

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 FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

Motion Noted: October 16, 2017

I. INTRODUCTION

On September 24, 2017, President Trump issued a Presidential Proclamation titled, “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats,” 82 Fed. Reg. 45,161 (Sept. 27, 2017)

1 (“EO3”). Like its predecessors, EO3 again suspends or restricts immigration by hundreds of
2 millions of people. EO3’s provisions take effect October 18, 2017, and apply indefinitely.

3 The States of Washington, California, Maryland, New York, Oregon, and the
4 Commonwealth of Massachusetts (“States”) request leave to amend their complaint to assert
5 that EO3 injures the States and their residents. The States also seek to allege that EO3 suffers
6 from many of the same constitutional and statutory deficiencies as the first and second
7 Executive Orders. The States have conferred with the Defendants, and they do not oppose this
8 motion. The States respectfully request that the Court grant leave to file the accompanying
9 proposed Third Amended Complaint.

10 II. FACTUAL AND PROCEDURAL HISTORY

11 The State of Washington first filed this lawsuit challenging President Trump’s issuance
12 of Executive Order No. 13769 (“EO1”) on January 30, 2017. ECF 1. On February 3, 2017, this
13 Court granted the State’s motion for a temporary restraining order (“TRO”) and enjoined
14 enforcement of several provisions of EO1. ECF 52. The Ninth Circuit denied Defendants’
15 emergency motion for a stay of the injunction. *Washington v. Trump*, 847 F.3d 1151 (9th Cir.
16 2017). Defendants chose not to seek review by the Supreme Court.

17 On March 6, 2017, President Trump issued Executive Order No. 13780 (“EO2”), which
18 revoked EO1. Two days later, Defendants withdrew their Ninth Circuit appeal in this case.
19 ECF 111. Following the issuance of EO2, Washington, California, Maryland, Massachusetts,
20 New York, and Oregon (“States”)¹ filed an amended complaint challenging EO2. ECF 152.
21 The States moved for a TRO to enjoin sections 2(c) and 6(a) of EO2. ECF 148.

22 On March 15, 2017, in a separate suit against EO2, the district court in Hawai‘i
23 enjoined Sections 2 and 6 nationwide. *Hawai‘i v. Trump*, 241 F. Supp. 3d 1119, 1140 (D. Haw.
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25 _____
26 ¹ The Court had previously granted Oregon’s motion to intervene on March 9, 2017.
ECF 112.

1 2017). The next day, in a third lawsuit, the district court in Maryland issued a nationwide
2 injunction against Section 2(c). *Int'l Refugee Assistance Project ("IRAP") v. Trump*, 241 F.
3 Supp. 3d 539, 566 (D. Md. 2017). In light of the *Hawai'i* ruling, this Court stayed
4 consideration of the States' motion for a TRO. ECF 164. The Court then granted Defendants'
5 request for a stay of this case pending the Ninth Circuit's resolution of the *Hawai'i* appeal.
6 ECF 175, 189.

7 The Ninth Circuit issued its opinion in *Hawai'i* on June 12, 2017, largely affirming the
8 injunction. *Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curium). Defendants
9 petitioned the Supreme Court for a writ of certiorari, applied for a stay pending appeal, and
10 requested that the *Hawai'i* case be consolidated with *IRAP*, where the Fourth Circuit had
11 largely affirmed the injunction entered by the district court. 857 F.3d 554 (4th Cir. 2017) (en
12 banc). The Supreme Court granted certiorari, granted the stay application "to the extent the
13 injunctions prevent enforcement of § 2(c) with respect to foreign nationals who lack any bona
14 fide relationship with a person or entity in the United States," consolidated the two cases, and
15 set the case for argument. *Trump v. IRAP*, 137 S. Ct. 2080, 2087 (2017). The parties in this
16 case agreed that the stay should remain in place pending the outcome of the Supreme Court
17 proceedings, but that any party could move to lift the stay if circumstances changed. ECF 192.

