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UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

STATE OF HAWAI'I 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)

BRIEF AMICUS CURIAE OF THE STATE OF NEW YORK, et al.; CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE

Related Documents: Dkt. No. 328

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI‘I

STATE OF HAWAI‘I 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)

BRIEF AMICI CURIAE for 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 IN SUPPORT OF PLAINTIFFS

INTRODUCTION AND INTERESTS OF THE AMICI

This Court has enjoined the enforcement of certain provisions of Executive Order No. 13,780, which imposed a 90-day ban on the entry to the United States of nationals from six overwhelmingly Muslim countries as well as suspended the U.S. Refugee Admissions Program and lowered its refugee cap.[1] While the Supreme Court of the United States stayed that injunction in part, the Court preserved the injunction with respect to foreign nationals who have a "bona fide relationship with a person or entity in the United States." *Trump v. Int'l Refugee Assistance Project*, ___ S.Ct. ___, 2017 WL 2722580, at *5 (June 26, 2017). The Supreme Court explained that such a relationship can be either "a close familial relationship" with "a person" in the United States, or a "formal, documented" relationship with an entity or organization that was "formed in the ordinary course." *Id.* at *7.

Notwithstanding that ruling, the defendants[2] have issued guidance stating that the federal government intends to enforce the enjoined provisions of the Executive Order against certain close family members of persons in the United States—

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

[2] The defendants in this action are: Donald J. Trump, as President of the United States; the United States Department of Homeland Security; John F. Kelly, as Secretary of Homeland Security; the United States Department of State; Rex Tillerson, as the Secretary of State; and the United States. This brief refers to them collectively as "defendants" or "the federal government."

including grandparents, grandchildren, aunts, uncles, nieces, nephews, and cousins (ECF No. 294-1, at 4 ¶ 11). That exclusion conflicts with the language and purpose of this Court's injunction as modified by the Supreme Court's partial stay, and with the language and rationale of the Supreme Court's order preserving the injunction with respect to foreign nationals who have a "bona fide relationship with a person or entity in the United States."

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 submit this brief as amici curiae to urge this Court to grant the motion of plaintiffs the State of Hawaii and Ismail Elshikh to enforce, or alternatively, to modify this Court's preliminary injunction (as amended on June 19, 2017, ECF No. 291), in order to ensure that the injunction is implemented in a manner consistent with its purpose and the Supreme Court's modification as to its scope. This brief supplements plaintiffs' brief by providing the perspective and experience of fifteen additional sovereign states and the District of Columbia, all of which have an urgent interest in the proper enforcement or modification of this nationwide injunction. Amici States have brought challenges to the Executive Order and its predecessor in other courts, similar to the challenge brought by Hawaii and Dr. Elshikh here, on the ground that the Order violates the Establishment Clause of the United States Constitution and

various other constitutional and statutory provisions.[3] We have also filed briefs amicus curiae supporting plaintiffs in this case and in the companion case from the Fourth Circuit, including a brief in the Supreme Court opposing any stay of the preliminary injunctions issued in these two cases,[4] and a brief in this Court supporting plaintiffs' motion for clarification (ECF Nos. 319, 321).

Amici have a strong interest in plaintiffs' challenge to this Executive Order because many of its provisions have threatened—indeed, have already caused—substantial harm to our residents, communities, hospitals, universities, and businesses while courts continue to adjudicate the Order's lawfulness. The preliminary injunction entered by this Court, along with the injunction entered in the

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[3] Cases challenging EO-2: *See* Second Am. Compl., *Washington v. Trump*, No. 17-cv-00141 (W.D. Wash. Mar. 16, 2017) (challenge to EO-2 by Washington, California, Oregon, New York, Maryland, and Massachusetts, stayed pending appeal in *Hawaii v. Trump*), ECF No. 152.

Cases challenging EO-1: *See Washington v. Trump*, No. 17-cv-141, 2017 WL 462040, at *2-*3 (W.D. Wash. Feb. 3, 2017) (enjoining travel and refugee bans in EO-1), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); Mass. & N.Y. Amicus Br. (15 States and D.C.), *Washington v. Trump*, No. 17-141 (9th Cir. 2017), ECF No. 58-2; *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *11 (E.D. Va. Feb. 13, 2017) (enjoining travel ban in EO-1 as applied to Virginia).

