No. 16-1540

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.

APPLICATION FOR A STAY OF THE MANDATE
OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
AFFIRMING THE MODIFIED PRELIMINARY INJUNCTION

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

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More than two months ago, on June 26, 2017, this Court granted certiorari to review two nationwide preliminary injunctions barring enforcement of Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order). Only the injunction in this case barred enforcement of the refugee restrictions in Section 6(a) and (b) of the Order. As relevant here, the Court partially stayed that injunction to allow the Order's refugee provisions to "take effect," except as applied to refugees who have a bona fide "relationship with" a U.S. individual or entity. Trump v.

International Refugee Assistance Project, 137 S. Ct. 2080, 2089 (2017) (per curiam) (IRAP). Several weeks later, when the district court in this case modified its injunction and severely undermined this Court's stay as to the refugee provisions, the Court again intervened and unanimously granted a second stay. 16-1540 Order (July 19, 2017) (July 19 Order). In so doing, the Court necessarily determined that the government was likely to succeed in challenging the modification of the injunction with respect to refugees. See Nken v. Holder, 556 U.S. 418, 434-435 (2009).

Despite this Court's rulings, last Thursday the Ninth Circuit affirmed the entire modified injunction. The court of appeals did not even attempt to reconcile its decision with this Court's July 19 Order. Instead, the court of appeals deferred to the district court's interpretation of this Court's June 26 stay ruling. The Ninth Circuit thus upheld the district court's determination that a refugee is exempt from the Order if a U.S. resettlement agency has made a promise to the federal government (known as an "assurance," Addendum (Add.) 25) to provide services to the refugee when the refugee arrives in this country, notwithstanding that such agencies typically do not have any pre-arrival contact with the refugee himself. That conclusion effectively reads out of this Court's June 26 stay ruling its requirement that the refugee have a "relationship with" a U.S. entity, IRAP, 137 S. Ct. at 2089, and it requires the admission of refugees who have no connection to the United States independent of the refugee-admission process itself.

Moreover, because the government has already obtained assurances for approximately 24,000 refugees -- more than would likely be scheduled to enter during the period Section 6(a) and (b) are in effect -- the Ninth Circuit's decision renders the June 26 stay functionally inoperative.

This Court's immediate intervention is thus needed once more. The court of appeals' decision -- which will take effect at approximately 11:30 a.m. Eastern Time tomorrow (September 12, 2017) because the court drastically shortened the time for issuance of the mandate -- will disrupt the status quo and frustrate orderly implementation of the Order's refugee provisions that this Court made clear months ago could take effect. That is the antithesis of what the Court's June 26 stay prescribed and what its July 19 stay preserved. The Court should not permit its rulings to be frustrated in that fashion, and it should not allow the "equitable balance" it carefully struck (IRAP, 137 S. Ct. at 2089) to be upset while the merits of the injunction are pending before it. The Court can and should prevent further uncertainty and disruption by staying the court of appeals' ruling with respect to refugee assurances.

To be clear, the government also disagrees with the court of appeals' interpretation of the "close familial relationship[s]" (IRAP, 137 S. Ct. at 2088) that suffice to exempt aliens from the Order under this Court's June 26 stay ruling. When this Court used that phrase in IRAP, it cited the Order's waiver provision,

which lists spouses, children, and parents as examples of close family members. The waiver provision is drawn from the provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., that govern which relatives are permitted to petition for an alien abroad to receive an immigrant visa. The government therefore based its good-faith interpretation on this Court's stay ruling and the line between close and extended family members that the INA and the Order's waiver provision draw. By contrast, respondents' interpretation lacks any basis in law (no legal source defines close family members to include all of the relatives captured by the district court's modified injunction) and effectively collapses any distinction between close and extended family members, reaching even cousins. The government thus continues to believe that its interpretation of the Court's June 26 decision is the better one.

Nevertheless, the government does not request a stay of the close-family aspect of the district court's modified injunction. This Court previously denied a stay of that part of the injunction. In addition, the lower courts' line-drawing error in that regard is less stark than their nullification of both the Order's refugee provisions and this Court's stays permitting implementation of those provisions. And the government already has been applying the lower courts' reading of close family members, whereas the Ninth Circuit's refugee-assurance ruling would upend the status quo and do far greater harm to the national interest.

The government therefore respectfully requests that the Court stay the court of appeals' mandate affirming the modified injunction, insofar as it deems an assurance agreement between a refugee-resettlement agency and the federal government sufficient to exempt a refugee applicant from the Order, pending the Court's disposition of the merits in the underlying case. Alternatively, the Court should construe this application as also a petition for a writ of certiorari, grant a stay pending its disposition of the petition, and either hold the petition, summarily reverse, or consider the refugee-assurance question together with the underlying merits of the preliminary injunction. Whichever course the Court adopts, it should grant a temporary administrative stay while it considers this application.[1]

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[1] This Court's Rule 23.3 provides that, "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought" in the court below. On July 15, 2017, the government moved in the court of appeals for a stay pending appeal, 17-16426 C.A. Doc. 3, but on July 24, 2017, the court denied that motion as moot after this Court itself stayed the refugee-assurance part of the modified injunction pending appeal, 17-16426 C.A. Doc. 7, at 1. Moreover, in its briefing below, the government asked the court of appeals, insofar as it affirmed the modified injunction, to stay its mandate pending the government's pursuit of review in this Court. 17-16426 Gov't Reply Br. 22. The court of appeals effectively denied that request in its decision: far from staying its mandate, the court expressly accelerated the time for its issuance, from the default time of 52 days to five days. Add. 34-35. At a minimum, this case presents "extraordinary circumstances." Sup. Ct. R. 23.3. Given the exceedingly short time the court allowed before its mandate would issue, and that court's clear indication of its view that the mandate should issue promptly, renewing the government's request for a stay pending this Court's review would be futile and would needlessly consume additional time and resources of the court of appeals and the parties.

STATEMENT

1. Three provisions of the Order are at issue in this litigation. 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. IRAP, 137 S. Ct. at 2083-2084. Section 6(a) suspends for 120 days decisions on and travel under the U.S. Refugee Admission Program (Refugee Program), pending a review of that program. Id. at 2084. Section 6(b) limits to 50,000 the number of persons who may be admitted as refugees in Fiscal Year 2017. Ibid.

Respondents in this case (No. 16-1540) -- the State of Hawaii and Dr. Ismail Elshikh -- challenged Sections 2 and 6 in the United States District Court for the District of Hawaii. IRAP, 137 S. Ct. at 2084-2085. The day before the Order was scheduled to take effect, the district court entered a temporary restraining order, which it later converted to a preliminary injunction, barring application of Sections 2 and 6 in their entirety. Id. at 2084; see Order § 14. On June 12, 2017, the Ninth Circuit largely affirmed the injunction as to Sections 2(c), 6(a), and 6(b), and vacated the injunction as to the provisions addressing internal reviews. IRAP, 137 S. Ct. at 2085.

