UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HAMEED KHALID DARWEESH, and HAIDER SAMEER ABDULKHALEQ ALSHAWI, on behalf of themselves and others similarly situated,

Petitioners,

and

PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Plaintiff,

-against-

DONALD J. TRUMP, U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, JOHN KELLY, KEVIN K. MCALEENAN, and JAMES T. MADDEN,

Respondents.

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Case No. 17-cv-480 (CBA)

REPLY IN SUPPORT OF PETITIONERS' MOTION TO ENFORCE COURT ORDER BY COMPELLING RETURN OF INDIVIDUALS REMOVED

Representations made by the government in its brief opposing Petitioners' motion to compel return of individuals removed under the Executive Order ("EO") considerably simplify the dispute between the parties. The government has revealed the existence of a list of at least some of those who were excluded from the United States on the basis of the EO. It represents that it has already facilitated the return of about 25 percent of these individuals and will continue to do so in any case in which Petitioners' counsel or others provide the name of such an individual to the government. Petitioners seek only to ensure that the return of *all* individuals excluded on the basis of the EO after the filing of their suit, without counsel having to independently learn and provide names to the government one by one.

The government's claim that the return of individuals should occur only when Petitioners' counsel learns the names of individuals on their own is untenable. Likewise, the government's contention that individuals agreed to removal voluntarily is belied by its admission that these individuals chose to leave rather than be placed into removal proceedings and possible lengthy detention. That is not voluntarily agreeing to removal. If there are now a few individuals who genuinely do not wish to return, then they can simply say so after being contacted. But the government's view that it will facilitate the return of individuals only if Petitioners happen to learn of their existence is nonsensical. That is plainly not what Judge Donnelly intended by issuing a stay to protect the status quo while Petitioners' challenge was considered expeditiously and ensuring that individuals were not harmed in the interim.

I. THE GOVERNMENT SHOULD PROVIDE ITS LIST OF INDIVIDUALS EXCLUDED UNDER THE EO AND SHOULD ABIDE BY ITS COMMITMENT TO FACILITATING THE RETURN OF THOSE INDIVIDUALS.

The parties' dispute regarding the proper course moving forward appears to have substantially narrowed. First, the government concedes that a significant number of putative class members were excluded from the United States because of the Executive Order. The government has submitted evidence that it has an accounting of who at least some of those individuals are, thus belying its prior position that it would face insurmountable difficulties to producing such a list. Dkt. 146-1, Second Hoffman Decl. ¶ 8; Dkt. 68 at 5 (Respondents' Opposition to Petitioners' Motion to Enforce). And the government has said it will work with Petitioners' counsel to facilitate the return of any of those individuals who can be identified. Dkt. 146, Respondents' Opp. Br. to Mot. to Enforce (hereinafter "Opp. Br.") at 10. Thus, the issue before the Court on this motion is reduced to how the individuals who were excluded and remain abroad should be identified, and how their return should be facilitated.

Second, the government concedes that it denied entry to some "individuals subject to the Executive Order with visas revoked by the Department of State" whom "CBP encountered" on January 27 and 28, 2017, Dkt. 146-1, Second Hoffman Decl. ¶ 7, but it ignores the *other* members of Petitioners' proposed class. In particular, the government has provided no information whatsoever as to (a) approved refugees, (b) lawful permanent residents, and (c) others from one of the seven listed countries who were "legally authorized to enter the United States, but who have been or will be denied entry to the United States on the basis of the [EO]." Dkt. 1, ¶ 56 (Petition for Writ of Habeas Corpus and Complaint). Pursuant to Judge Donnelly's order, the government should have provided this information long ago, and those additional putative class members should receive the same relief on this motion: an opportunity to return.

The government's current, *ad hoc* process, relies on Petitioners' counsel and others to identify individuals abroad. *See* Dkt. 146-2, Decl. of Bryan Giblin, ¶ 6 ("I am aware that upon specific request by CBP consular sections overseas have reached out *to named individuals* whose visas were canceled by CBP pursuant to E.O. 13769 for the purpose of issuing those individuals transportation letters to facilitate travel") (emphasis added). The government's offer to facilitate the return of putative class members on a case-by-case basis essentially relies on Petitioners' counsel to identify class members abroad. But counsel's attempts to do so—without the list of putative class members Judge Donnelly ordered the government to produce—has been necessarily inefficient and incomplete, relying on attorneys seeking to help individual clients or desperate family and friends who are able to locate and contact Petitioners' counsel. There is no doubt that Petitioners' counsel, denied access to the complete information that is solely in the possession of the government, have to date identified far less than the complete universe of individuals excluded under the Executive Order, in spite of extensive efforts and outreach.

