No. 19-350
(8:17-cv-00361-TDC)
(8:17-cv-02921-TDC)
(1:17-cv-02969-TDC)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; KEVIN K. MCALEENAN, In his official capacity as Acting Secretary of Homeland Security; MICHAEL R. POMPEO, In his official capacity as Secretary of State; JOSEPH MAGUIRE, In his official capacity as Acting Director of National Intelligence; MARK A. MORGAN, in his official capacity as Senior Official Performing the Functions and Duties of the Commissioner of U.S. Customs and Border Protection; KENNETH T. CUCCINELLI, in this official capacity as Acting Director of U.S. Citizenship and Immigration Services; WILLIAM P. BARR, in his official capacity as Attorney General of the United States,

Defendants-Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a Project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, INC. on behalf of itself and its clients; JOHN DOES #1 AND 3; JANE DOE #2; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients; YEMENI-AMERICAN MERCHANTS ASSOCIATION; MOHAMAD MASHTA; GRANNAZ AMIRJAMSHIDI; FAKHRI ZIAOLHAGH; SHAPOUR SHIRANI; AFSANEH KHAZAELI; JOHN DOE #5; JOHN DOE #4; IRANIAN ALLIANCES ACROSS BORDERS; JANE DOE #1; JANE DOE #3; JANE DOE #4; JANE DOE #5; JANE DOE #6; IRANIAN STUDENTS' FOUNDATION, Iranian Alliances Across Borders Affiliate at the University of Maryland College Park; EBLAL ZAKZOK; SUMAYA HAMADMAD; FAHED MUQBIL; JOHN DOE #2,

Plaintiffs-Respondents.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR STAY OF DISTRICT COURT PROCEEDINGS

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INTRODUCTION

Plaintiffs filed these actions more than two years ago, seeking relief from a Presidential Proclamation that imposed (and continues to impose) enormous hardship on their families. The District Court has now held that Plaintiffs' claims, challenging the Proclamation as unconstitutional, are cognizable and should go forward. That finding is consistent with well-settled law, and is entirely consistent with the Supreme Court's opinions in *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018), which while finding that the plaintiffs in that case had not established an entitlement to preliminary injunctive relief, explicitly contemplated that the cases challenging the Proclamation would be remanded for further proceedings at the district court level.

The District Court thus appropriately rejected Defendants' second attempt to stay discovery in these cases. This Court should not upset that exercise of discretion, which merely allows these cases to finally proceed in the normal course to discovery, and which is entitled to substantial deference.

The District Court's well-reasoned opinion found both that the Government will not suffer any hardship in the absence of a stay and that Plaintiffs would suffer significant harm each and every day that these cases are stayed. The District Court further found that the Government's claims regarding judicial economy and the burdens of discovery were premature and indicated that it would supervise discovery

as it goes forward to address any such issues, should they arise. The District Court therefore concluded that the balance of equities did not favor a stay of proceedings.

There is no reason for this Court to find that the District Court exercised its discretion inappropriately. Defendants' longshot appeal of the denial of their motion to dismiss does not excuse the Government from the ordinary burdens of civil litigation, especially when a stay would come at such a substantial cost to Plaintiffs. The public interest also weighs in favor of allowing discovery to proceed so that Plaintiffs' constitutional claims—which have wide public significance—can be resolved as expeditiously as possible. This Court should therefore deny the Government's motion to stay district court proceedings.

STATEMENT OF FACTS

Plaintiffs challenge the validity and enforceability of Presidential Proclamation 9645,[1] the President's third attempt to fulfill his repeated promises to ban Muslims from the United States. (*See generally IRAP* v. *Trump*, No. 17-361, D. Ct. Doc. 219; *IAAB* v. *Trump*, No. 17-2921, D. Ct. Doc. 46; *Zakzok* v. *Trump*, No. 17-2969, D. Ct. Doc. 36.) Versions of the President's discriminatory policy toward Muslims have now been in effect for more than two years.

