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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAII, ISMAIL ELSHIKH, JOHN DOES 1 & 2, and MUSLIM ASSOCIATION OF HAWAII, INC.,

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.

[PROPOSED] RESPONSE TO NOTICE OF *IN CAMERA, EX PARTE* LODGING OF REPORT CONTAINING CLASSIFIED INFORMATION

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

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[PROPOSED] RESPONSE TO NOTICE OF *IN CAMERA, EX PARTE* LODGING OF REPORT CONTAINING CLASSIFIED INFORMATION

On October 10, 2017, the Court ordered the Government to provide "a copy of the September 15, 2017 Report submitted by the Secretary of Homeland Security, which is referenced in Section 1(h) of Proclamation No. 9645." Dkt. 371. On October 14, the Government furnished the report, which is classified Secret, to the Court *in camera* and *ex parte*. The Government also objected to the Court's review or consideration of the report. Dkt. 376.

Plaintiffs did not seek disclosure of the report and do not believe that the Court needs to review or consider the report in order to resolve the case. Nonetheless, if the Court does consider or review the report, Plaintiffs respectfully request that the Court require the Government to permit Plaintiffs' counsel who have in the past obtained security clearances at or above the Secret level to view the report. In the alternative, Plaintiffs respectfully ask that the Court require the Government to disclose the unclassified portions of the report to Plaintiffs' counsel and to provide substitutions for any classified material in the form of a statement or summary of the relevant classified material.

As an initial matter, Plaintiffs believe that it is unnecessary for this Court to review the report. As the recently completed TRO briefing makes clear, the September 24, 2017 Proclamation and other publicly available information are sufficient by themselves for this Court to determine whether the Proclamation

complies with the immigration laws and the Constitution. Moreover, even if the facts contained in the report "could be reviewed by courts *in camera*," "the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure in a case such as this." *Kerry* v. *Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment). Accordingly, Plaintiffs believe it would be entirely appropriate for the Court to exclude the report from the record. And if the report is so excluded, Plaintiffs would have no need to view its contents.

If, however, the Court decides to review or consider the report, counsel for Plaintiffs who have had appropriate security clearances should be permitted to view the report as well upon their renewal. A basic premise of our adversarial system is that each party is permitted to view and consider documents material to the resolution of its case. Only the most extraordinary circumstances justify a departure from that practice. This case does not present such a circumstance. Several of undersigned counsel have been granted security clearances at or above the Secret level. As the Ninth Circuit has explained, a lawyer "who has the appropriate security clearance" does not "implicate national security when viewing the classified material because, by definition, he or she has the appropriate security clearance." *Al Haramain Islamic Foundation, Inc.* v. *U.S. Dep't of Treasury*, 686 F.3d 965, 983 (9th Cir. 2012).

Furthermore, considering the report while denying Plaintiffs' counsel an opportunity to view it would inflict severe prejudice on Plaintiffs. Unlike instances in which the Court has permitted Plaintiffs to file declarations *in camera*, *see, e.g.*, Dkt. 379, the Government has not simply hidden names and identifying details for Plaintiffs; rather, it has hidden *all* material information contained in the report. This wholesale redaction deprives Plaintiffs and their attorneys of any opportunity to consider the report or explain how, if at all, it affects the merits of their claims.

Accordingly, if the Court decides to review or consider the report, Plaintiffs respectfully request that it permit Plaintiffs' counsel with appropriate security clearances to view the report in a secure location, subject to appropriate assurances against its improper use or disclosure. In the alternative, Plaintiffs respectfully request that the Court order the Government to disclose the non-classified portions of the report to Plaintiffs' counsel, and to provide a non-classified statement or summary of the relevant classified material. That procedure is a familiar one: The federal courts regularly follow it in other cases involving classified materials. *See, e.g.*, Classified Information Procedures Act § 6(c), 18 U.S.C. app. 3 § 6(c). Following the same procedures here would afford Plaintiffs' counsel access to any material information in the report while still giving due weight to the Government's interest in protecting against the disclosure of classified information.

DATED: Washington, DC, October 16, 2017.

Respectfully submitted,

/s/ Neal K. Katyal

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