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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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

BRIEF OF PARTICIPATING LAW FIRMS OF THE EMPLOYMENT LAW ALLIANCE IN SUPPORT OF PLAINTIFFS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, Amici state as follows:

Dinse, Knapp & McAndrew PC has no parent corporation and no publicly held corporation owns 10% or more of its stock

Fortney & Scott, LLC has no parent corporation and no publicly held corporation owns 10% or more of its stock

Hirschfeld Kraemer, LLP has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Lewis Roca Rothgerber Christie LLP has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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Pursuant to Federal Rule of Appellate Procedure 29(c), Amici state that no party or person other than Amici authored or contributed funding for this brief.

Respectfully submitted this 11th day of March, 2017.

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BRIEF OF PARTICIPATING LAW FIRMS OF THE EMPLOYMENT LAW ALLIANCE IN SUPPORT OF PLAINTIFFS

I. INTEREST OF AMICI CURIAE

The Employment Law Alliance ("ELA") is an integrated global practice network whose independent law firm members are well-known and well-respected for their employment and labor law practices. With more than 3,000 lawyers across more than 120 countries, all 50 U.S. states, and every Canadian province, the ELA is the world's largest such network. The following U.S. law firm members of the ELA, each of which has significant expertise in employment-related matters, hereby submit this brief:

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Fortney & Scott, LLC;

Hirschfeld Kraemer, LLP;

Lewis Roca Rothgerber Christie LLP;

Miller Nash Graham & Dunn LLP;

Partridge, Snow & Hahn LLP;

Shawe Rosenthal LLP; and

Tueth, Keeney, Cooper, Mohan, & Jackstadt, P.C.

(hereinafter the "Participating Members of the ELA" or "*Amici*").

Collectively, ELA member law firms represent hundreds of U.S.-based employers that have been, and would continue to be, adversely impacted by the Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States, issued on January 27, 2017, and on March 6, 2017 (collectively, the "Orders"). Many of the ELA member law firms represent employers that are institutions of higher education. The Orders also adversely affect the educational and financial interests of these educational institutions.

Amici submit this brief to provide examples of how the Orders adversely affect the ability of their member clients to do business and fulfill their educational missions.

II. ARGUMENT

On Friday, January 27, 2017, President Trump signed an "Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States"(the "Order" or the "original Order"). Executive Order No. 13769, 82 Fed. Reg. 8977 (January 27, 2017). On March 6, 2017, President Trump issued the new Executive Order, entitled "Protecting the Nation From Foreign Terrorist Entry into the United States" (the "Order" or the "new Order"), replacing the original Order (the original Order and new Order are collectively referred to as "the Orders"). Executive Order No. 13780, 82 Fed. Reg. 13209 (March 9, 2017). The new Order, similar to the original Order, bars people from six foreign countries ("EO

Countries") from entering the United States for an initial period of 90 days with the potential for an indefinite ban. These people include employees, students, affiliates, and contractors of U.S. employers that ELA members represent.

The Orders and their implementation have caused – and, unless this court upholds the district court's decision, will continue to cause – harmful financial and operational consequences to ELA member clients. Although the new Order allows lawful permanent residents ("green card holders") and those with valid non-immigrant visas to enter the country, the new Order still prevents those employees, students, affiliates, and contractors who do not possess current valid visas, and who pose absolutely no security risk, from entering the United States, some of whom may be separated from their families and homes potentially indefinitely. For those reasons, the Orders hamper travel for ordinary and legitimate travelers on business for and related to ELA member clients.

Even if such employees and contractors are eventually admitted, many have been subjected to lengthy investigation and questioning by Department of Homeland Security ("DHS") officers and detained upon arrival for, sometimes, several hours. These investigations often include searches of cell phones and social media accounts, inquiries into religious practices and beliefs, extensive interrogation of personal residence and travel histories and other subjects. The investigations and detentions may separate families of business travelers, including

young children. This is not only personally frightening, it also severely disrupts work, study, and business of the travelers and their ELA-represented institutions.

These concerns are causing employers to suspend travel for vulnerable employees and advise vulnerable students not to travel. This, of course, causes further disruption to their business efforts and relationships.

Such disruption – should it be allowed to continue – would inevitably and irreparably erode business opportunities for U.S. employers. Employers may lose valuable employees, students, affiliates, and contractors who – precisely because of their skills, talents, education, experience, foreign origin, knowledge of language, culture and business practices, and special relationships – are uniquely able to advance employers' interests in and connections to the EO Countries.

A. The Haphazard Implementation of the Executive Orders Created Unprecedented Chaos and Uncertainty for Employers.

1. The Original Order

The original Order took effect on January 27, 2017. In the week after implementation, and before the Western District of Washington enjoined enforcement of various sections of the original Order in its February 3, 2017 Temporary Restraining Order, the scope and effect of the original Order remained fluid, and the federal government implemented it in an inconsistent and contradictory manner.

