

No. 17-1351

IN THE

**United States Court of Appeals
for the Fourth Circuit**

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland

No. 8:17-cv-00361-TDC (Chuang, J.)

**BRIEF AMICUS CURIAE OF DR. ISMAIL ELSHIKH IN SUPPORT OF
APPELLEES AND AFFIRMANCE**

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STATEMENT OF INTEREST OF AMICUS CURIAE

Dr. Ismail Elshikh is an American citizen of Egyptian descent and a resident of Hawai‘i, where he has lived for over a decade. His five children and his wife, who is of Syrian descent, also are American citizens and residents of Hawai‘i. As the Imam of the Muslim Association of Hawai‘i, Dr. Elshikh is a leader in the local Muslim community and works closely with many of its members. He also has family living in Syria, one of the six Muslim-majority states from which travel into the United States is banned under Section 2(c) of Executive Order 13,780 (the “Executive Order”). In particular, his mother-in-law is a resident of Syria whose United States visa application was pending when the March 6 Executive Order was issued. Dr. Elshikh files this *amicus* brief in support of Plaintiffs-Appellees’ position and in support of affirmance of the district court’s preliminary injunction (although he thinks the injunction should cover the whole Order). Dr. Elshikh is a named plaintiff-appellee in *State of Hawai‘i, et al. v. Trump, et al.*, No. 17-15589, pending before the U.S. Court of Appeals for the Ninth Circuit.

Dr. Elshikh is deeply and personally affected by the Executive Order, which, in addition to its travel ban provisions, places sweeping limits on domestic refugee admissions. These and other sections of the Executive Order work together to convey to Muslim citizens, like Dr. Elshikh, that they are second-class persons and should be excluded from the United States on the basis of their faith.

The Executive Order also creates concrete obstacles to the ability of Dr. Elshikh's mother-in-law to visit his family in Hawai'i. Several members of Dr. Elshikh's Mosque, and countless other Muslim citizens, now face similar hurdles in reuniting with their families abroad.

Furthermore, Dr. Elshikh's work as Imam has been affected by the Executive Order. His Mosque's religious practice is compromised by the forced exclusion of new members from abroad, including refugees, as a result of the Executive Order. Dr. Elshikh also is called to provide spiritual leadership and support, as Imam, to Mosque members who have come to fear for their wellbeing in the United States. Dr. Elshikh's perspective will assist the Court in evaluating the Executive Order's effects on Muslim communities and its discriminatory purpose, as determined by reasonable observers.

RULE 29(a)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part, and no party, person, or entity, other than *amicus* and his counsel, has contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

The public record shows, and the experience of *amicus* reflects, that the Executive Order was meant to and does discriminate against Muslims in clear violation of the First Amendment's protection against governmental establishment

of religion.¹ “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982) (applying strict scrutiny and invalidating a policy that granted denominational preference). The key inquiry in this regard is what an “objective observer” would understand as the primary purpose of a government action. Even where a policy appears neutral on its face, it may be unconstitutional where in “operation” it discriminates against members of a particular faith. *Church of Lukumi Babalu Aye, Inc., et al. v. City of Hialeah*, 508 U.S. 535, 540 (1993).

Dr. Elshikh believes that his experience confirms that in “purpose” and in “operation,” this Executive Order harms those of the Muslim faith and interferes with their ability to openly pursue the religion of their choice. *First*, as a Muslim-American, and particularly as a parent trying to raise his children in the Muslim faith, Dr. Elshikh has keenly felt the sting of the message of exclusion and discrimination the Order sends. *Second*, as the son-in-law of a Syrian national seeking to visit the United States, Dr. Elshikh has experienced the pain imposed by the additional obstacle the Order erects to the desired visit of his children’s beloved

¹ Although it is the position of *amicus* that the Executive Order is unlawful in its entirety, for reasons including violation of the Due Process Clause of the Fourteenth Amendment and the Order’s conflict with the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101, *et seq.*, this *amicus* brief is filed to address the Executive Order’s particular violation of the Establishment Clause of the First Amendment.

grandmother. *Third*, as an Imam and leader of a Muslim community in Hawai‘i, Dr. Elshikh has witnessed the detrimental effect the Order has had on his religious community.

This is not the experience of an American citizen free from State-sponsored sectarian preference. And these harms, combined with the obvious religious animus motivating the Executive Order, work to chill all Muslim citizens of the United States from the free and public exercise of their faith.

1. The Executive Order Harms Muslim-Americans by Sending a Message of Exclusion.

The Order harms Dr. Elshikh and Muslim citizens and residents more generally by preventing a wide swathe of Muslim immigrants, travelers, and refugees from entering the United States, and thereby communicating a message that our communities are safer when Muslims are excluded.