[1] Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161 (Sept. 27, 2017).

A. The District Court's Preliminary Injunction Order

The individual Plaintiffs in these cases are U.S. citizens and lawful permanent residents whose relatives—including spouses, parents, and children—are unable to obtain visas while the Proclamation is in effect. (*See generally IRAP*, No. 17-361, D. Ct. Doc. 219; *IAAB*, No. 17-2921, D. Ct. Doc. 46; *Zakzok*, No. 17-2969, D. Ct. Doc. 36, at 21-35.) The Proclamation has prevented the individual Plaintiffs from reuniting with their family members and loved ones and has caused them to feel "personally attacked, targeted, and disparaged." (*IAAB*, No. 17-2921, D. Ct. Doc. 26-8.) The organizational Plaintiffs are social services organizations and associations of young people, with similarly situated members and clients, that host events and provide services that the Proclamation has disrupted. (*See IRAP*, No. 17-361, D. Ct. Doc. 219; *IAAB*, No. 17-2921, D. Ct. Doc. 46; *Zakzok*, No. 17-2969, D. Ct. Doc. 36.)

Plaintiffs alleged that the Proclamation violated the U.S. Constitution and sought a preliminary injunction of the Proclamation based on some of those claims. (*See IRAP*, No. 17-361, D. Ct. Doc. 205; *IAAB*, No. 17-2921, D. Ct. Doc. 26; *Zakzok*, No. 17-2969, D. Ct. Doc. 2.) In an order dated October 17, 2017, the District Court found that the Proclamation likely violates both the Establishment Clause and the Immigration and Nationality Act's anti-discrimination provision, 8 U.S.C. § 1152(a), and therefore issued a preliminary injunction prohibiting the Government

from enforcing most provisions of Section 2 of the Proclamation. (*See IRAP*, No. 17-361, D. Ct. Doc. 220; *IAAB*, No. 17-2921, D. Ct. Doc. 47; *Zakzok*, No. 17-2969, D. Ct. Doc. 37.) In an *en banc* decision, this Court affirmed. *IRAP* v. *Trump*, 857 F.3d 554 (4th Cir. 2017).

In a separate action, the U.S. District Court for the District of Hawaii also concluded that the Proclamation likely violated § 1182(f) and § 1152(a)(1) and enjoined the Proclamation. *Hawaii* v. *Trump*, 265 F. Supp. 3d 1140, 1160-61 (D. Haw. 2017). The Ninth Circuit likewise affirmed the district court decision. *Hawaii* v. *Trump*, 878 F.3d 662, 673 (9th Cir. 2017).

On December 4, 2017, the Supreme Court stayed both injunctions. *Trump* v. *IRAP*, 138 S. Ct. 542 (2017); *Trump* v. *Hawaii*, 138 S. Ct. 542 (2017). The Supreme Court ultimately granted certiorari in *Trump* v. *Hawaii*, 138 S. Ct. 923 (2018), and reversed the preliminary injunction, 138 S. Ct. 2392 (2018). But consistent with the case's procedural posture, the decision "simply h[e]ld . . . that plaintiffs ha[d] not demonstrated a ***likelihood*** of success on the merits of their constitutional claim," *id.* at 2423 (emphasis added), and the Supreme Court plainly contemplated that the case could go forward on remand. *See id.* ("The case now returns to the lower courts for such further proceedings as may be appropriate."); *id.* at 2424 (Kennedy, J., concurring) (noting the lower courts on remand would determine "[w]hether judicial proceedings may properly continue in this case"); *id.* at 2433 (Breyer, J., dissenting)

("[T]he Court's decision today leaves the District Court free to explore these issues on remand.").

The Supreme Court also granted the petitions for certiorari in these cases and, in light of *Trump* v. *Hawaii*, vacated and remanded this Court's *en banc* decision affirming the District Court's order granting the preliminary injunction. *IRAP* v. *Trump*, 138 S. Ct. 2710 (2018). This Court remanded these cases to the District Court. *IRAP* v. *Trump*, 905 F.3d 287 (4th Cir. 2018).

