No. 19-36020

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN DOE #1 *et al.,*

Plaintiffs-Appellees,

v.

DONALD TRUMP *et al.,*

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon

OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTIONFOR ADMINISTRATIVE STAY

Nadia H. Dahab
Stephen W. Manning
INNOVATION LAW LAB
333 SW Fifth Avenue #200
Portland, OR 97204
(503) 241-0035

Jesse Bless
AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
1331 G Street NW
Washington, DC 20005
(781) 704-3897

Esther H. Sung
Karen C. Tumlin
JUSTICE ACTION CENTER
P.O. Box 27280
Los Angeles, CA 90027
(323) 316-0944

Kevin M. Fee
Scott D. Stein
SIDLEY AUSTIN, LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7919

The government's Emergency Motion for an Administrative Stay ("Administrative Motion") should be denied. Plaintiffs respectfully request that the Court set a briefing schedule on the government's Motion for a Stay Pending Appeal consistent with the already rapid pace for motion practice under Federal Rule of Appellate Procedure 27 and this Court's Circuit Rules. *See* Circuit Rule 27-1, 27-2.

Plaintiffs are seven U.S. citizens whose relatives have qualified for green cards and would be barred from entering the United States under the Proclamation, and one nonprofit organization that has been forced to divert resources to address the Proclamation. On November 2, 2019, the district court issued a Temporary Restraining Order (TRO) barring the Proclamation from taking effect. On November 26, before the expiration of that TRO, the district court issued a preliminary injunction prohibiting implementation of the Proclamation after concluding that it was likely unlawful and would confer irreparable harm on Plaintiffs and putative class members.

The government's Administrative Motion should be denied for at least three reasons. First, an administrative stay would upend the status quo and cause irreparable harm. Second, the government has failed to meet its burden to demonstrate that the stay would prevent irreparable harm that will occur within 21 days. Third, the government is wrong on the merits.

1. The government's Administrative Motion should be denied because a stay would upend the status quo and cause immediate irreparable harm to Plaintiffs. As the district court found, the record here shows that but for the injunction, "the individual Plaintiffs have shown a likelihood that they will suffer sufficiently *immediate* irreparable harm. It is also likely that putative class members will suffer similar irreparable harm." ECF 2-3, Ex. B (emphasis added). The record shows that upending the status quo will cause irreparable harm to Plaintiffs and the putative class members.

2. The government's Administrative Motion should also be denied for the independent reason that the government failed to show any emergency or irreparable harm that the government will suffer without a stay during the short time period necessary for the Court to consider the underlying stay motion after full briefing. Emergency motions are reserved for extraordinary cases in which a party demonstrates that relief is necessary to avoid irreparable harm that will occur within 21 days. Circuit Rule 27-3. The government fails to satisfy that standard. Nothing in their motion justifies a further acceleration of the timeline for motion practice under Federal Rule of Appellate Procedure 27 and this Court's Circuit Rules. *See* Circuit Rule 27-1, 27-2.

The decision below enjoined enforcement of Presidential Proclamation No. 9945 before it ever went into effect. ECF 2-3, Ex. B. By its terms, Proclamation

9945 was intended to deny entry to those "who will financially burden the United States healthcare system," by barring otherwise qualified lawful immigrants if they are unable to show they will be covered by "approved" health insurance within 30 days of arrival or have the financial resources to cover their foreseeable healthcare costs. ECF 2-2, Ex. A.

Appellants claim an "emergency" based solely on the proposition that without action within 21 days, they will suffer the "harms the Proclamation was designed to address." ECF 2-1. But neither the Proclamation nor the government's motion explain how these purported harms create an emergency requiring action by this Court within 21 days. The decision below merely maintains the status quo, consistent with expressed Congressional will as to the appropriate means for determining whether an intending immigrant will likely be a financial burden to the United States. *See* 8 U.S.C. § 1182(a)(4).

The sole basis for the Proclamation's sweeping change to this country's immigration laws—a change expected to affect up to 65 percent of arriving immigrants[1]—is the Proclamation's observation that the United States incurs an estimated $35 billion in uncompensated care costs per year. But the Proclamation says nothing about the percentage of those costs attributable to the lawful

[1] ECF 2-3, Ex. B.

immigrants the Proclamation unlawfully and capriciously targets. That is not surprising. The record below indicates that uninsured immigrants use less than one-tenth of one percent (0.06) of total American medical resources, and the otherwise qualified lawful immigrants the Proclamation targets represent an even smaller percentage of those costs. ECF 2-3, Ex. B. Despite ample opportunity, Appellants have not submitted any evidence or affidavits to the contrary. Appellants offer no facts to suggest that a crisis in the American healthcare system can be averted only if the district court's injunction is lifted within 21 days.