The Executive Order is the outgrowth of rhetoric by a presidential candidate who spoke for months about the need to block Muslims from entering the country. This began with candidate Trump’s fixation on barring the entry of Muslim refugees, particularly from Syria—the latter of which he described as “a 200,000-man army” that “could be ISIS.”² Donald Trump vowed that under his leadership, “they [would be] going back.” *Id.* Candidate Trump’s vitriolic statements about

² Ali Vitali, *Donald Trump in New Hampshire: Syrian Refugees Are ‘Going Back,’* NBC NEWS (Oct. 1, 2015), <http://www.nbcnews.com/politics/2016-election/donald-trump-new-hampshire-syrian-refugees-are-going-back-n436616>.

Muslim refugees then grew bolder. He announced in December 2015 by a “press release” that—if elected President—he would impose a “total and complete shutdown” on Muslims entering the country.³

Since President Trump took office, the Administration has made statements further confirming the discriminatory views behind the Executive Order’s exclusionary message. Dr. Elshikh has seen the release, still up today on President Trump’s campaign website, calling for a ban on Muslims “entering the United States until our country’s representatives can figure out what is going on.”⁴ He also recalls watching the President say, after he was elected and signed the first Executive Order in late January, that the United States should be admitting Christian refugees, but not Muslim refugees.⁵

In the view of *amicus*, both the travel and refugee bans in the revised Executive Order, codified at Sections 2 and 6, show that the President is living up to his campaign promises. The travel ban imposed in Section 2(c) plainly targets only Muslim-majority countries. Meanwhile, a high proportion of United States refugees, banned entirely from entry under Section 6, are Muslim. Indeed,

³ Press Release, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>.

⁴ *Id.*

⁵ See *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority as Refugees*, Christian Broadcasting Network (Jan. 27, 2017), <http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees>

Muslims accounted for about half of United States refugee admissions last year.⁶ As a complete package, the Executive Order conveys a message to Muslims like Dr. Elshikh, his family, and the members of his Mosque, that they are of a disfavored religion; that they are dangerous and undesirable people because of their faith; and that people like them should be kept out of the country.

The effect is particularly harmful to children. Dr. Elshikh has five children, ranging from two to twelve years of age. They cannot help but be aware of the original—and revised—Executive Order because of the publicity and because of its effect on their family. They are deeply upset by the message the Order conveys: that a travel ban and a refugee ban are needed to stop people from certain Muslim countries from entering the United States. They do not fully understand why this is happening, but they are confused and hurt by the message that their faith makes them outsiders.

2. The Executive Order Harms Muslims Who Seek to Be Reunited with Family Members Abroad.

All Muslim citizens, and indeed all citizens, are harmed by a policy that sews religious division. But many Muslim-Americans also experience an additional harm as a result of the Order: It is far harder for their family members living abroad to visit them or apply for immigration status to reunite with them.

⁶ See Phillip Connor, *U.S. admits record number of Muslim refugees in 2016*, PEW RESEARCH CENTER (Oct. 5, 2016).

These Muslims are forced to contend, every day that the Order is in effect, with the fact that it will be more difficult for them to see their loved ones—making them not equal to other Americans—because of an Executive Order motivated by religious animus.

Dr. Elshikh's story is illustrative. His mother-in-law is a Syrian national, living in Syria, with a Syrian travel document. She has been making concrete plans to visit Dr. Elshikh's family for many years, having last visited Hawai'i in 2005, when she stayed for one month. She has not yet met two of Dr. Elshikh's five children, and only his oldest child remembers meeting her grandmother. Dr. Elshikh and his family are eager to be reunited with his mother-in-law in Hawai'i and worry for her safety in Syria.

In September 2015, Dr. Elshikh's wife began the process of obtaining approval for her mother-in-law to come to the United States. At the beginning of this process, the Government told Dr. Elshikh's family that his mother-in-law would qualify as a Syrian refugee. They chose to proceed with the green card application for a number of reasons. But Dr. Elshikh's wife's family members—many of whom still live in Syria—may qualify for refugee status as well.

Dr. Elshikh's wife petitioned for an I-130 immigrant visa for her mother. The I-130 Petition was approved in February 2016, and Dr. Elshikh's mother-in-law was eagerly anticipating the completion of the rest of her visa application

process. Then, on January 31, 2017, days after President Trump signed the first Executive Order, Dr. Elshikh called the National Visa Center to inquire whether the Executive Order would impact his mother-in-law's application. He was told that as a result of the Executive Order, her application for an immigrant visa was now on hold and would not proceed to the next stage in the process. After the U.S. District Court for the District of Washington temporarily enjoined enforcement of the first Executive Order on February 3, 2017, and the Ninth Circuit denied the Government's application for a stay, things changed. Specifically, on March 2, 2017, Dr. Elshikh's family received an email from the National Visa Center informing them that his mother-in-law's visa application was now, in fact, proceeding to the next stage of the process, and her interview would be scheduled at an embassy overseas. No date was set, but the email stated that most interviews are set within three months.

