

17-16426

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

STATE OF HAWAI'I and ISMAIL ELSHIKH,

Plaintiffs-Appellees,

—v.—

DONALD J. TRUMP, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I
CASE NO. 1:17-CV-00050
HONORABLE DERRICK WATSON, DISTRICT JUDGE

**BRIEF OF *AMICI CURIAE* ADAM SOLTANI, ASMA ELHUNI,
HASSAN SHIBLY, & BASIM ELKARRA IN SUPPORT OF
PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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INTEREST OF *AMICI CURIAE*¹

The proposed *Amici* are American Muslim citizens who would personally be harmed by the implementation of the Defendants' unjustifiably narrow interpretation of "close familial relationship," the criterion set forth by the Supreme Court in *Trump v. Int'l Refugee Assistance Project* ("IRAP"), 137 S.Ct. 2080, 2088 (2017) (per curiam). The proposed *Amici* have close familial relationships with relatives living in the six Muslim-majority countries identified by Executive Order 13780, who wish to visit *Amici* in the United States but would be banned from doing so under the Defendant's policy. Accordingly, the proposed *Amici* have "...a unique perspective [and] specific information that can assist the court beyond what the parties can provide." *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in chambers). The proposed *Amici* seek to appear in support of Plaintiffs-Appellees the State of Hawai'i and Ismail Elshikh and in support of affirmance of the order of the District Court made on July 13, 2017.

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no one, except counsel for *Amici*, has authored this brief in whole or in part or contributed money toward the preparation of this brief. All parties have consented to the filing of this brief. This brief does not purport to represent the position of NYU School of Law.

INTRODUCTION

On January 27, 2017, President Trump issued Executive Order 13769, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States.” 82 Fed. Reg. 8977 (Jan. 27, 2017) (“EO-1”). The order, *inter alia*, banned entry into the United States for 90 days by citizens or nationals of seven predominantly Muslim countries. *Id.* at 8978. It was immediately challenged in court, resulting in a nationwide injunction against its key provisions, *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), which was upheld by the Court of Appeals for the Ninth Circuit on February 9, 2017. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

In response, the President revoked EO-1 and issued a “watered down version”² of it on March 6, 2017, also titled “Protecting the Nation from Foreign Terrorist Entry into the United States.” Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (“EO-2”). EO-2, *inter alia*, banned entry to the U.S. for individuals from six of the seven original Muslim countries for 90 days, *id.* at 13213 (§2), and suspended all refugee admissions for 120 days. *Id.* at 13215 (§6). It too was met with legal challenges asserting that EO-2 violates the Establishment Clause of the First Amendment as well as provisions of the Immigration and Nationality Act (“INA”),

² Jacob Pramuk, *Trump May Have Just Dealt a Blow to His Own Executive Order*, CNBC (Mar. 15, 2017), <http://www.cnbc.com/2017/03/15/trump-may-have-just-dealt-a-blow-to-his-own-executive-order.html>.

66 Stat. 187, as amended.

On March 15, the district court in Hawai'i entered a nationwide temporary restraining order against enforcing §2 and §6 of EO-2, *Hawai'i v. Trump*, No. CV-17-00050 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15, 2017), followed by a preliminary injunction, 2017 WL 1167383 (D. Haw. Mar. 29, 2017). This Court unanimously upheld the injunction with respect to §2(c) (entry suspension), §6(a) (suspension of refugee admissions), and §6(b) (refugee cap), finding that EO-2 likely exceeded the President's statutory authority under the INA. *Hawai'i v. Trump*, 859 F. 3d 741 (9th Cir. 2017) (per curiam).

Similar litigation in the District of Maryland resulted in a second nationwide preliminary injunction against §2(c) of EO-2. *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235 (D. Md. Mar. 16, 2017) (*IRAP*). The Court of Appeals for the Fourth Circuit, sitting en banc, upheld the injunction. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017). The court found that the plaintiffs were likely to succeed on the merits of their Establishment Clause claim because a reasonable observer would conclude that that §2(c) of EO-2 was motivated principally by "animus toward Muslims" and an intention to exclude Muslims from the United States because of their religious beliefs, not for purposes of national security. *Id.* at 656.

