

THE HONORABLE JAMES L. ROBART

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

STATE OF WASHINGTON; STATE
OF CALIFORNIA; STATE OF
MARYLAND; COMMONWEALTH
OF MASSACHUSETTS; STATE OF
NEW YORK; and STATE OF
OREGON,

Plaintiffs,

v.

DONALD TRUMP, in his official
capacity as President of the United
States; U.S. DEPARTMENT OF
HOMELAND SECURITY; ELAINE
C. DUKE, in her official capacity as
Acting Secretary of the Department of
Homeland Security; REX
TILLERSON, in his official capacity
as Secretary of State; and the UNITED
STATES OF AMERICA,

Defendants.

CIVIL ACTION NO. 2:17-cv-00141-JLR

MOTION TO LIFT STAY OF
PROCEEDINGS

Motion Noted: October 16, 2017

I. INTRODUCTION

On September 24, 2017, President Trump issued a third immigration ban. Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists and Other Public-Safety Threats, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (“EO3”). EO3 *indefinitely* restricts entry to the United States by foreign nationals from six Muslim-majority countries, plus Venezuela and North Korea, suspending entirely immigrant visas for *anyone* from the six Muslim-majority countries. This severe and expansive proclamation suffers from many of the same constitutional and statutory deficiencies as EO1 and EO2. The new immigration ban goes into effect nationwide on October 18, 2017.

The plaintiff States—including their residents, employers, health care systems, and educational institutions—will face immediate harms if EO3 is allowed to take effect as scheduled. Accordingly, the States respectfully request that the Court lift the stay of proceedings so that the States may move to amend their complaint and seek emergency relief.

The States have conferred with counsel for Defendants. Defendants do not oppose lifting the stay. However, as detailed below, Defendants take a different position than the States as to the appropriate timing and briefing schedule for the State’s accompanying Motion for a Temporary Restraining Order. *See infra*, at pp. 7-8.

The States respectfully propose that Defendants be given until 12:00 noon Pacific Daylight Time (PDT) on October 15, 2017, to file a response to the Motion for a Temporary Restraining Order. The States will forego a reply brief and respectfully request that a hearing be scheduled at 1:00 p.m. PDT on October 16, 2017, on the States’ Motion for a Temporary Restraining Order.¹

¹ This proposed briefing schedule closely tracks the schedule in *Hawai’i v. Trump*, CV No. 17-00050 DKW-KSC, __ F. Supp. 3d __, 2017 WL 2989048 (D. Haw. July 13, 2017). There, the district court ordered the *Hawai’i* plaintiffs to file their Motion for Leave to File a Third Amended Complaint and Motion for a Temporary Restraining order by 6:00 a.m. Hawaii Standard Time (HST) on October 10, 2017. The Government must file its response to both

II. RELEVANT PROCEDURAL HISTORY

The State of Washington first filed this lawsuit challenging President Trump’s issuance of Executive Order No. 13769 (“EO1”) on January 30, 2017. ECF 1. On February 3, 2017, this Court granted the State’s motion for a temporary restraining order (“TRO”) and enjoined enforcement of several provisions of EO1. ECF 52. The Ninth Circuit denied Defendants’ emergency motion for a stay of the injunction. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam). Defendants chose not to seek review by the Supreme Court.

On March 6, 2017, President Trump issued Executive Order No. 13780 (“EO2”), which revoked EO1. Two days later, Defendants withdrew their Ninth Circuit appeal in this case. ECF 111. Following the issuance of EO2, Washington, California, Maryland, Massachusetts, New York, and Oregon (“States”)² filed an amended complaint challenging EO2. ECF 152. The States moved for a TRO to enjoin sections 2(c) and 6(a) of EO2. ECF 148.

On March 15, 2017, in a separate suit against EO2, the district court in Hawai‘i enjoined Sections 2 and 6 nationwide. *Hawai‘i v. Trump*, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017). The next day, in a third lawsuit, the district court in Maryland issued a nationwide injunction against Section 2(c). *Int’l Refugee Assistance Project (“IRAP”) v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017). In light of the *Hawai‘i* ruling, this Court stayed consideration of the States’ motion for a TRO. ECF 164. The Court then granted Defendants’ request for a stay of this case pending the Ninth Circuit’s resolution of the *Hawai‘i* appeal. ECF 175, 189.