A separate group of plaintiffs, the respondents in No. 16-1436, also challenged the Order in a suit in the United

States District Court for the District of Maryland. IRAP, 137 S. Ct. at 2084. That court enjoined Section 2(c), and the Fourth Circuit, sitting en banc, affirmed that injunction in substantial part. Id. at 2084-2085.

2. The government sought certiorari in both cases and a stay of both injunctions. IRAP, 137 S. Ct. at 2085-2086. On June 26, 2017, this Court granted the government's petitions for writs of certiorari and issued a partial stay of both injunctions pending the Court's consideration of the merits. Id. at 2086-2089. 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 [Section] 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 2088. 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 Section 6(a) and (b). IRAP, 137 S. Ct. at 2089. The Court ruled that Section 6(a) and (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. a. Pursuant to a memorandum issued by the President on June 14, 2017, clarifying the effective date of the previously enjoined provisions, the Department of State and Department of Homeland Security (DHS) began implementing Sections 2(c), 6(a), and 6(b) on June 29, 2017, and they commenced enforcement of those provisions at 8:00 p.m. Eastern Time on that day. 82 Fed. Reg. 27,965 (June 19, 2017); D. Ct. Doc. 301-2, at 1 (July 3, 2017). The same day, those agencies and their components published public

guidance addressing various implementation issues, which the government provided to respondents' counsel as it became available. D. Ct. Docs. 301-2, 301-4, 301-5 (July 3, 2017). Some of the guidance was subsequently updated as the agencies continued to review and consider the relevant issues. D. Ct. Doc. 301, at 7 (July 3, 2017).[2]

b. On June 29, 2017, after receiving from the government the public guidance then available, respondents in this case filed an emergency motion in the district court asking it 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 (June 29, 2017). As relevant here, respondents urged the district court to interpret this Court's stay ruling to exempt from the Order two categories of aliens.

First, they argued that this Court's June 26 stay ruling does not cover applicants for admission as refugees if the Department of State has obtained what is known as a sponsorship-assurance agreement from a U.S.-based refugee-resettlement agency. D. Ct.

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

Doc. 293-1, at 11-12; see Add. 25-26. An assurance is a contractual commitment between the resettlement agency -- one of nine nongovernmental organizations that have entered into 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). The resettlement agency, however, typically has no contact with the refugee until he or she arrives in 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.[3]

Second, respondents argued that the government's guidance 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, the Order's waiver provision, and provisions of the INA, the government's guidance interpreted that

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[3] See State Refugee Fact Sheet.

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.[4] 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 relationship[s]" 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.

On July 6, 2017, after expedited briefing, the district court denied respondents' motion for clarification. D. Ct. Doc. 322, at 6. The court "w[ould] not upset [this] Court's careful balancing and 'equitable judgment' brought to bear when 'tailor[ing] a stay' in this matter" nor "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. (citation omitted; brackets in original). Respondents appealed, and the court of appeals dismissed their appeal for lack of jurisdiction. 17-16366 C.A. Doc. 3, at 3. The court of appeals

[4] See State Visa Guidance; DHS FAQs Q29; see also D. Ct. Doc. 345, at 11.

stated, however, that the district court could entertain a request to enforce or modify its existing injunction. Ibid.

4. a. On July 7, 2017, respondents filed a new motion in the district court 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. On July 13, 2017, the district court granted in substantial part respondents' motion to modify its injunction. D. Ct. Doc. 345, at 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 Section 6(a) and (b) of the Order. Id. at 16-17. Second, the court held that the government's interpretation of "close familial relationship" is too narrow. Id. at 11; see id. at 11-15. The district court denied respondents' request to modify its injunction in various other respects. D. Ct. Doc. 345, at 18-22, 24. The court also denied without comment the government's request to stay its ruling pending appellate review. Id. at 24.

b. Because the district court's modification of its injunction rested entirely on its interpretation of this Court's June 26 stay ruling, the government immediately filed a motion in this Court requesting clarification of its June 26 stay. 16-1540

Gov't Mot. for Clarification 15-17. Out of an abundance of caution, the government also filed a notice of appeal of the modified injunction in the court of appeals (with an accompanying stay request), and in this Court the government alternatively requested (as relevant here) that the Court stay the modified injunction pending the Ninth Circuit's disposition of that appeal. Id. at 17-18, 39. In opposing a stay, respondents correctly observed that a stay could not be issued unless the government demonstrated (inter alia) a likelihood of success on the merits. 16-1540 Resps. Opp. to Gov't Mot. for Clarification 36 (A stay "is available only where both certiorari and reversal are likely, and the equities favor the applicant." (emphasis omitted)).

On July 19, 2017, this Court denied the government's request for clarification, but it granted in part the government's alternative request for a stay pending the appeal to the Ninth Circuit. July 19 Order. The July 19 Order stated that "[t]he District Court order modifying the preliminary injunction with respect to refugees covered by a formal assurance is stayed pending resolution of the Government's appeal to the Court of Appeals for the Ninth Circuit." Ibid. Justices Thomas, Alito, and Gorsuch would have granted the stay in full. Ibid.

c. The court of appeals denied as moot the government's motion for a stay pending appeal. 17-16426 C.A. Doc. 7, at 1. In its briefing, the government requested that, to the extent the court of appeals affirmed the modified injunction, the court stay

its mandate pending review in this Court. 17-16426 Gov't C.A. Reply Br. 22. On September 7, 2017, after expedited briefing and argument, the court of appeals affirmed the modified injunction. Add. 1-35.

i. The court of appeals held that the district court did not err in modifying the injunction to "enjoin[] the government from excluding refugees covered by formal assurances." Add. 23; see Add. 23-34. After describing the refugee-resettlement process, Add. 24-27, the court of appeals determined that refugee-resettlement agencies would experience two kinds of harm from the exclusion of refugees covered by an assurance: "tangible injuries through the loss of invested resources and financial support," and "intangible injuries from the inability to effectuate their spiritual and moral missions." Add. 27; see Add. 27-31. The court acknowledged that "the assurance is technically between the [refugee-resettlement] agency and the Government." Add. 31. It nevertheless "c[ould not] say that the district court clearly erred in its factual findings or ultimately abused its discretion in holding that the written assurance * * * meets the requirements set out by [this] Court." Ibid. The court of appeals noted that, before signing an assurance agreement, resettlement agencies undertake a selection process to match refugees with local communities. Add. 31-32. And after the assurance is signed but before the refugee arrives, the agency undertakes additional preparations for the refugee. Add. 32.

