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

MOHAMMED ABDULLAH TAWFEEQ,	*	
Plaintiff,	*	**Civil Action No.: 1:17-CV-353-TCB**
v.	*	
JOHN F. KELLY, Secretary, U.S. Department of Homeland Security, *et. al.*	*	**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT**
Defendants.	*	

Defendants hereby reply to Plaintiff's Opposition to Defendants' Motion to Dismiss (ECF No. 37) (hereinafter, "Pl. Opp."). Plaintiff makes no allegations that Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017), titled "Protecting the Nation from Foreign Terrorist Entry Into the United States" ("the Order") is invalid and does not seek to enjoin enforcement of any provision thereof. (*See* Am. Compl. at 39.) Rather, Plaintiff asks this Court to preemptively issue a writ of mandamus ordering the government to apply the Order and the law to Plaintiff, and an injunction against not misapplying the law to Plaintiff. (Am. Compl. at 39.)

For purposes of this filing, Defendants accept as true Plaintiff's assertion that he is an Iraqi lawful permanent resident ("LPR") to whom the six categorical exceptions found

in §101(a)(13)(C)(i)-(vi) of the Immigration and Nationality Act ("INA"), 8 U.S.C §1101(a)(13)(C)(i)-(vi), do not apply. (*Id*. at ¶ 100.)

I. Plaintiff's Claims Are Not Justiciable

A. Plaintiff lacks standing because he has not suffered an injury that is fairly traceable to the Order.

Since the Order's effective date, March 16, 2017, Plaintiff does not allege he or any other Iraqi LPR similarly situated has been treated unlawfully in connection with the Order. Plaintiff alleges he has not traveled since the Order's effective date and cites to *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979), for the proposition that "Defendants cannot blame Plaintiff for not putting himself at risk when their actions caused the chilling effect on his travel." (Pl. Opp. at 15 n.3.)

Babbitt does not support Plaintiff's standing argument. There, the Supreme Court acknowledged that abstract questions are not justiciable by a federal court because there is no case or controversy. *Id*. at 297-98. (plaintiffs lacked standing where they "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," and holding that a threatened injury had to be "certainly pending" to result in standing). Thus, *Babbitt* does not support Plaintiff's claim to standing: the Parties *agree* that section 2 of the Order does not apply to Iraqis, (Am. Compl. at ¶ 10), and Plaintiff has alleged no facts that would make section 4 of the

Order applicable to him. (Pl. Opp. at 37). Plaintiff's alleged injury stems only from *his* uncertainty whether government employees will require Plaintiff to go through the "admission" process rather than allowing him entry as an LPR under INA §101(a)(13)(C), 8 U.S.C §1101(a)(13)(C). Most fatal to his claim, Plaintiff does not allege that he *or any other LPR* with Iraqi citizenship has ever been required to apply for admission at the border upon return from travel abroad due solely to the provisions of the Order,[1] or that anyone in the government has threatened to apply it in such situations.

B. Plaintiff lacks standing because all of Plaintiff's claims of imminent harm relate to his own unreasonable uncertainty

Plaintiff's claims of imminent harm center on his feelings of uncertainty with respect to section 4 of the Order even though he does not allege any circumstance under which it would apply to him. (Def. Mem. in Supp. of Mot. to Dism. at 13-14, 16, and Am. Compl. at ¶ 114.) Plaintiff seeks a preemptive order of mandamus from this Court compelling Defendants "to provide instructions to their employees to allow lawful [permanent] residents like Plaintiff to return to the United States under the criteria laid out in INA §101(a)(13)(C)." (Am. Compl. at 39.) However, Plaintiff does not allege that

[1] LPRs who fall within one of the categories enumerated in INA §101(a)(13)(C)(i)-(vi), 8 U.S.C §1101(a)(13)(C)(i)-(vi), are deemed to be seeking admission, *irrespective of the Order*. These statutory categories include LPRs who have committed certain crimes or who have abandoned their LPR status.

any government employee has failed to apply INA §101(a)(13)(C), 8 U.S.C §1101(a)(13)(C) since the effective date of the Order.[2]

Without alleging any supporting facts, Plaintiff attempts to show imminent harm by alleging his unfounded belief that "Defendants intend to subject him 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." (Pl. Opp. at 8.) Plaintiff cites to a voter registration case where the Court found that the plaintiffs' averment "that they intend to increase voter registration efforts and anticipate increased registration applications ahead of the upcoming presidential election" was sufficient to meet the immediacy requirement in showing imminent injury. (Pl. Opp. at 12). *See Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008).