The Ninth Circuit issued its opinion in *Hawai‘i* on June 12, 2017, largely affirming the injunction. *Hawai‘i v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam). Defendants

motions by 6:00 a.m. HST on October 14, 2017. Each of those deadlines is one day prior to the dates proposed by the States here.

² The Court had previously granted Oregon’s motion to intervene on March 9, 2017. ECF 112.

1 petitioned the Supreme Court for a writ of certiorari, applied for a stay pending appeal, and
2 requested that the *Hawai‘i* case be consolidated with *IRAP*, where the Fourth Circuit had
3 largely affirmed the injunction entered by the district court. *IRAP v. Trump*, 857 F.3d 554 (4th
4 Cir. 2017) (en banc). The Supreme Court granted certiorari, granted the stay application “to the
5 extent the injunctions prevent enforcement of § 2(c) with respect to foreign nationals who lack
6 any bona fide relationship with a person or entity in the United States,” consolidated the two
7 cases, and set the case for argument. *Trump v. IRAP*, 137 S. Ct. 2080, 2087 (U.S. 2017). The
8 parties in this case agreed that the stay should remain in place pending the outcome of the
9 Supreme Court proceedings, but that any party could move to lift the stay if circumstances
10 changed. ECF 192.

11 On June 28, 2017, Defendants began to enforce the non-enjoined parts of EO2 and
12 published guidance interpreting the Supreme Court’s definition of “bona fide relationship” to
13 exclude many family members and most refugees. *See Hawai‘i v. Trump*, ___ F. Supp. 3d ___,
14 CV No. 17-00050 DKW-KSC, 2017 WL 2989048, at *5-6 (D. Haw. July 13, 2017)
15 (summarizing guidance). Plaintiffs in the *Hawai‘i* litigation successfully challenged
16 Defendants’ interpretation of “bona fide relationship,” and the Ninth Circuit upheld the lower
17 court’s injunction preventing Defendants from enforcing EO2 against grandparents and other
18 family members or refugees who have formal assurances from resettlement agencies or are in
19 the U.S. Refugee Admissions Program. *Hawai‘i v. Trump*, ___ F.3d ___, No. 17-16426, 2017
20 WL 3911055, at *14 (9th Cir. Sept. 7, 2017). The Supreme Court stayed the Ninth Circuit
21 mandate with respect to refugees covered by a formal assurance. *Trump v. Hawai‘i*, ___ S. Ct.
22 ___, Nos. 17A275, 16-1540, 2017 WL 4014838, at *1 (U.S. Sept. 12, 2017).

23 On September 24, 2017, EO2 expired, and President Trump issued EO3, a Presidential
24 Proclamation titled, “Enhancing Vetting Capabilities and Processes for Detecting Attempted
25 Entry into the United States by Terrorists or Other Public-Safety Threats.” 82 Fed. Reg. 45,161
26 (Sept. 27, 2017). EO3 again suspends immigration by hundreds of millions of people from six

1 Muslim-majority countries, and applies “additional scrutiny” to immigrants from Iraq, another
 2 Muslim-majority country. EO3 §§ 1(g), 2(a)–(c), (e), (g)–(h).³ The order also suspends large
 3 classes of non-immigrants like students, businesspeople, and tourists. EO3 §§ 2(a)–(h). The
 4 non-immigrant restrictions vary by country and by type of visa. *Id.* EO3’s restrictions contain
 5 no sunset date—they apply indefinitely. The new entry restrictions and limitations go into
 6 effect at 12:01 a.m. EST on October 18, 2017. EO3 § 7(b).

7 Following the issuance of EO3, the Supreme Court removed the *Hawai‘i* and *IRAP*
 8 cases from the oral argument calendar and directed the parties to file letter briefs addressing
 9 whether, or to what extent, EO3 rendered the cases moot. *Trump v. Hawai‘i*, __ S. Ct. __, No.
 10 16-1540, 2017 WL 2734554, at *1 (U.S. Sept. 25, 2017). On October 10, 2017, the Supreme
 11 Court dismissed *IRAP* as moot and directed the Fourth Circuit to vacate its opinion, finding
 12 that there was no longer a live controversy because the only section of EO2 enjoined in *IRAP*
 13 had “expired by its own terms on September 24, 2017.” *Trump v. IRAP*, __ S. Ct. __, No. 16-
 14 1436, 2017 WL 4518553 (U.S. Oct. 10, 2017). The Court “express[ed] no view on the merits.”
 15 *Id.*