The court of appeals did not dispute the government's showing that refugee-resettlement agencies typically have no contact with refugees prior to their entry into the United States. Add. 32. It held, however, that this "does not negate the finding that a relationship has formed," due to the expenditures and arrangements resettlement agencies make for refugees before arrival. Ibid. The court also did not dispute that approximately 24,000 refugees have been assured already -- more than the number likely to enter while the Order's refugee provisions are in effect. Add. 33. It stated that this Court's June 26 stay ruling "did not express concern about the number of refugees that would fall within the scope of the injunction." Ibid. The court of appeals further stated that "[m]ore than 175,000 refugees currently lack formal assurances," and unless those refugees have a qualifying bona fide relationship with a U.S. person or entity, the Order "suspends those refugees' applications." Ibid.

ii. The court of appeals also upheld the district court's interpretation of "close familial relationship[s]" (IRAP, 137 S. Ct. at 2088) as including, in addition to the relatives covered by the government's guidance, "grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins." Add. 12-13; see Add. 12-22. The Ninth Circuit held that "[this] Court's use of 'close familial relationships' * * * exclude[d]" only "individuals who have no connection with the United States or have remote familial

relationships that would not qualify as 'bona fide.'" Add. 14. It rejected the government's interpretation based on the relatives who are permitted by the INA to petition for an alien abroad to receive an immigrant visa. Add. 15-22.

iii. Instead of staying issuance of its mandate pending review in this Court, as the government had requested, the Ninth Circuit accelerated it. Add. 34-35. The court noted that issuance of its mandate "would not ordinarily occur until at least 52 days after [its] opinion is filed," but it directed that "[t]he mandate shall issue five days after the filing of [its] opinion." Ibid.

ARGUMENT

The Ninth Circuit's decision upholding the district court's modified injunction contravenes this Court's June 26 and July 19 stay rulings and upends the equitable balance this Court struck. The lower courts' conclusion 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 to furnish services after arrival -- which the Department of State secures for every refugee permitted to enter the United States -- cannot be reconciled with the June 26 stay's language or logic, let alone the July 19 stay of this very aspect of the modified injunction. And it drains the partial stay this Court granted as to Section 6(a) and (b) of any practical effect.

This Court can and should stay the Ninth Circuit's mandate affirming the modified injunction with respect to refugees covered by a resettlement assurance agreement, pending this Court's disposition of the merits of the underlying appeal from the original injunction. Having already granted review in the underlying appeal in this case (No. 16-1540) and already unanimously stayed the modified injunction in this very respect, the Court undoubtedly has authority to issue a stay in aid of its own jurisdiction under 28 U.S.C. 1651(a). All of the stay factors counsel strongly in favor of a stay. See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The Court has already granted certiorari. Trump v. International Refugee Assistance Project, 137 S. Ct. 2080, 2086 (2017) (per curiam). And its July 19 Order staying the district court's modified injunction with respect to refugee assurances -- the same part of the injunction the court of appeals has now affirmed -- necessarily established that the government is likely to succeed on the merits of this issue and will suffer irreparable harm without a stay. See Nken v. Holder, 556 U.S. 418, 434-435 (2009); Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008); cf. Lucas v. Townsend, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (standard for stay pending appeal to court of

appeals). Nothing has changed since then to cast any doubt on those determinations.

In any event, the stay factors are readily satisfied here as an original matter. On the merits, refugee-resettlement agencies' assurance agreements are with the federal government and do not establish any relationship "with a particular person seeking to enter the country as a refugee." IRAP, 137 S. Ct. at 2089 (emphasis added). The court of appeals read that requirement out of this Court's July 26 stay ruling altogether. The court of appeals deemed purported future injuries to a refugee-resettlement agency sufficient despite the agency's lack of any relationship -- and, in fact, typically any contact -- with the refugee prior to arrival, and despite the refugee's lack of any connection to the United States independent of the Refugee Program itself. Moreover, because the number of refugees covered by such assurances exceeds the number of individuals likely to enter the United States during the limited period that Section 6(a) and (b) are in effect, the modified injunction eviscerates this Court's partial stay regarding those provisions.

Depriving that partial stay of any practical effect while this Court considers the merits would irreparably injure the government, which has a paramount interest in safeguarding national security. See IRAP, 137 S. Ct. at 2088. By contrast, respondents cannot show that a brief delay in the entry of

unrelated third-party refugees will cause respondents themselves any injury. This Court should therefore stay the court of appeals' mandate affirming the modified injunction insofar as it exempts refugees covered by an assurance agreement from the Order, pending this Court's resolution of the underlying merits.

In the government's view, the Court need not separately grant review of the Ninth Circuit's ruling affirming the modified injunction in order to grant such a stay. This Court already has granted certiorari to review the merits of the original preliminary injunction, and it partially stayed that injunction on June 26, 2017, pending this Court's disposition of the merits. Moreover, both the modified injunction itself and the court of appeals' ruling affirming it rest entirely on the lower courts' misinterpretation of this Court's June 26 stay. Once this Court decides the underlying merits, this dispute over the correct interpretation of the June 26 stay ruling presumably will become moot. At this stage then, the Court may simply stay the court of appeals' mandate affirming the modified injunction while this Court considers the underlying case on the merits.

In the alternative, however, if the Court finds it would be a more appropriate course, the government respectfully requests that the Court construe this stay application as a petition for a writ of certiorari, see IRAP, 137 S. Ct. at 2086 (construing stay request as petition for a writ of certiorari); 16A1191 Gov't Stay

Appl. 17 (collecting cases), and that the Court in turn stay the court of appeals' mandate under 28 U.S.C. 2101(f) pending disposition of the petition. It could then either hold the petition, grant the petition and summarily reverse the decision below, or consolidate it for plenary consideration with the underlying appeal of the original preliminary injunction.[5]

Whichever course the Court adopts, the government respectfully requests an administrative stay pending the consideration of this application. Given the court of appeals' decision to accelerate drastically the issuance of its mandate -- which will now occur at approximately 11:30 a.m. Eastern Time tomorrow -- an administrative stay is appropriate to enable the Court to consider the government's application without requiring the government to disrupt the status quo in the Refugee Program by implementing the modified injunction in the interim.

