No. 17-1351

IN THE

United States Court of Appeals
for the Fourth Circuit

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland, No. 17-cv-00361

JOHN DOE #8 MOTION FOR LEAVE TO INTERVENE ON BEHALF OF PLAINTIFFS-APPELLEES AND FILE A SEPARATE BRIEF

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the length limits in Local Rule 27(d)(2) because it contains 3,502 words, excluding documents required by Rule 27(a)(2)(B). It has been prepared in a proportionally spaced typeface using the Times New Roman font in 14 point.

Dated: April 24, 2017

Respectfully submitted,

/s/ *Lena Masri*
Lena F. Masri

Counsel of Record for John Doe #8

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, John Doe #8 states that he is not a publicly held corporation or other publicly held entity, has no parent corporations, subsidiaries, or affiliates, and issues no stock. No publicly held corporation has a direct financial interest in the outcome of this litigation.

Dated: April 24, 2017

Respectfully submitted,

/s/ *Lena Masri*
Lena F. Masri

Counsel of Record for John Doe #8

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

MOTION TO INTERVENE AND FILE A SEPARATE BRIEF

John Doe #8 respectfully moves to intervene in this appeal pursuant to Local Rule 12(e) as a party to similar pending litigation in *Sarsour et al. v. Trump et al.*, No. 1:17-cv-00120 (E.D. Va.). Pursuant to Local Rule 28(d), John Doe #8 also moves to file a separate Brief, attached hereto as Appendix A. Such intervention is appropriate because *en banc* resolution of the Administrative Procedure Act ("APA")/Immigration Nationality Act ("INA") claim will have a binding effect on similar claims made by John Doe #8, which were decided differently by the district court for reasons that have not yet been briefed in this appeal.

Pursuant to Local Rule 27(a), undersigned counsel for John Doe #8 contacted counsel for both parties to the appeal. Counsel for the International Refugee Assistance Project *et al.* take no position on John Doe #8's request for intervention. Counsel for the United States opposes John Doe #8's intervention.

If intervention is denied, John Doe #8 respectfully moves for leave to file the Brief as *amicus curiae*. This Motion and proposed Brief comport with the provisions of Fed. R. App. P. Rule 27 and Loc. R. 29-1.

STATEMENT OF THE CASE

On January 27, 2017, President Trump issued Executive Order 13769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 8977 ("Jan. 27 Order"); J.A. 451-59. The order, *inter alia*,

banned entry into the United States for 90 days by citizens or nationals of seven predominantly Muslim countries.

On January 30, 2017, John Doe #8 was one of 27 plaintiffs who filed a lawsuit in the Eastern District of Virginia seeking to enjoin enforcement of the order in its entirety on multiple constitutional and statutory grounds. *See* Compl. for Injunctive and Declaratory Relief and Jury Demand at 20-32, *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Jan. 30, 2017), ECF No. 1. John Doe #8, a lawful permanent resident from Sudan living in Missouri, had filed a marriage petition for his wife, a Sudanese national living in Sudan. The marriage petition was approved, but his wife's visa application to enter the United States remains pending. Pursuant to the Executive Order, her application would be denied based on her Sudanese national origin and her Muslim faith, preventing John Doe #8 from reuniting with his wife.

Of note, John Doe #8 and the *Sarsour* plaintiffs alleged that the Executive Order violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, because it entails agency action that is contrary to law. As amended, the complaint points to Section 1152 of the Immigration and Nationality Act ("INA"), which states that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's … nationality." Amended Compl. for Injunctive and Declaratory Relief and Jury Demand at 48,

Sarsour v. Trump No. 1:17-cv-00120 (E.D. Va. Mar. 13, 2017), ECF No. 11 (citing 8 U.S.C. § 1152(a)(1)(A)). As an additional count, John Doe #8 and the *Sarsour* plaintiffs alleged that the Executive Order violates the INA itself, once again pointing to Section 1152's nondiscrimination provision. Id. at 50.