B. The Previous Stay

While *Trump* v. *Hawaii* was pending before the Supreme Court, the Government moved to stay the proceedings in the District Court for the first time. (*See generally IAAB*, No. 17-2921, D. Ct. Doc. 63-1, 66; *Zakzok*, No. 17-2969, D. Ct. Docs. 51-1, 54.)[2] The District Court granted that motion as a matter of judicial economy, concluding that "the orderly course of justice requires that all three cases be stayed pending the Supreme Court's resolution of *Trump* v. *Hawaii* . . . not because factors of judicial economy are more important than the potential harm to Plaintiffs, but because the Court [was] convinced that" denial of a stay would "not necessarily mean that Plaintiffs will receive a faster resolution." (*Zakzok*, No. 17-2969, D. Ct. Doc. 58 ("Stay Op.") at 15.)

[2] The Government moved for stays at that time only in *IAAB* and *Zakzok*, because Plaintiffs in those cases had moved for entry of a scheduling order but Plaintiffs in *IRAP* had not. (*See Zakzok*, No. 17-2969, D. Ct. Doc. 58 at 2.)

But the District Court also explicitly recognized that staying the case would cause Plaintiffs substantial harm. The District Court thus concluded that the "appropriate way to address the ongoing harm to Plaintiffs would be to proceed with the case on an expedited basis following the Supreme Court's decision . . . which may include steps such as shortening the typical time periods for briefing motions, responding to discovery requests, and completing all discovery." (*Id.* at 15-16.)

C. The District Court Denies the Government's Motion to Dismiss Plaintiffs' Constitutional Claims

Following the Supreme Court's decision in *Trump* v. *Hawaii*, 138 S. Ct. 923 (2018), the *IAAB* and *Zakzok* Plaintiffs amended their complaints (*IAAB*, No. 17-2921, D. Ct. Doc. 78; *Zakzok*, No. 17-2969, D. Ct. Doc. 62), and the *IRAP* Plaintiffs voluntarily dismissed certain of their statutory claims (*IRAP*, No. 17-361, D. Ct. Doc. 270). As amended, the complaints advance two categories of claims.

First, Plaintiffs allege that the Proclamation and the actions taken by the agencies implementing it violate the substantive and procedural requirements of the Administrative Procedures Act. (*See* Pet. Ex. A ("MTD Op.") at 9.) Second, Plaintiffs allege that the Proclamation violates the United States Constitution. (*See id.*) Specifically, all Plaintiffs allege that the Proclamation violates the Establishment Clause; the *IRAP* and *IAAB* Plaintiffs also allege that the Proclamation violates the Fifth Amendment guarantees to equal protection and due

process; and the *IAAB* Plaintiffs further allege that the Proclamation violates the First Amendment's guarantees of freedom of speech and association. (*See id.* at 9.)

In an order dated May 2, 2019, the District Court granted the Government's motion to dismiss the APA claims but denied the motion to dismiss the constitutional claims. The District Court rejected the Government's justiciability arguments, holding that Plaintiffs have standing. (*See id.* at 14-16.) The District Court also rejected the Government's argument that *Trump* v. *Hawaii* forecloses Plaintiffs' constitutional claims, explaining that "the highly deferential Rule 12(b)(6) standard" differs from the standard applied by the Supreme Court at the preliminary injunction stage. (*See id.* at 38-41.) The District Court concluded that "Plaintiffs have put forward factual allegations sufficient to show that the Proclamation is not rationally related to the legitimate national security and information-sharing justifications identified in the Proclamation and therefore that it was motivated only by an illegitimate hostility to Muslims." (*Id.* at 38.)

