No. 16-1540 (16A1191)

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF HAWAII, ET AL.

MOTION FOR CLARIFICATION OF JUNE 26, 2017, STAY RULING AND APPLICATION FOR TEMPORARY ADMINISTRATIVE STAY OF MODIFIED INJUNCTION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 16-1540 (16A1191)

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF HAWAII, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR CLARIFICATION OF JUNE 26, 2017, STAY RULING
AND APPLICATION FOR TEMPORARY ADMINISTRATIVE STAY
OF MODIFIED INJUNCTION

Nearly three weeks ago, this Court issued its per curiam decision partially staying the injunctions below. Trump v. IRAP, No. 16-1436 (June 26, 2017). Since that time, the government has faithfully implemented Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), consistent with the terms of the Court's stay. In several respects not at issue here, the government identified -- and reflected in public guidance -- individuals who are not affected by the Court's stay and whose status as a visa or refugee applicant thus would not be affected.

In two important respects, however, respondents pressed further in an effort to strip this Court's stay of significant practical consequence. The district court adopted both of respondents' arguments, and denied the government's request for a stay pending this Court's review. The government therefore is left to seek this Court's immediate intervention.

First, for aliens abroad who seek admission as refugees, this Court held that the suspension in Section 6(a) of the Order and the annual cap in Section 6(b) "may not be enforced against an individual * * * who can credibly claim a bona fide relationship with a person or entity in the United States." IRAP, slip op. 13. Respondents do not contend that the government has applied Sections 6(a) and 6(b) to refugees who themselves have developed actual, bona fide relationships with U.S. entities. Rather, respondents object that, for every refugee who is likely to enter the United States while Sections 6(a) and 6(b) are in effect, the government has contracted with a resettlement agency to provide assistance to the alien once he eventually arrives in the United States, and the alien has a qualifying bona fide relationship on this basis. Prior to the refugee's arrival, however, the relationship is solely between the government and the agency, not between the agency and the refugee. Indeed, the agency typically has no contact with the refugee before his admission. Because the fact of an assurance does not itself create a relationship between a refugee and a resettlement agency, the government has not treated that fact alone

as sufficient to trigger the injunctions. To do so (as the district court did) would render the refugee portion of this Court's decision effectively meaningless.

Second, for aliens abroad who seek a visa, this Court similarly held that the suspension in Section 2(c) of the Order may not be enforced against an individual with a credible claim of a bona fide relationship to a U.S. person or entity, including "a close familial relationship" with a U.S. individual. IRAP, slip op. 12 (emphasis added). In interpreting what degree of closeness is required, the government looked to the waiver provision of Section 3(c)(iv) of the Order, which allows waivers for aliens who seek "to visit or reside with a close family member (e.g., a spouse, child, or parent)" in the United States. Order § 3(c)(iv). That waiver provision in turn reflected the provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., governing eligibility for family-based immigrant visas, which are limited to spouses, children, parents, and siblings. In light of related INA provisions and this Court's stay decision, the government has further interpreted the phrase "close familial relationship" to include fiancé(e)s and parents- and children-in-law.

At respondents' urging, however, the district court interpreted that phrase also to include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, and siblings-in-law. Again, that interpretation empties the Court's

decision of meaning, as it encompasses not just "close" family members, but virtually all family members. Treating all of these relationships as "close familial relationship[s]" reads the term "close" out of the Court's decision. Moreover, by divorcing the Court's language from its context -- namely, the Order's waiver provision and the immigration provisions on which it was based -- the district court adopted an expansive definition untethered to relevant legislative enactments or Executive action.

Given the parties' disagreement, it would have been natural and appropriate for respondents to seek such clarification from this Court in the first instance. See, e.g., Swenson v. Stidham, 410 U.S. 904 (1973); cf. Stephen M. Shapiro et al., Supreme Court Practice 841 (10th ed. 2013). Instead, respondents sought clarification from the district court, which correctly denied their request. The court of appeals correctly held that it lacked jurisdiction over respondents' appeal of that denial, but it instructed the district court to entertain a motion to enforce or modify its injunction, which respondents then filed and the district court granted. At this point, this Court's intervention is both necessary and warranted. Only this Court can definitively settle whether the government's reasonable implementation is consistent with this Court's stay.

The government therefore respectfully submits this motion for clarification. In the alternative, the government has filed a notice of appeal, and this Court may grant a writ of certiorari

before judgment, or even a writ of mandamus, and vacate the district court's order insofar as that order granted respondents' motion to modify the preliminary injunction. In the event that the Court would prefer the government to seek review first in the court of appeals, the government requests a stay pending such an appeal. In all events, the government respectfully requests a temporary administrative stay of the district court's modified injunction pending this Court's disposition of this motion. Disrupting the government's implementation of the Order (which the district court's order is already accomplishing) is entirely unnecessary; once the Court rules, the government can address any aliens who would have been affected in the interim.

STATEMENT

1. Three provisions of the Order are at issue here. Section 2(c) suspends for 90 days entry of certain nationals of six countries that present heightened terrorism-related risks, subject to case-by-case waivers, pending a review of whether foreign governments provide adequate information regarding nationals seeking entry to this country. Trump v. IRAP, No. 16-1436 (June 26, 2017) (per curiam), slip op. 3. Section 6(a) suspends for 120 days adjudications of and travel under the United States Refugee Admission Program (Refugee Program), pending a review of that program. Id. at 3-4. Section 6(b) limits to 50,000 the number of persons who may be admitted as refugees in Fiscal Year 2017. Id. at 4.

Respondents in this case (No. 16-1540) are the State of Hawaii and Dr. Ismail Elshikh, a U.S. citizen, who is married to a U.S. citizen, and whose Syrian mother-in-law seeks a visa to enter the United States. Dr. Elshikh and Hawaii challenged Sections 2 and 6 in the United States District Court for the District of Hawaii. IRAP, slip op. 4-6. The district court entered a preliminary injunction barring application of Sections 2 and 6 in their entirety, including provisions directing internal reviews of the Nation's screening and vetting procedures and communications with foreign governments. Id. at 4-5. The Ninth Circuit largely affirmed the injunction with respect to Sections 2(c), 6(a), and 6(b), and vacated the injunction as to the provisions addressing internal reviews. Id. at 6.

A separate group of plaintiffs, the respondents in Trump v. IRAP, No. 16-1436, also challenged the Order in a suit in the United States District Court for the District of Maryland. IRAP, slip op. 4-5. That court enjoined Section 2(c), and the Fourth Circuit affirmed that injunction in substantial part. Id. at 5.

2. The government sought certiorari in both cases and a stay of both injunctions. IRAP, slip op. 5-7. On June 26, 2017, this Court granted the government's petitions for certiorari and issued a partial stay of both injunctions. Id. at 9-13. With respect to Section 2(c), the Court's stay ruling states:

> The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawaii. In practical terms, this means that §2(c) 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. All other foreign nationals are subject to the provisions of [the Order].

Id. at 12. The Court explained that "[t]he facts of these cases illustrate the sort of relationship that qualifies." Ibid. "For individuals, a close familial relationship is required." Ibid. The Court cited as an example "[a] foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law." Ibid. "As for entities," the Court explained, "the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Order]." Ibid. The Court gave as examples "[t]he students from the designated countries who have been admitted to the University of Hawaii," "a worker who accepted an offer of employment from an American company," and "a lecturer invited to address an American audience." Ibid. By contrast, "a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion." Ibid.

The Court granted a similar partial stay of the injunction affirmed by the Ninth Circuit with respect to Sections 6(a) and 6(b). IRAP, slip op. 13. The Court ruled that Sections 6(a) and 6(b) "may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship with

a person or entity in the United States." Ibid. "As applied to all other individuals," however, the Court held that "the provisions may take effect." Ibid. As the Court explained, "when it comes to refugees who lack any such connection to the United States * * * , the balance tips in favor of the Government's compelling need to provide for the Nation's security." Ibid.

3. As this Court noted in its ruling, on June 14, 2017, the President had issued a memorandum to Executive Branch officials clarifying that the effective date of the enjoined provisions of the Executive Order would "be the date on which the injunctions in these cases 'are lifted or stayed with respect to that provision.'" IRAP, slip op. 7 (quoting Presidential Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence, 82 Fed. Reg. 27,965 (June 19, 2017) (Presidential Memorandum)). The Presidential Memorandum directed the relevant agencies to "begin implementation of each relevant provision of sections 2 and 6 of the [Order] 72 hours after all applicable injunctions are lifted or stayed with respect to that provision." 82 Fed. Reg. at 27,966.

The Departments of State and Homeland Security accordingly began implementing Sections 2(c), 6(a), and 6(b) on June 29, 2017 and commenced enforcement of those provisions at 8:00 p.m. Eastern Daylight Time on that day. The same day, those agencies and their components also published public guidance addressing various implementation issues, which the government provided to

respondents' counsel as it became available. D. Ct. Doc. 301, Exs. A, C, and D (July 3, 2017). Some of the guidance was subsequently updated as the agencies continued to review and consider the relevant issues. Id. at 7. Current versions of the public guidance are available online.[1]

4. a. On June 29, 2017, after receiving from the government the public guidance then available, respondents in this case (No. 16-1540) filed an emergency motion in the district court asking that court to "clarify" the operative scope of its injunction in light of this Court's June 26 stay ruling. D. Ct. Doc. 293-1, at 2. As relevant here, respondents urged the district court to interpret this Court's stay ruling to exempt from the Order two broad categories of aliens.[2]

First, respondents argued that this Court's June 26 stay ruling exempts from Section 6(a)'s refugee suspension and from

---

[1] See Bureau of Consular Affairs, U.S. Dep't of State, Important Announcement: Executive Order on Visas (State Visa Guidance), https://travel.state.gov/content/travel/en/news/important-announcement.html; Bureau of Population, Refugees, and Migration, U.S. Dep't of State, Fact Sheet: Information Regarding the U.S. Refugee Admission Program (State Refugee Fact Sheet), https://www.state.gov/j/prm/releases/factsheets/2017/272316.htm; U.S. Dep't of Homeland Sec. (DHS), Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry into the United States (DHS FAQs), https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states.

[2] The respondents in No. 16-1436 did not ask the district court in that case to clarify its injunction; instead, they filed an amicus brief in this case. D. Ct. Doc. 297-2 (June 30, 2017).

