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(See Next Page For Additional Counsel)

IN THE UNITED STATES DISTRICT COURT  
 FOR THE 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;  
 ELAINE DUKE, in her official capacity as  
 Acting 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.

**PLAINTIFFS' MOTION**  
**FOR LEAVE TO FILE**  
**THIRD AMENDED**  
**COMPLAINT;**  
**[PROPOSED] THIRD**  
**AMENDED COMPLAINT;**  
**EXHIBITS 1-9 TO**  
**[PROPOSED] THIRD**  
**AMENDED COMPLAINT;**  
**[PROPOSED] ORDER;**  
**CERTIFICATE OF**  
**SERVICE**

Civil Action No. 1:17-cv-  
 00050-DKW-KSC

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**PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED  
COMPLAINT**

Pursuant to Local Rule 7.6 for the United States District Court for the District of Hawaii and Rules 7 and 15(a) of the Federal Rules of Civil Procedure, the State of Hawaii (the “State”) and Ismail Elshikh, PhD (collectively, “Plaintiffs”), by and through their counsel, respectfully request that the Court grant Plaintiffs leave to file a Third Amended Complaint (“TAC”) in the form attached hereto. Plaintiffs’ proposed TAC challenges Defendant Donald J. Trump’s September 24, 2017 Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats (“EO-3”). It also adds three additional Plaintiffs to this lawsuit, John Doe 1, John Doe 2, and the Muslim Association of Hawaii, Inc. (“Muslim Association of Hawaii”).

In the event that Plaintiffs’ request for leave to file the TAC is granted, Plaintiffs further request that the deadline for Defendants’ response to the TAC be deferred until the resolution of Plaintiffs’ concurrently-filed Motion for Temporary Restraining Order and any subsequent proceeding regarding preliminary injunctive relief.

**FACTUAL AND PROCEDURAL BACKGROUND**

On February 3, 2017, the State filed a Complaint, Dkt. 1, and a Motion for Temporary Restraining Order, Dkt. 2, in this Court. That Complaint and motion

sought injunctive relief against President Trump’s Executive Order No. 13,769 (“EO-1”), which barred individuals from seven Muslim-majority countries and all refugees from entering the United States. 82 Fed. Reg. 8977. EO-1 was enjoined before this Court could rule on the State’s request. However, the Court granted leave to the State to file a First Amended Complaint adding Dr. Elshikh as a plaintiff. Dkt. 36. On March 6, 2017, President Trump replaced EO-1 with Executive Order No. 13,780, 82 Fed. Reg. 13,209 (“EO-2”), which blocked nationals from six of the same countries from entering the United States for 90 days, halted the admission of refugees to the United States for 120 days, and capped annual refugee admissions at 50,000.

Following the issuance of EO-2, this Court granted leave for Plaintiffs to file a Second Amended Complaint challenging EO-2. Dkt. 59. The Court granted Plaintiffs’ concurrently-filed Motion for Temporary Restraining Order against EO-2 on March 15, 2017, Dkt. 219, and converted the temporary restraining order to a preliminary injunction on March 29, 2017, Dkt. 270, enjoining the Government from implementing EO-2’s 90-day travel ban, 120-day refugee ban, and 50,000-refugee cap. On April 3, 2017, the Court issued an Order granting the parties’ joint motion for a stay of further proceedings related to EO-2 pending the disposition of the Government’s appeal of the preliminary injunction. Dkt. 279. The Ninth Circuit affirmed the majority of the injunction on June 12, 2017. Dkt. 288.

On September 24, 2017, while the Government’s appeal of the Ninth Circuit’s opinion was pending, President Trump issued EO-3, which replaces the 90-day travel ban in EO-2 with an indefinite travel ban. Effective October 17, 2017, at 6:01 PM Hawaii Standard Time (“H.S.T.”), Section 2 of EO-3, *inter alia*, bars nationals of six Muslim-majority countries—Iran, Libya, Syria, Yemen, Somalia, and Chad—from entering the United States as immigrants. Foreign nationals of those countries also may not enter the United States with certain types of nonimmigrant visas. In addition to the six Muslim-majority countries that it targets, EO-3 bars entry by North Korean nationals and certain Venezuelan government officials.

