

IN THE
**United States Court of Appeals
for the Ninth Circuit**

STATE OF HAWAII, *et al.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC
District Judge Derrick K. Watson

**PLAINTIFFS-APPELLEES' PETITION FOR
INITIAL HEARING EN BANC**

DOUGLAS S. CHIN

Attorney General of the State of Hawaii

CLYDE J. WADSWORTH

Solicitor General of the State of Hawaii

DEIRDRE MARIE-IHA

KIMBERLY T. GUIDRY

DONNA H. KALAMA

ROBERT T. NAKATSUJI

Deputy Attorneys General

NEAL K. KATYAL

COLLEEN ROH SINZDAK

MITCHELL P. REICH

HOGAN LOVELLS US LLP

555 Thirteenth Street NW

Washington, DC 20004

Telephone: (202) 637-5600

Fax: (202) 637-5910

Email: neal.katyal@hoganlovells.com

DEPARTMENT OF THE ATTORNEY
GENERAL, STATE OF HAWAII

425 Queen Street

Honolulu, HI 96813

Telephone: (808) 586-1500

Fax: (808) 586-1239

THOMAS P. SCHMIDT

HOGAN LOVELLS US LLP

875 Third Avenue

New York, NY 10022

Telephone: (212) 918-3000

Fax: (212) 918-3100

Attorneys for Plaintiff State of Hawaii

SARA A. SOLOW
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
Telephone: (267) 675-4600
Fax: (267) 675-4601

*Attorneys for Plaintiffs State of Hawaii
and Ismail Elshikh*

Plaintiffs-Appellees the State of Hawaii and Ismail Elshikh respectfully request that the Court grant initial hearing en banc in this case. This proceeding involves a “question[] of exceptional importance”—whether the District Court abused its discretion by preliminarily enjoining Sections 2 and 6 of Executive Order No. 13,780. *See* Fed. R. App. P. 35(b)(1)(B).

Yesterday, the U.S. Court of Appeals for the Fourth Circuit ordered initial hearing en banc in a similar case that involves a challenge to the same Executive Order. In light of the Fourth Circuit’s action, Appellees respectfully move this Court to hear this case en banc as well. Appellees have conferred with the Government, which states: “In light of the government’s interest in an expedited resolution of the important legal issues presented by both the stay motion and the merits appeal, the government supports initial review by the full Court if, but only if, the Court determines that initial en banc consideration would not delay the briefing, argument, or resolution of the stay or the appeal.”

1. This appeal involves a challenge to Executive Order No. 13,780, issued by President Trump on March 6, 2017, entitled “Protecting the Nation from Foreign Terrorist Entry Into the United States.” 82 Fed. Reg. 13,209 (Mar. 9, 2017) (“Order”). On March 15, 2017, following extensive briefing and oral argument, the United States District Court for the District of Hawaii issued a temporary restraining order enjoining Defendants from “enforcing or implementing Sections

2 and 6 of the Executive Order across the Nation.” Dist. Ct. Dkt. 219, at 42. On March 29, 2017, following a new round of briefing and oral argument, the District Court granted Plaintiffs’ motion to convert the temporary restraining order to a preliminary injunction. The Court enjoined Defendants “from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation.” Dist. Ct. Dkt. 270, at 23.

2. The Government filed a notice of appeal on March 30, 2017. The parties conferred and agreed upon an expedited briefing schedule, which this Court adopted. The Court has scheduled oral argument for May 15, 2017. Dkt. 14.

3. Another case involving a challenge to President Trump’s Executive Order has been progressing in parallel in the Fourth Circuit. In that case, the United States District Court for the District of Maryland issued a preliminary injunction prohibiting the Government from implementing Section 2(c) of the Order. *Int’l Refugee Assistance Project, Inc. v. Trump*, No. 8:17-cv-00361-TDC, at 43 (D. Md. Mar. 16, 2017). After the Government appealed, the Fourth Circuit set an expedited briefing schedule. *See Int’l Refugee Assistance Project, Inc. v. Trump*, No. 17-1351 (4th Cir. Mar. 23, 2017).

4. On March 27, 2017, the Fourth Circuit *sua sponte* ordered the parties to “stat[e] their position on the appropriateness of initial en banc review in this case.” Dkt. 40, at 2. Both parties responded that, in their view, en banc review

was appropriate because of the “exceptional importance” of the questions presented. *See* Appellees’ Resp. at 4 (Dkt. 50); Appellants’ Resp. at 2 (Dkt. 48). Yesterday, the Fourth Circuit ordered initial hearing en banc. Dkt. 108.

5. This Court should consider doing the same thing here. By granting en banc review, the Fourth Circuit has indicated that the pending challenges to President Trump’s Executive Order present “questions of exceptional importance.” Fed. R. App. P. 35(b)(B). The lawfulness of President Trump’s executive action and the nationwide injunction imposed on Sections 2 and 6 by the Court below are unquestionably issues of pressing, nationwide concern. *Cf. Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. Feb. 9, 2017) (noting “sensitive and weighty concerns” implicated by challenge to prior Executive Order). Those issues merit the attention of the full Court. *Cf. West Virginia v. EPA*, No. 15-1363 (D.C. Cir. May 16, 2016) (en banc) (*sua sponte* ordering of initial hearing en banc in a challenge to President Obama’s Clean Power Plan); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1125 (10th Cir. 2013) (en banc) (initial hearing en banc granted in light of the “exceptional importance of the questions presented” by challenge to federal regulations). This Court has granted initial en banc review in other cases raising issues of national importance. *See, e.g., United States v. Fox*, 631 F.3d 1128 (9th Cir. 2011); *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1205 (9th Cir. 2011). Further, granting initial hearing en banc here may

expedite the ultimate resolution of this appeal by potentially obviating the need for any petitions for rehearing after a panel decision. Such a hearing could be conducted either in person or remotely.¹

6. This petition is timely because it is filed by the date when the Appellees' brief is due. Fed. R. App. P. 35(c).

WHEREFORE, Plaintiffs-Appellees respectfully request that the Court grant initial hearing en banc.

DATED: Washington, D.C., April 11, 2017.

Respectfully submitted,

/s/ Neal Kumar Katyal

DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
KIMBERLY T. GUIDRY
DONNA H. KALAMA
ROBERT T. NAKATSUJI
Deputy Attorneys General

NEAL K. KATYAL
COLLEEN ROH SINZDAK
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
Email: neal.katyal@hoganlovells.com

DEPARTMENT OF THE ATTORNEY
GENERAL, STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

¹ Should the date of argument need to change, counsel have indicated their unavailability at page 8 of the Consent Motion to Expedite (filed March 31, 2017).

Telephone: (808) 586-1500
Fax: (808) 586-1239
Attorneys for Plaintiff State of Hawaii

Telephone: (212) 918-3000
Fax: (212) 918-3100

SARA A. SOLOW
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
Telephone: (267) 675-4600
Fax: (267) 675-4601

*Attorneys for Plaintiffs State of Hawaii
and Ismail Elshikh*

CERTIFICATE OF COMPLIANCE

I certify that the foregoing petition complies with the type-volume limitation of Fed. R. App. P 35(b)(2)(A) because it contains 826 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2017, I filed the foregoing Petition for Initial Hearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Neal Kumar Katyal
Neal Kumar Katyal