In the government's view, Petitioners' counsel should continue scrambling to identify individuals through whatever information they can gather. This approach makes no sense given that the government already has at least a partial list of those who have been excluded, and has provided that list to the State Department in order to facilitate return.[1] Dkt. 146-1, Second Hoffman Decl. ¶ 17. It therefore can easily provide the same to Petitioners and honor its representation to the Court that it will continue to facilitate their return, and should do so.

II. PETITIONERS SEEK ONLY LIMITED PRELIMINARY RELIEF, AND THE GOVERNMENT'S ARGUMENTS TO THE CONTRARY ARE MISPLACED.

Contrary to the government's assertion in its brief, Petitioners do not in this motion seek final judgment, permanent relief, or ultimate class certification. Opp. Br. at 4-8. There is now no dispute that putative class members were excluded under the EO and remain abroad. In its opposition to Petitioners' Motion to Enforce, Respondents reveal for the first time that, at a minimum, 141 individuals were deemed inadmissible and prevented from entering the United States based on the EO between January 27, 2017 and February 3, 2017—a period that covers time *after* the Court issued its stay order prohibiting removal under the EO of any individuals nationwide. *See* Dkt. 146-1, Second Hoffman Decl. ¶ 8; Dkt. 8, Jan. 28, 2017 Order (enjoining the removal of individuals under the Executive Order). The government further discloses that only 38 of these 141 individuals have been allowed to enter the United States since February 3, 2017. Dkt. 146-1 ¶¶ 8-10. The relief Petitioners seek in this motion is thus not only limited but amply justified.

The government suggests that all the vast majority of the individuals they identify as having been excluded under the EO "voluntarily" withdrew their applications for admission. *Id.*

[1] There is, however, no indication that the Department of State is conducting any outreach to individuals excluded under the EO based on the provision of this list by CBP or otherwise taking steps to facilitate the return of listed individuals.

¶ 10. And the government argues that some of the individuals who were removed may not want to come back. *Id*. at 11. But there is significant evidence of systemic coercion, and many if not most or nearly all of the individuals who were excluded want at least the opportunity to return—as evident by the many individuals who have already returned despite the ordeal they suffered during their initial exclusion. *See* Dkt. 53-1 at 15-17 (describing government's coercive tactics outlined in declarations of removed individuals). Petitioners obviously do not argue that any class member *must* come back; but the government can and should facilitate the identification of class members and their return if they wish.

The government's argument that the return of putative class members is equivalent to this Court granting relief on the ultimate merits is wrong. *See* Opp. Br. at 4-7. Requiring the return of putative class members is not at all equivalent to issuing a "permanent injunction on the merits" on the relief sought in this matter. *Id*. at 4. Requiring return would not, for example, be a ruling on the merits of Petitioners' Equal Protection or Due Process claims, but would simply be a necessary order to ensure proper enforcement of the Court's stay order and to preserve the status quo ante while this Court considers the merits.

Likewise, there is no merit to the government's suggestion that Petitioners seek a premature certification of the class. *Id*. at 7-8. The government's effort to argue otherwise is nothing more than a repackaging of its argument that because the named Petitioners themselves are no longer detained, the Court need not and cannot grant relief to any other members of the putative class. Judge Donnelly already rejected that view for the limited purposes of her stay order. *See* Stay Hr'g Tr. 4:1-6 (Court responding to the government's contention that the case was moot because the two named Petitioners had been released by asking, "What about all the other people in the class?"); *id*. at 13:14-16 (finding a likelihood of class certification). The

relief sought in this motion must be understood as essential to ensure enforcement of the court's original stay order and restoration of the status quo ante.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their Motion to Enforce and order Respondents to return to the United States all individuals who were removed at any time after the filing of Petitioners' motion for class certification because of the Executive Order.

Dated: February 20, 2017

Respectfully submitted,

/s/ Karen C. Tumlin

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Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Karen C. Tumlin, hereby certify that on February 20, 2017, the foregoing motion and accompanying exhibits were filed and served through the CM/ECF system. Parties may access the filings through the Court's CM/ECF System.

Dated: February 20, 2017

/s/ Karen C. Tumlin
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