On October 6, 2017, Plaintiffs filed a Motion to Lift the Stay, and to Increase the Word Limit and Set a Schedule for Briefing on Plaintiffs’ Forthcoming Motion for a Temporary Restraining Order. Dkt. 363.<sup>1</sup> Plaintiffs requested that the Court’s April 3, 2017 stay be lifted so that they could seek leave to file their TAC challenging EO-3 and adding additional plaintiffs. In response, the Court lifted the stay and directed that Plaintiffs file the instant motion and their

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<sup>1</sup> Plaintiffs conferred with counsel for the Government on October 5, 2017. By email correspondence, the Government indicated that it did not oppose Plaintiffs’ motion to lift the stay or their motion for leave to file a TAC. In addition, the Government asked Plaintiffs to relay to the Court its request that the deadline for responding to the TAC be extended until after the resolution of Plaintiffs’ Motion for a Temporary Restraining Order and any subsequent preliminary injunction motion. Plaintiffs consent to that request.

Motion for Temporary Restraining Order by 6:00 AM H.S.T on October 10, 2017.  
Dkt. 366.

### ARGUMENT

Plaintiffs respectfully request permission to file a TAC challenging EO-3 and adding additional plaintiffs as parties. Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend a complaint “shall be freely given when justice so requires.” The district court has discretion to allow a party to amend a pleading, *see Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971) (citation omitted), which the Ninth Circuit has explained should be exercised with “extreme liberality,” *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). In determining whether to permit a litigant to amend its pleadings, courts consider: (1) whether the movant has acted with undue delay, bad faith, or dilatory motive; (2) whether the nonmovant would be unduly prejudiced by the amendment; (3) whether there have been repeated failures to cure a pleading deficiency, and (4) whether the proposed amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

The *Foman* factors overwhelmingly favor permitting Plaintiffs to file their TAC. *First*, Plaintiffs have not acted with undue delay, bad faith, or a dilatory motive; immediately upon the release of EO-3, Plaintiffs began studying the new

Proclamation and gathering information regarding the grave harms it would inflict on Plaintiffs. They then promptly sought leave to amend their complaint before EO-3's travel bans are scheduled to take effect.

*Second*, while Plaintiffs would be significantly prejudiced if they are *not* allowed to amend their complaint to challenge the legality of EO-3, Defendants will not be prejudiced by the filing. Defendants have indicated that they do not oppose the instant motion, *see* n.1, *supra*, and in any event Defendants necessitated a new complaint by issuing a Proclamation that threatens many of the same harms as the Executive Orders that preceded it. Moreover, the two new individual plaintiffs proposed to be added to the lawsuit—John Doe 1 and John Doe 2—filed declarations supporting the State's initial motion for a temporary restraining order in February 2017, *see* Dkts. 10, 10-1, 10-2, 15, and the other proposed plaintiff—the Muslim Association of Hawaii—is the governing association for Dr. Elshikh's mosque. Thus, the circumstances of each of the prospective plaintiffs have been known to Defendants since the initiation of this case.

*Finally*, the third and fourth factors are met. There have been no failures to cure pleading deficiencies and there are no issues related to futility.

Given the foregoing, it is in the interests of justice to allow Plaintiffs to amend their complaint to challenge the illegality of EO-3. Fed. R. Civ. P. 15(a)(2). Allowing Plaintiffs to file a TAC challenging EO-3 will enable the State of Hawaii

to act to protect its sovereign interests, its universities, and its residents and employers. It also will enable the individual Plaintiffs to vindicate their rights to reunite with family members abroad—many of whom remain in the countries targeted by EO-3—and to be free of an unconstitutional establishment of religion. And it will permit the Muslim Association of Hawaii to avoid the diminishment of its community, the harm to its finances, and the impediment to its religious practice that will occur if EO-3 is implemented.

This Court previously allowed Plaintiffs to amend their complaint in nearly identical situations following President Trump’s replacement of EO-1 with EO-2, Dkt. 59, and in order to add Dr. Elshikh as a plaintiff, Dkt. 36. Now that President Trump has permitted the travel ban in Section 2(c) of EO-2 to expire and replaced it with EO-3, Plaintiffs request that the Court grant similar relief by allowing Plaintiffs to amend their complaint to challenge EO-3 and add additional plaintiffs.

## **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request leave to file a Third Amended Complaint. If the Court grants Plaintiffs’ motion, Plaintiffs further request that the deadlines for Defendants’ response to the Third Amended Complaint be extended until after this Court has resolved Plaintiffs’ Motion for Temporary Restraining Order and any subsequent proceeding regarding preliminary injunctive relief.



DATED: Washington, DC, October 10, 2017.

Respectfully submitted,

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