Section (b)'s refugee cap all applicants for admission as refugees as to whom the Department of State has obtained what is known as a sponsorship-assurance agreement from a U.S.-based refugee-resettlement agency. D. Ct. Doc. 293-1, at 11-12. An assurance is a contractual commitment between the resettlement agency -- one of nine nongovernmental organizations that have entered agreements with the government to provide resettlement services -- and the Department of State to provide certain services and assistance to the refugee following the refugee's arrival in the United States. D. Ct. Doc. 301-1, at 5 (Bartlett Decl. ¶¶ 14-17) (July 3, 2017). In order to facilitate successful resettlement, the Department of State obtains such an agreement for every refugee who is permitted to travel to this country before the refugee's arrival. See ibid. (¶ 16); D. Ct. Doc. 345, at 16 (July 13, 2017) (Addendum (Add.) 16). The resettlement agency, however, typically has no contact with the refugee until he or she arrives to the United States. D. Ct. Doc. 301-1, at 7 (Bartlett Decl. ¶ 21). Accordingly, the Department of State's guidance stated that an assurance agreement between a resettlement agency and the Department does not, by itself, establish a qualifying bona fide relationship between the refugee and a U.S. entity. See State Refugee Fact Sheet.

Second, respondents argued that the government's guidance has construed too narrowly the phrase "close familial relationship" in this Court's June 26 stay ruling. D. Ct. Doc. 293-1, at 7-11. Relying on this Court's ruling and on provisions of the INA, the

government's guidance interpreted that phrase to include a parent (including parent-in-law), spouse, fiancé(e), child, adult son or daughter, son-in-law, daughter-in-law, sibling (whether whole or half), and step relationships. See State Visa Guidance; DHS FAQs, Q29; see also Add. 11. The government's definition did not include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law, and any other "extended" family members. Respondents argued that these excluded categories also constitute "close familial relationships" and that such relatives should therefore be categorically exempt from Sections 2(c), 6(a), and 6(b). D. Ct. Doc. 293-1, at 7-11.

b. On July 6, 2017, after expedited briefing, the district court denied the motion. D. Ct. Doc. 322, at 6. The court explained that "[b]ecause [respondents] seek clarification of the June 26, 2017 injunction modifications authored by the Supreme Court, clarification should be sought there, not here." Id. at 5. The district court "w[ould] not upset the Supreme Court's careful balancing and 'equitable judgment' brought to bear when 'tailor[ing] a stay' in this matter," nor would it "presume to substitute its own understanding of the stay for that of the originating Court's 'exercise of discretion and judgment' in '[c]rafting a preliminary injunction . . . dependent as much on the equities of a given case as the substance of the legal issues it presents.'" Ibid. (brackets in original; citation omitted).

Instead of seeking guidance from this Court as the district court suggested, respondents appealed. On July 7, 2017, the Ninth Circuit dismissed the appeal for lack of jurisdiction. Hawaii v. Trump, No. 17-16366 (C.A. Doc. 3). The district court's order denying their request for clarification, it held, was neither a final order nor immediately appealable under 28 U.S.C. 1292(a). C.A. Doc. 3, at 2. The court of appeals stated, however, that the district court could entertain a request to enforce or modify its existing injunction. Id. at 3. The court of appeals also denied respondents' alternative request for mandamus, holding that "the district court's denial of Plaintiffs' motion for clarification was not clear error." Id. at 3 n.1.

5. Respondents returned to the district court. On July 7, 2017, they filed a new motion presenting substantially the same arguments as in their motion for clarification and seeking (as relevant here) largely the same relief, but this time styled as seeking enforcement or modification of the district court's injunction. D. Ct. Doc. 328-1, at 4-15. The government opposed respondents' motion, arguing that any clarification respondents desired should be sought from this Court in the first instance, as the district court had indicated; that the relief respondents requested contradicts this Court's June 26 stay ruling; and that, if the district court were nevertheless inclined to grant any additional relief, it should stay its ruling to allow the government to seek prompt review in this Court and thus minimize

disruption and confusion. D. Ct. Doc. 338, at 3-15 (July 11, 2017).[3]

After expedited briefing, on July 13, 2017, the district court granted in substantial part respondents' motion to modify its injunction. Add. 9-26. First, the court held that every refugee as to whom the Department of State has obtained an assurance agreement from a resettlement agency has a qualifying bona fide relationship with a U.S. entity within the meaning of this Court's June 26 stay ruling, and therefore is exempt from Sections 6(a) and 6(b) of the Order. Add. 16-17. Second, the district court held that the government's interpretation of "close familial relationship" -- which includes "parents, parents-in-law, spouses, fiancés, children, adult sons or daughters, sons-in-law, daughters-in-law, siblings (whether whole or half), and step relationships," but not other relatives -- is too narrow. Add. 11; see Add. 11-15. The court held that "close familial relationship" also includes "grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States." Add. 26; see Add. 15.[4]

---

[3] The respondents in No. 16-1436 did not seek modification or enforcement of the injunction in that case, but instead again filed an amicus brief in the district court in this case. D. Ct. Doc. 339-1 (July 11, 2017).

[4] The district court also granted respondents' request to modify the injunction to forbid the government categorically from applying the Order to prohibit entry of aliens under the "Lautenberg Program," which "permits certain nationals of the

The district court denied respondents' request to modify its injunction in various other respects. Add. 18-22, 24. The court also denied without comment the government's request to stay its ruling pending appellate review. Add. 24.[5]

ARGUMENT

The district court's interpretation of this Court's June 26, 2017, stay ruling distorts this Court's decision and upends the equitable balance this Court struck. The district court's categorical holding that the Order may not be applied to any refugee applicant as to whom the Department of State has obtained a contractual commitment from a resettlement agency -- which includes every refugee permitted to enter the United States -- effectively eviscerates this Court's ruling partially staying the injunction as to Sections 6(a) and 6(b). And the district court's sweeping interpretation of "close familial relationship" (Trump v.

---

former Soviet Union and other countries with 'close family in the United States' to apply for refugee status." Add. 22; see Add. 22-23 (citing Pub. L. No. 101-167, § 599D, 103 Stat. 1261 (codified at 8 U.S.C. 1157)). The government had opposed respondents' request for categorical relief as to the Lautenberg Program because it includes grandparents and grandchildren. Add. 23. "In light of the [district court's] determination that grandparents and grandchildren are within the penumbra of 'close family' for purposes of the Supreme Court's June 26 decision," the district court rejected the government's position. Ibid.

[5] As discussed further below, see p. 17, infra, out of an abundance of caution, the government has also filed today a notice of appeal of the district court's decision modifying its injunction. See D. Ct. Doc. 346 (July 14, 2017) (docketed as No. 17-16426 (9th Cir.)).

IRAP, No. 16-1436 (June 26, 2017) (per curiam), slip op. 12) to encompass a wide range of distant relatives -- including cousins, uncles, and siblings-in-law -- effectively eliminates the "close" requirement and has no basis in this Court's ruling or the INA.

This Court should grant the government's motion to clarify the scope of this Court's stay in order to resolve the uncertainty created by the district court's mistaken ruling. Alternatively, the Court may construe this motion as a petition for a writ of certiorari or a writ of mandamus, grant the petition, and vacate the district court's modified injunction. If the Court prefers that the court of appeals first consider the scope of this Court's stay order, the government requests that the Court grant a stay pending disposition of that appeal. In all events, the government respectfully requests that this Court grant a temporary administrative stay of the district court's modified injunction pending disposition of this motion. See, e.g., Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 893 (2013), injunction pending appeal granted, 134 S. Ct. 1022 (2014).

I. THIS COURT SHOULD CLARIFY THE SCOPE OF ITS OWN STAY RULING

A. Immediate relief in this Court is appropriate because the dispute concerns the meaning and operative effect of this Court's own stay order. This Court unquestionably has authority to clarify or modify its own rulings. It has done so even after issuing an opinion on the merits. See Swenson v. Stidham, 410 U.S.

904 (1973) (granting party's motion to modify opinion in argued case); cf. Shapiro 841 (noting that, "[i]n some circumstances" where a party before this Court "is not seeking a change in the Court's judgment on the merits * * * , it may be appropriate to file a motion to clarify or modify the opinion of the Court, rather than a petition for rehearing"). A fortiori, the Court may clarify or amend its own stay ruling in a case that is still pending before it for plenary consideration on the merits.

This Court should exercise that authority here because the parties' dispute concerns the correct interpretation of this Court's own June 26 stay order balancing the equities and crafting interim relief -- a legal question that only this Court can authoritatively resolve. Respondents initially sought "clarif[ication]" of "the scope of the [district court's] June 19, 2017 amended preliminary injunction." D. Ct. Doc. 293, at 3 (June 29, 2017). But as the district court recognized in denying that request, respondents' arguments in substance concerned only the meaning of this Court's June 26 ruling granting a partial stay of that injunction. D. Ct. Doc. 322, at 5. After respondents' appeal of that ruling was dismissed, respondents presented substantially the same arguments to the district court, changing only the label. Indeed, as both respondents and the court acknowledged, given the pendency of appellate proceedings involving the original injunction, the district court's authority was confined to "preserv[ing] the status quo or ensur[ing] compliance with its

earlier orders," i.e., the "preliminary injunction * * * as modified by the Supreme Court's June 26, 2017 order." Add. 9 & n.4; see D. Ct. Doc. 342, at 2 (July 12, 2017) ("agree[ing]" that the district court's "authority to modify its injunction is limited to what is necessary to preserve the status quo"). The parties' dispute and the district court's July 13 ruling thus turn entirely on the meaning of this Court's stay ruling.

Further litigation in the lower courts on that question would serve little purpose. The Ninth Circuit cannot conclusively determine the correct reading of this Court's stay ruling any more than the district court. Withholding authoritative clarification of this Court's ruling would only exacerbate the uncertainty the district court's ruling has created and delay final resolution of the stay's scope. That in turn would compromise the government's ability to implement the provisions of the Order, which this Court made clear should take effect with limited exceptions. The Court can and should avoid those difficulties and needless additional litigation by clarifying its June 26 stay ruling.