I. THE COURT SHOULD STAY THE NINTH CIRCUIT'S MANDATE AFFIRMING THE REFUGEE-ASSURANCE ASPECT OF THE MODIFIED INJUNCTION

Recognizing the "urgen[cy]" of the government's "interest in preserving national security," this Court on June 26 stayed the

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[5] As a further alternative, because the dispute turns entirely on the lower courts' misreading of this Court's June 26 stay ruling, this Court may construe this application as a request to modify or clarify that stay ruling to make clear that an assurance agreement standing alone does not establish a qualifying bona fide relationship between the resettlement agency and a refugee for whom it contracts with the government to provide future services. See 16-1540 Gov't Mot. for Clarification 15-16 (citing Swenson v. Stidham, 410 U.S. 904 (1973), and Stephen M. Shapiro et al., Supreme Court Practice § 15.6(a), at 841 (10th ed. 2013)).

district court's original injunction with respect to Section 6(a) and (b) in order to allow those provisions to "take effect," with only limited, explicit exceptions. IRAP, 137 S. Ct. at 2088-2089 (citation omitted). When the district court modified its injunction to exempt every refugee covered by an assurance from Section 6(a) and (b) and refused to stay its ruling, this Court on July 19 stayed the modified injunction to that extent pending the government's appeal to the Ninth Circuit. Yet without even attempting to reconcile its decision with this Court's second stay, the Ninth Circuit has now repeated the district court's error by affirming the same modified injunction, based on the same misguided interpretation of this Court's June 26 stay, and refused to stay its ruling to facilitate orderly review by this Court. This Court should therefore again grant a stay.

A. The Ninth Circuit's Reading Of This Court's June 26 Stay Ruling Is Wrong And Would Severely Impair The Orderly Implementation Of The Order That This Court Contemplated

The court of appeals' ruling upholding the modified injunction rests on a deeply flawed interpretation of this Court's June 26 stay ruling. That 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, 137 S. Ct. at 2089. The district court and the court of appeals concluded, however, that every refugee applicant as to whom the government has entered into an assurance agreement

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

1. a. 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). Like the district court, D. Ct. Doc. 345, at 16, the court of appeals acknowledged that "[a]ll refugees receive a sponsorship assurance from a resettlement agency before they travel to the United States." Add. 26 (emphasis added).

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

[6] The nine 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, 137 S. Ct. at 2089. The assurance is not an agreement between the resettlement agency and the refugee; rather, it is indisputably an agreement between that agency and the federal government, as even the Ninth Circuit acknowledged. Add. 31 ("[T]he assurance is technically between the agency and the Government."). In other words, the agency enters into an agreement with the government to provide certain services to a

refugee if and when the refugee arrives as part of the government's own Refugee Program, in order to ensure a smooth transition into the United States. It is also undisputed that a resettlement agency typically has no contact with the refugees it assures before their arrival in the United States. D. Ct. Doc. 301-1, at 7 (Bartlett Decl. ¶ 21). Rather, the agency works with individuals and organizations in the United States, including with any ties a refugee may otherwise have in the country, to prepare for the refugee's arrival, usually without interacting with the refugee abroad. Ibid.

The absence of a formal connection between a resettlement agency and a refugee subject to an assurance stands in stark contrast to the sort of relationships this Court identified as sufficient in its June 26 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, 137 S. Ct. at 2088, refugees do not have any freestanding connection to resettlement agencies, separate and apart from the refugee-admissions process itself, 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 in the relevant sense. IRAP, 137 S. Ct. at 2087-2088. Loss of a future opportunity to perform the resettlement services for which the government has

contracted if a refugee is admitted does not establish any existing, formal relationship. As an entity that performs those services on behalf of the government in carrying out a governmental program, a resettlement agency has no legally cognizable interest in that program's application to the persons whom the program exists to benefit. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990); accord Air Courier Conference of Am. v. American Postal Workers Union, AFL-CIO, 498 U.S. 517, 524-525 (1991).

b. The court of appeals nevertheless concluded that an assurance agreement standing alone does establish a qualifying bona fide relationship between a refugee and an agency. Add. 31-33. This Court's June 26 stay ruling, it stated, "specifies that a qualifying relationship is one that is 'formal, documented, and formed in the ordinary course,'" and the court of appeals "c[ould not] say that the district court clearly erred in its factual findings or ultimately abused its discretion in holding that the written assurance * * * meets th[ose] requirements." Add. 31 (citation omitted).

At the outset, the court of appeals erred in deferring to the district court's understanding of this Court's stay ruling. The meaning of an order of this Court is a question of law, and the abuse-of-discretion standard does not insulate a district court's legal errors from de novo review. See Koon v. United States, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). Such deference

to the district court's interpretation of this Court's June 26 stay is especially improper here, because this Court itself implicitly held that the district court had likely erred when the Court stayed this aspect of the modified injunction on July 19, see p. 17, supra -- a key point that the Ninth Circuit did not even attempt to refute.

In any event, the lower courts' interpretation fails under any standard of review. Their focus on whether an assurance is "formal," binding, refugee-specific, and issued "in the ordinary course" (Add. 31 (citation omitted)) misses the fundamental point that an assurance agreement does not create any relationship whatsoever with the refugee. Moreover, not only does the refugee lack his or her own relationship with the resettlement agency, but any relationship that might be thought to exist is entirely derivative of the government's administration of the refugee-admission process (and its obtaining of assurances). By contrast, the Court's examples in its June 26 ruling -- workers, students, and lecturers -- all have independent relationships with U.S. entities that do not arise solely from the admission process. The same simply cannot be said of refugees to whom a resettlement agency will provide services pursuant to a contract with the U.S. government if and when those refugees arrive in this country, and with whom the agency typically will not even have had any contact prior to that time.

The court of appeals also relied on the fact that resettlement agencies undertake efforts and expend private resources on refugees before they arrive. Add. 32. But the alleged harm that an agency experiences if a refugee for whom it has agreed to provide services does not arrive, and its prior efforts do not achieve their intended end, does not flow from any independent, preexisting relationship with the refugee formed in the ordinary course. Rather, it exists solely as a result of the resettlement agencies' contracts with the government. More generally, contrary to the Ninth Circuit's suggestion (Add. 14), the mere fact that a U.S. person may suffer some "bona fide" injury due to a refugee's inability to enter does not suffice under this Court's June 26 stay ruling. Many U.S. persons might suffer various types of harm from the exclusion of an alien. But this Court, in balancing the equities, required an injury to specific types of "relationship[s]," not any injury simpliciter. 137 S. Ct. at 2088.

The court of appeals also deemed irrelevant the fact that resettlement agencies typically have no contact with refugees before arrival. Add. 32. A worker's employment, a student's admission to a university, and a speaker's lecture, the court stated, all may be arranged through an organization acting as an agent for one party or the other, not directly between the alien and the U.S. entity. Ibid. The government acknowledged that point in its briefs and at argument, see id. at 31 n.15, and it is irrelevant here. Such an analogy to principal-agent relationships

fails because the U.S.-based resettlement agency is not a principal who has any relationship with a refugee indirectly through an agent, and the government certainly is not, as the court of appeals oddly asserted (see id. at 31), an "intermediary" for the resettlement agency. Ibid. To the contrary, if anything, it is the resettlement agency that is the agent of the government to provide services after the refugee arrives in the United States.

In short, the only entity in the United States with whom refugees might allege a connection due to an assurance is the federal government itself. But neither respondents nor the courts below suggested that a connection with the government constitutes a qualifying bona fide relationship that exempts an alien from the Order. And for good reason: unlike the examples of U.S. entities this Court identified that might be harmed by the exclusion of an alien, the government's interest lies in enforcing the Order, not in nullifying it.