D. The District Court Denies the Government's Motion for a Stay

The Government filed its answers on May 31, 2019. (*IRAP*, No. 17-361, D. Ct. Doc. 283; *IAAB*, No. 17-2921, D. Ct. Doc. 96; *Zakzok*, No. 17-2969, D. Ct. Doc. 75.) Rather than proceeding with discovery, however, the Government sought an interlocutory appeal and stay of proceedings. (*IRAP*, No. 17-361, D. Ct. Doc. 289; *IAAB*, No. 17-2921, D. Ct. Doc. 100; *Zakzok*, No. 17-2969, D. Ct. Doc. 79.) The

District Court granted the Government's motion to certify the order denying the Government's motion to dismiss for immediate appeal under 28 U.S.C. 1292(b); however, the District Court ***denied*** the Government's motion for a stay of discovery pending the interlocutory appeal. (*See* Pet. Ex. C.)

Regarding the request for interlocutory appeal, the Government sought certification as to whether (i) Plaintiffs' constitutional claims were appropriately evaluated under rational basis review; (ii) *Trump* v. *Hawaii* held that the Proclamation satisfies rational basis review as a matter of law, foreclosing further constitutional challenge; (iii) Plaintiffs adequately pled that the Proclamation fails the rational basis test; and (iv) Plaintiffs have cognizable legal interests for purposes of their due process, Establishment Clause, and equal protection claims. (*See id.* at 5.) The District Court did ***not*** find that any of these issues "constitute controlling questions of law as to which there is substantial ground for difference of opinion." (*Id.* at 5.) The District Court ultimately granted the motion for certification, but it did so only because it concluded that these cases "ha[ve] national significance and [are] of special consequence." (*Id.* at 7 (quoting *In re Trump*, 928 F.3d 360, 368 (4th Cir. 2019))).

As to the motion for a stay, the District Court recognized that, "[s]ince the first executive order affecting entry of certain immigrants and nonimmigrants was entered in January 2017, the individual Plaintiffs have been separated from their

family members for more than two and one-half years," and that "[s]ome of these family members are elderly, very ill, or at risk of persecution." (*Id.* at 8.) The District Court further emphasized that, in light of the "lengthy stay to permit appellate review of the Court's preliminary injunction" that Plaintiffs have already endured, "an additional stay at this point has significant potential to harm the Plaintiffs." (*Id.*) By contrast, the District Court did not find any "harm to the Government by not granting a stay." (*Id.*) The District Court further concluded that the Government's claims regarding judicial economy and the burdens of discovery were "premature," explaining that it will "consider and resolve discovery disputes, if any, as they arise, with due regard to all arguments offered by the parties and consideration of the interests of the parties and the need for judicial economy." (*Id.* at 9.) The District Court thus concluded that the balance of equities did not favor granting a stay and, accordingly, declined to grant one. (*See id.*)

ARGUMENT

I. This Court Should Deny the Motion for a Stay of District Court Proceedings

The District Court appropriately denied the Government's motion for a stay. By default, an order granting certification "shall not stay proceedings in the district court." 28 U.S.C. § 1292(b). Whether to depart from that rule and grant a stay pending appeal is left to a district court's discretion. *See Maryland* v. *Universal Elections, Inc.*, 729 F.3d 370, 375 (4th Cir. 2013) ("[A] request to stay proceedings

calls for an exercise of the district court's judgment to balance the various factors relevant to the expeditious and comprehensive disposition of the causes of action on the court's docket." (quotation marks omitted)). The District Court appropriately exercised that discretion here and determined that discovery should proceed.

Having failed below, the Government now bears a heavier burden to obtain a stay of district court proceedings from this Court. *See Long* v. *Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) ("[W]hen a party seeking a stay makes application to an appellate judge following the denial of a similar motion by a trial judge, the burden of persuasion on the moving party is substantially greater than it was before the trial judge."); *cf. United States* v. *Greenfield*, 986 F.2d 1425, 1993 WL 46819, at *1 (7th Cir. 1993) ("Our review of an order denying a motion to stay [pending appeal] is one of substantial deference and a district court's order will only be overturned for an abuse of discretion."). The Government "must show (1) that [it] will likely prevail on the merits of the appeal, (2) that [it] will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay." *Long*, 432 F.2d at 979; *accord Nken* v. *Holder*, 556 U.S. 418, 425-26 (2009). The Government bears the burden of establishing that a stay is justified. *Nken*, 556 U.S. at 433-34; *see also Williford* v. *Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) ("The

party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative.").