[4] Ill. Amicus Br. (16 States and D.C.), *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Va. & Md. Amicus Br. (16 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153; Va. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos. 16-A1190, 16A-1191 (Sup. Ct. June 21, 2017); N.Y. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos. 16-A1190, 16A-1191 (Sup. Ct. June 21, 2017).

Fourth Circuit case, substantially mitigated the harm threatened by the Order, and the Supreme Court's decision to leave important aspects of the injunction in place continues to provide critical protection to the state interests endangered by the Order. Accordingly, the amici States have a strong interest in ensuring that the protection provided by this Court's injunction is not diminished by an interpretation that is inconsistent with its meaning and purpose and in violation of the Supreme Court's directives.

The amici States are particularly concerned that the federal government has construed the Supreme Court's phrase "bona fide relationship with a person or entity in the United States" in a manner so narrow that it will not adequately protect the ability of state universities, hospitals, and businesses to recruit and retain students and staff from the affected countries, or otherwise protect the rights of persons in the United States. Nothing in the Supreme Court's order categorically limited the types of "close familial relationship[s]" that would be sufficient for a foreign national to fall within the protection of the unstayed portion of this Court's injunction by stating a credible claim of a "bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 2017 WL 2722580, at *6-*7. Yet the federal government has nonetheless drawn such absolute categorical lines—arbitrarily determining that many close family relationships do not qualify for the protection of this Court's

injunction, including grandparents, grandchildren, aunts, uncles, nieces, nephews, and cousins, among others (ECF No. 294-1, at 4, ¶ 11).

When foreign nationals decide whether to accept offers of employment or offers of admission to an educational institution in the United States, they take into account whether their close family members will be able to visit them. And when such persons have come to work or study in the United States, their fundamental familial relationships are profoundly burdened if close family members are prevented from visiting them. The artificially narrow line drawn by the federal government will thus also likely impair the ability of institutions in the amici States not only to recruit but also to retain individuals from the affected countries who do not wish to endure the hardship of disruption and separation from family members with whom they have bona fide "close familial relationship[s]."[5] *Trump v. IRAP*, 2017 WL 2722580, at *7.

[5] Amici States also share the concerns raised by plaintiffs about other aspects of the federal government's guidance. *See* Brief of Hawaii et al., ECF No. 328-1, at 10-15.

ARGUMENT

THE FEDERAL GOVERNMENT'S NARROW INTERPRETATION OF "CLOSE FAMILIAL RELATIONSHIP" IMPROPERLY AND ARBITRARILY EXCLUDES FROM THE PROTECTION OF THE INJUNCTION PERSONS WHO FALL SQUARELY WITHIN ITS MEANING AND PURPOSE

The federal government has stated that it intends to recognize as bona fide "close familial relationship[s]" protected by the injunction only a specified list of family relationships, not including grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, and siblings-in-law. But nothing in this Court's injunction or the language or rationale of the Supreme Court's June 2017 order supports such a restrictive definition of "close familial relationship."

First, the federal government's interpretation is not supported by the language used by the Supreme Court in leaving part of the injunction in place. The Supreme Court, while staying the underlying injunction in part, broadly held that sections 2(c), 6(a), and 6(b) of EO-2 "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 2017 WL 2722580, at *6. The Court made clear that the exclusionary provisions of these sections can be enforced only against those "who have no connection" or "no tie" to the United States. *Id*.

With respect to foreign nationals claiming a bona fide relationship with *a person* in the United States, the Supreme Court held that "a close familial relationship is required," but did not expressly limit what constitutes such a

relationship or enumerate an exhaustive list of relationship categories. *Id*. at *7. Instead, the Supreme Court provided two examples of the "sort of relationship" that continues to be protected under this Court's injunction—being a wife or a mother-in-law of a person in the United States. *Id.* The Court's recognition that a person's relationship to his or her mother-in-law "clearly" presents a close enough relationship to qualify for protection, *id*., necessarily implies that the Court viewed the injunction as encompassing a broad category of relationships beyond those found within a traditional nuclear family.