B. Out of an abundance of caution, to ensure that there is no impediment to this Court's prompt resolution of this issue, the government has also filed today a notice of appeal of the district court's decision modifying its injunction. See D. Ct. Doc. 346 (July 14, 2017) (docketed as No. 17-16426 (9th Cir.)). To the extent necessary, this Court thus may construe this motion as a

petition for a writ of certiorari before judgment, grant certiorari, and vacate the district court's modified injunction.

Alternatively, the Court may construe the motion as a petition for a writ of mandamus. See Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 428 (1978) (per curiam). This motion is accordingly being served on the district court. In the absence of an order of this Court definitively clarifying its stay ruling, mandamus would be warranted because "no other adequate means [would] exist" for the government to obtain the requested relief, as no lower court can conclusively determine the correct scope of a decision of this Court. Further lower-court litigation during the very window in which the Order was to take effect would only delay definitive resolution of the ruling's scope by this Court. In addition, the government's right to relief is "clear and indisputable" for the reasons discussed below. And the writ is appropriate as this case concerns "a question of public importance" and an issue of the interpretation of this Court's own ruling, which makes it "peculiarly appropriate that * * * action by this [C]ourt should be taken." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam) (brackets and citation omitted); see Cheney v. United States Dist. Court, 542 U.S. 367, 380-381 (2004) (mandamus standard).

II. THE DISTRICT COURT'S READING OF THIS COURT'S STAY RULING IS WRONG AND WOULD SEVERELY IMPAIR IMPLEMENTATION OF THE ORDER

The district court's ruling modifying its injunction rests on a deeply flawed interpretation of this Court's June 26 stay ruling. The government respectfully requests that the Court clarify its June 26 stay ruling in two respects: first, the existence of an assurance agreement between the Department of State and a refugee-resettlement agency as to a particular refugee applicant, standing alone, does not establish a qualifying bona fide relationship that exempts the applicant from Sections 6(a) and 6(b) of the Order; and second, the government has properly interpreted "close familial relationship[s]," IRAP, slip op. 12, consistent with this Court's stay ruling and the INA, to include only immediate relationships but not more distant relatives, such as grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins.

A. An Assurance Agreement Between A Refugee-Resettlement Agency And The Government By Itself Does Not Establish A Qualifying Bona Fide Relationship With A U.S. Entity

This Court's June 26 stay ruling held that Section 6(a)'s refugee suspension and Section 6(b)'s refugee cap "may take effect" as to "all" refugee applicants except those "who can credibly claim a bona fide relationship with a person or entity in the United States." IRAP, slip op. 13. The district court concluded, however, that every refugee applicant as to whom the federal government has entered an assurance agreement with a refugee-

resettlement agency automatically has a qualifying bona fide relationship with a U.S. entity, and is therefore exempt from Sections 6(a) and 6(b). This Court's ruling cannot plausibly bear that construction, which is irreconcilable with this Court's reasoning and would as a practical matter render the partial stay this Court granted as to the refugee provisions a dead letter.

1. To implement the Refugee Program, the Department of State enters into annual cooperative agreements with non-profit resettlement agencies in the United States. See D. Ct. Doc. 301-1, at 5 (Bartlett Decl. ¶¶ 14-15). Currently, nine agencies have entered into agreements with the United States to provide resettlement services. Ibid. (¶ 14).[6] Before any refugee travels to the United States under the Refugee Program, the Department of State obtains a commitment (an "assurance") from a resettlement agency. Ibid. (¶ 16); see, e.g., id. at 63 (Attach. No. 3). As the district court observed, "[t]he parties do not dispute that before any refugee is admitted to the United States under the [Refugee Program], the Department of State must receive" an assurance agreement. Add. 16.

As part of its assurance, the resettlement agency agrees that, once the refugee arrives in the United States, the resettlement

[6] The nine resettlement agencies are Church World Service, Episcopal Migration Ministries, Ethiopian Community Development Council, HIAS, International Rescue Committee, Lutheran Immigration and Refugee Service, United States Committee for Refugees and Immigrants, United States Conference of Catholic Bishops, and World Relief. D. Ct. Doc. 301-1, at 5 (Bartlett Decl. ¶ 14).

agency (or a local affiliate) will provide certain benefits for that refugee in exchange for payment from the government. D. Ct. Doc. 301-1, at 6-7 (Bartlett Decl. ¶ 20). The cooperative agreement specifies the services that the resettlement agency must provide to each refugee and provides government-funded compensation to the resettlement agency for doing so. Id. at 5 (¶ 15); see id. at 24 (Attach. No. 2). The services provided by resettlement agencies and their local affiliates throughout the country include placement, planning, reception, and basic needs and core service activities for arriving refugees. Id. at 6-7 (¶ 20). Once a given refugee has been approved by DHS and passes all required medical examinations, he is assigned to a resettlement agency, which submits the assurance agreeing to provide the required services after the refugee arrives in the United States. Id. at 5 (¶¶ 13-15); see id. at 63 (Attach. No. 3).

A government-arranged assurance agreement does not by itself establish a "bona fide relationship" between the refugee and an "entity in the United States" of the type this Court described in its stay ruling. IRAP, slip op. 13. The assurance is not an agreement between the resettlement agency and the refugee; rather, it is an agreement between that agency and the federal government. In other words, the government enters into an agreement to provide the refugee with certain services once the refugee arrives, in order to ensure a smooth transition into the United States. Significantly, however, resettlement agencies typically do not

have any direct contact with the refugees they assure before their arrival in the United States. D. Ct. Doc. 301-1, at 7 (Bartlett Decl. ¶ 21). Rather, the resettlement agency works with individuals and organizations in the United States, including any U.S. ties a refugee may otherwise have in the United States, to prepare for the refugee's arrival without directly interacting with the refugee abroad. Ibid.

The indirect link between a resettlement agency and refugee that exists by virtue of such an assurance stands in stark contrast to the sort of relationships this Court identified as sufficient in its stay ruling. Unlike students who have been admitted to study at an American university, workers who have accepted jobs at an American company, and lecturers who come to speak to an American audience, cf. IRAP, slip op. 12, refugees do not have any freestanding connection to resettlement agencies that is separate and apart from the Refugee Program by virtue of the agencies' assurance agreement with the government. Nor can the exclusion of an assured refugee plausibly be thought to "burden" a resettlement agency, apart from an opportunity to perform the resettlement services for which the government has contracted if a refugee is admitted. Id. at 11.

The district court nevertheless held that an assurance agreement standing alone does establish a qualifying bona fide relationship between the refugee and the resettlement agency because it is "formal," "binding," refugee-specific, and "issued

in the ordinary course." Add. 17. But the court's focus on those features misses the fundamental point that an assurance agreement does not create any relationship whatsoever with the refugee -- much less one that is independent of the refugee-admission process itself. The common thread among the hypothetical worker, student, and lecturer this Court described as potential examples of aliens with qualifying relationships is that each one has an independent relationship with a U.S. entity, such that the entity would suffer concrete hardship from the alien's exclusion. IRAP, slip op. 12. The same simply cannot be said of refugees to whom a resettlement agency will provide services after the refugee arrives in this country pursuant to a contract with the U.S. government. The resettlement agency suffers no greater injury than the hypothetical entities this Court described that might "enter[] into a relationship simply to avoid" the Order by "contact[ing] foreign nationals" and "add[ing] them to client lists." Ibid.

Respondents further asserted below that resettlement agencies are harmed because they have devoted private resources to refugee work and may lose federal funding. See D. Ct. Doc. 328-1, at 12. Even assuming this to be true, any such harm flows not from any independent, pre-existing relationship with the refugee formed in the ordinary course. It exists solely as a result of the resettlement agencies' contracts with the government. The district court stated that this Court's stay ruling does not "require[] a refugee to enter into a contract with a United States

entity" to have a qualifying relationship. Add. 17. But the refugee herself must have some relationship with a U.S. entity. Otherwise, the test this Court articulated would be meaningless.

2. Here, as the district court noted, it is undisputed that, "before any refugee is admitted to the United States under the [Refugee Program], the Department of State must receive a commitment ('assurance') from a resettlement agency." Add. 16. Thus, as the government showed below, and neither respondents nor the district court disputed, approximately 24,000 refugees already have been assured -- which is more than the number of refugees who would likely be scheduled to enter during the period Sections 6(a) and 6(b) are in effect.[7] The district court's reading of this Court's stay would therefore mean that all of those refugees have qualifying bona fide relationships, and all of them are therefore exempt from the Order. Respondents asserted below that another 175,000 potential refugees do not yet have assurances. D. Ct. Doc. 342, at 10. That is irrelevant because those refugees are unlikely to enter while the Order is in effect. Section 6(a) applies only for 120 days from this Court's June 26 ruling, see pp. 5, 8, supra, and thus will expire October 24, 2017. And Section 6(b) applies only during Fiscal Year 2017, which ends

[7] D. Ct. Doc. 301-1, at 5 (Bartlett Decl. ¶ 17) ("As of June 30, 2017, a total of 23,958 refugees in the [Refugee Program] were assured by a resettlement agency. It is unlikely that all the refugees who are already assured would travel to the United States during the next 120 days while [the Order's] refugee suspension is partially in effect.").

September 30, 2017. Refugees who would not enter during those periods are not affected by those provisions of the Order or, consequently, by this Court's stay.

The district court's ruling, in short, would mean that the stay this Court crafted after carefully balancing the equities covers virtually no refugee. Sections 6(a) and 6(b) thus would be unable to "take effect" as this Court explicitly intended. IRAP, slip op. 13. This Court's stay ruling should not be construed in a way that renders its application to Sections 6(a) and 6(b) largely inoperative. Cf. Corley v. United States, 556 U.S. 303, 314 (2009) ("[B]asic interpretive" principles require that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (brackets and citation omitted)).

B. The Government Has Properly Construed "Close Familial Relationship" Consistent With This Court's Ruling And The INA To Include Only Certain Immediate Relationships

The district court also misread the exception this Court identified for aliens seeking entry who have a U.S. relative. This Court's June 26 stay ruling provides that, for a foreign national to be exempt from the Order based on a "credible claim of a bona fide relationship with a person * * * in the United States," "a close familial relationship is required." IRAP, slip op. 12. Because the express terms of that ruling make clear that only "close familial relationship[s]" count, ibid. (emphasis added), a line necessarily must be drawn between such relationships and more

attenuated family connections. The government has appropriately construed that language to include only certain immediate relationships -- parent (including parent-in-law), spouse, fiancé(e), child, adult son or daughter, son-in-law, daughter-in-law, sibling (whether whole or half), and step relationships -- but to exclude other, more distant relatives. Add. 6; see State Visa Guidance; State Refugee Fact Sheet; DHS FAQs, Q29. That tailored understanding comports with this Court's opinion, the most relevant provisions of the INA, and the facts before this Court when it issued the stay. By contrast, the district court disregarded those interpretive guideposts and instead adopted a boundless conception of "close family" -- covering grandparents, grandchildren, siblings-in-law, aunts, uncles, nieces, nephews, and cousins -- that essentially eliminates the "close" requirement by covering virtually every conceivable familial connection.