On June 26, 2017, the Supreme Court consolidated the Hawai'i and Maryland

cases, granted certiorari, and partially stayed the preliminary injunctions entered by the lower courts. *Trump*, 137 S.Ct at 2083. Specifically, the Court stayed the injunction with respect to “foreign nationals abroad who have no connection to the United States at all,” but affirmed that §§ 2(c), 6(a), and 6(b) “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.” *Id.* at 2088. For individuals, the Court explained, this means a “close familial relationship is required.” *Id.* The Court did not define “close familial relationship,” but acknowledged as an example that the mother-in-law of plaintiff-appellee Ismail Elshikh “clearly has such a relationship.” *Id.*

On June 29, three days after the Supreme Court’s decision, the State Department issued guidance to consular officials. The State Department Guidance, as amended, defined “close familial relationship” to exclude grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law. See U.S. Dept. of State, *Implementing Executive Order 13780 Following Supreme Court Ruling -- Guidance to Visa-Adjudicating Posts* (Jun. 28, 2017).³

On July 13, 2017, The District Court granted in part the motion of plaintiffs-appellees to Enforce, or in the alternative to Modify the Preliminary Injunction. *Hawai’i v. Trump*, No. CV-15-00050 DKW-KSC, 2017 WL 2989048 (D. Haw. Jul.

³ Available at http://live.reuters.com/Event/Live_US_Politics/989297085.

13, 2017). The District Court concluded that the State Department Guidance was in conflict with the scope of familial relationships recognized in relevant federal immigration statutes, *id.* at *5, was not supported by the decision of the Supreme Court in this case or by other Supreme Court precedent on the subject, *id.* at *6, and “...represents the antithesis of common sense. Common sense, for instance, dictates that close family members be defined to include grandparents. Indeed, grandparents are the *epitome* of close family members.” *Id.* (emphasis original). For these reasons, the District Court modified the preliminary injunction to enjoin defendants-appellants from enforcing EO-2 so as to exclude grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews or cousins of persons in the United States.

ARGUMENT

I. Amici Would Be Irreparably Harmed by Enforcement of the State Department Guidance

As detailed below, *Amici* have close family members whom they seek to bring to the United States, for the reasons families have always sought to get together: to celebrate, to renew ties and to establish ties for succeeding generations. The unjustifiably restrictive policy issued by the State Department, if permitted to be enforced, would have barred these family members from obtaining visas. The *Amici* respectfully suggest that their circumstances, detailed below, show how continued enforcement of the State Department Guidance would have caused irreparable harm,

and why the decision of the District Court modifying the preliminary injunction should be affirmed.

A. Adam Soltani

Adam Soltani is a Muslim American citizen living in Oklahoma with his wife and two young children. He is of Iranian heritage and he has a brother, Johan, also living in Oklahoma, who is getting married in Edmond, Oklahoma on August 3, 2017. Under the State Department Guidance, Adam Soltani would not be able to bring his family now living in Iran to the August wedding. The Soltani brothers' family members in Iran include their grandmother, who helped raise them in the United States, their cousins, with whom they grew up, and their uncles. Under the State Department Guidance, all of these relatives would be ineligible for a visa.

Adam Soltani and his brother do not have many family members in the United States. The Soltani brothers have a close relationship with their grandmother, Zahra, who lives in Iran. She cared for the Soltani brothers as children while visiting the United States for the better part of a year. During that summer and into school year, she watched after Adam and his brothers as a parent.

The Soltani brothers have an especially close relationship with their cousins in Iran, Maisam, Nabi, Molud, and Zahra. Their oldest cousin, Maisam, is the same age as Adam. Johan has traveled to see them in Iran many times, building strong familial bonds. His most recent visit was last year. The cousins' attendance at the

wedding, which has now been made possible by the decision of the District Court, will make it a joyous occasion.

The uncertainty resulting from EO-2 has made it difficult to plan, but the decision of the District Court has permitted Adam and his family to hope and expect that they will be able to celebrate John's wedding in the presence of the people who are most important to them.