16 III. ARGUMENT

17 A. Circumstances Have Changed and Lifting the Stay Is Warranted

18 “When circumstances have changed such that the court’s reasons for imposing [a] stay
 19 no longer exist or are inappropriate, the court may lift the stay.” *Hawai‘i v. Trump*, 233 F.
 20 Supp. 3d 850, 854 (D. Haw. 2017) (quoting *Crawford v. Japan Airlines*, No. 03-00451 LEK-
 21 KSC, 2013 WL 2420715, at *6 (D. Haw. May 31, 2013)); accord *CMAX, Inc. v. Hall*, 300
 22 F.2d 265, 270 (9th Cir. 1962) (“Should there be substantial change in circumstances indicating
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24 ³ The order also suspends all entry by North Koreans and entry by certain non-
 25 immigrants from Venezuela. EO3 §§ 2(d)(ii), 2(f)(ii). These provisions will affect very few
 26 travelers. In 2015, for example, 55 immigrants were admitted from North Korea, compared to
 13,114 immigrants from Iran. 3d Am. Compl. ¶ 204. The provision affecting Venezuelans
 applies only to certain government officials and their families.

1 that the trial should not be further delayed, [the party opposing the stay] may seek a district
 2 court order resetting the case for trial.” “Logically, the same court that imposes a stay of
 3 litigation has the inherent power and discretion to lift the stay.” *Canady v. Erbe Elektromedizin*
 4 *GmbH*, 271 F. Supp. 2d 64, 74 (D.D.C. 2002).

5 Here, there can be no question that Defendants have significantly changed the
 6 circumstances. In allowing EO2 to expire and in issuing EO3 with new terms, changed banned
 7 countries, and no expiration date, Defendants have shifted the facts and legal standards at play.
 8 In light of these changed circumstances, the federal district courts in Hawai‘i and Maryland
 9 have already allowed plaintiffs to move to amend their complaints and seek injunctive relief
 10 concerning EO3. *See Hawai‘i v. Trump*, No. 1:17-cv-00050-DKW-KSC (D. Haw.), ECF 366
 11 (Oct. 6, 2017) (lifting stay of proceedings to allow Plaintiffs to move to amend their complaint
 12 and move for a TRO against EO3); *IRAP v. Trump*, No. 8:17-cv-00361-TDC (D. Md.), ECF
 13 201 (Oct. 4, 2017) (granting Plaintiffs leave to amend their complaint and move for a
 14 preliminary injunction against EO3).⁴ Defendants invited these developments by informing the
 15 Supreme Court that, “[i]f respondents (or anyone else) believes [EO3] violates their rights,
 16 they can file new challenges and those claims will not evade review” Suppl. Brief of
 17 Petitioners at 6, *Trump v. IRAP*, __ S. Ct. __ (U.S. Oct. 5, 2017) (No. 16-1436, 16-1540). This
 18 Court should also lift the stay.

19 **B. The States Will Suffer Significant Harm if the Stay is Not Lifted**

20 In considering whether to lift the stay, the Court should consider the possible damage
 21 that may result from leaving the stay in place. *CMAX*, 300 F.2d at 268 (identifying factors
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23 ⁴ Defendants did not oppose the plaintiffs’ request to resume proceedings or challenge
 24 EO3 in either case. *Hawai‘i v. Trump*, ECF 363 (Oct. 16, 2017) (“[T]he Government consents
 25 to Plaintiffs’ request to lift the stay in order to challenge EO-3.”); *IRAP v. Trump*, ECF 198
 26 (Sep. 29, 2017) (noting “Defendants do not oppose the motion for leave to amend the
 complaint” but request not to file a response “until the Plaintiffs’ preliminary injunction
 motion is resolved”).

1 weighed by the court in determining the propriety of a stay, including possible damage that
 2 may result). If EO3 takes effect, the imminent harms to the States and their residents will be
 3 significant. The States have detailed those harms in the proposed Third Amended Complaint
 4 and accompanying declarations. 3d Am. Compl. ¶¶ 16-129 (citing relevant declarations). The
 5 States wish to amend their complaint and seek emergency relief against EO3 before it takes
 6 effect on October 18, 2017. If the stay is not lifted to allow the States to challenge EO3 and
 7 seek emergency relief, the States will suffer irreparable harm. Accordingly, this factor weighs
 8 in favor of lifting the stay.