1. To begin, when this Court balanced the equities and identified circumstances in which a foreign national's connection to the United States is insufficient to outweigh the government's national security interests, it pointed in part to the Executive Order itself. IRAP, slip op. 11. As the Court explained, the Order "distinguishes between foreign nationals who have some connection to this country, and foreign nationals who do not, by establishing a case-by-case waiver system primarily for the benefit of individuals in the former category." Ibid.

Notably, the Court specifically cited the waiver provision, the most relevant subsection of which applies to a foreign national who "seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa," where "the denial of entry during the suspension period would cause undue hardship." Order § 3(c)(iv) (emphases added); see IRAP, slip op. 11. The Court's reference to "close familial relationship[s]," which echoes the waiver provision for "close family member[s]," as well as the Court's specific reference to that provision in explaining the types of connections that are sufficient, indicate that the Court envisioned exempting a similarly limited set of family members from the Order. The district court disregarded the Order's waiver provision and this Court's reference to it.

2. The specific lines the government has drawn in implementing this Court's ruling –- like the definition of "close family member" in Section 3(c)(iv) of the Executive Order -- are derived from the INA. The INA reflects congressional policies that accord special status to certain family relationships over others. See Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2197-2198 (2014) (opinion of Kagan, J.). The long-settled maxim that "equity follows the law," Hedges v. Dixon County, 150 U.S. 182, 192 (1893), makes federal immigration law an appropriate point of reference.

Section 201 of the INA defines "immediate relatives" -- the "most favored" family-based immigrant visa category, Cuellar de Osorio, 134 S. Ct. at 2197 (opinion of Kagan, J.) -- as "the children, spouses, and parents" of U.S. citizens. 8 U.S.C. 1151(b)(2)(A)(i). Step-relationships are included in the INA's definitions of "child" and "parent." See 8 U.S.C. 1101(b)(1)-(2). Section 203, concerning family-based preferences in allotting immigrant visas, specially privileges the following relationships: unmarried and married sons and daughters (age 21 or older) of U.S. citizens; siblings of U.S. citizens; and spouses, unmarried children under the age of 21, and unmarried sons and daughters (age 21 or older) of lawful permanent residents. See 8 U.S.C. 1153(a). Half-siblings are included in the sibling preference. See 9 U.S. Dep't of State, Foreign Affairs Manual 102.8-3 (2016). The fiancé(e) relationship also is recognized and given special accommodation in the INA. See 8 U.S.C. 1101(a)(15)(K), 1184(d). The government's definition treats all of these family relationships as "close familial relationship[s]" within the meaning of this Court's ruling.

Contrary to the district court's characterization, the government's reliance on the family-based visa provision of the INA is hardly "cherry-picking." Add. 12. The government's definition of close family members is drawn from the INA provisions governing which U.S. citizens and lawful permanent residents can petition for an immigrant visa for a family member abroad. While

even that does not create an entitlement for the alien to enter the United States –- the alien must independently satisfy the eligibility criteria for entry to the United States -- Congress has identified those persons who have a sufficient interest in unification to petition for an alien to come to the United States permanently. This is the most obvious touchstone for the class of close family members for whom the denial of a visa could plausibly be thought to affect the rights of "people * * * in the United States who have relationships with foreign nationals abroad." IRAP, slip op. 10; see id. at 10-11 (explaining that, under Kleindienst v. Mandel, 408 U.S. 753, 770 (1972), U.S. plaintiffs may challenge the exclusion of a foreign national that assertedly affects their own First Amendment interests).

In contrast, the district court relied on a strained analogy to cases involving local housing ordinances and grandparents petitioning for visitation rights. In Moore v. City of East Cleveland, 431 U.S. 494 (1977), for example, the Court invalidated limitations on living arrangements of people in the United States, all of whom indisputably had due-process rights. See Add. 14. That hardly supports the proposition that such distant family members have a cognizable stake in whether their alien relatives abroad can enter the country. In this very different context, the appropriate definition of "close family members" is the relationship that enables an individual in the United States to petition for an immigrant visa on the alien's behalf. See Cuellar

de Osorio, 134 S. Ct. at 2213 (opinion of Kagan, J.) (noting that "the grandchildren, nieces, or nephews of citizens [are] relationships [that] d[o] not independently entitle [those family members] to visas"); see also INS v. Hector, 479 U.S. 85 (1986) (per curiam) (INA did not permit consideration of hardship to niece of deportee, notwithstanding de facto parent-child relationship); Moreno-Morante v. Gonzales, 490 F.3d 1172, 1175-1178 (9th Cir. 2007) (similar as to grandchild).

Other statutory provisions confirm this conclusion. Within the INA, for example, a provision that establishes one of the various particular grounds on which aliens are inadmissible also builds in an "[e]xception for close family members," with reference specifically to "parent, spouse, son, daughter, brother, or sister" relationships. 8 U.S.C. 1182(a)(3)(D)(iv). A law concerning Iraqi refugees enacted in 2008 employed the phrase "close family members" and stated that the phrase's meaning is "described in section 201(b)(2)(A)(i) or 203(a) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i) and 1153(a))."[8] Those are the same sections of the INA on which the government primarily relies here. In contrast to those "close familial relationship[s]," the INA does not provide comparable immigration benefits for grandparents, grandchildren, brothers-in-law,

[8] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1243(a)(4), 122 Stat. 396 (codified as amended at 8 U.S.C. 1157 note).

sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States.

To the extent the district court addressed the INA at all, it relied on INA provisions or implementing regulations that are not relevant to visa issuance or that otherwise reflect narrow exceptions to the general rules. For example, the court relied on the fact that, by regulation, a juvenile alien who cannot be released to the custody of his or her parents may be released to an aunt, uncle, or grandparent. Add. 13 (citing Reno v. Flores, 507 U.S. 292, 297, 301 (1993), and 8 C.F.R. 236.3(b)(1)(iii)). But that regulation sheds no light on the most relevant inquiry for purposes of implementing the injunction, i.e., what family relationship is sufficient to permit an individual to petition for a visa for aliens abroad.

The district court also relied on the fact that a provision in the Family Sponsor Immigration Act of 2002, Pub. L. No. 107-150, 116 Stat. 74, defines an alien's sister-in-law, brother-in-law, grandparents, and grandchildren as "close family." Add. 13 (citing § 2(a), 116 Stat. 74 (codified at 8 U.S.C. 1183a(f)(5))). That provision does not create the ability to petition for a visa; it only establishes who may serve as a financial sponsor for certain aliens. See 8 U.S.C. 1183a.

Even in that context, the provision reflects the same distinction between close and extended family drawn by the government. Under 8 U.S.C. 1183a(f)(1)(D) and (4), a family

sponsor must be the same relative who is petitioning under 8 U.S.C. 1154 to classify the alien as a family-sponsored or employment-based immigrant (or a relative with a significant ownership interest in the entity filing an employment-based petition). See 8 U.S.C. 1153(a) and (b). Only spouses, parents, sons, daughters, and siblings may file family-sponsored petitions, and the eligible "relatives" in the employment-based context are limited to the same family members. See 8 U.S.C. 1154(a); 8 C.F.R. 213a.1 (defining relative to include spouse, parents, children, and siblings); see also 71 Fed. Reg. 35,732, 35,733 (June 21, 2006) (defining "'relative,' for purposes of the affidavit of support requirement, to include only those family members who can file alien relative visa petitions"). Only when a petitioner has died and the petition either converts to a widow(er) petition or the Secretary of Homeland Security reinstates the petition on humanitarian grounds can one of the extended family members serve as a financial sponsor under this provision. See 8 U.S.C. 1183a(f)(5)(B)(i) and (ii). And even then, siblings-in-law and grandparents only serve as financial sponsors; they cannot petition for a visa applicant. Cf. Cuellar de Osorio, 134 S. Ct. at 2213 (opinion of Kagan, J.) ("grandchildren, nieces, or nephews of citizens [are] relationships [that] d[o] not independently entitle [those family members] to visas").

The district court also cited (Add. 13 n.8) a human-trafficking regulation that allows grandchildren, nieces, and

nephews to be eligible for T visas (for victims of human trafficking), but only if DHS determines that they face "a present danger of retaliation as a result of the principal's escape from the severe form of trafficking in persons or cooperation with law enforcement." 81 Fed. Reg. 92,266, 92,280 (Dec. 19, 2016). Similarly, the district court relied on DHS regulations that allow an individual to "apply for asylum if a 'grandparent, grandchild, aunt, uncle, niece, or nephew' resides in the United States." Add. 13 n.8 (citing 69 Fed. Reg. 69,480, 69,488 (Nov. 29, 2004)). But those provisions were compelled by a negotiated agreement with Canada that included broader familial definitions than typically available under the INA. See 69 Fed. Reg. at 69,480 (discussing "Safe Third Country Agreement").

The remaining INA provisions relied on by the district court (Add. 13 n.8) apply only where the usual close family member has died. Under 8 U.S.C. 1433(a), a grandparent can apply on behalf of a grandchild only if the U.S. citizen-parent has died. And the provisions of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, see Add. 13 n.8, similarly are applicable only if the grandchild is an orphan and "both * * * parents died as a direct result of * * * [the 9/11 attacks]," and at least one of the parents was, on September 10, 2001, a U.S. Citizen or Lawful Permanent Resident. § 421(b)(3), 115 Stat. 357.

Notably, in cases in which an alien abroad has a particularly close relationship with a more distant relative, such as where a

minor child is orphaned and is raised by an aunt and uncle, he might be a potential candidate for a case-by-case waiver under Section 3(c) of the Order, which provides a non-exclusive list of circumstances that might qualify an individual for a waiver. But those exceptions to the normal INA rules, which apply only in narrow and factually distinguishable circumstances, do not provide a basis for disregarding the typical definition of close familial relationships in the INA.