The federal government, however, has sought to narrowly define "close family" as only "a parent (including parent-in-law), spouse, child, adult son or daughter, son-in-law, daughter-in-law, sibling, whether whole or half," including "step relationships." (ECF No. 294-1, at 4, ¶ 11.) This definition expressly excludes "grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law," as well as "other 'extended' family members." (*Id*.; *see also* ECF No. 294-2; ECF No. 264-3, at 2-3.) Defendants do not identify any language in the Supreme Court's order that supports such a limited and exclusive definition. Nor is there any support for defendants' suggestion, made in opposition to plaintiffs' earlier motion to clarify (ECF No. 301, at 11-12), that the Court considered "mother-in-law" status to be qualifying in this case only for the reason that plaintiff Dr.

Elshikh's mother-in-law is also the mother of his wife—a fact never mentioned by the Court.

The federal government's cramped view of what counts as a "close familial relationship" is contradicted both by social science research and by common experience. In particular, the relationship between grandparents and grandchildren is widely recognized as close to—and sometimes a substitute for—the relationship between parents and children.[6] Other excluded family relationships, including those with uncles and aunts, can also be close and significant ones.[7] There is thus simply

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[6] Indeed, grandparents are frequently responsible for caring for and nurturing their grandchildren. *See, e.g.*, Teresa Wiltz, *Why More Grandparents Are Raising Children*, The Pew Charitable Trusts (Nov. 2, 2016) (stating that in 2015, approximately 2.9 million children in this country were living with grandparents who were responsible for their care and discussing reasons for this increase), at http://tinyurl.com/WiltzPewCharitableTrusts; Xiaolin Xie & Yan Xia, *Grandparenting in Chinese Immigrant Families*, 47 Marriage & Family Rev. 383 (2011) (studying cultural trend in Chinese immigrant families of bringing grandparents to United States, often on temporary visas only, to be primary care givers for grandchildren while parents worked outside the home), at http://tinyurl.com/Xia-XieMarriageFamilyRev.

[7] *See, e.g.*, Native American Training Inst., *Kinship Relationships and Expectations* (describing relationship between an aunt and niece as akin to that of a mother and child; relationship between an uncle and nephew as "similar to the relationship between a young boy and his father"; and that a brother-in-law may appropriately "help a brother raise male children"), at http://tinyurl.com/NativeAmTrainingInst; Margaret Slade, *Relationships: The Role of Uncles and Aunts*, New York Times (April 9, 1984) (noting view of sociology professor that "[a]mong some ethnic groups, aunts and uncles serve as a network

no basis for categorically excluding these relationships from the class of close family relationships that qualify for protection under the modified injunction.

Contrary to defendants' arguments made in opposition to plaintiffs' initial motion to clarify (ECF No. 301, at 6, 11-17), there is no basis for importing the specific and limited definitions of family created by the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., into the different context of this injunction. The INA definitions are designed to determine eligibility for long-term immigrant visas, while the injunction as modified by the stay protects on an interim basis applicants for shorter-term, non-immigrant visas. Thus, although the INA's definition of "family" excludes mothers-in-law, *see, e.g.*, *id.* §§ 1151(b)(2)(A), 1153(a), the Supreme Court expressly held that this relationship is within the ambit of the injunction's protections. *Trump v. IRAP*, 2017 WL 2722580, at *7.

It is hardly surprising that the relationships that warrant the protection of this Court's preliminary injunction are more extensive than the relationships that qualify for eligibility to permanently reside in the United States under the INA. The definition of family for purposes of the protection of this Court's injunction reflects

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that can absorb children from another household when needed, as in a divorce or after a parent's death"), at http://tinyurl.com/Slade-NYTimes.

an equitable determination that, at least as an interim matter, it would be unjustly harmful to persons in the United States to keep them separated from close family members when there are serious questions about the validity of EO-2. By contrast, the relevant INA provisions reflect a Congressional policy determination about how far to extend the opportunity for permanent immigration with a path to American citizenship. The federal government is simply wrong to rely on the INA's narrow definition of close family as the full measure of the family relationships protected by the interim equitable relief at issue here.

