

No. 17-35105

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, *et al.*

Plaintiffs-Appellees,

v.

DONALD TRUMP, *et al.*,

Defendants-Appellants.

On Motion for a Stay Pending Appeal of a Temporary
Restraining Order Issued by the United States District Court
for the Western District of Washington
Case No. 2:17-cv-141, Hon. James L. Robart

**MOTION FOR LEAVE TO FILE BRIEF OF AMERICANS UNITED FOR
SEPARATION OF CHURCH AND STATE, SOUTHERN POVERTY LAW CENTER,
AND AS *AMICI CURIAE* SUPPORTING APPELLEES AND DENIAL OF A STAY,
AND REQUEST TO FILE 2759-WORD BRIEF**

KRISTI L. GRAUNKE
MICHELLE R. LAPOINTE
*Southern Poverty Law Center
1989 College Avenue NE
Atlanta, GA 30317
(404) 521-6700*

ANGELO J. CALFO
KRISTIN W. SILVERMAN
*Calfo Eakes & Ostrovsky
PLLC
1301 Second Avenue
Suite 2800
Seattle, WA 98101
(206) 407-2200*

RICHARD B. KATSKEE
ERIC ROTHSCHILD
ANDREW L. NELLIS
BRADLEY GIRARD
KELLY M. PERCIVAL
*Americans United for
Separation of Church and
State
1310 L Street, NW, Suite 200
Washington, DC 20005
(202) 466-3234*

Counsel for Amici Curiae

INTRODUCTION

Currently before the Court is Defendants' emergency motion for a stay of the temporary restraining order issued February 3, 2017, by the U.S. District Court for the Western District of Washington (Robart, J.). Pending determination of the State of Washington's request for a preliminary injunction, for which the court directed the parties to set a briefing schedule so that the request could be decided with dispatch, the court restrained enforcement of Executive Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017), which bars immigrants and refugees from predominantly Muslim countries from entering or remaining in the United States. Defendants have impermissibly appealed an unappealable temporary restraining order and have sought a stay of that TRO pending resolution of their putative appeal.

Americans United for Separation of Church and State and the Southern Poverty Law Center respectfully request leave to file the accompanying proposed *amicus* brief in support of Plaintiffs and against issuance of the requested stay.

Identity and Interest of *Amici Curiae*

i. *Amicus* Americans United for Separation of Church and State is a national, nonsectarian public-interest organization. Its mission is twofold: (1) to advance the free-exercise rights of individuals and religious

communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United represents more than 125,000 members and supporters across the country. Since its founding in 1947, Americans United has regularly participated as a party, as counsel, or as an *amicus curiae* in leading church–state cases decided by the United States Supreme Court and by federal and state trial and appellate courts throughout the country.

Americans United has long defended the fundamental rights of religious minorities in the United States by, among other things, bringing legal challenges to governmental action that singles out particular religions for favor or disfavor. *See, e.g., Ziglar v. Abbasi*, 2016 WL 7473962 (U.S. 2016) (supporting Muslim petitioners who were detained and tortured after the terror attacks of September 11, 2001); *Hassan v. City of New York*, 2014 WL 3572027 (3d Cir. 2015) (supporting challenge to New York City Police Department’s surveillance of Muslim communities); *Awad v. Ziriax*, 2011 WL 2118216 (10th Cir. 2012) (supporting challenge to Oklahoma law that singled out Islam for official disfavor). Americans United also advocated for the passage of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, under which a claim has been made in this case, as well as its sister statute, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*, and routinely

participates as counsel or as an *amicus curiae* in cases arising under these statutes. *See, e.g., Holt v. Hobbs*, 2014 WL 2361896 (2015). Notably, Americans United filed an *amicus* brief in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), proposing the factors for the test of constitutionally permissible religious accommodations under RFRA and RLUIPA that the Supreme Court then adopted.

ii. *Amicus* Southern Poverty Law Center has provided *pro bono* civil-rights representation to low-income persons in the Southeast since 1971, with particular focus on seeking justice for the most vulnerable people in society. SPLC has litigated numerous cases to enforce the civil rights of immigrants and refugees to ensure that they are treated with dignity and fairness. SPLC monitors and exposes extremists who attack or malign groups of people based on their immutable characteristics. SPLC is dedicated to reducing prejudice and improving intergroup relations. SPLC has a strong interest in opposing governmental action premised on unlawful discrimination that undermines the promise of civil rights for all.