3. Finally, the government's definition of close family members is consistent with the factual context for this Court's stay ruling. Although the Court did not catalogue exhaustively which "close familial relationships" are sufficient to exempt an alien from the Order, the Court left the injunction in place only for persons "similarly situated" to John Doe #1 and Dr. Elshikh. IRAP, slip op. 10. The Court also explained that "[t]he facts of these cases illustrate the sort of relationship that qualifies," citing Doe #1's wife and Dr. Elshikh's mother-in-law (who is also the mother of Elshikh's U.S.-citizen wife). Id. at 12. Those types of immediate relationships reflect the reason why the Court determined that certain ties to family members in the United States weigh in favor of leaving the injunction in effect as to such persons: the U.S. relative "can legitimately claim concrete hardship if that person is excluded." Id. at 13. The same is true of other original plaintiffs in these cases before the Court, who sought entry of fiancé(e)s and siblings. 16-1436 Pet. 15 n.7.

The district court read this Court's reference to Dr. Elshikh's mother-in-law as creating a much larger exception, unmoored from the INA and the Order's waiver provision. That is incorrect. This Court did not declare that a "mother-in-law" automatically has a qualifying "close familial relationship"; rather, it examined "[t]he facts of these cases," IRAP, slip op. 12, from which it was apparent that Dr. Elshikh's mother-in-law would in fact have a qualifying relationship as the mother of Dr. Elshikh's wife, herself a U.S. citizen. D. Ct. Doc. 66-1, at 2-4 (Elshikh Decl. ¶¶ 1, 4) (Mar. 8, 2017). And the Court cited Dr. Elshikh's mother-in-law as a "foreign national who wishes to enter the United States to live with or visit a family member," IRAP, slip op. 12, which she of course would do by living with or visiting her daughter. The Court's statement that Dr. Elshikh's mother-in-law has a "close familial relationship" thus did not necessarily reflect a categorical determination to privilege the mother-in-law relationship as such, even though Congress in the INA did not. Out of an abundance of caution, however, the government has implemented the Order in its guidance to include parents-in-law (and children-in-law) as having qualifying bona fide relationships. See pp. 10-11, supra.

Importantly, as with Dr. Elshikh's mother-in-law, parents-in-law of persons in the United States will typically also be parents of persons in the United States, because spouses typically live together. This places the parent-in-law relationship in a

fundamentally different position from the other relatives that the district court included. For example, siblings-in-law of persons in the United States are far less likely to be siblings of persons in the United States, because siblings often live apart. And the likelihood is even lower for cousins and the other types of more distant relatives that the district court held are not covered by the stay. Simply put, the fact that this Court held that Dr. Elshikh's mother-in-law is exempt from the Order's application cannot be read as holding that virtually all family members are exempt from the Order, especially given the Court's clear admonition that "a close familial relationship is required." IRAP, slip op. 12 (emphasis added).

III. THIS COURT SHOULD STAY THE DISTRICT COURT'S MODIFIED INJUNCTION PENDING CLARIFICATION OF THIS COURT'S STAY RULING

A. The government respectfully requests that this Court grant a temporary administrative stay of the district court's modified injunction pending disposition of this motion and that it direct a prompt response by respondents. See, e.g., Little Sisters of the Poor, 134 S. Ct. 893 (granting temporary injunction pending briefing on and consideration of injunction pending appeal and ordering response to application). The Court has authority under the All Writs Act, 28 U.S.C. 1651, to stay the district court's ruling, which purports to interpret, but in fact contravenes, a prior ruling of this Court in a case still pending before the

Court.[9] The Court should exercise that authority because all of the relevant considerations support a stay here. See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); see also Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

First, there is no question that these issues warrant review by this Court. The Court already has granted certiorari and a stay in this case, recognizing the important governmental interests at stake in enforcement of the Order. IRAP, slip op. 9, 11-12. The issues presented concern the interpretation of this Court's stay ruling, which only this Court can definitively resolve. Requiring the parties to litigate first in the court of appeals would serve no purpose and would merely delay the case from reaching this Court. See pp. 16-17, supra. Second, there is at least a fair prospect that the Court will reject the district court's misinterpretation of that ruling. See pp. 18-35, supra.

Third, the balance of equities and public interest strongly support a stay. The Court already has granted a stay of the district court's original injunction. IRAP, slip op. 9-13. As the Court underscored in that ruling, the government's "interest in preserving national security is 'an urgent objective of the

[9] The Court also may stay a district-court ruling pending a petition for a writ of certiorari under 28 U.S.C. 2101(f) or pending a petition for a writ of mandamus under this Court's Rule 23 and the All Writs Act. See Perry, 558 U.S. at 190. As noted, out of an abundance of caution, the government is pursuing all of these avenues in the alternative, see pp. 17-18, supra, which eliminates any question of the Court's authority to grant a stay.

highest order,'" and both that interest and the Executive's authority "are undoubtedly at their peak when there is no tie between [a] foreign national and the United States." Id. at 11 (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010)); see id. at 13 (holding that, for refugees who lack a qualifying bona fide relationship with a U.S. person or entity, the equitable "balance tips in favor of the Government's compelling need to provide for the Nation's security"). The same considerations strongly support a stay of the district court's ruling that effectively narrows the stay this Court granted.

The fact that the government is now in the midst of implementing the Order pursuant to this Court's June 26 stay ruling magnifies the need for an administrative stay. The government began implementing the Order subject to the limitations articulated by this Court more than two weeks ago, on June 29, which has entailed extensive, worldwide coordination among multiple agencies and issuing public guidance to provide clarity and minimize confusion. Add. 6; pp. 8-9, supra. The district court's ruling requires the government immediately to alter its implementation of the Order in substantial respects, inviting precisely the type of uncertainty and confusion that the government has worked diligently to prevent. The Court can and should prevent such needless uncertainty and confusion by staying the district court's injunction until this Court can definitively resolve the issues presented.

B. For the same reasons, if the Court concludes that the court of appeals should address the correctness of the district court's interpretation of this Court's stay ruling in the first instance, the Court should further grant a stay of the district court's modified injunction pending disposition of that appeal. The Court, or a single Justice, has authority to stay a district-court order pending appeal to a court of appeals.[10] A stay pending that appeal would help to minimize the disruption and practical difficulties that would be created if the district court's order remains operative for a substantial period but is later vacated or stayed.

C. The government requested a stay from the district court, which denied the government's request. Add. 24. The government respectfully submits that, in light of the unique posture of the litigation, this case presents "extraordinary circumstances" (Sup. Ct. R. 23.3) in which seeking a stay from the court of appeals first is unnecessary: the government seeks clarification by this Court of the meaning of its own June 26 stay ruling, and it is therefore appropriate for this Court to grant a temporary stay pending its resolution of that request. In addition, given the government's strong interest in implementing the Order consistent with this Court's stay, a timely resolution of the issues presented

[10] See, e.g., West Virginia v. EPA, 136 S. Ct. 1000 (2016); Ashcroft v. North Jersey Media Grp., Inc., 536 U.S. 954 (2002); INS v. Legalization Assistance Project, 510 U.S. 1301 (1993) (O'Connor, J., in chambers); United States Dep't of Def. v. Meinhold, 510 U.S. 939 (1993).

herein is essential. Seeking resolution in the Ninth Circuit about the meaning of this Court's stay followed by a near-certain request for this Court's review by the non-prevailing party would result in unnecessary delay. Out of an abundance of caution, however, the government will also be filing a protective stay motion in the court of appeals. But given that the dispute concerns this Court's stay ruling and the exigencies presented by ongoing implementation of the Order, the government respectfully submits that this Court should grant a temporary administrative stay without awaiting action by the court of appeals.

CONCLUSION

The Court should clarify its June 26 stay ruling as set forth above. In the alternative, the Court may construe this motion as a petition for a writ of certiorari before judgment or as a petition for a writ of mandamus and should grant the petition and vacate the district court's modified injunction. If the Court would prefer that the government pursue review in the court of appeals in the first instance, the Court should stay the district court's injunction pending disposition of that appeal. In all events, the Court should grant a temporary administrative stay of the modified injunction pending disposition of this motion.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

JULY 2017

ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I and ISMAIL ELSHIKH, Plaintiffs, vs. DONALD J. TRUMP, *et al*., Defendants.	CV. NO. 17-00050 DKW-KSC **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO ENFORCE, OR, IN THE ALTERNATIVE, TO MODIFY PRELIMINARY INJUNCTION**

INTRODUCTION

On June 26, 2017, the United States Supreme Court granted certiorari in this matter, granted in part the Government's stay application, "and narrow[ed] the scope of the injunction[]" entered by this Court with respect to Sections 2(c), 6(a), and 6(b) of Executive Order 13,780.[1] *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436 (16A1190) and 16-1540 (16A1191), slip op. at 11–12 (U.S. June 26, 2017) [hereinafter Slip. Op.] (per curiam). Plaintiffs challenge the Government's implementation of the non-enjoined portions of EO-2, asking this Court to enforce or, in the alternative, to modify the scope of the existing preliminary injunction.

[1]Executive Order 13,780 is entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017) [hereinafter EO-2].

See Pls.' Mot. to Enforce or, In the Alternative, to Modify Prelim. Inj., ECF No. 328 [hereinafter Motion].

Upon careful consideration of the parties' expedited submissions, the Court concludes that on the record before it, Plaintiffs have met their burden of establishing that the requested injunctive relief is necessary to preserve the status quo pending appeal regarding the definition of "close familial relationship" employed by the Government with respect to Sections 2(c), 6(a) and 6(b) of EO-2. Plaintiffs have similarly met their burden with respect to refugees with a formal assurance, as it relates to the Government's implementation of Sections 6(a) and 6(b) of EO-2, and participants in the Lautenberg Program. Plaintiffs' Motion is accordingly GRANTED in these respects and DENIED to the extent other relief is sought, for the reasons detailed below.

BACKGROUND

The Court briefly recounts the factual and procedural background relevant to Plaintiffs' Motion.