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

5 On September 24, 2017, EO2 expired, and President Trump issued EO3. EO3 suspends
6 all immigration from six Muslim-majority countries, and applies “additional scrutiny” to
7 immigrants from Iraq, another Muslim-majority country. EO3 §§ 1(g), 2(a)–(c), (e), (g)-(h).²
8 The order also suspends entry by large classes of non-immigrants like students,
9 businesspeople, and tourists. EO3 §§ 2(a)-(h). The non-immigrant restrictions vary by country
10 and by type of visa. EO3 takes effect October 18, 2017, and applies indefinitely.

11 Following the issuance of EO3, the Supreme Court removed the *Hawai‘i* and *IRAP*
12 cases from the oral argument calendar and directed the parties to file letter briefs addressing
13 whether, or to what extent, EO3 rendered the cases moot. *Trump v. Hawai‘i*, --- S. Ct. ----, No.
14 16-1540, 2017 WL 2734554, at *1 (U.S. Sept. 25, 2017). On October 10, 2017, the Supreme
15 Court dismissed *IRAP* as moot and directed the Fourth Circuit to vacate its opinion, finding
16 that there was no longer a live controversy because the only section of EO2 enjoined in *IRAP*
17 had “expired by its own terms on September 24, 2017.” *Trump v. IRAP*, --- S. Ct. ----, No. 16-
18 1436, 2017 WL 4518553 (U.S. Oct. 10, 2017). The Court “express[ed] no view on the merits.”
19 *Id.*

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24 ² 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 affected Venezuelans
applies only to certain government officials and their families.

1 **III. ARGUMENT**

2 **A. Leave to Amend is Proper**

3 The Federal Rules of Civil Procedure allow parties to seek leave to amend their
4 pleadings before trial, and “[t]he Court should freely give leave when justice so requires.” Fed.
5 R. Civ. P. 15(a)(2). Indeed, “[f]ederal policy favors freely allowing amendment so that cases
6 may be decided on their merits.” *Wizards of the Coast LLC v. Cryptozoic Entm’t LLC*, 309
7 F.R.D. 645, 649 (W.D. Wash. 2015) (citing *Martinez v. Newport Beach City*, 125 F.3d 777,
8 785 (9th Cir. 1997)). “This policy is ‘to be applied with extreme liberality.’” *Eminence*
9 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (quoting *Owens v. Kaiser*
10 *Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (additional citation omitted)).

11 When leave to amend is sought before the defendants have filed a responsive pleading,
12 as here³, the presumption in favor of granting leave is at its highest. “Under Rule 15(a), leave
13 to amend should be granted freely until the defendant files a responsive pleading.”⁴ *Martinez v.*
14 *Newport Beach City*, 125 F.3d 777, 785 (9th Cir. 1997); *see also Johnson v. Mammoth*
15 *Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992) (“Under Rule 15(a), leave to amend
16 should be granted as a matter of course, at least until the defendant files a responsive
17 pleading.”); *Eminence Capital, LLC*, 316 F.3d at 1052 (holding that, in circumstances like
18 these, “there exists a *presumption* under Rule 15(a) in favor of granting leave to amend”)
19 (emphasis in original)). The party opposing amendment bears the “burden of showing that

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22 ³ The Court previously granted Defendants’ motion for an extension of time to file a
23 response to the Second Amended Complaint until 10 days after the Court resolved Defendants’
24 Motion to Stay. ECF 183. The Court subsequently granted the Motion to Stay. ECF 189.
25 Defendants have never filed a response to the Complaint, First Amended Complaint or the
26 Second Amended Complaint.

⁴ “After that point, leave to amend should be granted unless amendment would cause
prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay.”
Martinez, 125 F.3d at 785 (citing *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160
(9th Cir. 1989)); *Johnson*, 975 F.2d at 607 (same).

1 amendment is not warranted.” *Wizards of the Coast*, 309 F.R.D. at 649 (citing *DCD Programs,*
2 *Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)).