Therefore, the irreparable harm to Plaintiffs and the putative class of visa applicants they seek to represent significantly outweighs the harm, if any, the government could suffer from the possible admission of an intending immigrant who has already satisfied all statutory requirements under the current immigration system.

3. The motion for an administrative stay should also be denied because the government is wrong on the merits. The district court's decision properly enjoined enforcement of Presidential Proclamation No. 9945. ECF 2-3, Ex. B. By its terms, Proclamation 9945 was not an exercise of "foreign affairs" power, as Appellants now contend. It was intended solely to deny entry to otherwise eligible immigrants from abroad who purportedly "will financially burden the United States healthcare system." But Congress has already addressed how to determine

whether an intending immigrant will be a financial burden whose entry should be precluded, or, as known in the immigration context, a public charge. *See* 8 U.S.C. § 1182(a)(4). As the district court's well-reasoned opinion demonstrates, the Proclamation thus contravenes Congressional will by replacing a long-standing statutorily required multi-factor test for determining the likelihood that an individual will become a financial burden to the United States with a dispositive single-factor test based on healthcare coverage. And, unlike the Proclamation at issue in the Travel or Muslim Ban, there was no worldwide multi-agency review proceeding supporting the conclusions in the Proclamation at issue here.

The government claims to have suffered irreparable harm because the injunction prevents the President from exercising authority provided by 8 U.S.C. § 1182(f). ECF 2-1 (citing *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)). But that argument folds purported harm into the merits and is flawed in two fatal respects. First, the Court's rules require Appellants to show with *facts* how the injunction constitutes an emergency requiring action within 21 days to prevent irreparable harm. Circuit Rule 27-3(a)(3)(ii). Absent facts showing immediate irreparable harm, Appellants' argument reduces to an assertion that it is always an emergency when the executive suffers a legal defeat on the merits. That assertion is entirely inconsistent with this Court's standards for emergency motions, and it ignores the respect afforded Article III courts at large. Second, the district court gave due

consideration to whether the Proclamation was an exercise of authority consistent with *Hawaii* and found that it was not. To the extent Appellants take issue with that holding, that is a merits issue that can be addressed according to this Court's ordinary procedures, it does not establish emergency action or a ruling on a motion for a stay is necessary within 21 days. *See Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009) (the Court's review of administrative stay is "limited and deferential, and it does not extend to the underlying merits of the case.").

Accordingly, the Administrative Motion should be denied. Plaintiffs request that the ordinary rules for motion practice apply. *See* Circuit Rule 27(a)(3)(A). If Appellants want to waive their opportunity thereafter to file a reply to speed up the Court's consideration, they are free to do so. But they have failed to demonstrate that relief is needed within 21 days to avoid irreparable harm as required under Circuit Rule 27-3. Therefore, the Court should deny Appellants' Administrative Motion and address their underlying motion for an administrative stay of the injunction in due course.[2]

DATED this 5th day of December, 2019.

---

[2] Appellees acknowledge that the ordinary briefing schedule would result in briefing completed just before the upcoming holidays. If the Court wishes to expedite briefing out of consideration for its own schedule, Appellees would consent to an expedited briefing schedule for the benefit of this Court, without conceding that Appellants have made their showing for emergency consideration.

Respectfully submitted,

/s/ Nadia Dahab

Nadia H. Dahab
nadia@innovationlawlab.org
Stephen W. Manning
smanning@ilgrp.com
INNOVATION LAW LAB
222 SW Fifth Avenue #200
Portland, OR 97204
(503) 241-0035

Esther H. Sung
esther.sung@justiceactioncenter.org
Karen C. Tumlin
karen.tumlin@justiceactioncenter.org
JUSTICE ACTION CENTER
P.O. Box 27280
Los Angeles, CA 90027
(323) 316-0944

Jesse Bless
jbless@aila.org
AMERICAN IMMIGRATION LAWYERS ASSOCIATION
1331 G Street NW
Washington, DC 20005
(751) 704-3897

Kevin M. Fee
kfee@sidley.com
Scott D. Stein
sstein@sidley.com
SIDLEY AUSTIN, LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7919

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION** complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 1,359 words. This opposition complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Nadia Dahab
NADIA DAHAB
nadia@innovationlawlab.org
INNOVATION LAW LAB