his job duties necessitate travel.

Plaintiff lays this out in a logical progression of past and future injury based on Defendants' actions and statements. Plaintiff works for a prominent news organization covering North Africa and the Middle East, a position in which he must travel internationally on a regular basis. ECF No. 33 at ¶ 127. But for the EOs at the heart of this case, Plaintiff's employer likely would have sent him out of the country on several occasions to cover stories. *Id.* at ¶ 128; ECF No. 33-8. Plaintiff visited Iraq as recently as January 2017 and has been part of CNN's coverage concerning the U.S. military and ISIS in Iraq. ECF No. 33 at ¶¶ 3, 48, 51.

The fact that Plaintiff remains grounded due to uncertainty regarding his rights has resulted in damage to his career. *Id.* at ¶¶ 127-135.

Indeed it is Defendants who suffer from a lack of plausibility as a legal matter. The provisions of the March EO relating to Iraqis are per se ultra vires as applied to a returning LPR, as Plaintiff has alleged. INA § 101(a)(13)(C) provides the *only* legal basis for providing the "admission" scrutiny to an LPR. But the EO explicitly *requires* a border agent to conduct a "thorough inquiry" to at least some LPRs—at a minimum those who, in the border agent's view, are seeking an "immigration benefit" and who are returning from an area that was or is under ISIS control. The EO is silent as to what the implications are to this added scrutiny and who bears the burden of proof under that inquiry. Will Mr. Tawfeeq need to make a showing that he is not a security threat and/or that he is not seeking an "immigration benefit"? On that entirely plausible reading of Section 4, the March EO impermissibly adds to the criteria under INA § 101(a)(13)(C).

Defendants also complain that Plaintiff has not yet announced a travel date. *See, e.g.*, ECF No. 36-1 at 13. Eleventh Circuit caselaw only requires Plaintiff to allege the manner in which the injury will occur and a fixed time period in the future in which it is likely. *See, e.g., Florida State Conference of N.A.A.C.P.*, 522 F.3d at 1161 ("[P]laintiffs here have alleged when and in what manner the alleged

injuries are likely going to occur. Immediacy requires only that the anticipated injury occur with some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months."). Plaintiff has identified the manner of the alleged injury (impediments to his return to the United States) and when they are likely to occur (on a future return from a trip abroad, of the type he took in January and would have taken again but for the EOs issued in the period from January to March). The caselaw is clear that Plaintiff need not travel under the March EO to challenge it. *See, e.g.*, *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979).[3] Plaintiff's showing is thus sufficient for standing. *See also, e.g., Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1258 (11th Cir. 2012) (holding that attorney working with undocumented immigrants had standing to challenge state statute on pre-enforcement basis based on credible threat of its application to him at future date); *Florida State Conference of N.A.A.C.P.*, 522 F.3d at 1163-64 (finding probabilistic harm capable of satisfying injury in the "undemanding Article III sense").

[3] Defendants cannot blame Plaintiff for not putting himself at risk when their actions caused the chilling effect on his travel. *Cf., e.g. Pittman v. Cole*, 267 F.3d 1269, 1283-84 (11th Cir. 2001) (judicial advisory opinion that caused judicial candidates to self-censor their speech gave rise to standing).

Defendants also repeatedly minimize Plaintiff's prior injury as a mere thirty-minute airport delay. *See, e.g.*, ECF No. 36-1 at 13. Whatever the rhetorical value of that point, the caselaw is clear that the duration of the violation of one's rights does not affect standing. A plaintiff need make "only a minimal showing of injury." *Florida State Conference of N.A.A.C.P.*, 522 F.3d at 1165. In one recent case, the Eleventh Circuit found standing to challenge changes to voter rolls when plaintiffs were misidentified as non-citizens but were permitted to vote. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014). Misidentification of Plaintiff as an alien seeking admission similarly suffices for standing here, even though the government denied Plaintiff his rights with ruthless efficiency. Indeed the only case the government can muster for its new "30 minutes delay is OK" standard is a single, inapposite Fourth Amendment case. *See* ECF 36-1 at 21-22. Mr. Tawfeeq here raises no Fourth Amendment claims, and surely Defendants do not assert that Plaintiff's right to return to his home as an LPR depends on how quickly an immigration officer can wrongfully send him away.

Defendants' focus on airport delays also completely ignores the *prospective* harms that Plaintiff alleges. Plaintiff has alleged that, under the January EO, Defendants prohibited LPRs like Plaintiff from boarding flights, turned them away when they arrived at a U.S. port of entry, and subjected them to improper screening.

ECF No. 33 at ¶¶ 5, 78-79. But Plaintiff has also alleged that this behavior continues under the March EO and that the President has stated he may revoke the March EO in favor of returning to the January EO. *Id.* at ¶¶ 114, 122-25. Thus, not only has Plaintiff alleged sufficient harm for standing based on past behavior, he also alleges that Defendants at present are violating the rights of similarly situated individuals and would violate his rights if he travelled.

