

No. 17-15589

In the United States Court of Appeals for the Ninth Circuit

STATE OF HAWAI‘I AND ISMAIL ELSHIKH,
Plaintiffs-Appellees,

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 W.
TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE;
AND THE UNITED STATES OF AMERICA,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawai‘i

**UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF FOR
THE STATES OF TEXAS, ALABAMA, ARIZONA,
ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MONTANA,
NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA,
SOUTH DAKOTA, TENNESSEE, AND WEST VIRGINIA, AND
GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI
AS AMICI CURIAE IN SUPPORT OF APPELLANTS
AND A STAY PENDING APPEAL**

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UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF

Amici curiae the States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and Governor Phil Bryant of the State of Mississippi respectfully move for leave to file a brief as amici curiae in support of appellants and a stay pending appeal. The parties consent to the proposed amicus brief, which accompanies this motion and Form 8 certification.

1. On March 6, 2017, the President issued Executive Order 13,780, determining that “the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States.” 82 Fed. Reg. 13,209, 13,213 (Mar. 9, 2017). “In light of the conditions in these six countries, until the assessment of current screening and vetting procedures” required by the Order are completed, the Order states that “the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high.” *Id.* at 13,211. “Accordingly, while that assessment is ongoing,” the Order imposes a “temporary pause on the entry of nationals” from these six countries, “subject to categorical exceptions and case-by-case waivers,” as described in the Order. *Id.* The Order also imposes a temporary restriction on aliens seeking entry under the U.S. Refugee Admissions Program. *Id.* at 13,215-16. On March 15, 2017, the district court enjoined the Executive Order in part on the basis that plaintiffs were likely to prevail on their Establishment Clause claim.

2. Federal Rule of Appellate Procedure 29 permits a State to file an amicus brief without the parties' consent or leave of court "during a court's initial consideration of a case on the merits." Fed. R. App. P. 29(a)(1), (2). Although the parties consent to the proposed amicus brief, that rule appears not to govern here both because the case is before the Court in a stay posture simultaneously with the "case on the merits," and because the attached brief is submitted on behalf of fourteen States as well as the Governor of Mississippi. *See id.* 29(a)(2) (no leave of Court required for amicus brief of a "state").

3. Amici respectfully move for any necessary leave to file an amicus brief at this stage, in support of appellants and in support of their motion to stay pending appeal being considered simultaneously by the Court. The attached proposed brief includes material that is "desirable" and "relevant to the disposition of the case." *Id.* 29(a)(3). The amicus brief provides an overview of the federal immigration laws against which plaintiffs' statutory and constitutional claims should be evaluated; explains that the Executive Order reflects a policy decision delegated to the Executive Branch expressly by Congress, and was issued after multiple federal officials drew public attention to serious flaws in the preexisting vetting scheme for aliens residing abroad who wish to enter this country; and draws the Court's attention to authorities relevant to the extension of constitutional rights that plaintiffs advocate here.

4. This is a case of national interest with important and far-reaching foreign-affairs and national-security implications. Amici have a substantial interest in the health and welfare of their citizens, but the States and their elected officials must

rely on the federal Executive to determine when the entry of aliens should be suspended for public-safety reasons under a regime crafted by the States' elected representatives in Congress. *See generally Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012). Amici thus share a substantial interest in the federal government having the latitude to make policy judgments reserved to it by statute, and inherent in this country's nature as a sovereign, regarding the terms and conditions for whether aliens may enter the country.

5. Amici have also endeavored to assist the Court in resolving the weighty issues in this case in as few words as possible. The attached brief complies with the type-volume limitation for an amicus brief on the merits because it uses fewer than half of the 14,000 words that are allotted for appellants' opening brief during the Court's initial consideration of the case on the merits. *See* Fed. R. App. P. 29(a)(1), (5), 32(a)(7)(B)(i); 9th Cir. R. 32-1(a).

6. The parties consent to the relief requested in this motion.

CONCLUSION

Amici respectfully request leave to file the attached brief as amici curiae supporting appellants and a stay pending appeal.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

This motion has been conferenced with counsel for the parties, and the parties consent to the filing of the proposed amicus brief for which leave to file is requested herein.

s/ Scott A. Keller
SCOTT A. KELLER

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Scott A. Keller
SCOTT A. KELLER