The President's March 6, 2017 Order appeared to resurrect the same barrier to his mother-in-law's ability to join his family in Hawai'i that the first Order had imposed. But on March 15, the District Court for the District of Hawaii temporarily enjoined enforcement of the revised Order. The District Court subsequently converted the temporary restraining order to a preliminary injunction two weeks later. The next day, on March 31, 2017, Dr. Elshikh's mother-in-law was informed by email from the National Visa Center that she would receive an

immigrant visa interview on May 21, 2017 in Amman, Jordan. The email also explained that officials could not assist with land border crossings into Jordan, and that many visa applicants traveling from Syria had been unable to make it to Amman for interviews. Dr. Elshikh's mother-in-law conveyed that she was unable to travel into Jordan from Syria. An email from the National Visa Center on April 7, 2017 informed her that the May 21 interview was cancelled, and a new interview date would be forthcoming. On April 14, 2017 the National Visa Center sent another email confirming that Dr. Elshikh's mother-in-law would now be interviewed on May 24, 2017, in Lebanon.

Dr. Elshikh's family continues to worry for his mother-in-law's safety, especially given recent turmoil in Syria. A chemical weapons attack killed dozens of Syrian civilians earlier this month, and in response President Trump launched 59 Tomahawk cruise missiles at the Al Shayrat Airfield near Homs, Syria on April 6, 2017, killing another six people.⁷

If the injunction on the implementation of the Executive Order entered by the lower court in this case is not extended—and this Court allows Section 2(c) to go into effect—this will have an immediate, negative impact on Dr. Elshikh's ability to reunite with his mother-in-law. Her interview has now been scheduled to

⁷ See Barbara Starr & Jeremy Diamond, *Trump launches military strike against Syria*, CNN (Apr. 7, 2017), <http://www.cnn.com/2017/04/06/politics/donald-trump-syria-military/index.html>.

occur May 24. If Section 2(c) is in effect when Dr. Elshikh's mother-in-law appears for her interview, she will be barred from receiving an immigrant visa to enter the country unless she can satisfy the demanding "waiver" provision. She would have to show not only that she would suffer undue hardship without a waiver, but that it would be in the "national interest" for her immigrant visa to be granted. Order § 3(c). That is unquestionably a difficult showing to make. Dr. Elshikh and his family will thus continue to be restrained from living with their mother, mother-in-law, and grandmother *not* because she is dangerous or threatens the United States in any way, but solely because of a discriminatory Executive Order. And they are presently harmed by the uncertainty that surrounds everything about the Executive Order, particularly its vague waiver provisions, which confer no rights at all on Dr. Elshikh's mother-in-law and which can be disregarded without any consequence.

3. The Executive Order's Religious Discrimination Harms Imams in the United States.

The Order has particular salience for Imams, who are the spiritual leaders of Muslim communities within the United States. Again, Dr. Elshikh's experience is illustrative. He is an Imam, and a key part of his job is to provide support to and spiritual leadership for members of the Hawai'i Muslim community. Many members of his Mosque are upset about the new Executive Order, and some are very fearful. The pervasive perception is that the Executive Order targets

Muslims, both abroad and within the United States, because of their religious views and national origin. Dr. Elshikh personally knows of more than twenty individuals who are members of his community and Mosque in Hawai‘i, who have immediate relatives in the six countries designated for restricted travel under Section 2(c). If the Order is allowed to take effect, these persons immediately will be prevented from receiving visits from their relatives—including spouses, parents, and children.

Dr. Elshikh has also witnessed the effect of the Order’s refugee ban on members of his Mosque. At least one current member of Dr. Elshikh’s Mosque is a refugee from a Muslim-majority country, and in the past, the Mosque had as members a family in which the husband, wife, and oldest son were applying for political asylum. It is the experience of *amicus* that all members of the Mosque are enriched by their relationships with refugees from Muslim-majority countries who join the Mosque community and worship with them. Dr. Elshikh and others in his Mosque perceive the Executive Order’s limits on refugee admissions to be another attack on Muslims, again on the basis of religion.

The foregoing harms to Dr. Elshikh, his family, and the broader Muslim community confirm the Executive Order’s discriminatory purpose and effect. Plainly no other denominational group has been subjected to the hardships and

perceptions of disfavor visited upon Muslims through the Executive Order. Moreover, this was the stated aim of President Trump, both before and after the election—he not only sought preferential treatment for Christians in refugee admissions, but repeatedly broadcast his own sentiments of prejudice and fear toward Muslims wishing to enter the country. The First Amendment’s Free Speech Clause permits a presidential candidate to broadcast these views, but the Establishment Clause prevents that same candidate from enacting policy based on them. Because that is precisely what this Executive Order represents, it must be held unconstitutional.

CONCLUSION

For the foregoing reasons, the District Court’s judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed R. App. P. 32(a)(7)(C) and Circuit Rules 29 and 32, I hereby certify that the foregoing brief was produced using the Times New Roman 14-point typeface and contains 2,740 words.

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CERTIFICATE OF SERVICE

I certify that on April 19, 2017, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Neal Kumar Katyal
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