Defendants also, puzzlingly, argue that Plaintiff has not alleged how the March EO's "thorough review" would constitute a judicially cognizable injury. ECF No. 36-1 at 18. Plaintiff has, however, (i) presented a complete legal theory about how imposing additional screening on LPRs like Plaintiff violates their right to be treated according to the returning resident screening under INA § 101(a)(13)(C), (ii) alleged that Defendants are using the March EO to prevent LPRs from returning to the U.S. in violation of their legal rights, and (iii) alleged that Plaintiff would be similarly mistreated if he returned from abroad. *See, e.g.*, ECF 33 at ¶¶ 92-126. Defendants' arguments apparently rest on the idea their agents' "thorough review" is nothing more than security theater, which presents a factual dispute for another time.

B. Causal Link

Plaintiff has also properly alleged the requisite causal link between the harm that he alleges—being denied entry or being subjected to improper additional screening—and Defendants' behavior. Plaintiff has alleged that Defendants are charged with admitting aliens, previously violated Plaintiff's rights under the January EO, and continue to violate the rights of Iraqi LPRs under the March EO.

Defendants suggest that causality fails because Plaintiff is not covered by the EO's terms, as he will not seek "admission" after a brief trip abroad. *See*, *e.g.*, ECF No. 36-1 at 17. Unfortunately for Defendants, the March EO does not apply only to those Iraqis who seek "admission"—it also applies to those who seek any "other immigration benefit," a term that neither the March EO nor the immigration law defines. ECF No. 33-2 at § 4. Surely an LPR who seeks to return to the United States under INA § 101(a)(13)(C) seeks to benefit from that provision and thus comes within a plausible reading of the March EO, even if he does not as a legal matter seek "admission." How CBP officers are reading the ambiguous EO is a factual question best dealt with at the discovery or summary judgment stage and cannot be resolved now by the Court.

But Defendants' argument concerning whether Plaintiff will fall within the March EO as seeking "admission" suffers from another fatal flaw. Defendants

seek to focus the Court's attention on the legal issue on which the parties now apparently agree—that a returning LPR *should* be treated according to INA § 101(a)(13)(C) and thus generally *should not* be treated as seeking "admission." The problem for Defendants is the closely related *factual* issue of whether their agents will actually treat Plaintiff as seeking admission when he returns. Plaintiff alleges that CBP officials already improperly treated him as seeking admission under the January EO and that they continue to do so to other LPRs under the March EO. Whatever the outcome of the legal question of whether Plaintiff *should* be treated as seeking admission, the factual question of whether he *will* be treated as seeking admission cannot yet be resolved by this Court. Have Defendants issued guidance to their agents in the field such that Plaintiff can be assured that his rights will be respected? Presumably not. The terms of the March EO could certainly cause Defendants' agents to mistreat Plaintiff again, and there are no facts available for Defendants to argue that causality is otherwise interrupted.

C. Redressability

Finally, the injuries that Plaintiff alleges are fully redressable by this Court. Plaintiff seeks clarification of his rights under the March EO. He seeks injunctive and mandamus relief that would require Defendants to issue guidance to their officers—who will actually be admitting Plaintiff at the airport—regarding how

they are to implement the March EO in light of the INA. In essence, Plaintiff seeks this Court's assistance in ensuring that Defendants have properly understood and implemented the March EO in light of the complex legal framework here and that they have conveyed that proper implementation to their agents in the field. Such relief would address Plaintiff's concerns and vindicate his rights.[4]

III. Plaintiff's Case Is Not Moot.

Defendants separately allege that Plaintiff's case is now moot because the January EO has been revoked. As an initial matter, Defendants' argument appears to be only that the claims under the January EO—not the March EO—are mooted. For the reasons discussed in the prior section, Plaintiff's claims under the March EO are live because the March EO remains in effect and applies to Plaintiff. Defendants allege, however, that because they have voluntarily ceased the challenged conduct under the January EO, Plaintiff's claims relating to that EO are moot. "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful

[4] Other Courts around the country have found standing to challenge the March EO on claims far more attenuated than those that Plaintiff advances here. *See, e.g.*, *Int'l Refugee Assistance Project v. Trump*, No. CV TDC-17-0361, 2017 WL 1018235, at *5-7 (D. Md. Mar. 16, 2017) (holding that LPRs who sponsored visa applications for family members affected by March EO travel ban have standing to challenge the March EO).

behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

The problem for Defendants' arguments regarding the January EO is two-fold. First, as described above, Plaintiff's claims relate primarily to the March EO—not the now-revoked January EO. Defendants apparently hope, via a mootness claim, to remove their conduct under the January EO from the Court's consideration. But Defendants' disregard for the rights of LPRs under the January EO remains relevant, for example, to the probability that they will again disregard Plaintiff's rights under the March EO. As Defendants freely admit in their Motion, the March EO was promulgated in response to the concerns expressed in federal court challenges to their conduct under the January EO. *See* ECF No. 36-1 at 9.