B. Asma Elhuni

Asma Elhuni is an American Muslim citizen who came to the United States from Libya with her parents and brothers when she was two years old. She grew up in New Jersey and now lives in Georgia, the proud mother of four children. All of Asma Elhuni's family, aside from her immediate relatives, live overseas and are Libyan nationals. All but two of her aunts reside in Libya, one of the six Muslim-majority countries targeted by EO-2.

Family ties are of paramount importance to Asma Elhuni, as they provide her American family with a connection to their Libyan culture and heritage. Having her Libyan-based family visit the US would deepen those ties and allow her and her children to share their American lives with them.

Asma Elhuni is extremely close to her aunts. She traveled to Libya to visit them every year when she was younger. More recently she took her children to stay with her aunts.

Two of Asma's aunts have since left Libya and are now caring for Asma's mother in Egypt. Asma wants to bring her mother and aunts to the United States, so that her aunts can be a part of her children's lives and continue to help with her mother's care. Asma's aunts in Egypt applied last year for visas to the US. However, under the restrictive definition of close familial relationship contained in the State Department Guidance, Asma Elhuni's aunts would be ineligible for visas as Libyan nationals. As a result of the District Court's decision, Alma Elhuni will be able to have her aunts come visit her in the United States and help pass on her heritage and culture to her own children.

C. Basim Elkarra

Basim Elkarra is a U.S. citizen of Arab descent residing in Sacramento County, California with his wife, also an American citizen of Syrian heritage, and their five children. His wife has three aunts, one uncle, and several cousins living in Syria. She has lived with them in the past and her cousins are like her sisters and brothers. She considers them part of her immediate family.

It goes without saying that the living conditions of their relatives in Syria are dire – their homes have been destroyed and their lives are in danger. Basim and his wife would like to bring them to the United States, at least for a visit, both for their safety and to permit Basim's children, born and raised in the United States, to come to know their roots, culture, language and history. Such a visit would have

been barred by the restrictive definition of close familial relationship in the State Department Guidance, but is now possible as a result of the decision of the District Court. And because conditions in Syria are so dangerous from day to day, Bassim Elkarra and his wife want to make arrangements for such a visit as soon as possible.

D. Hassan Shibly

Hassan is an American citizen who was born in Syria. He grew up in New York and now resides in Florida with his wife and three young children. When Hassan was growing up, his family overseas was not financially able to visit him in the United States. And as a child, the absence of his cousins and aunts and uncles in the United States left him feeling that there was a void in his life with respect to his culture and heritage as well as knowledge of his own family's history and traditions.

As part of his and his wife's approach to parenting, it is a priority for them to have their children grow up with a sense of connection to their heritage and their family. Especially in the current climate, Hassan believes that it is critical to the development of his children, and to their sense of belonging, that they establish connections with family who share the same language and the same heritage.

Now that his children are at an age when they will remember, Hassan would like his children to know their extended family in a way that he could not growing

up. However, under the restrictive definition of close familial relationship contained in the State Department Guidance, arranging for the cousins to visit would not be possible because they are nationals of a country covered by EO-2. The decision of the District Court has made such a visit possible for Hassan Shibly's relatives. And because of conditions in Syria, it is critical that such a visit be arranged as soon as possible.

II. The District Court's Modification of the Preliminary Injunction to Bar Enforcement of the Government's Restrictive Definition of "Close Familial Relationship" Should Be Affirmed

Amici adopt *in toto* the arguments put forward by the Plaintiffs-Appellees in support of affirmance of the decision of the District Court.

CONCLUSION

This brief is just a sampling of the personal, immediate harms that would befall American Muslims as a result of the Defendants' unjustifiably narrow interpretation of the Supreme Court's order. But because of the District Court's July 13 ruling, *Amici's* grandmothers, aunts, uncles, and cousins will still be eligible for visas. *Amici* therefore urge this Court to affirm the District Court's ruling and allow *Amici* to reunite with their family in the United States.

Dated: August 3, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the length limits in Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 32-1(a) because it contains 2,360 words, excluding items under Federal Rule 32(f). It has been prepared in a proportionally spaced typeface using the Times New Roman font in 14 point.

Dated: August 3, 2017

Respectfully submitted,

/s/ Michael Price
Michael Price

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on August 3, 2017, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically *via* that system.

Dated: August 3, 2017

Respectfully submitted,

/s/ Michael Price
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