3 Here, the States have promptly sought leave to amend prior to the effective date of
4 EO3, October 18, 2017, and seventeen days after the issuance of the EO3, which shares
5 constitutional and statutory infirmities of its predecessors and will begin to harm the States as
6 soon as it is implemented.

7 Defendants do not oppose the States’ motion, and have requested that the States
8 represent their position as follows: “The Government does not object to Plaintiffs’ motion to
9 amend their complaint on the condition that the Court extends the Government’s deadline to
10 respond to the amended complaint until after Plaintiffs’ TRO motion, and any subsequent
11 motion for a preliminary injunction, is resolved.” This position is consistent with Defendants’
12 in related litigation challenging EO3 in the Districts of Maryland and Hawai‘i, where
13 Defendants did not oppose plaintiffs’ motions for leave to amend their complaints to include
14 claims challenging EO3. *See* Plaintiff’s Request for Pre-Motion Conference at 2, *Hawai‘i v.*
15 *Trump*, No. 1:17-cv-00050-DKW-KSC (D. Haw. Sept. 29, 2017), ECF 198; Order at 2, *IRAP*
16 *v. Trump*, No. TDC-17-0361 (D. Md. Oct. 4, 2017), ECF 201 (granting leave to amend).
17 Likewise, the Solicitor General informed the Supreme Court that the Defendants expects that
18 challenges to EO3 will proceed in the district courts. Letter Brief of Petitioner at 5, *Trump v.*
19 *IRAP*, No. 16-1436 (U.S. Oct. 5, 2017) (“The lower courts should be considering challenges to
20 [EO3] . . . based on its text, operation and findings”).

21 For these reasons, the Court should grant the request for leave to file the accompanying
22 Third Amended Complaint.

1 **B. The States Should Be Granted Leave to Seek Redress for Their Ongoing Harms**

2 Defendants’ continuing course of conduct, and the course of conduct mandated by
3 EO3, harms the States. Like EO1 and EO2, EO3 harms the States’ families, educational
4 institutions, economy, businesses, and health care systems.

5 EO3 will again result in our States’ residents being separated from their families, often
6 in heartbreaking situations—and, this time, indefinitely. *See, e.g.*, ECF 194-23 (Decl. Bina) ¶¶
7 4, 6 (WA resident with rare form of cancer cannot travel and EO3 will prevent Iranian parents
8 from coming to care for her); ECF 194-21 (Decl. Ayoubi) ¶ 10 (WA resident’s wife unable to
9 move to United States if EO3 is implemented); ECF 118-4 (Decl. Althaibani) ¶¶ 8-12 (NY
10 resident prevented from living with husband).

11 EO3 will also damage our States’ public universities and colleges. The States’ public
12 universities and colleges have hundreds of students and faculty members from the targeted
13 countries. *See, e.g.*, ECF 194-40 (5th Decl. Chaudhry) ¶ 5 (140 students and 9 faculty members
14 at WSU); ECF 194-43 (2d Decl. Eaton) ¶ 4 (105 graduate students at UW); ECF 194-51 (2d
15 Decl. Heatwole) ¶¶ 4-5, 10 (180 students and 25 employees at University of Massachusetts);
16 3d Am. Compl. ¶¶ 53, 58 (529 students in the University of California system); *id.* ¶ 75
17 (University System of Maryland has employees from EO3 targeted countries). Like with the
18 first two executive orders, the universities again risk losing current and future students from
19 the targeted countries, along with the associated tuition revenue. *See, e.g.*, ECF 194-40 (5th
20 Decl. Chaudhry) ¶ 11; ECF 194-39 (3d Decl. Branon) ¶¶ 4-6; ECF 194-43 (2d Decl. Eaton) ¶
21 5; ECF 194-59 (Decl. Yoganarasimhan) ¶¶ 5-7; ECF 194-42 (Decl. Detwiler) ¶ 5; ECF 194-44
22 (Decl. Ehsani) ¶ 11; ECF 194-54 (Decl. Nofallah) ¶ 8. They also risk losing talented faculty
23 members, as several faculty members have already indicated that they are considering
24 positions in other countries to avoid indefinite separation from their families under EO3. *See,*
25 *e.g.*, ECF 194-26 (Decl. Hajishirzi) ¶¶ 9-10; ECF 194-37 (Decl. Alaghi) ¶ 9; ECF 194-52
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1 (Decl. Hosseinzadeh) ¶ 8. The departure of such faculty members, many of whom teach or
2 conduct research in highly specialized fields and bring in substantial research grants to the
3 universities, will injure the universities' reputations and educational programs. *See, e.g.*, ECF
4 194-55 (4th Decl. Riedinger) ¶¶ 3-4.