2. The court of appeals' contrary ruling not only reads out the central "relationship with" requirement, IRAP, 137 S. Ct. at 2089, but as a practical matter it renders this Court's stay as to Section 6(a) and (b) a nullity. The court acknowledged that "[a]ll refugees receive a sponsorship assurance from a resettlement agency before they travel to the United States." Add. 26 (emphasis added); accord D. Ct. Doc. 345, at 16. And neither the courts below nor respondents disputed the government's showing that the number of refugees as to whom the government in the ordinary course

had obtained assurances as of June 30, 2017 -- approximately 24,000 -- exceeds the number who would likely be scheduled to enter during the pendency of Section 6(a)'s 120-day suspension of adjudications and travel under the Refugee Program and Section 6(b)'s refugee cap (which expires September 30, 2017, at the end of Fiscal Year 2017).[7]

Instead of allowing those provisions to "take effect," as this Court intended, IRAP, 137 S. Ct. at 2089, the court of appeals' ruling would render those provisions defunct. The Ninth Circuit stated that this Court's June 26 ruling "did not express concern about the number of refugees that would fall within the scope of the injunction." Add. 33. But it is not plausible that, in crafting a stay to allow those provisions to "take effect," the Court intended to permit application of the Order's refugee-entry restrictions to virtually no refugees at all. This Court's stay ruling should not be construed in a way that renders its application to Section 6(a) and (b) practically meaningless. 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

[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.").

no part will be inoperative or superfluous, void or insignificant." (brackets and citation omitted)).

The court of appeals further stated that its interpretation would not render this Court's stay as to Section 6(a) and (b) "inoperative" because an additional approximately 175,000 refugee applicants do not yet have formal assurances. Add. 33. Those additional refugee applicants, however, have no bearing on the intended scope of this Court's stay ruling because those refugees were unlikely to enter while the Order is in effect. Refugees who would not enter during Section 6(a)'s 120-day suspension, or while Section 6(b)'s cap is in effect until September 30, 2017, are not affected by those provisions in any relevant sense, and so are not affected by the stay. In the context of a stay ruling premised on alleged harm to U.S. persons and entities who "can legitimately claim concrete hardship" if "a particular person seeking to enter the country * * * is excluded," IRAP, 137 S. Ct. at 2089 (emphases added), it is exceedingly unlikely that the Court intended the Order to take effect only as to refugees who would not enter in any event.[8]

The court of appeals' reasoning also highlights the arbitrariness of the distinction it and respondents seek to draw

[8] The government's position -- that an assurance agreement alone does not establish a qualifying bona fide relationship -- does not mean that no refugee applicants may enter under this Court's June 26 stay ruling. For example, hundreds of refugees have been adjudicated as allowed to enter based on credible claims of bona fide relationships with U.S. family members. See 17-16426 Oral Argument at 12:40-13:00 (Aug. 28, 2017), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012056.

based on assurances. It makes no sense to exempt from Section 6(a) and (b) of the Order the roughly 24,000 refugees for whom assurances exist, based on the happenstance that they had reached a later stage of the administrative process in which the government routinely obtains assurances. In both cases, the refugees' relationship to a U.S. entity is the same: they have none.

B. A Stay Is Needed To Prevent Irreparable Harm To The Government And The Public Interest And Would Cause No Injury To Respondents

The balance of equities and public interest strongly support a continued stay of the refugee-assurance aspect of the district court's modified injunction. This Court has twice reached that determination in issuing its prior stays. In its June 26 stay, the Court underscored that the government's "interest in preserving national security is 'an urgent objective of the highest order,'" and that both this interest and the Executive's authority "are undoubtedly at their peak when there is no tie between [a] foreign national and the United States." IRAP, 137 S. Ct. at 2088 (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010)). As to Section 6(a) and (b), the Court held that, for refugees who lack a credible claim of 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." Id. at 2089. And when the district court construed this Court's June 26 stay ruling to prevent application of Section 6(a) and (b) to any refugee as to whom the government

had obtained an assurance, the Court again issued a stay on July 19. In so doing, it necessarily again determined that the balance of equities supported equitable relief. See Nken, 556 U.S. at 434-435; Winter, 555 U.S. at 22.

The equities even more strongly support a stay of the court of appeals' ruling today. Allowing the modified injunction to take effect now would cause irreparable injury to the government and public interests (which "merge" here, Nken, 556 U.S. at 435). The government began implementing the Order subject to the limitations articulated by this Court more than two months ago, on June 29, which entailed extensive, worldwide coordination among multiple agencies and the issuance of guidance to provide clarity and minimize confusion. D. Ct. Doc. 345, at 6. Except for a brief interruption of less than one week -- between the district court's July 13 entry of its modified injunction, id. at 25-26, and this Court's July 19 Order staying the refugee-assurance part of it -- the government has been implementing Section 6(a) and (b) within those limits ever since. The court of appeals' ruling affirming the modified injunction would require the government to change course in substantial respects, inviting precisely the type of uncertainty and confusion that the government has worked diligently to avoid. The Court can and should prevent such needless uncertainty and confusion by staying the Ninth Circuit's mandate until it can definitively resolve the issues presented.

By contrast, staying the court of appeals' mandate would cause no cognizable injury, let alone irreparable harm, to respondents. Neither Dr. Elshikh nor Hawaii has pointed to any harm that they themselves would suffer from a brief delay in entry of refugees whose sole connection to this country is that they are the subject of an assurance between a resettlement agency and the federal government. Respondents plainly cannot make such a showing, because Dr. Elshikh never sought admission of a refugee and his own family-member visa claim is now moot, and Hawaii is not a refugee-resettlement agency and has not identified any individual refugee whose admission it seeks. More generally, Section 6(a) and (b) have been applicable for months to refugees whose only basis for asserting a tie to the United States is an assurance agreement entered into between the government and a resettlement agency. A stay would simply preserve the same status quo that this Court's prior rulings established.

II. THIS COURT SHOULD GRANT A TEMPORARY ADMINISTRATIVE STAY PENDING ITS CONSIDERATION OF THIS APPLICATION

The government respectfully requests that this Court grant a temporary administrative stay of the court of appeals' mandate pending the Court's consideration of this application, and that it direct a prompt response by respondents. See, e.g., Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 893 (2013), (granting temporary injunction pending briefing on and consideration of injunction pending appeal and ordering response

to application), injunction pending appeal granted, 134 S. Ct. 1022 (2014). The Court has authority under 28 U.S.C. 1651(a) to stay the court of appeals' ruling, which purports to interpret, but in fact contravenes, a prior ruling of this Court in a case still pending before the Court. It should do so because all of the relevant factors support a stay here. See Part I, supra.