I. Prior Proceedings

A. This Court's March 29, 2017 Preliminary Injunction

On March 15, 2017, the Court temporarily enjoined Sections 2 and 6 of EO-2 nationwide ("TRO"). *See Hawaii v. Trump*, --- F. Supp. 3d ---, 2017 WL 1011673 (D. Haw. Mar. 15, 2017). Upon Plaintiffs' motion, full briefing, and a March 29,

2017 hearing, the Court converted the TRO into a preliminary injunction ("PI"). *Hawaii v. Trump*, --- F. Supp. 3d ---, 2017 WL 1167383 (D. Haw. Mar. 29, 2017). The Government appealed the Court's ruling on March 30, 2017. Notice of Appeal, ECF No. 271.

B. The Ninth Circuit's June 12, 2017 Opinion

The Ninth Circuit's June 12, 2017 *per curiam* opinion affirmed the injunction as to Section 2(c), suspending entry of nationals from the six designated countries for 90 days; Section 6(a), suspending the U.S. Refugee Admissions Program ("USRAP") for 120 days; and Section 6(b), capping the entry of refugees to 50,000 in fiscal year 2017. *Hawaii v. Trump*, --- F.3d ---, 2017 WL 2529640, at *29 (9th Cir. June 12, 2017) (per curiam). The Ninth Circuit vacated the portions of the injunction that prevented the Government from conducting internal reviews, as otherwise directed in Sections 2 and 6, and the injunction to the extent that it ran against the President. *Id.*, 2017 WL 2529640, at *29. The Ninth Circuit remanded to this Court with instructions to enter an amended injunction consistent with its opinion. This Court accordingly entered an amended injunction on June 19, 2017, upon issuance of the expedited mandate. Am. Prelim. Inj., *Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KSC (D. Haw. June 19, 2017), ECF No. 291.

II. The Supreme Court's June 26, 2017 Order

The Government petitioned for certiorari and filed an application to stay both the preliminary injunction entered in this case and the one entered by the District of Maryland in a case now consolidated on appeal. *Int'l Refugee Assistance Project v. Trump*, --- F. Supp. 3d ---, 2017 WL 1018235 (D. Md. Mar. 16, 2017) [hereinafter *IRAP*] (issuing preliminary injunction); *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. May 25, 2017) (No. TDC-17-0361, D. Md.; renumbered No. 17-1351, 4th Cir.). On June 26, 2017, the Supreme Court granted certiorari in both cases. Slip Op. at 9. The Supreme Court also granted "the Government's applications to stay the injunctions, to the extent the injunctions prevent enforcement of §2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States," Slip Op. at 11–12.

More specifically, the Supreme Court stayed the preliminary injunctions relating to Section 2(c) in the following manner—

> The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawaii. In practical terms, this means that §2(c) 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. All other foreign nationals are subject to the provisions of EO-2.

Slip Op. at 12. The Supreme Court explained that the facts in this case and in *IRAP* "illustrate the sort of relationship that qualifies"—

> For individuals, a close familial relationship is required. A foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law, clearly has such a relationship. As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience. Not so someone who enters into a relationship simply to avoid §2(c): For example, a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion.

Slip Op. at 12.

With respect to the enjoined portions of Section 6 relating to refugee admissions and the refugee cap, the Supreme Court reasoned that the "equitable balance struck [with respect to Section 2(c)] applies in this context as well." Slip Op. at 13. It held—

> An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. As to these individuals and entities, we do not disturb the injunction. But when it comes to refugees who lack any such connection to the United States, for the reasons we have set out, the balance tips in favor of the Government's compelling need to provide for the Nation's security.
>
> The Government's application to stay the injunction with respect to §§6(a) and (b) is accordingly granted in part. Section 6(a) may not be enforced against an individual seeking admission as a

> refugee who can credibly claim a bona fide relationship with a person or entity in the United States. Nor may §6(b); that is, such a person may not be excluded pursuant to §6(b), even if the 50,000-person cap has been reached or exceeded.

Id. (internal citations omitted).

III. Plaintiffs' Challenge To The Government's Implementation Of EO-2

The Government began enforcing the non-enjoined portions of EO-2 on June 29, 2017 at 8:00 p.m. EDT. In doing so, the Government published guidance to its agencies on the implementation and enforcement of EO-2, guidance that has been amended, and which the Government has indicated will be amended again, as circumstances warrant. *See* Katyal Decl., Exs. A–C, & F, ECF Nos. 329-1, 329-2, 329-3, & 329-6.

The Government's guidance defines "close familial relationship" as including a parent, parent-in-law, spouse, fiancé, child, adult son or daughter, son-in-law, daughter-in-law, sibling (whether whole or half), and step relationships. These relationships are exempt from EO-2. The Government's definition does not include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law.[2] Plaintiffs challenge the Government's narrower construction.

---

[2]The Government's first official guidance published on June 29, 2017, before enforcement of Sections 2(c), 6(a), and 6(b), indicated that fiancés would not be considered to be close family members for purposes of applying the Supreme Court's decision. That guidance was

With respect to refugee program guidance, the Government instructed agencies that, "[t]he fact that a resettlement agency in the United States has provided a formal assurance for a refugee seeking admission . . . is not sufficient in and of itself to establish a qualifying relationship for that refugee with an entity in the United States." Katyal Decl., Ex. B, Dep't of State, *untitled guidance document* (received by Pls. June 29, 2017), ECF No. 329-2. The Government also initially indicated that it had not determined whether refugees with a "bona fide relationship with a person or entity in the United States" would be permitted to travel after July 6, 2017, and would issue further guidance. *See id.* Updated guidance from the State Department instructs its private voluntary agency partners that "[n]o new [advanced booking notifications ('ABNs')] for travel for cases with or without the required bona fide relationship to a person or entity in the United States may be requested at this time. We hope to allow new ABNs for such cases to resume in the very near future, once we clarify verification procedures." Katyal Decl., Ex. F, E-mail from Lawrence E. Bartlett, Dir., Office of Admissions, Bureau of Population, Refugees, & Migration, to Voluntary Agencies (July 3, 2017, 16:30 EDT), ECF No. 329-6. Plaintiffs contest this guidance, principally asserting that refugees with a formal

---

subsequently updated to include fiancés. *See* Katyal Decl., Ex. C, Dep't of State, *Exec. Order on Visas*, at 3 (June 29, 2017), ECF No. 329-3, *available at* https://travel.state.gov/content/travel/en/news/important-annoucement.html.

assurance can credibly claim a bona fide relationship with a refugee resettlement agency.

Plaintiffs additionally request that the Court recognize that certain client relationships with legal services organizations are protected by this Court's injunction, and that the participants in three specific refugee programs are categorically exempt from EO-2: "U.S.-affiliated Iraqis" at risk of persecution because of their contributions to the United States' combat mission in Iraq; participants in the Central American Minors Program; and participants in the Lautenberg Program, each of which, Plaintiffs argue, requires participants to have close family ties with the United States, a relationship with a "designated resettlement agency," or both. Plaintiffs ask the Court to issue an order either enforcing or modifying its amended preliminary injunction to reflect the scope of relief requested in the Motion.[3]

---

[3]Plaintiffs request that the Court issue an order enforcing or modifying its preliminary injunction to reflect that

> (1) the injunction bars the Government from implementing the Executive Order against grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States; (2) the injunction prohibits the Government from applying sections 6(a) and 6(b) to exclude refugees who: (i) have a formal assurance from a resettlement agency within the United States (ii) have a bona fide client relationship with a U.S. legal services organization; or (iii) are in the U.S. Refugee Admissions Program ("USRAP") through the Iraqi Direct Access Program for "U.S.-affiliated Iraqis," the Central American Minors Program, or the Lautenberg Program; (3) the injunction bars defendants

DISCUSSION

I. Legal Standard

Federal Rule of Civil Procedure 62(c) allows this Court to issue further orders with respect to an injunction it issued, notwithstanding appeal, in order to preserve the status quo or ensure compliance with its earlier orders. *See Nat. Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001).[4] Pursuant to Rule 62(c), "[t]he court may modify or broaden the scope of its injunction under its continuing duty to supervise the relief granted if it is informed of new facts that require additional supervisory action."[5] *Nat'l Grange of the Order of Patrons of*

> from suspending any part of the refugee admission process, including any part of the "Advanced Booking" process, for individuals with a bona fide relationship with a U.S. person or entity; and (4) the preliminary injunction prohibits the Government from applying a presumption that an applicant lacks "a bona fide relationship with a person or entity in the United States."

Mot. 1–2.

[4]*See also Hoffman for & on Behalf of N.L.R.B. v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976) (addressing situations in which a district court "has a continuing duty to maintain a status quo" and stating, "[w]e believe the rule should be, and we so hold that, in the kinds of cases where the court supervises a continuing course of conduct and where as new facts develop additional supervisory action by the court is required, an appeal from the supervisory order does not divest the district court of jurisdiction to continue its supervision, even though in the course of that supervision the court acts upon or modifies the order from which the appeal is taken"). The current status quo pending appeal is the preliminary injunction which enjoins defendants from enforcing portions of EO-2, as modified by the Supreme Court's June 26, 2017 order.

[5]*See also Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986) ("A change in the law may constitute a changing circumstance requiring the modification of an injunction. An intervening judicial opinion may require modification of an injunction."), *overruled in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

Husbandry v. Cal. State Grange, 182 F. Supp. 3d 1065, 1074 (E.D. Cal. 2016) (citing, *inter alia*, *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647–48 (1961) (holding that a district court has "wide discretion" to modify an injunction based on changed circumstances or new facts); *A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098–99 (9th Cir. 2002) (modification of injunction during pendency of appeal was proper to clarify the injunction and supervise compliance in light of new facts)).[6]

This Court is guided by the Supreme Court's instruction that "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." Slip. Op. at 9 (citations omitted).

---

[6]Plaintiffs initially moved this Court to clarify the scope of the injunction, in light of the Supreme Court's June 26, 2017 modification (ECF. No. 293), a motion which the Court denied without reaching the merits. *See Hawaii v. Trump*, --- F. Supp. 3d ----, 2017 WL 2882696 (D. Haw. July 6, 2017). On July 7, 2017, the Ninth Circuit dismissed Plaintiffs' appeal of that decision and denied as moot their motion for an injunction pending appeal. *See Hawaii v. Trump*, No. 17-16366, slip op. at 3 (9th Cir. July 7, 2017), ECF No. 3. The Ninth Circuit explained that although this Court does "not have authority to *clarify* an order of the Supreme Court, it does possess the ability to interpret and enforce the Supreme Court's order, as well as the authority to enjoin against, for example, a party's violation of the Supreme Court's order placing effective limitations on the scope of the district court's preliminary injunction." *Id.* Because Plaintiffs now seek such injunctive relief, the Court reaches the merits of their request, consistent with the Ninth Circuit's guidance. *See id.* ("Plaintiff's motion before the district court was clear: it sought clarification of the Supreme Court's June 26 order, not injunctive relief. Because the district court was not asked to grant injunctive relief or to modify the injunction, we do no fault it for not doing so.").