The Government has not carried—and cannot carry—that burden here.

A. The Government Has Not Made a Strong Showing That It Is Likely to Succeed on the Merits of Its Appeal

As Plaintiffs will discuss at greater length in a separate brief opposing Defendants' petition, the Government has not shown that an interlocutory appeal is appropriate here, let alone that any such appeal would be likely to succeed on the merits. As the District Court properly recognized, the Government has not identified any "controlling questions of law as to which there is substantial ground for difference of opinion." (Pet Ex. C at 5.) Indeed, there are none. The District Court's decision is entirely consistent with *Trump* v. *Hawaii* and other well-settled law, and Defendants have not established, as they must to justify a stay, that they would be likely to obtain a reversal on appeal.

B. The Government Has Not Shown That It Would Suffer Irreparable Injury If the Stay Is Denied

The Government has likewise failed to establish that it would suffer irreparable injury in the absence of a stay—a failure that weighs especially heavily here, where the harm to Plaintiffs is so clear. *See Lockyer* v. *Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) ("'[I]f there is even a fair possibility that the stay . . . will work damage to some one else,' the party seeking the stay 'must make out a clear

case of hardship or inequity.'" (quoting *Landis* v. *N. Am. Co.*, 299 U.S. 248, 255 (1936)). The Government cannot show any hardship or inequity, much less irreparable injury. As such, the Government should be treated like any other litigant and should be required to begin discovery.

The Government complains that "[t]he broad discovery Plaintiffs are likely to pursue would be extraordinarily burdensome, and would likely generate numerous privilege disputes, including regarding the presidential communications privilege, the government's deliberative process privilege, and the confidentiality of records pertaining to the issuance or refusal of visa applications." (Pet. 22.) But the obligation to litigate a case in the ordinary course is not an "irreparable injury" sufficient to justify a stay. *See Long*, 432 F.2d at 980 ("[M]ere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough." (quotation marks omitted)); *see also FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." (quotation marks omitted)); *Sherwood* v. *Marquette Transp. Co.*, 587 F.3d 841, 845 (7th Cir. 2009) ("[T]he expense of litigation is not 'irreparable injury.'" (collecting cases)).

After all, parties are already protected against unduly burdensome or otherwise improper discovery by Rule 26. A moving party typically can demonstrate hardship sufficient to justify a stay of proceedings only where it has

shown that it will bear a burden or suffer a consequence that it would not otherwise bear in the ordinary course of litigation. *Compare, e.g.*, *Lockyer*, 398 F.3d at 1112 ("[B]eing required to defend a suit, without more, does not constitute a 'clear case of hardship'" sufficient to justify a stay.), *with E & I Holdings, LLC* v. *Bellmari Trading USA, Inc.*, No. 2:18-cv-484, 2018 WL 5624269, at *1-2 (S.D. W. Va. Oct. 30, 2018) (granting stay pending resolution of motion to dismiss because defendants could not participate in discovery without waiving rights under forum selection clause). The Government has shown no such abnormal burden here.

The Government's claimed burden is, moreover, too speculative to qualify as an irreparable injury. The Government postulates that discovery is "***likely***" to be extraordinarily burdensome and "***likely***" to generate numerous privilege disputes (Pet. 22); these concerns are speculative on their face. Plaintiffs have not yet propounded any discovery requests; many of the eventual requests are sure to be unobjectionable; and the District Court will be ready and able to address any disputes—regarding burden, privilege, or anything else—if and when they arise. The mere prospect of thorny discovery disputes does not suffice to establish irreparable harm, nor can it justify the categorical stay the Government seeks. *See Nken*, 556 U.S. at 434 ("[S]imply showing some possibility of irreparable injury fails to satisfy the second factor." (citation and quotation marks omitted)); *Direx Israel, Ltd.* v. *Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) ("[T]he required

'irreparable harm' must be neither remote ***nor speculative***, but actual and imminent." (emphasis added and quotation marks omitted)); *Singer Co.* v. *P.R. Mallory & Co.*, 671 F.2d 232, 235 (7th Cir. 1982) ("[C]ourts have repeatedly held that a 'speculative' injury does not constitute an irreparable injury[.]").