9 **C. Allowing the States to Amend the Complaint and Seek Emergency Relief From**
 10 **Unlawful EO3 Poses No Hardship or Inequity to Defendants**

11 In contrast to the significant and widespread harm and inequity that the States will
 12 suffer if the stay is not lifted, Defendants will not suffer any hardship or inequity from having
 13 to respond to a legal challenge and request for injunctive relief concerning EO3. This factor
 14 also weighs in favor of lifting the stay. *CMAX*, 300 F.2d at 268 (identifying hardship or
 15 inequity which a party may suffer as additional factor weighed by the court in determining
 16 propriety of a stay).

17 As both the Supreme Court and the Ninth Circuit have cautioned, “‘if there is even a
 18 fair possibility that the stay . . . will work damage to someone else,’ the stay may be
 19 inappropriate absent a showing by the moving party of ‘hardship or inequity.’” *Dependable*
 20 *Highway Express, Inc., v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (quoting
 21 *Landis v. North Am. Co.*, 299 U.S. 248, 255 (1936)); *Lockyer v. Mirant Corp.*, 398 F.3d 1098
 22 (9th Cir. 2005). A stay is particularly inappropriate where the party is seeking injunctive relief
 23 against ongoing and future harm. *See Lockyer*, 398 F.3d at 1112 (holding that a stay is
 24 inappropriate where the plaintiff seeks injunctive relief against ongoing and future harm as
 25 opposed to damages for past harm).
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1 Here, there is more than just a “fair possibility” that the stay will “work damage” to the
2 States and to the residents, employers, health care systems, and educational institutions that
3 they seek to protect. If the States’ claims have merit, which the accompanying proposed Third
4 Amended Complaint and Motion for a Temporary Restraining Order show that they do,
5 Defendants’ unlawful actions threaten widespread harm that is certain to commence on
6 October 18, 2017.

7 Furthermore, Defendants have not filed a responsive pleading in this case yet and will
8 have the opportunity to oppose the States’ request for emergency relief. The fact that
9 Defendants will be required to respond to these pleadings does not, by itself, constitute a
10 hardship. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 1050354, *4 (W.D. Wash. Mar.
11 17, 2017) (“[B]eing required to defend a suit, without more, does not constitute a clear case of
12 hardship or inequity’ for purposes of a stay.”) (quoting *Lockyer*, 398 F.3d at 1112). In fact,
13 Defendants already have to respond to similar legal claims in other litigation challenging EO3,
14 so they can make no claim of prejudice from being required to go forward here.

15 Lastly, Defendants themselves fully controlled the decision and timing surrounding the
16 issuance of EO3, and those decisions gave rise to the States’ need to amend their complaint
17 and seek emergency relief. It would be extraordinarily unfair to prevent the States from taking
18 necessary action to respond to the change in circumstances that Defendants created.

19 Defendants take the position that:

20 “The Government does not oppose lifting the stay, but the Government
21 does not believe it is either necessary or appropriate for the Court to
22 decide Plaintiffs’ TRO motion before October 18. There will be no
23 irreparable injury to Plaintiffs from a brief delay in entry from the
24 Proclamation while the issues are adjudicated on a reasonable briefing
25 schedule. Moreover, the Government believes it should be given at least
26 14 days to file its opposition to plaintiffs’ TRO motion. Any less time

1 would be prejudicial, especially since Plaintiffs have created any urgency
2 by waiting 17 days after the Proclamation was issued before filing their
3 TRO motion, despite knowing the Proclamation would take effect after 23
4 days. The Government should not be disadvantaged, nor the Court
5 burdened, by Plaintiffs' delay."⁵

6 Defendants' proposed schedule for the timing and briefing of the State's accompanying motion
7 for a temporary restraining order is untenable in light of the irreparable harm the States will
8 face if EO3 is allowed to take effect on October 18. Defendants' position conveniently ignores
9 that Defendants had 90 days to announce EO3 but waited until the very evening that EO2
10 expired before doing so. Furthermore, EO3 announces large-scale changes to immigration law
11 with less than one month between the announcement and its implementation. The States moved
12 expediently in evaluating the legality of EO3 and assessing the impacts it would have on their
13 residents, employers, health care systems, and educational institutions. The States' motion to
14 lift the stay in order to seek leave to amend the complaint, and a temporary restraining order
15 against EO3, is made promptly to avoid the irreparable harm the States' will face as a result of
16 Defendants' unlawful actions.