The court of appeals' ruling drastically accelerating issuance of its mandate magnifies the need for an administrative stay. Despite the government's request to stay the mandate to allow orderly review by this Court, the court of appeals substantially shortened the time for issuance of its mandate, from the ordinary 52 days to five days. Add. 34-35. Its mandate thus will issue -- and the district court's modified injunction will take effect -- at approximately 11:30 a.m. Eastern Time tomorrow according to the Ninth Circuit Clerk's Office. A temporary administrative stay would ensure that this Court has adequate time to consider the application, while minimizing the disruption that would be created if the refugee-assurance aspect of the modified injunction were allowed to take effect only to be stayed or invalidated thereafter. Requiring the government now abruptly to cease its implementation of Section 6(a) and (b) in order to comply with the modified injunction, only to resume implementation if and when the modified injunction is vacated or stayed, risks needless confusion and practical difficulties that a temporary administrative stay would avoid.

CONCLUSION

The Court should stay the court of appeals' mandate affirming the district court's modified injunction with respect to refugees covered by an assurance, pending this Court's disposition of the underlying merits of the original preliminary injunction barring enforcement of Section 6(a) and (b) of the Order. In the alternative, the Court should construe this application as a petition for a writ of certiorari and stay the mandate pending its disposition of the petition. The Court then could either hold the petition pending the decision on the underlying merits, grant the petition and summarily reverse, or grant review and consolidate with its consideration of the underlying merits. In all events, the Court should grant a temporary administrative stay of the refugee-assurance aspect of the Ninth Circuit's mandate pending disposition of this application.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

SEPTEMBER 11, 2017

ADDENDUM

FOR PUBLICATION

FILED

SEP 7 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF HAWAII; ISMAIL ELSHIKH, Plaintiffs-Appellees, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, in his official capacity as Secretary of State; UNITED STATES OF AMERICA, Defendants-Appellants.	No. 17-16426 D.C. No. 1:17-cv-00050-DKW-KSC OPINION

Appeal from the United States District Court
for the District of Hawaii
Derrick Kahala Watson, District Judge, Presiding

Argued and Submitted August 28, 2017
Seattle, Washington

Before: Michael Daly Hawkins, Ronald M. Gould, and Richard A. Paez, Circuit Judges.

Per Curiam Opinion

PER CURIAM:

We are asked to review the district court's modified preliminary injunction,

which enjoins the Government from enforcing Executive Order 13780 against (1) grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States; and (2) refugees who have formal assurances from resettlement agencies or are in the U.S. Refugee Admissions Program ("USRAP") through the Lautenberg Amendment.

For the reasons that follow, we conclude that in modifying the preliminary injunction to preserve the status quo, the district court carefully and correctly balanced the hardships and the equitable considerations as directed by the Supreme Court in *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017), and did not abuse its discretion. We affirm.

I

A

On March 6, 2017, President Trump issued Executive Order 13780, entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (the "Executive Order").[1] Section 2(c) of the Executive Order suspends for ninety days the entry of nationals

[1] The President revoked Executive Order 13780's predecessor, Executive Order 13769, after a district court entered a nationwide injunction enjoining its enforcement and this court denied the Government's emergency motion to stay the injunction pending appeal. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017), *amended and superseded by* 858 F.3d 1168 (9th Cir. 2017).

of Iran, Libya, Somalia, Sudan, Syria, and Yemen into the United States. *Id.* at 13213. Section 6(a) suspends for 120 days the entry of refugees into the United States and decisions on applications for refugee status, and § 6(b) cuts by more than half the number of refugees that may be admitted to the United States in fiscal year 2017 from 110,000 persons to 50,000 persons. *Id.* at 13215–16.

B

On March 15, 2017, the District of Hawai‘i temporarily enjoined § 2 and § 6 of the Executive Order, holding that Plaintiffs, the State of Hawai‘i and Dr. Elshikh, had shown a likelihood of success on the merits of their Establishment Clause claim. *Hawai‘i v. Trump*, — F. Supp. 3d —, No. CV 17-00050 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15, 2017). Plaintiffs had argued that the Executive Order was primarily motivated by anti-Muslim animus and not by its purported national security objective.

On March 29, 2017, the district court converted the temporary restraining order into a preliminary injunction, and entered the following injunction:

> Defendants 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 the Executive Order across the Nation. Enforcement of these 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.

Hawai‘i v. Trump, — F. Supp. 3d —, No. CV 17-00050 DKW-KSC, 2017 WL

1167383, at *9 (D. Haw. Mar. 29, 2017), *aff'd in part, vacated in part, remanded*, 859 F.3d 741 (9th Cir. 2017).

On June 12, 2017, we affirmed in substantial part the preliminary injunction. *See Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam), *cert. granted sub nom. Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080. Rather than reach the constitutional question, we resolved the appeal on statutory grounds, concluding that the President exceeded the scope of his delegated authority and that the Executive Order violated other provisions of the Immigration and Nationality Act ("INA"). *Id.* at 755–56. We also vacated parts of the injunction that enjoined the Government from conducting internal reviews of its vetting procedures and vacated the injunction to the extent it ran against the President. *Id.* at 788–89.

We remanded the case to the District of Hawai'i to enter an amended preliminary injunction consistent with our opinion and granted the parties' motion to expedite the issuance of the mandate. *See id.* at 789. On June 19, 2017, the district court entered the following amended preliminary injunction:

> 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. 13780 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.

Hawai'i v. Trump, No. 1:17-cv-00050-DKW-KSC (D. Haw. June 19, 2017), ECF No. 291 (footnote omitted).

C

On March 16, 2017, the District of Maryland entered a separate preliminary injunction, barring enforcement of § 2(c) of the Executive Order, concluding that the plaintiffs were likely to succeed on the merits of their Establishment Clause claim. *Int'l Refugee Assistance Project v. Trump*, — F. Supp. 3d —, No. CV TDC-17-0361, 2017 WL 1018235, at *16 (D. Md. Mar. 16, 2017), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017).

The Fourth Circuit largely affirmed the injunction. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *cert. granted*, 137 S. Ct. 2080 (2017). The majority of the Fourth Circuit's en banc court held that plaintiff John Doe #1, a permanent resident who alleged that the Executive Order prevented his wife from obtaining a visa, was likely to prevail on the merits of the Establishment Clause claim. *Id.* at 578–79, 601.

D

The Government then filed petitions for certiorari and applications to stay the preliminary injunctions entered in *Hawai'i* and in *International Refugee*

Assistance Project. On June 26, 2017, the Supreme Court granted the petitions for certiorari and granted the stay applications in part. *Trump*, 137 S. Ct. at 2083.