Accordingly, the District Court "d[id] not find that there will be harm to the Government by not granting a stay." (Pet. Ex. C at 8.) And it found that the Government's arguments that discovery "will improperly burden the Government, and that discovery disputes will impact judicial economy, are premature." (*Id.* at 8-9.) The District Court pledged to "consider and resolve discovery disputes, if any, as they arise, with due regard to all arguments offered by the parties and consideration of the interests of the parties and the need for judicial economy." (*Id.* at 9.) There is no reason to doubt that the District Court will do just that.

C. A Stay Would Cause Substantial Harm to Plaintiffs

By contrast, as the District Court properly recognized, "an additional stay at this point has ***significant potential to harm*** the Plaintiffs." (*Id.* at 8 (emphasis added); *see also* Stay Op. at 14.) The policy and practices set forth in the Proclamation have now been in place, in one form or another, for more than two years. Any further delay of these cases would extend the serious and ongoing harm suffered by Plaintiffs and heighten the risk that some Plaintiffs—or the family members from whom they are separated—may not live long enough to see their

claims resolved and their families reunited. This risk is especially acute here because "[s]ome of [Plaintiffs'] family members are elderly, very ill, or at risk of persecution." (Pet. Ex. C at 8.)

For instance, *Zakzok* Plaintiff Eblal Zakzok's daughter, who is currently living in Turkey where Syrian refugees are regularly targeted by criminals, is separated from her four siblings and parents now living in Ohio. (*See Zakzok*, No. 17-2969, D. Ct. Doc. 62, ¶ 69.) *IAAB* Plaintiff Jane Doe #5 and her husband—who are eighty and ninety-two years old, respectively—remain separated from their son, who lives in Iran. (*See IAAB*, No. 17-2921, D. Ct. Doc. 26-7.) *IRAP* Plaintiff Jane Doe #2 remains separated from her sister and two young nephews, who are Syrian refugees living in a refugee hotel on the border of Saudi Arabia and Yemen, where they are under constant threat from nearby rocket fire and are exploited by the hotel proprietor. (*IRAP*, No. 17-361, D. Ct. Doc. 203, ¶¶ 333–34.) Moreover, many of the individual Plaintiffs continue to fear that family members who are refugees in other countries could be deported to countries where they would be subject to persecution or torture. (*See Zakzok*, No. 17-2969, D. Ct. Doc. 6-2, 6-5; *IAAB*, No. 17-2921, D. Ct. Doc. 26-4.) The individual Plaintiffs also continue to suffer from the stigma and disparagement stemming from the Proclamation, which they feel is an attack on their religion and national origins. (*See Zakzok*, No. 17-2969, D. Ct. Doc. 6-2, 6-3; *IAAB*, No. 17-2921, D. Ct. Doc. 26-7, 26-8.) The members and clients

of the organizational Plaintiffs are in similar situations. Until Plaintiffs have an opportunity to litigate the merits of their claims, the severity of those harms will only worsen.