On February 7, 2017, the International Refugee Assistance Project ("IRAP") *et al.* filed a separate lawsuit in the District of Maryland that is the subject of this appeal. J.A. 22. The amended complaint alleged, in a single count, a violation of the APA and the INA, also citing Section 1152. J.A. 253.

On February 9, 2017, the Court of Appeals for the Ninth Circuit upheld a nationwide injunction against operative parts of the Jan. 27 Order. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017). In response, the President issued a "watered down version"[1] of the original order on March 6, 2017. 82 Fed. Reg. 13209 ("Mar. 6 Order" or "the Order"). The Order, *inter alia*, banned entry to the U.S. for individuals from six of the seven original Muslim countries for 90 days. Mar. 6 Order § 2.

On March 10, the *IRAP* plaintiffs filed a motion for a preliminary injunction of § 2 the Order. J.A. 30. On March 13, John Doe #8 and the *Sarsour* plaintiffs filed a motion for preliminary injunction against the entire Order, including § 2.

[1] Jacob Pramuk, Trump May Have Just Dealt a Blow to His Own Executive Order, CNBC, Mar. 15, 2017, http://www.cnbc.com/2017/03/15/trump-may-have-just-dealt-a-blow-to-his-own-executive-order.html.

Pls.' Emergency Mot. For Temporary Restraining Order And/Or Preliminary Injunction, *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Mar. 13, 2017), ECF No. 13. On March 15, the district court in *IRAP* granted a preliminary injunction against § 2 of the Order, J.A. at 36, as did a district court in Hawai'i in a similar case. *Hawai'i v. Trump*, No. 17-cv-50, 2017 WL 1011673 (D. Haw. Mar. 15, 2017). The *IRAP* court specifically found that the plaintiffs were likely to succeed on their statutory INA claim based on § 1152's non-discrimination provision. J.A. 793. It also found that the plaintiffs met the "zone of interests" test under the APA, concluding that they "have standing to assert the claim under 8 U.S.C. § 1152." J.A. 785.

But on March 24, the district court in *Sarsour* declined to enjoin any portion of the Order, reaching opposite conclusions about these statutory claims. *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Mar. 24, 2017), ECF No. 36 (attached as Appendix B). Specifically, the *Sarsour* court found that the INA claim against § 2 was unlikely to succeed on the merits even if the Order discriminates on the basis of nationality. Id. at 16. Additionally, the *Sarsour* court found that the Order is not reviewable under the APA because the President is not an "agency" and as a result, that the APA claim was also unlikely to succeed on the merits. Id. at 17.

On March 23, this Court set an expedited briefing schedule in the government's appeal of the *IRAP* decision. Accelerated Briefing Order, Mar. 23,

2017, Ct. of App. ECF No. 26. It has also agreed to decide the case *en banc*, in the first instance. Order, Apr. 13, 2017, Ct. of App. ECF No. 125. The parties have filed their principal briefs, with the brief for plaintiff-appellees filed on April 14. But even though both briefs contain extensive argument on the merits of the INA claim under § 1152, neither of them discusses the APA claim or addresses the government's (successful) argument in *Sarsour* that the Order is non-reviewable.

Because the APA claim is common to both cases, and because it is closely linked to the INA claim, John Doe #8 now moves this Court to intervene on appeal in order to protect his interests, and for the limited purpose of ensuring that any binding, *en banc* resolution of the INA issue has the benefit of briefing on the attendant APA issue that is, apparently, in dispute.

ARGUMENT

I. John Doe #8 Is Entitled to Intervene as of Right Under Local Rule 12(e)

The Fourth Circuit authorizes motions to intervene on appeal pursuant to Local Rule 12(e) and has repeatedly granted such motions in the past. *See, e.g., Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *North Carolina, ex rel. Cooper v. Tenn. Valley Auth*., 615 F.3d 291 (4th Cir. 2010); *CSX Transp., Inc. v. U.S. Cruises, Inc.*, 989 F.2d 492 (Table) (4th Cir. 1993); *Atkins v. State Bd. Of Educ.*, 418 F.2d 874 (4th Cir. 1969) (per curium).