Amici address the shifting interpretation of the original Order here because it contributes directly to the sense of unpredictability they face. While every new law or regulation is subject to interpretation, the inconsistencies and contradictions associated with the Orders are truly unprecedented in our experience. The changes whipsawed back and forth with life-changing consequences for the affected employees and students each time. As we describe more fully in Sections B and C, the resulting climate stunts the growth, and disrupts the orderly administration of the business and educational enterprises that *Amici* represent.

For example, the Department of State ("DOS") and DHS applied the original Order inconsistently to lawful permanent residents from the affected countries. By its plain language, the original Order purported to bar immigrants and nonimmigrants – including lawful permanent residents and other long-time U.S. residents – from entering the United States.[1] The same day the original Order was issued, Edward J. Ramatowski, Deputy Assistant Secretary of the Bureau of

[1] "Immigrants" include individuals lawfully admitted for permanent residence, often referred to as LPRs or green card holders. LPRs have been "accorded the privilege of residing permanently in the United States ... in accordance with immigration laws," *see* 8 U.S.C. § 1101(a)(20), and they often reside in, work, and raise their families in the United States over period of many years. LPRs are also eligible to apply for U.S. citizenship after a specified period of time, typically five years. "Nonimmigrants" include visitors, individuals with student visas (F, J, or M visas), highly-skilled workers (H-1Bs), intracompany transferees (L-1As and L-1Bs), and numerous other temporary classifications (Os, TNs, etc.). *See* 8 U.S.C. § 1101(a)(15)(A)-(V).

Consular Affairs for DOS, provisionally revoked all valid nonimmigrant and immigrant visas of nationals of the EO Countries, except certain specified diplomatic visas, and visas of foreign nationals granted the national interest exception under Section 3(g) of the original Order. The DOS estimated that this provisional revocation impacted 60,000 people, while the Department of Justice estimated the impact at 100,000. The provisional revocation of these visas renders the affected individuals potentially deportable.

Even long-term permanent residents of the U.S. were denied return to the U.S. upon the signing of the original Order if they had been born in EO Countries. But on January 29, 2017, two days after the Order was signed, John Kelly, the Secretary of DHS, stated that the entry of lawful permanent residents would be deemed to be in the national interest and that "absent the receipt of significant derogatory information indicating a serious threat to public safety and welfare, permanent resident status will be a dispositive factor in [the agency's] case-by-case determinations." That guidance was welcome, but because it addressed an entire category of people at once, it contradicted the original Order's statement that determinations would be made on a case-by-case basis.[2] That guidance could be

[2] The Order provides a highly discretionary exception, stating that "the Secretaries of State and Homeland Security may, on a case-by-case basis, and when in the national interest, issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked." *See* Order, § 3(g).

changed at any time, and there still is no guidance regarding how to apply or qualify for a case-by-case waiver or exemption.

On January 31, 2017, Secretary Kelly and other leaders from DHS spoke at a news conference about how DHS and the DOS were implementing the Order. Kevin McAleenan, Acting Commissioner of U.S. Customs and Border Protection ("CBP"), part of DHS, addressed dual nationals (*i.e.*, individuals who are nationals of both an EO Country and another country), stating that "[t]ravelers will be assessed at our border based on the passport they present." In other words, foreign nationals from one of the EO Countries would still be able to enter the United States if they present a valid passport from a non-EO Country.

But on or about February 1, 2017, DOS announced on its website that it had "temporarily stopped scheduling appointments and halted processing of immigrant visa applications for individuals who are nationals or dual nationals" of the EO Countries. The announcement further stated that all interviews scheduled for these applicants in February, 2017, had been cancelled. This directly contradicted the January 31 statements that dual nationals would not be affected.

The same day, on January 31, 2017, CBP also published additional information relating to the Order in a "question and answer" format on its website, stating that "USCIS will continue to adjudicate N-400 applications for naturalization and administer the oath of citizenship consistent with prior

practices." That guidance is inconsistent with reports *Amici* have received from clients who have been told that processing of their naturalization applications and/or administration of the oath have been suspended.

On February 1, 2017, Donald F. McGahn II, Counsel to the President, released a Memorandum to the Acting Secretary of State, the Acting Attorney General, and the Secretary of DHS providing "Authoritative Guidance" on the Executive Order. In this memorandum, Mr. McGahn acknowledged that there had been "reasonable uncertainty" about whether the 90-day ban on entries applies to lawful permanent residents from the EO Countries, and clarified that Sections 3(c) and 3(e) of the Order do not apply to such individuals.