As to § 2(c) of the Executive Order, the Supreme Court stayed the preliminary 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." *Id.* at 2087. The Court "balance[d] the equities," *id.*, and concluded that for foreign nationals "who have no connection to the United States at all[,] . . . [d]enying entry to such a foreign national does not burden any American party by reason of that party's relationship with the foreign national," *id.* at 2088. But the Court left the injunctions in place "with respect to parties similarly situated to [John Doe #1], Dr. Elshikh, and Hawaii." *Id.* The Court explained: "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." *Id.* The Court explained how the relationships held by the plaintiffs "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 [the Executive Order]. 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.

Id.

As to § 6(a) and § 6(b) of the Executive Order, the Supreme Court stated that the "equitable balance struck" regarding § 2(c) "applies in this context as well." *Id.* at 2089. Thus, the Executive Order 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." *Id.* The Court explained: "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." *Id.*

E

On June 29, 2017, the Government began to enforce the non-enjoined parts of the Executive Order.[2] The relevant agencies published public guidance on the

[2] The President issued a memorandum that changed the effective date of the Executive Order and directed the relevant agencies to "begin implementation of each relevant provision of sections 2 and 6 of the Executive Order 72 hours after all applicable injunctions are lifted or stayed with respect to that provision." Effective Date in Executive Order 13780, 82 Fed. Reg. 27965, 27966 (June 14, 2017).

scope of the implementation and enforcement of the Executive Order. On June 29, 2017, Plaintiffs filed an emergency motion to clarify the scope of the preliminary injunction. On July 6, 2017, the district court denied that motion, ruling that "[b]ecause Plaintiffs seek clarification of the June 26, 2017 injunction modifications authored by the Supreme Court, clarification should be sought there, not here." *Hawai'i v. Trump*, — F.3d —, No. 17-00050 DKW-KSC, 2017 WL 2882696, at *3 (D. Haw. July 6, 2017), *appeal dismissed*, No. 17-16366, 2017 WL 3048456 (9th Cir. July 7, 2017).

Plaintiffs appealed that district court ruling on July 7, 2017, and we *sua sponte* dismissed the appeal for lack of jurisdiction that same day. *Hawaii v. Trump*, — F.3d —, No. 17-16366, 2017 WL 3048456, at *1 (9th Cir. July 7, 2017). We also noted that the district court "possess[es] 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.*

On the evening of July 7, 2017, Plaintiffs filed a new motion in the district court, this time seeking enforcement or modification, rather than clarification, of the district court's preliminary injunction. Plaintiffs contended the following: (1) the Government's definition of "close familial relationship" was artificially narrow; (2) refugees with a formal assurance from a refugee resettlement agency

have a "bona fide relationship" with a U.S. entity; (3) clients of legal services organizations have a "bona fide relationship" with a U.S. entity; and (4) refugees in the Direct Access Program for U.S.-Affiliated Iraqis, the Central American Minors Program, and the Lautenberg Program are categorically protected.

On July 13, 2017, the district court granted in part Plaintiffs' motion to enforce or modify the preliminary injunction. *Hawai'i v. Trump*, — F. Supp. 3d — , No. CV 17-00050 DKW-KSC, 2017 WL 2989048, at *1 (D. Haw. July 13, 2017). The district court concluded that the Government too narrowly defined "close familial relationships" by restricting it to parents, parents-in-law, spouses, fiancés,[3] children, adult sons and daughters, sons- and daughters-in-law, siblings (half and whole relationships), and step relationships. *Id.* at *5–6. The district court modified the preliminary injunction to include grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States. *Id.* at *6, *10. The district court also concluded that refugees with a formal assurance have bona fide relationships with refugee resettlement agencies and that refugees in USRAP through the Lautenberg Amendment should categorically be protected by the injunction.[4] *Id.* at *7, *9.

[3] The Government's initial guidance indicated that fiancés would not be considered close family members. Subsequent guidance reversed the Government's position as to fiancés.

[4] The district court did not grant relief with respect to foreign nationals in a client relationship with a legal services organization or to participants in the Direct

The district court entered the amended preliminary injunction as follows:

> 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.

Id. at *10.

Access Program for U.S.-Affiliated Iraqis and the Central American Minors Program. *See Hawai'i*, 2017 WL 2989048, at *8–9. Plaintiffs do not challenge these aspects of the district court's order.

On July 14, 2017, the Government filed a notice of appeal from the district court's order, along with a motion for a stay pending appeal. The Government also filed a motion at the Supreme Court, requesting that the Court clarify its June 26, 2017 stay ruling concerning the issues presented in the appeal, along with an application for a temporary administrative stay of the district court's injunction. On July 19, 2017, the Supreme Court summarily denied the motion for clarification but stayed in part the district court's modified injunction "with respect to refugees covered by a formal assurance," pending resolution of the Government's appeal before us. *Trump v. Hawaii*, No. 16-1540, 2017 WL 3045234, at *1 (U.S. July 19, 2017).

On July 21, 2017, the parties filed a joint motion to expedite the Government's appeal, which we granted.

We now turn to the merits of the Government's appeal.

II

We have jurisdiction under 28 U.S.C. § 1292(a)(1). "We review de novo the legal premises underlying a preliminary injunction" and "review for abuse of discretion the terms of a preliminary injunction." *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002). "As long as the district court got the law right, it will not be reversed simply because [we] would have arrived at a different result if [we] had applied the law to the facts of the case." *Id.* (alterations

in original) (quoting *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995)). The district court has the power to supervise compliance with an injunction and to "modify a preliminary injunction in consideration of new facts." *Id.* at 1098; *accord* Fed. R. Civ. P. 62(c). "A party seeking modification . . . of an injunction bears the burden of establishing that a significant change in facts or law warrants revision . . . of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000).

III

On appeal, the Government contends that the district court disturbed the status quo "by significantly expanding the preliminary injunction beyond the limits of the stay." The Government argues that the district court erred in modifying the preliminary injunction to bar its enforcement against: (1) certain family members, including grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins; and (2) refugees for whom the Department of State has obtained an assurance from a U.S.-based resettlement agency, as well as refugees in USRAP through the Lautenberg Program.

A

We first address the Government's challenge of the district court's modified preliminary injunction that enjoins the Government from enforcing the Executive Order against grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts,

uncles, nieces, nephews, and cousins of persons in the United States. *See Hawai'i*, 2017 WL 2989048, at *5–6, *10.

Emphasizing that the Supreme Court limited the injunction to aliens who have "*close* familial relationships" with a person in the United States, the Government argues that it appropriately construed the stay to include only immediate relationships such as parents, parents-in-law, spouses, fiancés, children, adult sons or daughters, sons-in-law, daughters-in-law, siblings (whole or half), and step-relationships, but to exclude "more distant relatives." The Government argues that it justifiably drew these lines by relying on provisions of the INA and because the Supreme Court's weighing of the equities approvingly cited the Executive Order's waiver provision.