When determining whether to grant a motion to intervene on appeal, this

Court considers the factors established by Federal Rule of Civil Procedure 24. *See, e.g.*, *Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Ass'n*, 646 F.2d 117, 120 (4th Cir. 1981); *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (citing *Newport News*, 646 F.2d); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989); *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999); *see also Carter v. Welles-Bowen Realty, Inc.*, 628 F.3d 790 (6th Cir. 2010); *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997).

Under Rule 24(a), intervention as of right must be granted when a party files a "timely motion" showing that "(1) it has an interest in the subject matter of the action, (2) disposition of the action may practically impair or impede the movant's ability to protect that interest, and (3) that interest is not adequately represented by the existing parties." *Newport News*, 646 F.2d at 120. Under Rule 24(b), permissive intervention may be granted when a party files a "timely motion" and "has a claim or defense that shares with the main action a common question of law or fact." And as this Court has recognized, "liberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir.1986) (internal quotation marks and citations omitted).

John Doe #8 satisfies each of these requirements. First, he has a significant interest in the action, which concerns the validity of a preliminary injunction that is

protecting him from irreparable harm, and that is similar to the order he sought, unsuccessfully, in the Eastern District of Virginia. Second, an unfavorable disposition of this action, by the *en banc* Court, would likely be determinative of his statutory claims and impair his ability to pursue them in the Fourth Circuit or any district therein. Third, John Doe #8's interests are not adequately represented by the existing parties, which did not address the APA issue in their briefs on appeal. The question is tied to resolution of the INA claim, and it was dispositive in the *Sarsour* decision.

A. John Doe #8 Has a Protected Interest in the Subject Matter of this Appeal

This appeal concerns the validity of an injunction that is protecting John Doe #8 from irreparable harm, similar to the order Doe himself sought in the Eastern District of Virginia. Indeed, the *IRAP* and *Sarsour* cases have progressed along parallel tracks following the Jan. 27 Order, with the initial *IRAP* complaint filed just one week after the complaint in *Sarsour*.

Both sets of plaintiffs moved for preliminary injunctions within days of the revised Order, and just three days apart from each other. Both asserted that § 2 violates the APA and the INA. And there is no dispute that John Doe #8 stands to suffer grievous harm by enforcement of the Order should the defendants prevail on appeal. Indeed, the *Sarsour* court agreed that all of the plaintiffs seeking an injunction, including John Doe #8, had sufficiently shown that they would suffer

"cognizable injury caused by personal contact" as a result of the Order's implementation. *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Mar. 24, 2017), ECF No. 36, at 10.

The difference between these cases is how the district courts resolved their claims. The *IRAP* court treated them together, stemming from the combined count, and found them to have merit. But the *Sarsour* court analyzed each claim separately, as alleged, coming to the opposite conclusion on the merits of the INA argument and specifically finding that the Order is non-reviewable under the APA. Given that the INA and APA claims are closely related and raised by plaintiffs in both cases, John Doe #8 has a strong interest in their resolution by this Court, both because of the harm that enforcement of the Order would cause him directly and because of the binding effect that an unfavorable decision would have on his own pending litigation.

B. Disposition of this Appeal May Practically Impair John Doe #8's Ability to Protect His Interests

The *IRAP* and *Sarsour* cases involve common questions of fact and law, the *en banc* resolution of which will have *stare decisis* effects in the Fourth Circuit. As a result, John Doe #8 has an interest in preventing precedent that could impair his ability to appeal the denial of his request for a preliminary injunction or further litigate the merits of his case. Indeed, the intent of Rule 24 was to permit a party to intervene as of right in just such a situation. *See* Wright & Miller, *Federal Prac.*

&Proc. § 1908.2 ("The central purpose of the 1966 amendment was to allow intervention by those who might be practically disadvantaged by the disposition of the action and to repudiate the view, expressed in authoritative cases under the former rule, that intervention must be limited to those who would be legally bound as a matter of res judicata."). And as this Court has recognized, "*stare decisis* by itself may furnish the practical disadvantage required under 24(a)." *Francis v. Chamber of Commerce of U. S.*, 481 F.2d 192, 195 (4th Cir. 1973) (citing *Nuesse v. Camp*, 128 U.S.App. D.C. 172, 385 F.2d 694, 701 (1967).