Here, Plaintiff contends he meets the immediacy requirement because the injury is 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." (Pl. Opp. at 15.) Plaintiff does not identify, even generally, if and when he intends to travel

[2] Plaintiff alleges "On information and belief, Defendants intend to implement §1(g) and §4 of [the Order] to encumber the return of Iraqi lawful permanent residents," and that it "would be applied to Plaintiff when he presents himself for inspection after a trip abroad." (Am. Compl. at ¶ 125 & 126; *see also* Pl. Opp. at 8.) However, Plaintiff alleges no facts to support these speculative assertions.

abroad and return to the United States. Nor does he articulate how the Order would encumber his return if he did travel given that an LPR returning to the United States is not applying for an immigration benefit except under certain limited circumstances that do not apply here. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the someday will be—do not support a finding of the 'actual or imminent' injury" that is required for standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Thus, he does not meet the immediacy requirement.

Plaintiff cites to *Virginia v. American Booksellers Association*, 484 U.S. 383, 392-93 (1988), for the proposition that the immediacy requirements of imminent harm are met when the law is aimed directly at an individual and the individual's interpretation of the law is correct. (Pl. Opp. at 12-13.) In that case, there was no dispute that the criminal statute was aimed at the plaintiffs. *See Am. Bookseller's Ass'n.*, 484 U.S. at 384. But in this case, the Parties agree that sections 2 and 4 of the Order are not aimed at Plaintiff. Instead, Plaintiff's own allegations admit that his alleged prospective injury stems from conjecture—that government employees may not know the law and may apply section 4 to Plaintiff in a manner contrary to law if Plaintiff were to travel abroad and return to the United States. (Pl. Opp. at 19 "In essence, Plaintiff seeks this Court's assistance in ensuring that Defendants have properly understood and implemented the March EO . . .

and that they have conveyed that proper implementation to their agents in the field."). The assertion that government employees might incorrectly apply the law is entirely speculative, is not supported the by language of the Order, and there is no precedent to support Plaintiff's novel claim that this kind of speculation gives rise to standing.

Section 4 of the Order is inapplicable to Plaintiff. Plaintiff's claims of uncertainty stem from the following language of section 4 of the Order: "An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review." (Am. Compl. at ¶ 11; Pl. Opp. at 8.) However, as shown below, section 4 of the Order generally does not apply to Plaintiff.

First, notwithstanding Plaintiff's conjectures that CBP officers would not know that Plaintiff, as a returning LPR,[3] is not an applicant for "admission," (Pl. Opp. at 19), it cannot be disputed that if Plaintiff were to leave the United States, he would not make an application for a visa or "admission" upon his return. Rather, he would be treated as a "returning lawful permanent resident" as a matter of law under INA §101(a)(13)(C), 8 U.S.C §1101(a)(13)(C). Plaintiff's speculative uncertainty as to whether government employees will perform their duties in accordance with the law is contrary to elementary

[3] Defendants again note that, for purposes of this filing, Defendants accept as true Plaintiff's allegations that he would not be subject to any of the categorical exceptions found in INA §101(a)(13)(C)(i)-(vi), 8 U.S.C §1101(a)(13)(C)(i)-(vi). (Am. Compl. at ¶ 100.)

presumptions governing the regularity of government action, *see United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)[4], and does not satisfy the requirement that the threatened injury must be certainly impending. *See Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1148 (2013). Rather, Plaintiff's allegations stack contingency upon contingency, requiring the Court to assume that Government officials will willfully violate the law applicable to Plaintiff at some hypothetical future time and that the Government should be subject to injunctions that resolve no dispute and confer no rights. *N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426, 435 (1941) (an "obey the law" injunction can open a party to contempt proceedings and that such an encumbrance should not be imposed lightly). In sum, Plaintiff's arguments are a far cry from the actual, imminent, concrete injury necessary to articulate Article III standing, and cannot plausibly form the basis for a writ of mandamus requiring government officials to take specified, hypothetical future action.

Next, Plaintiff argues that he "plausibly" falls within the purview of "other immigration benefit" in section 4 of the Order because he is seeking the benefit of entry as an LPR under INA §101(a)(13)(C), 8 U.S.C §1101(a)(13)(C), which is an immigration

[4] "The presumption of regularity supports the official acts of public officers, and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Id.*

statute. (Pl. Opp. at 8.) However, merely alleging plausibility does not make it so. Plaintiff ignores the first part of the sentence, "*[a]n application* by any Iraqi national for a visa, admission, or other immigration benefit." (Order, § 4) (emphasis added). Here, upon Plaintiff's possible return to the United States, he would not be making an *application* for any immigration benefit, such as for "admission" or for a "visa," at the time of entry upon his return to the United States from a trip abroad, because it cannot be disputed that Plaintiff would be treated as a "returning lawful permanent resident" as a matter of law under INA §101(a)(13)(C), 8 U.S.C §1101(a)(13)(C).[5] Thus, Plaintiff cannot allege that there is any "immigration benefit" for which he has or will make an application, and any claims related to past or future harm with respect to the "other immigration benefit" language in section 4 is not cognizable.