5 States' businesses will also suffer injuries. The State of Washington's technology
6 industry, for example, heavily relies on immigrants and nonimmigrants from the banned
7 countries to serve as data scientists and software engineers. *See e.g.*, Ex. 194-33 (Decl.
8 Soroush) ¶¶ 1-6 (Apple software engineer); Ex. 194-28 (Decl. Jazayeri) ¶ 2-6 (Facebook
9 software engineer); Ex. 194-35 (Decl. Vaezi) (Microsoft data scientist) ¶¶ 2-6. Washington
10 companies, including Amazon, Expedia, and Starbucks, employ many people originally from
11 the banned countries. *See, e.g.*, ECF 6 (Decl. Blackwell-Hawkins) ¶¶ 3, 7; ECF 7 (Decl.
12 Dzielak) ¶¶ 4, 18. Small businesses have also sustained cumulative, irreparable harm with each
13 successive EO. *See, e.g.*, ECF 194-62 (2d. Decl. Zawaideh) ¶¶ 2-8; *see also* 3d Am. Comp. ¶¶
14 74, 86. EO3 also will negatively impact the States' coffers by reducing tourism tax revenue.
15 *See, e.g.*, ECF 194-60 (2d. Decl. Oline) ¶¶ 10-15; ECF 194-61 (2d. Decl. Soike) ¶¶ 2-14; 3d
16 Am. Comp. ¶ 121 (economic injury to Oregon).

17 Finally, EO3 will also cause lasting harm to the States' health care systems. Physicians
18 from the banned countries provide health care for our residents. ECF 194-64 (2d Decl. de
19 Leon) ¶¶ 5-7; ECF 118-46 (Decl. Johnson) ¶ 11; ECF 194-66 (2d Decl. Overbeck) ¶ 6 (Oregon
20 Health Authority); ECF 194-64 (2d Decl. Akhtari) ¶¶ 13, 18. Like its predecessors, the order
21 will impede the States' efforts to recruit and retain providers of primary care, dental health, and
22 mental health services, particularly in underserved areas of our States. *See* ECF 118-32 (Decl.
23 Fullerton) ¶¶ 5-7, 14-19; ECF 118-43 (Decl. Akhtari) ¶¶ 14, 16-17; ECF 100 (Decl. Overbeck)
24 ¶¶ 3-6. EO3 will negatively affect physicians who perform critical public health work. *See*
25 ECF 194-67 (2d Decl. Parsian) ¶¶ 5-16 (cancer radiologist); ECF 194-68 (Decl. Zangeneh) ¶¶
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1 3-8 (HIV prevention research). Our medical schools, and particularly those that participate in
2 the National Resident Matching Program, will be unable to offer residency to students from
3 restricted or banned countries. *See* ECF 118-47 (Decl. Scherzer) ¶¶ 15-17 (New York); 3d
4 Amend. Compl. ¶ 60 (California), *id.* ¶ 127 (Oregon). These harms, which undermine the
5 depth and strength of our health care systems, will have lasting effects for the provision of
6 healthcare in our States.

7 IV. CONCLUSION

8 For the foregoing reasons, Washington respectfully requests that the Court grant leave
9 to file the Third Amended Complaint submitted concurrently herewith.

10 DATED this 11th day of October, 2017.

11 Respectfully submitted,

12
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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

/s/ Noah G. Purcell
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