

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

STATE OF HAWAII and ISMAIL
ELSHIKH,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States; U.S.
DEPARTMENT OF HOMELAND
SECURITY; JOHN F. KELLY, in his
official capacity as Secretary of Homeland
Security; U.S. DEPARTMENT OF STATE;
REX TILLERSON, in his official capacity as
Secretary of State; and the UNITED
STATES OF AMERICA,

Defendants.

Civil No. 1:17-cv-00050
(DKW/KSC)

MEMORANDUM OF LAW IN
SUPPORT OF MOTION

Related Documents: Dkt. No. 293

MEMORANDUM OF LAW IN SUPPORT OF MOTION

The States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia, respectfully request leave to file brief as amici curiae in support of Plaintiffs' Motion to Clarify the Scope of the Preliminary Injunction, filed June 29, 2017 (ECF No. 293). The proposed amicus brief is attached as Exhibit "1" to the Declaration of Barbara D. Underwood. Plaintiffs consent to the filing of the amicus brief. Defendants have advised that they

would ordinarily take no position, but they oppose the motion for leave to file on the ground that plaintiffs' reply submissions have been filed (ECF No. 303) and, thus in defendants' view briefing is closed. Underwood Decl. ¶ 4.

Amici States have important proprietary, sovereign, and quasi-sovereign interests that are affected by the provisions of Executive Order No. 13,780, that are challenged in this lawsuit,¹ and by the preliminary injunction barring its enforcement in certain respects. Amici states have already filed an amicus brief in this Court supporting Hawaii's Motion for a Temporary Restraining Order, *see* Brief of the State of Illinois et al. (ECF No. 154), and amicus briefs in the Supreme Court of the United States opposing a stay of this Court's injunction (Brief of Virginia et al., *Trump v. IRAP*, Nos. 16-A1190, 16A-1191 (Sup. Ct. June 21, 2017)), and opposing the petition for certiorari (Brief of New York et al., *Trump v. IRAP*, Nos. 16-A1190, 16A-1191 (Sup. Ct. June 21, 2017)). Now that the Supreme Court has stayed the injunction in part, amici States continue to have a strong interest in preserving so much of the injunction as the Supreme Court left undisturbed.

Defendants do not—and cannot—identify any way in which they would be prejudiced by the filing of this amicus brief. Amici States raise no new arguments, but rather provide a broader perspective on the state interests at stake, already

¹ Executive Order No. 13,780, §§ 2(c), 6(a)-(b) (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017) (“EO-2”).

identified by Hawaii. The broad experience and perspective of the fifteen amici States and the District of Columbia will assist this Court in its consideration of the scope of its injunction as modified, an injunction which is nationwide in scope.

Nor would the proceedings be delayed by granting this motion to file a brief today, which is the day originally scheduled by the court as the date for plaintiffs' reply brief. Finally, amici States, relying on the date scheduled for the reply brief, have worked diligently during the time between the filing of Hawaii's motion and today, including through the Fourth of July holiday, to prepare this brief and consult with each other and obtain the necessary approvals in each State. The circumstance that Hawaii filed its reply brief one day early should not deprive fifteen States and the District of Columbia of the opportunity to be heard on this important question, nor should this Court be deprived of the benefit of hearing the views of amici States.

This Court has broad discretion to grant a prospective amicus participation. *See Hoptowitz v. Ray*, 682 F. 2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds*, *Sandin v. Connor*, 515 U.S. 472 (1995). In deciding whether to grant a motion for leave to file an amicus brief, a court should consider whether the brief "assist[s] in a case of general public interest" or "supplement[s] the efforts of counsel," among other factors. *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus. State of Mont.*, 694 F. 2d 203, 204 (9th Cir. 1982). "An amicus brief should normally be allowed" if the amicus "has unique information or perspective that can help the

court beyond the help that the lawyers for the parties are able to provide.” *Cnty. Ass’n for Restoration of Env’t v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999). Moreover, courts have permitted not only amicus filings but also intervention over a party’s objection to the timing of the motion, when the objecting party asserted prejudice but failed to explain how. *See, e.g., Jordan v. Nationstar Mortgage, LLC*, 2016 WL 7494297, at *4 (E.D. Wash. 2016); *Day v. Apoliona*, 505 F. 3d 963, 966 (9th Cir. 2007).

CONCLUSION

For the foregoing reasons, the proposed amici States respectfully request that this Court grant its motion for leave to file the attached brief as amici curiae.

Dated: New York, NY
July 6, 2017

ADAMS MIYASHIRO KREK
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DUANE R. MIYASHIRO

Respectfully submitted,

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/s/ Barbara D. Underwood
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