Second, the President has himself publicly contemplated returning to the January EO. *See* ECF No. 33-9. Specifically, at a political rally days after signing the March EO, President Trump complained that the March EO was a "watered down version of the first order" that was "tailored to the dictates" of a "flawed" Ninth Circuit ruling and that he believed that "we ought to go back to the first one and go all the way" to the Supreme Court. ECF No. 33 at ¶¶ 130-32. Defendants bear "[t]he formidable, heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Sheely v. MRI*

Radiology Network, P.A., 505 F.3d 1173, 1184 (11th Cir. 2007) (quotations omitted). *See also Friends of the Earth*, 528 U.S. at 190 ("[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."). Given that the President has recently contemplated returning to the problematic January EO, Defendants cannot show with certainty that the January EO is irrelevant.

And even if Defendants are correct that withdrawal of the January EO produced mootness, their arguments fail under the mootness exception for voluntary cessation. "It long has been the rule that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1283 (11th Cir. 2004) (quotation omitted). Courts must consider three factors: "(1) whether the challenged conduct was isolated or intentional, as opposed to a continuing and deliberate practice; (2) whether the defendant's cessation of the conduct was motivated by a genuine change of heart or timed to anticipate suit; and (3) whether, in ceasing the conduct, the defendant has acknowledged liability." *Thomas v. Branch Banking & Trust Co.*, 32 F. Supp. 3d 1266, 1268-69 (N.D. Ga. 2014) (Batten, Sr., J.).

Here, Defendants' conduct was—and is—continuing and deliberate. The January EO was part of an intentional policy intended to circumvent the rights of LPRs, and President Trump has publicly pined for reinstatement of that flawed EO. Even if this Court finds that Defendants have ceased their unlawful conduct under the January EO, both the timing of that cessation and the *actual text of the March EO* suggest that the new EO was related to the numerous lawsuits filed to challenge the EO rather than a true "change of heart." *See* ECF No. 33-2 at § 1(c).

Admittedly, a government is generally entitled to a presumption that once it has voluntarily ceased an illegal action, the objectionable behavior will not recur. *Troiano*, 382 F.3d at 1283. Critically, though, the government does not enjoy that presumption until the faulty policy has been "unambiguously terminated" and not when—as here—the government apparently intends to alternate between equally unlawful executive orders and stymy judicial review of its unlawful conduct. *Id.* at 1285. *See also*, *e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 and n. 11 (1982) (finding no mootness when a city had indicated it would reenact a challenged ordinance).

The Court should also decline to find mootness because Defendants' conduct here fits the "capable of repetition, yet evading review" exception to mootness. This exception requires that the Court find: (1) a reasonable expectation

or a demonstrated probability that the same controversy will recur involving the same complaining party, and (2) the challenged action was too short in duration to be fully litigated prior to its cessation or expiration. *See News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1507 (11th Cir. 1991). This exception is available when the challenged governmental activity casts a "brooding presence" over a party's interests. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974). *See, e.g.*, *Hall v. Bennett*, 999 F. Supp. 2d 1266, 1269-70 (M.D. Ala. 2014) (permitting challenge relating to special election based on likelihood that government would hold future, similar elections). Here Defendants clearly believe that the President has the ability to suspend the entry of returning LPRs into the United States without regard to the INA. Plaintiff deserves to have his statutory and constitutional rights adjudicated to avoid the "brooding presence" of that policy—whether under the March EO or under a renewed application of the January EO.

IV. Conclusion

For the foregoing reasons, Plaintiff requests that the Court deny Defendants' Motion to Dismiss. Pursuant to Local Rule 7.1(E) and the Court's standing order regarding motions, ECF No. 34 at ¶ 19, Plaintiff requests oral argument on this Motion in light of the important issues raised and their complexity. And as

discussed above, if the Court intends to treat this Motion as one for factual dismissal, Plaintiff believes that the hearing should be evidentiary in nature.

DATED May 8, 2017

Respectfully submitted,

/s/ Daniel P. Pierce
Theresia M. Moser
Georgia Bar No. 526514
Moser Law Co.
112 Krog Street N.E., Suite 26
Atlanta, Georgia 30307
Phone: (404) 537-5339
Fax: (404) 537-5340
tmoser@moserlawco.com

Carl W. Hampe (*pro hac vice*)
Daniel P. Pierce (*pro hac vice*)
Fragomen, Del Rey, Bernsen & Loewy LLP
1101 15th St. NW, Suite 700
Washington, DC 20005
Phone: (202) 223-5515
Fax: (202) 371-2898
champe@fragomen.com
dpierce@fragomen.com

Attorneys for Plaintiff

CERTIFICATE OF FONT AND POINT SELECTION

Undersigned counsel hereby certifies, pursuant to L.R. 7.1(D), N.D. Ga., that the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** was prepared in Times New Roman, 14 point font, which is one of the font and point selections approved in L.R. 5.1, N.D. Ga.

/s/ Daniel P. Pierce
Daniel P. Pierce

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed a true and correct copy of the within and foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** by using the Court's CM/ECF, which will automatically send e-mail notification of this filing to the following counsel of record:

Sheetul S. Wall
Department of Justice - Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
450 5th Street N.W.
Washington, D.C. 20044
(202) 598-2668
Email: Sheetul.S.Wall2@usdoj.gov

This 8th day of May 2017.

/s/ Daniel P. Pierce
Daniel P. Pierce

Attorney for Plaintiff