REASONS WHY THE MOTION SHOULD BE GRANTED

1. The issues in this case have important ramifications for persons living across the United States and around the world. If the challenged TRO were to be stayed, families who currently find themselves living in different countries will be estranged. People fleeing war-torn regions will

be turned away from this nation's borders and given no opportunity to seek or obtain refuge from the horrors that they face in their countries of origin. Children coming to the United States for necessary medical care will be shunned. People lawfully residing and working in the United States will be prevented from traveling abroad by the threat that they will be detained and deported when they try to return home—or if they are already traveling abroad, they will have no way to avoid that consequence. And people lawfully in this country and not contemplating travel abroad are also at risk of being rounded up, detained, and deported. In short, nothing more than religion (albeit couched in the language of national origin or one-time residence) will determine whether hundreds of thousands of people have access (or continued access) to the opportunities of life in the United States.

2. What is more, it is not only the targeted Muslims who will be affected by the implementation of the Executive Order. The seismic shift in this Nation's treatment of a religious minority will be felt by families, neighborhoods, houses of worship, local businesses, and, as the district court recognized, public universities and other public institutions. All will suffer the loss of valued employees, customers, relatives, and members of the community.

3. The hardships in this country and around the world that will be caused by official discrimination against a single, disfavored religious group highlight the importance of correctly analyzing and deciding questions of religious-freedom rights—legal issues that *amici* are uniquely positioned to assist this Court in assessing. The proposed *amicus* brief explains why the Establishment Clause of the First Amendment to the U.S. Constitution bars enforcement of the anti-Muslim Executive Order, and hence why Plaintiffs are likely to succeed on the merits and why a stay of the TRO would be improper. As the brief explains, the government is forbidden to discriminate against Muslims. And it is forbidden to endorse or disfavor one religion as compared with others. The Executive Order does all of this and more.

4. All parties issued blanket consents to the filing of *amicus* briefs. At 10:41 p.m. EST (7:41 p.m. PST) on February 5, however, *amici* were informed that Defendants altered their position from straightforward consent to all *amicus* briefs, now giving consent solely if the *amicus* briefs were filed by the deadline for Plaintiffs' brief of 11:59 p.m. PST (2:59 a.m. EST). *Amici* had been anticipating filing the brief in the morning on February 6. In light of Defendants' changed position, *amici* immediately raced to finish and finalize their brief and this motion and endeavored to file them. It was simply not possible, however to do so by 11:59 p.m. PST,

so *amici* filed very shortly thereafter, as soon as the technical aspects of the file the brief could be resolved in accordance with the rules. Because of the late notice of change of position from Defendants, Defendants may now be withholding consent. *Amici* request that the Court accept the brief, whether as uncontested or as contested.

5. Finally, *amici* respectfully request that the Court also grant leave to file the possibly overlength proposed brief. Circuit Rule 27-1 provides that motions may be no longer than twenty pages. Assuming that the normal rules for *amicus* briefs apply to *amicus* briefs supporting or opposing motions, *amici* would then have ten pages for their brief. Circuit Rule 32-3(2) provides that one may comply with the court's length requirements by "filing a monospaced or proportionally spaced brief or other document in which the word count divided by 280 does not exceed the designated page limit." Hence, we assume that the Rules allow for 2800-word *amicus* briefs supporting motions. The proposed brief is 2759 words. If *amici* have misunderstood the rules and the brief is overlength, we respectfully request that the Court grant leave to file it regardless.

CONCLUSION

The Court should grant the request to file the proposed *amicus* brief and order the Clerk to accept the accompanying brief for filing.

Date: February 6, 2017

KRISTI L. GRAUNKE
MICHELLE R. LAPOINTE
Southern Poverty Law Center
1989 College Avenue NE
Atlanta, GA 30317
(404) 521-6700

ANGELO J. CALFO
KRISTIN W. SILVERMAN
Calfo Eakes & Ostrovsky
PLLC
1301 Second Avenue
Suite 2800
Seattle, WA 98101
(206) 407-2200

Respectfully submitted,

/s/ Richard B. Katskee

RICHARD B. KATSKEE
ERIC ROTHSCHILD*
ANDREW L. NELLIS**
BRADLEY GIRARD
KELLY M. PERCIVAL***
Americans United for Separation
of Church and State
1310 L Street NW, Suite 200
Washington, D.C. 20005
(202) 466-3234

* Admitted only in Pennsylvania.
Supervised by Richard B. Katskee, a
member of the D.C. bar.

** Admitted only in New York.
Supervised by Richard B. Katskee, a
member of the D.C. bar.

*** Admitted only in California.
Supervised by Richard B. Katskee, a
member of the D.C. bar.

Counsel for Amici Curiae

Date: February 6, 2017

CERTIFICATE OF SERVICE

I certify that on February 6, 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.

/s/ Richard B. Katskee
Counsel for Amici Curiae