No. 17-35105

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON; STATE OF MINNESOTA, et al.
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, et al.,
Defendants-Appellants.

On Appeal From The United States District Court
For The Western District of Washington at Seattle
Case No.: 2:17-cv-00141
The Honorable James L. Robart
United States District Court Judge

MOTION OF PARTICIPATING LAW FIRMS OF THE EMPLOYMENT LAW ALLIANCE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

MELANIE GURLEY KEENEY
Missouri Bar No. 37789
Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.
34 N. Meramec Ave. Suite 600
St. Louis, MO 63105
mkeeney@tuethkeeney.com
Attorneys for Amicus Curiae Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.

P.K. RUNKLES-PEARSON
Oregon Bar No. 061911
Miller Nash Graham & Dunn LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204
Telephone: 503.224.5858
p.k.runkles-pearson@millernash.com
Attorneys for Amicus Curiae Miller Nash Graham & Dunn, LLP

MARY ELLEN SIMONSON
Arizona SBN 009298
Lewis Roca Rothgerber Christie LLP
201 East Washington Street, #1200
Phoenix, AZ 85004
msimonson@lrrc.com
Attorneys for Amicus Curiae
Lewis Roca Rothgerber Christie LLP

NATASHA J. BAKER
California SBN 226981
Hirschfeld Kraemer LLP
505 Montgomery Street, 13th Floor
San Francisco, CA 94111
nbaker@HKemploymentlaw.com
Attorneys for Amicus Curiae
Hirschfeld Kraemer LLP

ALISON M. HAMER
California SBN 258281*
Hirschfeld Kraemer LLP
233 Wilshire Boulevard, Suite 600
Santa Monica, CA 90401
ahamer@hkemploymentlaw.com
Attorneys for Amicus Curiae
Hirschfeld Kraemer LLP

* Ninth Circuit admission pending

I. INTRODUCTION

Participating member firms of the Employment Law Alliance ("ELA"), respectfully seek leave to file the attached brief as *amici curiae* in support of affirming the District Court's Temporary Restraining Order. Proposed *amici* approached Appellants and Appellees requesting consent to file this brief. Appellees have consented, but Appellants have not responded. In support of their Motion, proposed *amici* states as follows:

II. IDENTITY AND INTEREST

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. This following U.S. law firm members of the ELA, one of which with counsel in Washington, and each of which has significant experience in employment-related matters, hereby submit this brief:

Dinse Knapp McAndrew

Fortney & Scott, LLC

Hirschfeld Kraemer, LLP

Lewis Roca Rothgerber Christie LLP

Miller Nash Graham & Dunn LLP

Partridge, Snow & Hahn LLP

Shawe Rosenthal LLP

Tueth Keeney Cooper Mohan & Jackstadt, PC

The ELA has a substantial interest in this case because its member law firms collectively represent hundreds of employers nationwide, including employers in Washington and Minnesota, who have been and will continue to be adversely impacted by *Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States*, issued January 27, 2017 ("Executive Order"). Many of these employers are institutions of higher education whose educational missions are adversely affected. In light of the above disruption of ELA member clients' ability to do business, the undersigned respectfully submit this brief on behalf of the participating member law firms of the ELA in order to explain the grave impact of the Executive Order on U.S. employers.

III. REASONS THE COURT SHOULD GRANT AMICUS COUNSEL'S BRIEF

As noted above, many of the ELA's participating member's clients (and their employees and students) will suffer irreparable harm as a result of the Executive Order. As such, the ELA is well situated to provide the Court with significant guidance as to how the Executive Order is and will negatively affect

employers (and their employees and students) across the nation, including in Washington and Minnesota.

We respectfully request that the court accept our brief and allow us to appear as amici curiae.

Respectfully submitted this 7th day of February, 2017.

/s/ P.K. RUNKLES-PEARSON
P.K. RUNKLES-PEARSON
Oregon Bar No. 061911
Miller Nash Graham & Dunn LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204
Telephone: 503.224.5858
p.k.runkles-pearson@millernash.com
Attorneys for Amicus Curiae
Miller Nash Graham & Dunn, LLP

/s/ NATASHA J. BAKER
NATASHA J. BAKER
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Hirschfeld Kraemer LLP
505 Montgomery Street, 13th Floor
San Francisco, CA 94111
nbaker@HKemploymentlaw.com
Attorneys for Amicus Curiae
Hirschfeld Kraemer LLP

/s/ ALISON M. HAMER
ALISON M. HAMER
California SBN 258281
Hirschfeld Kraemer LLP
233 Wilshire Boulevard, Suite 600
Santa Monica, CA 90401
ahamer@hkemploymentlaw.com
Attorneys for Amicus Curiae
Hirschfeld Kraemer LLP

/s/ MARY ELLEN SIMONSON
MARY ELLEN SIMONSON
Arizona SBN 009298
Lewis Roca Rothgerber Christie LLP
201 East Washington Street, Suite 1200
Phoenix, AZ 85004
msimonson@lrrc.com
Attorneys for Amicus Curiae
Lewis Roca Rothgerber Christie LLP

/s/ MELANIE GURLEY KEENEY
MELANIE GURLEY KEENEY
Missouri Bar No. 37789
Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.
34 N. Meramec Ave. Suite 600
St. Louis, MO 63105
mkeeney@tuethkeeney.com
Attorneys for Amicus Curiae
Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.