Finally, because Plaintiff would not be subject to section 4, as discussed above, Plaintiff is not separately subject to the additional scrutiny that section imposes. The "thorough review" language in section 4 does not change the standard for determining whether an alien is admissible or otherwise entitled to enter, but requires the government to consult with specified agencies, as appropriate, and consider certain information

[5] Plaintiff himself alleges he is not subject to any of the categorical exceptions in INA §101(a)(13)(C)(i)-(vi), 8 U.S.C §1101(a)(13)(C)(i)-(vi), and Defendants accept this as true for this filing. (Am. Compl. at § 100.)

regarding possible connections of an applicant with national security or public safety threats. Given that Plaintiff would be a returning LPR who is not treated as an applicant for admission and would not be seeking "admission" or applying for any other "other immigration benefit" at the border upon his return, the "thorough review" requirement of section 4 would not apply to him.

Notwithstanding the Order, "[a] person claiming to have been lawfully admitted for permanent residence must establish that fact to the satisfaction of the inspecting officer and must present proper documents." 8 C.F.R. § 235.1(f)(1). The fact that Plaintiff, like every other person in the world seeking to enter the United States, might be subject to inspection pursuant to binding law unrelated to the Order cannot plausibly serve as the basis for cause of action articulated in Plaintiffs' pleadings. Therefore, Plaintiff has not articulated a past or ongoing injury related to section 4 of the Order.

C. This Court may not issue an advisory opinion regarding the Revoked Order.

Plaintiff is not disputing that Executive Order No. 13,769 ("Revoked Order") was explicitly revoked by the Order, but rather seeks a declaration from this Court that his 30-minute delay at Atlanta airport on January 30, 2017, was a refusal of entry into the United States pursuant to INA §101(a)(13)(C) on the basis of the Revoked Order. (Am. Compl at 39.) But such a declaration is prohibited under Article III which limits courts to deciding

live cases and controversies. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (A case is moot unless the litigant continues to have a personal stake in the outcome of the suit throughout all stages of federal judicial proceedings.); *Spencer v. Kemna*, 523 U.S. 1, 7–8 (1998) (If the litigant loses such a stake, the court must dismiss the petition rather than issue an advisory opinion on an abstract proposition of law.) Any declaration by this Court as to the character or lawfulness of any delay experienced by Plaintiff in January would have no practical effect on the Parties because Plaintiff's alleged delay is over, and because the Revoked Order was revoked there is absolutely no likelihood that Plaintiff will be affected by the Revoked Order in the future. Any decision by this Court would amount to an advisory opinion, which this Court lacks the authority to issue.

Moreover, even if this Court could issue a declaration about the source and lawfulness of Plaintiff's alleged 30-minute delay at the Atlanta airport, it would have no impact on Plaintiff's challenge to the Order. Plaintiff fails to explain how any delay on January 30, 2017 that might have resulted from the implementation of the Revoked Order, would be an indicator for how the current Order is being or will be implemented in the future. The content and the implementation of the Order are significantly different from that of the Revoked Order. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 1045950, *2-*3 (W.D. Wash. Mar. 16, 2017) (explaining the numerous substantive and

procedural differences between the two Executive Orders, including the delayed implementation of the current Order). Most relevant here, the entry bar in the new Order does not apply to LPRs, so the circumstance alleged by Plaintiff cannot recur. In any event, an alleged delay of 30 minutes is not a cognizable legal injury and cannot form the basis for a valid claim. *Cf. United States v. Flores-Montano*, 541 U.S. 149, 155 n.3 (2004) (noting in the context of a Fourth Amendment challenge that it is "clear that delays of one to two hours at international borders are to be expected.").

D. All of Plaintiff's Claims Arising from the Revoked Order are Moot and No Exception to the Mootness Doctrine Applies

Plaintiff argues his claims related to the Revoked Order are not moot because Defendants voluntarily ceased the alleged misconduct, (Pl. Opp. at 22), and because the alleged misconduct "is capable of repetition but could evade judicial review." (Pl. Opp. at 5). Both of these arguments fail. The Eleventh Circuit recognizes two exceptions to the mootness doctrine: (1) the "voluntary cessation" exception, and (2) the "capable of repetition yet evading review" exception. *See Church of Scientology Flag Serv. Org. v. City of Clearwater*, 777 F.2d 598, 606 n. 21 (11th Cir. 1985). Neither applies here.