The unclear government interpretations and communications regarding the intended scope of the Order and the lack of advance notice, agency guidance and inter-agency collaboration on the Order's scope caused substantial concern and chaos. Dual nationals of the U.S and EO Countries, and their employers, fearing they were subject to the travel ban, sought legal counsel to confirm they still were authorized to return to the U.S. in their capacity as U.S. citizens with U.S. passports. Lawful permanent residents of the U.S. whose country of origin is among the EO Countries were informed the travel ban applied to them and were blocked from their planned return to the U.S. for several days. Some lawful permanent residents were even forced to sign an I-407, abandoning their rights as a

permanent resident, at which time they were immediately deported. The fear associated with both the Orders has even resulted in foreign nationals questioning the ability to travel domestically within the U.S.

This uncertainty did cause and is causing ELA-represented employers substantial harm. Not only did it cause actual harm as to those who were unable to travel or who were traveling and could not return, but it also causes future harm for those who fear the original and new Orders' impact, and the potential expansion, or further issuance of additional executive orders on immigration, and are thus cancelling work-related or education-related travel on behalf of their organizations. The prospect that additional executive orders could be issued with a similar lack of clarity and guidance amplifies the climate of uncertainty for U.S. employers.

2. <u>The New Order</u>

On Monday, March 6, 2017, President Trump signed an Executive Order replacing the previously issued Executive Order. The new Order still contains a 90-day suspension of entry for certain citizens and nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen. This travel ban begins on March 16, 2017. Citizens and nationals of Iraq are no longer included, but they may still be subjected to additional screening when seeking to enter the United States. The revised travel ban only suspends entry into the United States of individuals who are citizens or nationals of the six designated countries if those individuals:

(1) Are outside the United States on March 16, 2017;

(2) Did not have a valid visa by 5:00 p.m. on January 27, 2017; and

(3) Do not have a valid visa on March 16, 2017.

Lawful permanent residents (*i.e.*, green card holders) are also excluded from the ban. The new Order also clarifies that dual nationals (*i.e.*, individuals who are nationals or citizens of one of the six designated countries and a non-designated country) will be permitted to enter the United States when traveling on a passport issued by a country not designated in the Order.

Although the new Order does provide consular officers and U.S. Customs and Border Protection officers discretion to authorize the issuance of a visa, or allow entry of a foreign national covered by the ban on a case-by-case basis if the foreign national demonstrates that denying entry during the suspension period would cause undue hardship, and that entry would not pose a threat to national security and would be in the national interest, neither of the Orders provide specific details or procedures on how to seek a waiver of the travel ban.

B. The Orders Harm U.S. Employers ELA represents.

The Order has harmed and is harming U.S. employers, as the new Order will continue to do, in several ways.

The ban was implemented so suddenly that many executives and employees were stranded abroad, potentially indefinitely, or had to cancel work-related travel plans for meetings, conferences and other travel on behalf of their employers.

Employers cancelled work-related travel extensively across many industries out of fear of the ban being reinstated or expanded.

These circumstances harm U.S. employers' ability to recruit and retain employees who had been previously vetted and approved, and who have specialized skill and knowledge.

All of this puts U.S. employers at a competitive disadvantage. It cannot continue without severe harm to U.S. employers and the U.S. economy.

1. The Sudden, Chaotic Impact of the Order Harmed Many Employers' Operations.

Many U.S. employers with global operations employ temporary nonimmigrant foreign workers and U.S. permanent resident green card holders who are based in the United States but who travel internationally for work. Such workers require flexible international travel to attend meetings at worldwide company offices, to visit various customer locations, and to participate in global industry activities. U.S. employers that are institutions of higher education also routinely admit students from other countries, including hundreds of students from the seven countries named in the original Order, and the six countries named in the new Order.

The Order's sudden implementation immediately affected employees and students who were traveling outside the U.S. and were not able to return, despite being already vetted and approved for employment or scholarship in this country and actively engaged in such activities in the United States.

A few examples demonstrate the problems ELA-employer clients face across the country. For example, employees with valid visas who were traveling abroad temporarily when the Order was issued were unable to return, with no warning. Employees with valid visas were unable to travel on behalf of their employers and had to cancel long-standing meetings and professional engagements. Visiting researchers and tenure-track university faculty members employed in H-1B status and traveling abroad temporarily when the Order was issued were unable to return to campus to resume teaching and research duties, with no warning. Students who have already been admitted or were temporarily away have been barred from traveling to their campuses.

Employers have lost the work that those employees would have performed upon their return to the United States. They have covered the lodging and travel costs of stranded employees. In addition, employers' interest is not limited to immediate financial loss. In many cases, the loss of a critical employee damages future business plans.