The risks posed by delay are not merely hypothetical. The Proclamation has already caused concrete injuries to numerous citizens and permanent residents who, like Plaintiffs, have been wrongfully prevented from reuniting with their loved ones. For some, reunification is no longer possible. Two-year-old American citizen Abdullah Hassan, for example, was separated from his Yemeni mother while he received treatment in the United States for a rare brain condition; his mother was denied a visa for over a year before finally being granted a waiver, but Abdullah lost consciousness before she arrived and died nine days later. *See* Kaelyn Forde, *2-Year-Old Boy Whose Yemeni Mother Fought Trump's Travel Ban To Be With Him Has Died*, ABC NEWS (Dec. 29, 2018, 6:16 PM), https://abcn.ws/2s2cvzs. Last year, U.S. citizen Mahmood Salem committed suicide after his wife and five children in Yemen were denied visas. *See* Mallory Moench, *U.S. Citizen's Family Was Denied Visa under Trump's Travel Ban. Then He Died by Suicide*, NBC NEWS (July 28, 2018, 5:12 AM), https://nbcnews.to/2mRckEM. And countless others have family members stranded in dangerous and war-torn countries where their lives are at risk. *See, e.g.*, Michael Daly, *She Escaped the Hell of Yemen, but Her 9-Year-Old Son is Stranded*, THE DAILY BEAST (Nov. 27, 2019, 10:42 AM), https://bit.ly/2LwrWLd

(two children of a Yemeni green-card holder were awaiting the results of their visa applications when one of the children—who was seven years old—was killed in an accident in Yemen).

The District Court recognized that "[t]hese 'human aspects' of the potential impact of a stay upon Plaintiffs are of 'particular significance in balancing the competing interests of the parties.'" (Stay Op. at 14 (quoting *Williford*, 715 F.2d at 127-28).) The District Court has consistently found that the risk of harm to Plaintiffs weighs against a stay. The passage of time has only compounded the injuries that will result from further delay. *See In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (declining to stay district court proceedings, including discovery, in part because "[t]he third factor—substantial injury to the parties opposing the stay—has increased in significance with the passage of time since among the Plaintiffs are many people with life-threatening injuries, some of whom have died since the litigation began."). This factor therefore weighs heavily against staying further district court proceedings.

D. The Public Interest Lies in Permitting Discovery to Proceed

Finally, the Government has made no showing that the public interest favors issuance of a stay, and indeed it does not. To the contrary, the public interest strongly favors permitting discovery to proceed. The public has an interest in the speedy resolution of legal claims; serial stays, granted over a period of years, undermine

that interest. *See World Trade Ctr.*, 503 F.3d at 170-71 ("[T]he passage of time . . . has a bearing on the public interest" because "there is a public interest in having any of the Plaintiffs who might be entitled to recovery receive compensation while still living and able to use it[.]"). The public's interest in the speedy resolution of claims is especially strong where, as here, Plaintiffs seek to vindicate important constitutional rights—because "when we protect the constitutional rights of the few, it inures to the benefit of all. And even more so here, where the constitutional violation injures Plaintiffs and in the process permeates and ripples across entire religious groups, communities, and society at large." *IRAP*, 857 F.3d at 604, *vacated and remanded sub nom. on other grounds*, 138 S. Ct. 353 (2017); *Giovani Carandola, Ltd.* v. *Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("[U]pholding constitutional rights surely serves the public interest.").

The Government has not identified any countervailing public-interest concerns that would outweigh the public's interest in seeing Plaintiffs' constitutional claims resolved as expeditiously as possible. The Government points to potential "separation of powers" concerns, but these concerns remain hypothetical and, in any event, can be carefully managed by the District Court in tailored, judicially overseen discovery. Accordingly, the public-interest factor weighs in favor of denying the Government's motion and permitting discovery to proceed.

CONCLUSION

The Government seeks to avoid the routine obligations of litigation based solely on the ground that it would be burdened by its participation in the judicial process. This falls far short of the showing required for a stay of discovery, and the District Court appropriately exercised its discretion to deny the Government's application for a stay. Plaintiffs respectfully request that the Court deny the Government's motion for a stay.

Dated: September 6, 2019

Respectfully submitted,

__/s/ *Steven C. Herzog*_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 5(c). The brief contains 4,459 words.

/s/ *Steven C. Herzog*

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2019, I electronically filed the foregoing Opposition to Defendants' Motion for Stay of District Court Proceedings with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/ *Steven C. Herzog*