Here, John Doe #8's interests would be impaired by the *stare decisis* effects of an unfavorable *en banc* decision on the INA and APA issues. As this Court found in *Feller v. Brock*, such "practical impairment" is sufficient to justify intervention as of right under Rule 42. 802 F.2d 722, 730 (4th Cir. 1986) (practical impairment was present for proposed intervenors where disposition of case affected scope of existing injunction affecting them, and *stare decisis* effect of case would "substantially impair" their ability to rely on existing precedent); *see also U.S. Army Corps of Engineers*, 302 F.3d 1242, 1258 (11th Cir. 2002) (granting intervention on appeal where "[b]ecause a final ruling in this case may adversely impact SeFPC's ongoing lawsuit against the Corps, we find that its interests could be impaired by the denial of intervention."); *Foster v. Gueory*, 655 F.2d 1319, 1324-25 (D.C. Cir. 1981) (intervention proper where intervenors and plaintiffs

"have each contended that their respective rights under Title VII and under § 1981 have been violated by the same practices of the defendants"); *Hartman v. Duffy*, 158 F.R.D. 525, 534 (D.D.C. 1994) (intervention proper where "Petitioners assert that, because they are challenging the same discriminatory policy exhibited through the same or similar subjective hiring practices as those the Plaintiffs experienced, the potential *stare decisis* effects of a ruling denying intervention would, as a practical matter, impair their interests."); *United States v. State of Or.*, 839 F.2d 635, 638 (9th Cir. 1988) (granting intervention where "an appellate ruling will have a persuasive stare decisis effect in any parallel or subsequent litigation"); *U.S. ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1396 (9th Cir. 1992) (finding no "serious[] dispute" that a party may intervene in a suit that might "preclude [it] from proceeding with claims" in a separate proceeding).

C. John Doe #8's Interests Are Not Adequately Represented

A movant seeking to intervene as of right need only show that representation of his interests "may be" inadequate, and the burden of showing so is "minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972); *United Guar. Residential Ins. Co. of Iowa v. Philadelphia Sav. Fund Soc.*, 819 F.2d 473, 475 (4th Cir. 1987) (citing *Trbovich* for adequacy standard). Here, John Doe #8's interests are not adequately represented by the existing parties because they did not address the APA issue in their primary briefs on appeal.

While devoting substantial argument to whether the Order violates the INA, neither of the parties in *IRAP* has briefed whether the APA permits such a claim, or others like it. The Maryland district court seemed to imply that the *IRAP* plaintiffs could bring a claim under the APA, although it did not say so explicitly. J.A. 785 (finding "standing to assert the claim under 8 U.S.C. § 1152."). This may be a minor distinction in *IRAP* because the plaintiffs combined their APA and INA claims into a single count in the complaint. But John Doe #8 has a stand-alone claim that the Order violates the APA, which the government opposed. Defs.' Mem. Of Law in Opposition to Ptfs.' Mot. For Temporary Restraining Order And/Or Preliminary Injunction at 17-20, *Sarsour v. Trump,* No. 1:17-cv-00120 (E.D. Va. Mar. 17, 2017), ECF No. 22. Moreover, the district court explicitly found that the president's executive order is not reviewable under the APA. Thus, even if this Court agrees that the Order violates § 1152 of the INA, John Doe #8 may still be unable to succeed on his claim that the Order constitutes unlawful agency action in violation of the APA. Consequently, John Doe #8 seeks to intervene to ensure that his interests in resolution of the APA claim are adequately represented on appeal.