CERTIFICATE OF SERVICE

I, P.K. RUNKLES-PEARSON, hereby certify that I electronically filed the following 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 on February 7, 2017.

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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.

Executed February 7, 2017, at Portland, Oregon.

/s/ P.K. RUNKLES-PEARSON
P.K. RUNKLES-PEARSON
Oregon SBN 061911

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34 N. Meramec Ave. Suite 600
St. Louis, MO 63105
mkeeney@tuethkeeney.com
Attorneys for Amicus Curiae Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.

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Phoenix, AZ 85004
msimonson@lrrc.com
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California SBN 226981
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Attorneys for Amicus Curiae
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California SBN 258281*
Hirschfeld Kraemer LLP
233 Wilshire Boulevard, Suite 600
Santa Monica, CA 90401
ahamer@hkemploymentlaw.com
Attorneys for Amicus Curiae
Hirschfeld Kraemer LLP

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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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Shawe Rosenthal LLP has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Tueth Keeney Cooper Mohan & Jackstadt, PC has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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.

/s/ P.K. RUNKLES-PEARSON
P.K. RUNKLES-PEARSON
OSB No. 061911
Miller Nash Graham & Dunn, LLP
111 S.W. Fifth Avenue, Suite 3400
Portland, Oregon 97204
Telephone: (503) 224-5858
Facsimile: (503) 224-0155
p.k.runkles-pearson @millernash.com

Attorneys for Amicus Curiae
Miller Nash Graham & Dunn, LLP

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

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 January 27, 2017 ("Order"). Many of the ELA member law

firms represent employers that are institutions of higher education; the Order also adversely affects their educational and financial interests.

Amici submit this brief to provide examples of how the Order adversely affects the ability of its 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"). The Order bars people from seven 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 Order and its 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. The Order prevents employees, students, affiliates, and contractors who pose absolutely no security risk from returning to the United States, separating them from their families and homes potentially indefinitely and without notice. These people fear that if they leave the United States, they will not be allowed to return. For those reasons, the Order

hampers 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 Order Created Unprecedented Chaos and Uncertainty for Employers.

The 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 Order in its February 3, 2017 Temporary Restraining Order, the scope and effect of the Order remained fluid, and the federal government implemented it in an inconsistent and contradictory manner.

Amici address the shifting interpretation of the 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 Order are truly unprecedented in our experience. The changes have whipsawed back and forth over the course of a single week 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 have applied the Order inconsistently to lawful permanent residents from the affected countries. By its plain language, the Order purports 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 Order was issued, Edward J. Ramatowski, Deputy Assistant Secretary of the Bureau of 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 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 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

[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).

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 Order's statement that determinations would be made on a case-by-case basis.[2] That guidance could be 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

[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).

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 the Order 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 caused future harm for those who fear the Order's impact and potential expansion or further 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 similar lack of clarity and guidance amplifies the climate of uncertainty for U.S. employers.

B. The Order Harms U.S. Employers ELA represents.

The Order has harmed and is harming U.S. employers 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 Executive 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 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 U.S.

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 U.S. 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 Executive 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 Order has already been implemented is a warning of other radical changes in the Order or its interpretation. Employers are concerned that the list of seven 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 Order. 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 seven EO Countries. The fear of being denied entry or re-entry has increased employee unwillingness to come to the U.S. for business or 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 U.S.

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 or 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 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 Order Negatively Impacts Recruitment.

U.S. employers are already experiencing a negative impact on recruitment, hiring, and retention practices as a result of the 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 Order, 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 resides elsewhere (pending the long immigration process) are suddenly facing a much longer family separation because the family members was 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 Order Harms U.S. Institutions of Higher Education.

Amici represent many employers who are higher education institutions. The Order presents 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 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 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. And 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 deny Appellants' Motion.

Respectfully submitted this 7th day of February, 2017.

/s/ P.K. RUNKLES-PEARSON
P.K. RUNKLES-PEARSON
Oregon Bar No. 061911
Miller Nash Graham & Dunn LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204
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/s/ NATASHA J. BAKER
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California SBN 226981
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505 Montgomery Street, 13th Floor
San Francisco, CA 94111
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Attorneys for Amicus Curiae
Hirschfeld Kraemer LLP

/s/ ALISON M. HAMER
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California SBN 258281
Hirschfeld Kraemer LLP
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Santa Monica, CA 90401
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201 East Washington Street, Suite 1200
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msimonson@lrrc.com
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34 N. Meramec Ave. Suite 600
St. Louis, MO 63105
mkeeney@tuethkeeney.com
Attorneys for Amicus Curiae
Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.

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 3,405 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows software in 14 pt. Times New Roman.

/s/ P.K. RUNKLES-PEARSON
P.K. RUNKLES-PEARSON
OSB No. 061911
Miller Nash Graham & Dunn, LLP
111 S.W. Fifth Avenue, Suite 3400
Portland, Oregon 97204
Telephone: (503) 224-5858
Facsimile: (503) 224-0155
p.k.runkles-pearson @millernash.com

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Miller Nash Graham & Dunn, LLP

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

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.

Executed February 7, 2017, at Portland, Oregon.

/s/ P.K. RUNKLES-PEARSON
P.K. RUNKLES-PEARSON
Oregon SBN 061911