2. Uncertainty About the Order is Hindering Business Travel and Investment.

The harm to U.S. employers is not limited to stranded individuals. Reasonable employers are concerned that the manner in which the original Order has already been implemented is a warning of other radical changes in the new Order or its interpretation. Employers are concerned that the list of countries will be expanded to other countries in a similar manner. Changing the list without notice would strand other employees outside the U.S., separated from family, school, and jobs. Employers are also concerned about the "case-by-case" waiver process described in the Orders. We do not know what that process will involve, or what criteria will be used to make a determination.

As a result of this uncertainty, many employees are afraid to travel, even if they are not from one of the six EO Countries in the new Order. The fear of being denied entry or re-entry has increased employee unwillingness to come to the U.S. for business, and to leave the U.S. for business. This has caused multinational business executives with visas or admission stamps for visiting one of the listed countries on business or holiday to question their continued ability to travel to the U.S. for business purposes. It has caused physicians from non-EO countries in the Middle East who are employed in the U.S. on H-1B visas to question whether the U.S. government will allow them to stay in this country to provide medical care in underserved areas of the United States.

U.S. employers with cross-border business are restricted as to which foreign national employees are eligible to travel to and from work on a daily basis. Many cross-border commuters now fear entering the U.S. for work, and fear departing the U.S. for work regardless of whether they are from the named countries in the Order. Such fear has caused disruption in business in border states where employees are electing to remain on one side or the other until they fully understand what risks they face when traveling internationally.

The uncertainty is not limited to employees. U.S. investors and entrepreneurs who work with U.S. employers are putting their plans to bring start-up and other business ventures to the U.S. on hold, given the immediate and potential impact of the original or new Order. Those from the EO Countries may not have the opportunity to invest in the U.S. economy, and the ban may deter others from doing so entirely.

Due to these circumstances, employers are hesitant to require employees to travel, because there is no certainty that employees will be admitted into (or back into) the U.S. Some employers are putting business on hold, at significant expense. This cannot continue indefinitely, or the companies and institutions will lose their competitive edge and standing in the global economy.

3. The Orders Negatively Impact Recruitment.

U.S. employers are already experiencing a negative impact on recruitment, hiring, and retention practices as a result of the original Order, and will continue to experience this under the new Order. For example, U.S. employers in the STEM fields (Science, Technology, Engineering, and Math) have difficulty recruiting and hiring qualified U.S. workers to fill STEM roles. Workers and students from other countries, including EO Countries, fill STEM roles that U.S. workers are not otherwise able to fill. But because of the Orders, U.S. employers do not know whether they may continue to employ workers from EO Countries, or whether they can pursue qualified workers from EO Countries for future positions.

Examples of these recruitment problems are already arising. For example, valued recruits for employment in the United States have been unable to travel to the U.S. for scheduled job interviews and worksite tours based on their country of birth, even if they are currently residing in a country not subject to the Order. New permanent residents in the U.S. whose immediate family still reside elsewhere (pending the long immigration process) are suddenly facing a much longer family separation because the family members were born in a country subject to the Order. These hardships will make it less likely that these valuable employees will come here, or that they will stay. The loss of their expertise will be substantial.

C. The Orders Have Harmed and Will Continue to Harm U.S. Institutions of Higher Education.

Amici represent many employers who are higher education institutions. The original and new Order present particular challenges for them.

Knowledge is universal, and teachers, researchers, and students are part of a global academic community. U.S. colleges and universities employ numerous instructors and researchers from the seven EO Countries. The Order has barred scholars from entering the country. Others have been afraid to leave the country for conferences or research for fear they would not be allowed to return. The new Order will pose the same issues.

The inability to invite scholars from the EO Countries causes more harm than the loss of those scholars alone. In some cases, academics may hold conferences in other countries so that all can attend. Research and scholarship will move elsewhere, causing both economic and academic loss.

Students are also significantly affected. U.S. colleges and universities enroll many students from EO countries. Students who are already admitted to colleges and universities for this, and the upcoming term may not be able to enter the country to attend class. Since the original and new Order, universities are prudently advising vulnerable students who are already here not to leave the country to visit family, to study abroad, for internships and field work, or to vacation over the upcoming spring break, because they will not be allowed to

return. These travel restrictions create impossible dilemmas for students who in some cases must leave the country to renew student visas, only to be denied reentry. Even students whose visas are intact for now must cope with the loss of family visits. Some families may not be able to attend their student's graduation ceremonies.

The loss of international students and scholars is more than financial. It represents a hole in the fabric of the university community – a loss of scholarship, innovation, understanding, and perspective that is simply not replaceable. This loss will quickly have a significant negative impact on the economy of the United States.

III. CONCLUSION

Based on the foregoing, *Amici* respectfully request that the Court grant Plaintiff's Motion.

Respectfully submitted this 11th day of March, 2017.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) because this brief contains 3689 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it uses proportionally spaced typeface using Microsoft Word for Windows software in 14 pt. Times New Roman.

Respectfully submitted this 11th day of March, 2017.

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