



U.S. Department of Justice
Civil Division

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VIA CM/ECF

May 29, 2020

Honorable Molly C. Dwyer, Clerk of Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

RE: *Doe v. Trump*, Appeal No. 19-36020
Oral Argument Being Considered for September 2020
Circuit Rule 25-2 Correspondence to the Court

Dear Ms. Dwyer:

The Government wishes to notify the Court that it will not seek permission to appeal the district court's recent class certification order, *Doe v. Trump*, No. 3:19-cv-1743-SI, 2020 WL 1689727 (D. Or. Apr. 7, 2020), an issue that was discussed in the Court's stay ruling earlier this month, *Doe v. Trump*, 957 F.3d 1050 (9th Cir. 2020). The Government advises the Court of this development to ensure that this appeal is properly expedited, which this Court has now twice ordered. *See id.* at 1056 (the Court should "expedite the appeal"); *Doe v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019) (ordering expedited briefing of the Government's urgent motion and stating that the "case will be assigned to the next available oral argument panel for a decision on the merits of the appeal"). This appeal concerns a district court's universal preliminary injunction that halts a Presidential Proclamation—an injunction that causes substantial ongoing and irreparable injury to the United States and that calls for prompt review in this Court.

The Government filed this appeal nearly seven months ago. This Court first ordered expedition in December 2019. The parties filed briefs on an expedited schedule, and the appeal was fully briefed in February 2020. This Court denied a stay of the preliminary injunction pending appeal, but it expressly instructed that the Court would "expedite the appeal." *Doe*, 957 F.3d at 1056.

This Court has now proposed scheduling argument in September, October, or November 2020—nine months or more after the Court first ordered expedition and seven months or more after briefing was complete. The Government renews its request that argument be scheduled promptly, in advance of September 2020. The Government advises the Court of its decision not to seek to appeal the class-certification order to ensure that the possibility of such a request is not considered as a reason for delaying argument on the appeal. And as the Government has previously pointed out, the COVID-19 pandemic underscores the tangible harm the district court’s injunction continues to cause to our healthcare system, which cannot sustainably provide large-scale uncompensated healthcare. The injunction minimizes the importance of healthcare planning by everyone, including intending immigrants before their entry into the United States, and the Government asks this Court to promptly resolve its appeal to stem the harm to the healthcare system caused by the district court’s universal order.

The Government determined not to seek permission to appeal the district court’s class-certification order in part to facilitate expedition of this appeal of the preliminary injunction. Importantly, however, that class-certification order provides no support for the universal preliminary injunction at issue in this appeal. The district court belatedly certified a class several months after issuing a universal injunction. The class certification order cannot cure the improper scope of the universal preliminary injunction, which must be assessed at the time it was issued. *See Doe*, 957 F.3d at 1094 (Bress, J., dissenting) (“The scope of a preliminary injunction should be supported at the time it is issued, not months later and while the injunction is on appeal.”). Plaintiffs did not move for a class-wide preliminary injunction, and the district court did not certify any class, even provisionally, before issuing the injunction, nor did it issue a class-wide injunction. Moreover, “reliance on the district court’s recent class certification decision is a concession that until a short time ago, there was no valid basis for the district court to enjoin the Proclamation as to anyone but the named plaintiffs.” *Id.* at 1093 (Bress, J., dissenting). Any relief should have been limited to those plaintiffs, who were the only parties before the court at the time universal relief was issued. Dkt. 23 at 54-59.

Finally, the Government advises the Court that a statement in its stay ruling—that “[n]o litigation challenging this Proclamation is pending elsewhere,” *Doe*, 957 F.3d at 1069-70—is incorrect. Another challenge to the Proclamation has been pending in the Southern District of New York since December 2019. *Make the Road New York v. Pompeo*, No. 19-cv-11633 (S.D.N.Y.).

Sincerely,

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Courtney E. Moran
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U.S. Department of Justice