First, the "voluntary cessation" exception provides 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." *Sec'y. of Labor v. Burger King Corp.*, 955 F.2d

681, 684 (11th Cir. 1992). "However, governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Coral Springs St. Sys. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir. 2004). In addition, where government parties are at issue, the exception does not apply where a superseding statute or regulation replaces the statute or regulation at issue, *unless* there is a "substantial likelihood that the challenged" statutory or regulatory "language will be reenacted." *Id*. Thus, "[w]hen government laws or policies have been challenged, the Supreme Court has held almost uniformly that cessation of the challenged behavior moots the suit." *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004); *accord Log Cabin Republicans v. United States*, 658 F.3d 1162, 1168 (9th Cir. 2011) ("voluntary cessation is different from a statutory amendment or repeal. Repeal is 'usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.'") As the Eleventh Circuit recently explained, "[t]he governing principle, as we have distilled it, is that 'in the absence of evidence indicating that the government intends to return to its prior legislative scheme, repeal of an allegedly offensive statute moots legal challenges to the validity of that statute.'" *U.S. v. Georgia*, 778 F.3d 1202, 1205 (11th Cir. 2015). Moreover, Plaintiffs bear the burden of proving otherwise, because "as a general matter, 'voluntary cessation by a government actor gives rise to a rebuttable presumption that the

objectionable behavior will not recur.'" *Id.*; *accord National Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (collecting cases) ("the mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists. Rather, there must be evidence indicating that the challenged law likely will be reenacted."). No such evidence is present here.

Plaintiff's fear that the Revoked Order might become active again, (Pl. Opp. at 21), is unfounded. He concedes the Order contains explicit language revoking it. (*Id.*) (Order, § 13 ("Executive Order 13769 of January 27, is revoked as of the effective date of this order")). The government has taken no steps to revive the Revoked Order and Plaintiff alleges no facts to the contrary. Merely alleging that Plaintiff believes the President of the United States "contemplates" returning to the Revoked Order does not meet the "voluntary cessation" exception to the mootness doctrine.[6] Rather, as the Eleventh Circuit has explained, voluntary cession does not apply where, as here, the "new policy . . . 'appears to have been the result of substantial deliberation' on the part of the alleged

[6] The government's continued commitment to the current Order is evidenced by the government's recent petition for a writ of certiorari to the Supreme Court in *International Refugee Assistance Project v. Trump*, -- F.3d --, 2017 WL 2273306 (4th Cir. 207), *petition for cert. filed*, No. 16-1436 (Jun. 1, 2017).

wrongdoers and has been 'consistently applied' in the recent past." *Troiano*, 382 F.3d at 1283.

Second, the "capable of repetition yet evading review" exception does not apply here. "To satisfy this standard, [Plaintiffs] must demonstrate (1) a 'reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party,' and (2) that the 'challenged action was in its duration too short to be fully litigated prior to its cessation or expiration.'" *See Naturist Soc'y., Inc. v. Fillyaw*, 958 F.2d 1515, 1520-21 (11th Cir. 1992) (quoting *The News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1507 (11th Cir.1991)). "[T]his exception is 'narrow,' and applies only in 'exceptional situations.'" *Soliman v. United States*, 296 F.3d 1237, 1242-43 (11th Cir 2002) (quoting *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health and Rehab. Servs.*, 225 F.3d 1208, 1216-17 (11th Cir. 2000)). Indeed, "the remote possibility that an event might recur is not enough to overcome mootness, and even a likely recurrence is insufficient if there would be ample opportunity for review at that time." *Id.*

Plaintiff cannot satisfy this stringent exception. Plaintiff does not allege he will be subjected to any actions, improper or otherwise, pursuant to the Revoked Order again in the future. Thus, he cannot show a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *See Fillyaw*, 958 F.2d at 1520-21. Second, Plaintiff does not allege "that the 'challenged action was in

its duration too short to be fully litigated prior to its cessation or expiration.'" *Id.* Therefore, Plaintiff alleges no facts to support "capable of repetition yet evading review" exception to the mootness doctrine.

II. CONCLUSION

Based on the foregoing and Defendants' Motion to Dismiss Amended Complaint and Memorandum in Support thereof, ECF No. 36, Defendants respectfully request the Court dismiss Plaintiff's Amended Complaint. Pursuant to Local Rule 7.1(E) and this Court's Instructions to Parties, ECF No. 34 at ¶ 19, Defendants defer to the Court's customary practice of deciding the matter without oral argument. The matters at issue in this case are not complex and Defendants believe the Court will be able to rule on the papers, without further argument from Parties' counsel.

DATED: June 6, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in LR 5.1B for documents prepared by computer.

s/ Sheetul S. Wall
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following lead counsel via CM/ECF:

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This 6th day of June, 2017.

s/ Sheetul S. Wall
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