Second, the federal government's interpretation of the injunction is inconsistent with the rationale the Supreme Court gave for distinguishing between foreign nationals who have a bona fide "connection" or "tie" to someone in the United States and those who lack such a relationship. As the Court reasoned, denying entry to a foreign national with no close ties to the United States "does not burden any American party by reason of that party's relationship with the foreign national," whereas the exclusion of a close family member of a person in the United States results in an "obvious hardship" to that person.[8] *Trump v. IRAP*, 2017 WL 2722580,

[8] The Supreme Court's use of the term "*a person* . . . in the United States," 2017 WL 2722580, at *6 (emphasis added), to serve as the reference point for evaluating the relevant hardship further demonstrates that the Court did not intend the scope of the injunction at issue here to be governed by the provisions of the INA, which authorizes only citizens and legal permanent residents, and not all persons in the United States, to sponsor family members for permanent immigration.

at *6. The Court applied the same analysis to the suspension of refugee admissions under §§ 6(a) and (b) of EO-2, and emphasized that it was "not disturb[ing] the injunction" where "[a]n American individual . . . that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded." *Id*. at *8.

The federal government's proposed approach will prevent many persons in the United States from reuniting with family members who are as close, or closer, to them than persons on the federal government's list of family members who continue to be protected by the injunction. Under the Supreme Court's cases, such a deprivation amounts to a constitutionally cognizable hardship. The Supreme Court has long recognized that the "protection of family rights" are not "cut[ ] off" at the "boundary of the nuclear family," and that this country's "deeply rooted" history and tradition "support[ ] a larger conception of the family." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502-05 (1977) (invalidating local ordinance making it a crime for a grandmother to live with her grandchild); *see also id*. at 504 ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

The federal government's proposed approach thus continues to jeopardize the amici States' public and quasi-sovereign interests by preventing numerous persons

in our States from receiving visits from family members with whom they have close and bona fide relationships. An ailing grandmother could not receive end-of-life care from her foreign granddaughter. A niece whose foreign aunt was like a mother to her could not bring that aunt to witness and celebrate her wedding. And an orphaned child would not be permitted to receive a visit from the uncle who took care of her financial and emotional needs after her father's untimely death. *See Moore,* 431 U.S. at 505 ("Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life."). Such exclusions thus hinder the amici States' ability to protect all of their residents' fundamental familial relationships—nuclear and extended—from the reach of the unconstitutional Executive Order underlying this lawsuit. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607-08 (1982) (discussing a State's interests in ensuring that its residents are "not excluded from benefits that are to flow from participation in the federal system" and in "securing observance of the terms under which it participates in" that system).

In addition, the federal government's impermissible exclusions will also result in continuing concrete and irreparable harms to amici States' economic and proprietary interests. The specter of unlawful exclusions will also create barriers to attracting and retaining foreign students and employees at our universities, hospitals,

and businesses. Many such persons may be unwilling to accept offers to work and study in our States in light of the federal government's stated intention to ban visits from their grandparents, grandchildren, or other close relatives. Moreover, amici States will lose significant sources of taxes and other revenues that would otherwise be collected from improperly excluded foreign nationals visiting our States. These are some of the very interests that this Court's injunction was originally designed to protect and the very harms the Supreme Court carefully sought to avoid when leaving the injunction in place as modified. *See* Ill. Amicus Br. (16 States and D.C.) at 5-20, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Va. Amicus Br. (16 States and D.C.) at 4-14, *Trump v. IRAP*, Nos. 16-A1190, 16A-1191 (Sup. Ct. June 21, 2017).

In sum, the federal government's restrictive definition of close familial relationships will result in the improper exclusion of numerous foreign nationals who have the requisite bona fide connection to a person in the United States, despite the Supreme Court's unequivocal holding that this Court's protections for such persons remain in full force. Accordingly, this Court should enter an order finding that such a restricted definition is impermissible and either enjoining defendants' violation of the injunction by their application of the unlawful guidance, or modifying the injunction to specify in detail the relationships within its broad penumbra.

CONCLUSION

This Court should grant plaintiffs' motion to enforce or modify the scope of the preliminary injunction.

Dated: New York, New York
July 10, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAI‘I

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.5 of the Local Rules for the District of Hawai‘i, the State of New York states that this Brief Amici Curiae is double-spaced, is in Times New Roman 14 point font, and contains 3,234 words (according to the Word Count function of Microsoft Word), exclusive of captions and signature lines.