17 Thus, the equities weigh in favor of lifting the stay.

18 **D. Lifting the Stay Will Benefit the Orderly Course of Justice**

19 Lifting the stay furthers the course of justice, and the pending Supreme Court appeal
20 does not alter this outcome. It is true that courts often stay proceedings where resolution of an
21 appeal in another matter is likely to provide guidance to the court in deciding the issues before
22 it. *See Landis*, 299 U.S. at 254; *see also Leyva v. Certified Grocers of California, Ltd.*, 593
23 F.2d 857, 863 (9th Cir. 1979). Indeed, this Court stayed these proceedings due to the fact that
24

25 ⁵ E-mail from Michelle Bennett, Trial Attorney, U.S. Department of Justice, Civil
26 Division, Federal Programs Branch, to Colleen Melody, Civil Rights Unit Chief, Washington
State Attorney General's Office (Oct. 11, 2017, 08:49 PDT) (on file with author).

1 both this lawsuit and *Hawai‘i* involved similar challenges to sections 2 and 6 of EO2. *See* ECF
 2 189 at 4-5. However, the Supreme Court proceedings in *Hawai‘i* and *IRAP* involve only the
 3 legality of EO2, and Defendants have now argued that even those appeals are moot. Suppl.
 4 Brief of Petitioners at 1, *Trump v. IRAP*, ___ S. Ct. ___ (U.S. Oct. 5, 2017) (No. 16-1436, 16-
 5 1540). The Supreme Court has not requested briefing on, and no party has argued, the legality
 6 of EO3. *Trump v. Hawai‘i*, ___ S. Ct. ___, No. 16-1540, 2017 WL 2734554, at *1 (U.S. Sept. 25,
 7 2017); Suppl. Brief of Petitioners, *Trump v. IRAP*, ___ S. Ct. ___ (U.S. Oct. 5, 2017) (No. 16-
 8 1436, 16-1540); Suppl. Brief of Respondents, *Trump v. IRAP*, ___ S. Ct. ___ (U.S. Oct. 5, 2017)
 9 (No. 16-1436, 16-1540). In fact, the Supreme Court has now dismissed *IRAP* as moot and
 10 directed the Fourth Circuit to vacate its opinion, finding that there was no longer a live
 11 controversy because the only section of EO2 enjoined in *IRAP* had “expired by its own terms
 12 on September 24, 2017.” *Trump v. IRAP*, ___ S. Ct. ___, No. 16-1436, 2017 WL 4518553 (U.S.
 13 Oct. 10, 2017). The Court “express[ed] no view on the merits.” *Id.* Because the Supreme Court
 14 appeal in *IRAP* did not consider the legality of EO3, nor is the appeal in *Hawai‘i* likely to
 15 (even if the Court addresses it), this Court should lift the stay and allow the States’ challenge to
 16 EO3 to proceed.

17 IV. CONCLUSION

18 The Court should lift the stay to allow the States to file an amended complaint and seek
 19 emergency relief against EO3 before it takes effect on October 18, 2017.

20 RESPECTFULLY SUBMITTED this 11th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

October 11, 2017

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

STATE OF WASHINGTON; STATE OF CALIFORNIA; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF NEW YORK; and STATE OF OREGON,

Plaintiffs,

v.

DONALD TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; ELAINE C. DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants.

CIVIL ACTION NO. 2:17-cv-00141-JLR

[PROPOSED] ORDER GRANTING MOTION TO LIFT STAY

Plaintiff States of Washington, California, Maryland, New York, Oregon, and the Commonwealth of Massachusetts (“States”) move to lift the stay of proceedings. ECF 189.

Having considered the motion, and Defendants’ response, if any, the Court concludes that circumstances have changed such that lifting the stay is warranted. Accordingly, the Court GRANTS the motion and lifts the stay of proceedings.

1 IT IS SO ORDERED.

2
3 DATED this _____ day of October, 2017.
4

5 _____
6 UNITED STATES DISTRICT JUDGE
7

8 Presented by:

9 /s/ Noah G. Purcell
10 BOB FERGUSON, WSBA #26004
11 Attorney General
12 NOAH G. PURCELL, WSBA #43492
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15 Civil Rights Unit Chief
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