D. This Motion is Timely

The Fourth Circuit uses three factors to evaluate timeliness: "[F]irst, how far the underlying suit has progressed; second, the prejudice any resulting delay might

cause the other parties; and third, why the movant was tardy in filing its motion." *Alt v. U.S. E.P.A.*, 758 F.3d 588, 591 (4th Cir. 2014).

This motion is timely because John Doe #8 did not learn until April 14 that the appellees would not address the APA issue in their appellate brief. At that point, counsel for the *Sarsour* plaintiffs began work immediately to confer with their clients, determine their legal recourse, draft pleadings, and contact counsel in *IRAP* for consent to intervene.

Although this appeal will be heard *en banc*, it involves a preliminary injunction in an underlying lawsuit that is not yet three months old. The parties are still litigating over a timetable for discovery. Nonetheless, this Court has granted an expedited briefing schedule and John Doe #8 has no intention of "derailing a lawsuit within sight of the terminal." *Scardelletti v. Debarr*, 265 F.3d 195, 202 (4th Cir. 2001), rev'd on other grounds, *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002).

Accordingly, the purpose of John Doe #8's intervention is limited to protecting his interests and briefing this Court on the APA issue common to both cases. *See Brink v. DaLesio*, 667 F.2d 420, 428 (4th Cir. 1981) (holding that district court abused its discretion in denying post-judgment motion to intervene in class action lawsuit when standing issue was decided concurrently with the merits), *opinion modified and superseded on denial of reh'g*, (4th Cir. Jan. 19, 1982). This

intervention will not unduly prejudice the parties or necessarily delay the proceedings. The appellants were fully capable of arguing that the Order is non-reviewable under the APA, as they did in *Sarsour*, yet they chose not to do so here. Thus, responding to this Motion and Brief would not require appellants to expend "extra effort." *Alt v. U.S. E.P.A.*, 758 F.3d at 591-92.

Finally, any delay in intervening was not the result of a strategic litigation decision. Counsel for John Doe #8 acted with all deliberate speed to craft this Motion and Brief, and requests to intervene prior to oral argument, while expedited briefing is still ongoing.

II. John Doe #8 Is Entitled to Permissive Intervention

Under Fed. R. Civ. Proc. 24(b), The Fourth Circuit may grant permissive intervention when a party files a "timely motion" and "has a claim or defense that shares with the main action a common question of law or fact."

As discussed above, this Motion is timely and John Doe #8 is currently litigating the same INA and APA issues involved in this appeal. The Court should therefore grant permission to intervene so that John Doe #8 is not deprived of his day in court with respect to the critical legal questions that are likely to be resolved by the *en banc* Court.

As the Supreme Court notes, "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of

law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). And here, intervention is particularly appropriate because of the binding effect on John Doe #8. *See 7C* Fed. Prac. & Proc. Civ. § 1911 (3d ed.) ("[T]he stare-decisis effect on the absentee may tip the scales in favor of allowing permissive intervention even by one who is adequately represented."). Judicial economy and the need for guidance also weigh in favor of permissive intervention. *See In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991).

This appeal will affect the outcome of John Doe #8's pending action as well as his ability to reunite with his wife. The Court should therefore permit John Doe #8 to participate in this appeal.

III. John Doe #8 Is Entitled to File a Separate Brief

John Doe #8 is entitled to file a separate brief on the APA issue for the same reasons that intervention is appropriate. Resolution of the INA claim involves APA issues that are not addressed in the principal briefs.

CONCLUSION

John Doe #8's motion to intervene as of right should be granted. In the alternative, John Doe #8's motion for permissive intervention should be granted. And if John Doe #8's motion to intervene is denied, he should be granted leave to file the attached Brief as *amicus curiae*.

Dated: April 24, 2017

Respectfully submitted,

/s/ *Lena Masri*
Lena F. Masri

Counsel of Record for John Doe #8

CERTIFICATE OF SERVICE

I certify that on April 24, 2017, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically *via* that system.

Dated: April 24, 2017

Respectfully submitted,

/s/ *Lena Masri*
Lena F. Masri

Counsel of Record for John Doe #8