With this framework in mind, the Court turns to Plaintiffs' specific requests for injunctive relief.

II. The Government's Implementation Of The Supreme Court's "Close Familial Relationship" Standard Is Unduly Restrictive

Plaintiffs request that the Court enjoin the Government from implementing EO-2 against grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States. The Supreme Court held that foreign nationals who claim a bona fide relationship with a person in the United States must have a "close familial relationship" in order to be excluded from the effects of EO-2, but the Supreme Court did not comprehensively define that phrase. Slip Op. at 12. The Government, in an effort to provide consular officials and agencies with the necessary guidance to implement the standard in a very short window of time, created a list of family relations it claims satisfies the standard. The Government's list includes only parents, parents-in-law, spouses, fiancés, children, adult sons or daughters, sons-in-law, daughters-in-law, siblings (whether whole or half), and step relationships, principally in reliance on certain provisions within the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 *et seq*.,

applicable to family-based immigrant visas. *See, e.g.*, 8 U.S.C. §§ 1101(b)(1)–(2); 1151(b)(2); 1153(a); 1184(d).[7]

In its June 26, 2017 decision, the Supreme Court identified illustrative, but not exhaustive, examples of "close familial relationships." A spouse and a mother-in-law "clearly" qualify, but which other relationships meet this standard is less clear. *See* Slip Op. at 12. What is clear from the Supreme Court's decision is that this Court's analysis is to be guided by consideration of whether foreign nationals have a requisite "connection" or "tie" to this country. *See* Slip Op. at 11 (holding that the injunction is not to be enforced against foreign nationals with "no connection to the United States at all," those who "lack[] any connection to this country," and "when there is no tie between the foreign national and the United States."). Put another way, context matters. And when appropriately considered in the context of the June 26 order, the Government's narrowly defined list finds no support in the careful language of the Supreme Court or even in the immigration statutes on which the Government relies.

First, the Government's utilization of the specific, family-based visa provisions of the INA identified above constitutes cherry-picking and resulted in a

---

[7]The Government contends that, to the extent it also relies on INA provisions that govern the "allocation of a numerically-limited number of visas . . . [,] all of these provisions draw lines in the context of determining which familial relationships are close enough to petition for a visa under the INA. That is exactly the type of line-drawing that the Supreme Court's opinion requires." Mem. in Opp'n 5 n.2 (citation omitted).

predetermined and unduly restrictive reading of "close familial relationship." Other, equally relevant federal immigration statutes define a close family in a much broader manner. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 297, 310 (1993) (including "aunts, uncles, [and] grandparents" as among "close blood relatives") (quoting 8 C.F.R. § 242.24 (1992), recodified at 8 C.F.R. § 236.3(b)(1)(iii)); *see also* Fam. Sponsor Immigration Act of 2002, Pub. L. 107-150, § 2(a) (entitled "Permitting Substitution of Alternative Close Family Sponsor In Case of Death of Petitioner," and amending 8 U.S.C. § 1183a(f) to allow sisters-in-law, brothers-in-law, grandparents, and grandchildren to sponsor aliens for admission).[8]

Second, Defendants point to nothing in the Supreme Court's order that supports their truncated reading. In fact, the Supreme Court specifically included a mother-in-law within its definition of "close family" despite the exclusion of mothers-in-law from the statutes relied upon by the Government in crafting its guidance. The Supreme Court was clear that EO-2 may not be enforced against Dr. Elshikh's mother-in-law, not because she is merely the mother of his wife, but because she "clearly has such a [close familial] relationship" with Dr. Elshikh

[8]Plaintiffs additionally identify other immigration laws that enable an individual to seek admission on behalf of "[g]randchild(ren)" and "[n]iece[s] or nephew[s]," 81 Fed. Reg. 92,266, 92,280 (Dec. 19, 2016); to apply for asylum if a "grandparent, grandchild, aunt, uncle, niece, or nephew" resides in the United States, 69 Fed. Reg. 69,480, 69,488 (Nov. 29, 2004); to apply for naturalization on behalf of a grandchild, 8 U.S.C. § 1433(a); and to qualify as a special immigrant if he is the "grandparent" of a person in the United States, *see* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 421(b)(3) (2001).

himself. Slip. Op. at 12. Had the Supreme Court intended to protect only immediate family members and parents-in-law, surely it could have said so. It did not.

Indeed, Supreme Court case law drawn from other contexts supports a broader definition of "close familial relationship" than that urged by the Government. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (holding that the invalidation of a local housing ordinance was warranted, in part, because the "tradition of uncles, aunts, cousins, and especially grandparents sharing a household with parents and children has roots equally venerable and equally deserving of constitutional recognition"); *Troxel v. Granville*, 530 U.S. 57, 63–65 (2000) (plurality opinion) ("[D]emographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. . . . In many cases, grandparents play an important role.").[9]

In sum, the Government's definition of "close familial relationship" is not only not compelled by the Supreme Court's June 26 decision, but contradicts it.

---

[9]*See also Caldwell v. Brown*, No. C09-1332RSL, 2010 WL 3501839, at *2 (W.D. Wash. Sept. 3, 2010) ("[T]he grandparent-grandchild relationship is entitled to respect and some level of recognition in our society. As the United States Supreme Court has recognized, grandparents often play an 'important role' in the lives of their grandchildren. . . . The question is not whether grandparents are important members of the American family: they are." (quoting *Troxel*, 530 U.S. at 64)).

Equally problematic, the Government's definition 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. The Government's definition excludes them. That simply cannot be. *See generally Klayman v. Obama*, 142 F. Supp. 3d 172, 188 (D.D.C. 2015) (noting that courts should not "abandon all common sense" when considering injunctive relief).[10]

In light of the careful balancing of the hardships and the equitable considerations mandated by the Supreme Court, the Court finds that Plaintiffs have met their burden of establishing that the specific requested injunctive relief related to EO-2 is necessary to preserve the status quo pending appeal. Plaintiffs' Motion is accordingly granted with respect to this issue, and the Court will modify the injunction in the manner requested.

III. The Government May Not Exclude Refugees With A Credible Claim Of A Bona Fide Relationship With A Person Or Entity In The United States

Plaintiffs ask the Court to modify the injunction with respect to Sections 6(a) and 6(b) in several respects, each of which is addressed in turn.

[10]Although the Government contends that its "reasonable construction" is entitled to deference (*see* Mem. in Opp'n 9), it offers no authority in support of that proposition.

A. The Government May Not Exclude Refugees Covered By a Formal Assurance Between The Government And A United States Refugee Resettlement Agency

Plaintiffs seek to prevent the Government from implementing agency guidance that "[t]he fact that a resettlement agency in the United States has provided a formal assurance for a refugee seeking admission . . . is not sufficient in and of itself to establish a qualifying relationship for the refugee with an entity in the United States." Katyal Decl., Ex. B, Dep't of State, *untitled guidance document* (received by Pls. June 29, 2017), ECF No. 329-1. Plaintiffs insist that a formal assurance issued by a resettlement agency satisfies the Supreme Court's bona fide relationship requirement due to the formal nature of the agreement and the extensive obligations it triggers on the part of the voluntary agency or affiliate.

The parties do not dispute that before *any* refugee is admitted to the United States under the USRAP, the Department of State must receive a commitment ("assurance") from a resettlement agency. *See* Mem. in Opp'n to Emergency Mot. to Clarify, Bartlett Decl. ¶¶ 14–19; ECF No. 301-1; *see id.* ¶ 16 ("All refugees receive a sponsorship assurance from a resettlement agency before they travel to the United States."). Once a particular refugee has been approved by the Department of Homeland Security and provides a satisfactory medical evaluation, the refugee is assigned to one of several Government-contracted resettlement agencies, which then submits an assurance agreeing to provide basic, required services if and when the

refugee arrives in the United States. Bartlett Decl. ¶¶ 19–21, ECF No. 301-1. The Government quarrels with the effect of such an assurance. According to the Government, because the assurance is an agreement between the State Department and a resettlement agency, not an agreement between a resettlement agency and the refugee who benefits from the assurance, the assurance cannot evidence the type of bona fide relationship contemplated by the Supreme Court. Mem. in Opp'n 11. The Court disagrees.

Nothing in the Supreme Court's decision requires a refugee to enter into a contract with a United States entity in order to demonstrate the type of formal relationship necessary to avoid the effects of EO-2. An assurance from a United States refugee resettlement agency, in fact, meets each of the Supreme Court's touchstones: it is formal, it is a documented contract, it is binding, it triggers responsibilities and obligations, including compensation, it is issued specific to an individual refugee only when that refugee has been approved for entry by the Department of Homeland Security, and it is issued in the ordinary course, and historically has been for decades. *See* Slip Op. at 12. Bona fide does not get any more bona fide than that.[11] Accordingly, Plaintiffs' Motion is granted with respect to this specific request for injunctive relief.[12]

---

[11]Even if the Government is correct that the resettlement agency providing an assurance typically does not have "direct contact" with the refugee prior to his or her arrival, no such "direct contact"

B. No Modification With Respect To Legal Services Organizations Is Warranted

Plaintiffs request that the Court modify its injunction to specify that the Government is prohibited from applying Sections 6(a) and 6(b) to exclude refugees who have a bona fide client relationship with a United States legal services organization.

The Government previously noted that there currently is no applicable guidance regarding the treatment of legal services providers because the nature of such representational services varies significantly. *See* Mem. in Opp'n to

---

is required anywhere in the Supreme Court's decision. Moreover, the resettlement agency's binding commitments arise when the agency provides a formal sponsorship assurance. *See* Bartlett Decl. ¶¶ 20–21, ECF No. 301-1*; see also* Suppl. Hetfield Decl. ¶¶ 4–5, ECF No. 336-3. The resettlement agency suffers a "concrete injury" in the form of lost resources when resettlement is thwarted by the very Government that approved that refugee's admission. *See Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 729, 731-732 (S.D. Ind.), *aff'd* 838 F.3d 902 (7th Cir. 2016); *see also Exodus Refugee Immigration, Inc. v. Pence*, No. 1:15-cv-01858-TWP-DKL, 2016 WL 1222265, at *5 (S.D. Ind. Mar. 29, 2016) (denying stay pending appeal pursuant to Rule 62(c), based, in part, on finding that the "State's conduct harms [the resettlement agency by] requir[ing] it to shift its resources to make up for the funding it will lose, [which] will have a detrimental effect on its Syrian and non-Syrian clients' resettlement and transition to life in the United States"), *aff'd* 838 F.3d 902 (7th Cir. 2016). A relationship that results in such concrete hardship to a United States entity is precisely the circumstance that the Supreme Court has found to be deserving of exclusion from the effects of EO-2. *See* Slip Op. at 13.

[12]Plaintiffs complain of travel procedures and booking dates that they assert the Government is using to flout this Court's injunction. *See, e.g.*, Suppl. Hetfield Decl. ¶¶ 4–5 & Ex. A (E-mail from Lawrence E. Bartlett, to Voluntary Agencies (July 8, 2017, 8:05 EDT)), ECF No. 336-3. As best the Court can discern, regardless of the booking date involved, these complaints all relate to refugees with formal assurances, who the Court has now determined have the requisite bona fide relationship contemplated by the Supreme Court, and who are therefore excluded from the application of EO-2. No further relief covering these refugees appears to be necessary, and the Court denies any such request as moot. If this ruling and the related injunction modifications set forth in this Order do not resolve or do not address Plaintiffs' travel procedure concerns, an application offering further detail may be filed.

Emergency Mot. to Clarify Prelim Inj. 20–21, ECF No. 301. The Court agrees. Plaintiffs, for instance, advocate that foreign nationals consulting abroad with "affiliates" of American legal services providers regarding United States immigration law qualify as having a credible claim of a bona fide relationship with a person or entity in the United States. That conclusion, while conceivable, appears to be nearly impossible to reach absent additional facts, such as with respect to the nature of the consultation and affiliation. A categorical exemption of the sort requested would run afoul of the Supreme Court's order, which provides at least one example of when such a legal services client relationship would not be protected. *See* Slip Op. at 12.

Accordingly, to the extent Plaintiffs seek injunctive relief on behalf of IRAP and similar legal services providers, they fail to meet their burden, and the Court declines to issue the categorical modification sought.

C. Categorical Modifications Relating To U.S.-Affiliated Iraqis, The Central American Minors Program, And The Lautenberg Program

Plaintiffs, joined by amici IRAP and HIAS, ask that the Court enforce or modify the injunction due to the Government's alleged refusal to recognize particular refugees who have the requisite relationship to a United States entity or close family member contemplated by the Supreme Court. More specifically, Plaintiffs seek relief on behalf of refugees who accessed the USRAP through the

Iraqi Direct Access Program for U.S.-Affiliated Iraqis, the Central American Minors Program, and the Lautenberg Program. *See* Br. of IRAP *et al*. as Amici Curiae in Supp. of Pls.' Mot. 10–13, ECF No. 339.

1. Direct Access Program For U.S.-Affiliated Iraqis

Plaintiffs contend that refugee applicants in the Iraqi Direct Access Program for U.S.-Affiliated Iraqis are categorically exempt from Sections 6(a) and 6(b) because they necessarily have the requisite bona fide relationship with a United States person or entity. *See* Mem. in Supp. of Mot. 15 n.6; *see also* Br. of IRAP *et al*. as Amici Curiae in Supp. of Pls.' Mot. 11–12; Allen Decl. ¶¶ 17–24, ECF No. 336-5 (describing mechanics and goals of program). Under the program, Iraqis who believe they are at risk or have experienced serious harm as a result of associating with the United States Government since March 20, 2003 may apply directly for resettlement as refugees in the United States, upon "verifiable proof of U.S.-affiliated employment." *See* Dep't of State, Bureau of Population, Refugees, & Migration, *Fact Sheet: U.S. Refugee Admissions Program (USRAP) Direct Access Program for U.S.-Affiliated Iraqis* (Mar. 11, 2016), *available at* https://www.state.gov/j/prm/releases/factsheets/2016/254650.htm ("The following individuals and their derivatives (spouse and unmarried children under age 21), with verifiable proof of U.S.-affiliated employment, may seek access through this program: 1. Iraqis who work/worked on a full-time basis as interpreters/translators

for the U.S. Government (USG) or Multi-National Forces (MNF-I) in Iraq; 2. Iraqis who are/were employed by the USG in Iraq[.]"). Program applicants need not be current employees of the United States or a United States-affiliated entity.

The Government opposes this request because the "Iraqi Direct Access Program includes certain nonqualifying relationships with the U.S. Government itself, as well as past (not current) relationships." Mem. in Opp'n 15 n.6. The Court concurs. Although U.S-Affiliated Iraqis with verifiable past employment relationships with United States entities may qualify for participation in the program, these applicants are not necessarily exempt from EO-2. The Supreme Court's guidance, as it relates to Section 6, clearly contemplates relationships that are current and existing. That does not necessarily follow with respect to certain Iraqi Direct Access Program applicants.

Accordingly, on the record before the Court, categorical relief is not appropriate, and Plaintiffs' Motion is denied with respect to the Iraqi Direct Access Program for U.S.-Affiliated Iraqis.

2. Central American Minors Program

The Central American Minors ("CAM") program "protects Central Americans at risk by allowing lawfully present parents in the United States to request refugee status for their children in El Salvador, Honduras, and Guatemala via the U.S. Refugee Admissions Program." *See* Dep't of State, *Cent. Am. Minors*

Program (Nov. 2014), *available at* https://www.state.gov/j/prm/ra/cam/index.htm. The Government argues that because the program also allows "caregivers" who are merely "related to" the in-country parent or qualifying child to apply to the program, these participants do not necessarily have a sufficiently close relationship to a United States-based parent to qualify as a "close family member." *See* Mem in Opp'n 15 n.6; *see also* Dep't of State, *Worldwide Refugee Admissions Processing System (WRAPS), CAM Frequently Asked Questions* (Nov. 2016), *available at* https://www.wrapsnet.org/s/CAM-Frequently-Asked-Questions-November-2016.docx.

While it appears that most of those eligible to participate in the program (*e.g.*, minors with parents lawfully in the United States) would fall within those excluded from EO-2, that is not categorically true for all of those in the program. Because caregivers need not have the requisite "close familial relationship" to the in-country parent, program-wide relief is not appropriate. Consequently, Plaintiffs' Motion is denied with respect to refugees who are in the USRAP through the CAM Program.

3. Lautenberg Program

The Lautenberg Program permits certain nationals of the former Soviet Union and other countries with "close family in the United States" to apply for refugee status. *See* Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2017* (Sept. 15, 2016), *available at*

https://www.state.gov/j/prm/releases/docsforcongress/261956.htm ("This Priority 2 designation applies to Jews, Evangelical Christians, and Ukrainian Catholic and Orthodox religious adherents identified in the Lautenberg Amendment, Public Law No. 101-167, § 599D, 103 Stat. 1261 (1989) (codified at 8 U.S.C. § 1157) as amended ('Lautenberg Amendment'), with close family in the United States.").

The Government opposes Plaintiffs' request for categorical relief with respect to the Lautenberg Program solely because the program includes grandparents and grandchildren as "close family." *See* Mem. in Opp'n 15 n.6 ("The Lautenberg Program . . . includes grandparents and grandchildren in the family relationship criteria for applicants."); *see also* Suppl. Hetfield Decl. ¶ 6, ECF No. 336-3. In light of the Court's determination that grandparents and grandchildren are within the penumbra of "close family" for purposes of the Supreme Court's June 26 decision, the Court rejects the Government's position with respect to the Lautenberg Program. That is, because all participants admitted through the Lautenberg Program, including grandparents and grandchildren, *must* have a "close familial relationship" as that term is used in the Supreme Court's stay order, the categorical relief requested by Plaintiffs is appropriate. As a result, Plaintiffs' Motion is granted with respect to refugees who are in the USRAP through the Lautenberg Program.

IV. No Modification Is Warranted With Respect To The Government's Alleged Use Of A "Presumption"

In their Motion, Plaintiffs request modification of the injunction to prevent the Government from applying a so-called presumption that an applicant lacks the requisite bona fide relationship identified by the Supreme Court. However, Plaintiffs present no substantive argument or authority in support of their request. *See* Mot. 2, ECF No. 328; Mem. in Supp. of Mot., ECF No. 328-1. In fact, even in the face of the Government's opposition, which correctly noted that Plaintiffs appear to have abandoned their presumption contention (*see* Mem. in Opp'n 2 n.1), Plaintiffs' reply brief remained silent (*see generally* Reply, ECF No. 342).

The Court accordingly finds that Plaintiffs have abandoned their presumption argument, notwithstanding the relief sought in their proposed orders. Because Plaintiffs present no discussion or authority in support of this request, there is no basis to award the injunctive relief sought, and the Motion is denied.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion is GRANTED IN PART and DENIED IN PART. The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this order be filed.

The Court MODIFIES the preliminary injunction entered on March 29, 2017, amended on June 19, 2017, and partially stayed by a June 26, 2017 decision of the United States Supreme Court, to provide as follows:

PRELIMINARY INJUNCTION

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendants JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of Executive Order No. 13,780 across the Nation—except for those portions of Sections 2 and 6 providing for internal review procedures that do not burden individuals outside of the executive branch of the federal government. Enforcement of the enjoined provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

Defendants JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them are enjoined fully from the following:

1. Applying section 2(c), 6(a) and 6(b) of Executive Order 13,780 to exclude grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States.

2. Applying Section 6(a) and 6(b) of Executive Order 13,780 to exclude refugees who: (i) have a formal assurance from an agency within the United States that the agency will provide, or ensure the provision of, reception and placement services to that refugee; or (ii) are in the U.S. Refugee Admissions Program through the Lautenberg Program.

IT IS SO ORDERED.

Dated: July 13, 2017 at Honolulu, Hawai‘i.

Derrick K. Watson
United States District Judge