The Government unreasonably interprets the Supreme Court's reference to "close familial relationship[s]." *Trump*, 137 S. Ct. at 2088. The Supreme Court granted the stay "with respect to foreign nationals who lack *any* bona fide relationship with a person or entity in the United States." *Id.* at 2087 (emphasis added). The Court criticized the lower courts' preliminary injunctions because the injunctions barred enforcement of the Executive Order "against foreign nationals abroad who have *no connection* to the United States at all." *Id.* at 2088 (emphasis added). The Court explained that, in considering the stay, the balance of equities favored the Government because an injunction covering "foreign nationals

unconnected to the United States" would "appreciably injure [the Government's] interests, without alleviating obvious hardship to anyone else." *Id.* (emphasis added); *see also id.* ("[T]he Government's interest in enforcing § 2(c), and the Executive's authority to do so, are undoubtedly at their peak when there is *no tie* between the foreign national and the United States." (emphasis added)).

In crafting the stay, the Supreme Court "balance[d] the equities," *id.* at 2087, and declined to stay the injunction for foreign nationals whose exclusion would burden any American party by inflicting "concrete . . . hardships," *id.* at 2088. The Supreme Court went on to illustrate the types of qualifying "close" familial relationships, explaining, "[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." *Id.* (emphasis added).

From this explanation, it is clear that the Supreme Court's use of "close familial relationship[s]" meant that the Court wanted to exclude individuals who have no connection with the United States or have remote familial relationships that would not qualify as "bona fide."[5] *Id.* The Government does not meaningfully argue how grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States

[5] A "bona fide" relationship is one "[m]ade in good faith; without fraud or deceit" or a "[s]incere; genuine" relationship. *Bona Fide*, BLACK'S LAW DICTIONARY (10th ed. 2014).

can be considered to have "no connection" to or "lack any bona fide relationship" with persons in the United States. Nor does the Government explain how its proposed scope of exclusion would avoid the infliction of concrete hardships on such individuals' family members in the United States. Stated simply, the Government does not offer a persuasive explanation for why a mother-in-law is *clearly* a bona fide relationship, in the Supreme Court's prior reasoning, but a grandparent, grandchild, aunt, uncle, niece, nephew, or cousin is not.

The Government contends that it drew this particular familial boundary based on the text of the INA. Section 201 of the INA pertains to aliens "who are not subject to the worldwide levels or numerical limitations" of immigrant visas and defines "immediate relatives" as "the children" (unmarried children under the age of twenty-one), "spouses, and parents of a citizen of the United States." 8 U.S.C. § 1151(b)(2)(A)(i); *see id.* § 1101(b)(1). Section 203, which concerns the allocation of immigrant visas, prioritizes sons and daughters of U.S. citizens; siblings of U.S. citizens (if the citizen is at least twenty-one years of age); and spouses, unmarried sons, and unmarried daughters of permanent resident aliens. *Id.* § 1153(a). The Government points out that the INA also recognizes the fiancé relationship. *See id.* §§ 1101(a)(15)(K), 1184(d).

There are at least two problems with the Government's justification. First, there is no support for the proposition that the Supreme Court's equitable decision

was informed by technical definitions of family from the INA. Indeed, the Court's conclusion that mothers-in-law—a close familial relationship not recognized by the sections of the INA upon which the Government relies—are "clearly" covered by the injunction indicates that the Court did not intend to limit the injunction to only the family relationships recognized in the specific provisions of the INA identified by the Government. Rather than rely on the INA's definition for "immediate relatives" to define "close familial relationships," the Supreme Court instead focused its consideration on the harms faced by persons in the United States based on the denial of entry of foreign nationals with whom they have bona fide relationships. In doing so, the Supreme Court deployed fundamental equitable considerations that have guided American law for centuries.

Second, the Government's reference to its favored INA provisions is unduly narrow and selective. Sections 201 and 203 deal only with those seeking lawful permanent residence in the United States. Given that the Executive Order bars entry for even those seeking temporary admission with non-immigrant visas, it does not follow that provisions dealing with permanent residence in the United States should properly inform whether foreign nationals have "bona fide relationships" that are exempt from the Executive Order.[6] Persons in the United

[6] Such provisions, like those relating to aliens wishing to travel or visit family in the United States on short-term, non-immigrant visas, do not impose any familial relationship-based requirements at all. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(B);

States affected by the exclusion extend beyond those petitioning for an immediate relative to live permanently in the United States.

But even if the INA may inform the construction of "close familial relationship[s]," the Government's decision to rely on the cited specific provisions of the INA is troubling because other provisions of the INA (and other immigration laws) offer broader definitions. In the Family Sponsor Immigration Act of 2002, for example, Congress amended the INA to provide that when the sponsor of an alien's immigrant visa petition has died, another member of the alien's "close family"—defined to include family members such as "sister-in-law, brother-in-law, grandparent, or grandchild"—could sponsor the alien for admission. Pub. L. No. 107-150, § 2(a) (codified at 8 U.S.C. § 1183a(f)(5)). In other words, the INA explicitly refers to sisters-in-law, brothers-in-law, grandparents, and grandchildren as *close* family. The Government's "cherry-picked" INA provisions recognize immediate family relationships as those between parents, spouses, children, and siblings, yet other provisions of the INA and other immigration laws offer broader definitions for close family. As Plaintiffs further point out, other immigration laws enable an individual to seek admission on behalf of aunts, uncles, and close blood

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Directory of Visa Categories, U.S. Dep't of State, https://travel.state.gov/content/visas/en/general/all-visa-categories.html (last visited Aug. 29, 2017).

relatives.[7]

The Government offers no explanation as to why it relied on its selected provisions of the INA, while ignoring other provisions of the same statute as well as other immigration laws. The INA was implemented with "the underlying intention of . . . preservation of the family unit." H.R. Rep. No. 82-1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680. The Government's artificially narrow interpretation of close familial relationships directly contradicts this intention.

The Government next contends that the Supreme Court approvingly cited the Executive Order's waiver provision when describing the equities that the Court weighed in partially granting the stay. The Executive Order sets out a number of

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[7] For example, Plaintiffs cite an immigration law that permits a juvenile alien to be released from detention to the custody of parents, legal guardians, or "other close blood relatives." *Reno v. Flores*, 507 U.S. 292, 310 (1993). Such relatives include "brother, sister, aunt, uncle, [and] grandparent." *Id.* at 297 (quoting 8 C.F.R. § 242.24(b)(1), *recodified at* 8 C.F.R. § 236.3(b)(1)(iii)). Other immigration laws enable an individual to seek admission on behalf of grandchildren, nieces, or nephews, *see* 81 Fed. Reg. 92266, 92280 (Dec. 19, 2016); to apply for asylum if a "grandparent, grandchild, aunt, uncle, niece, or nephew" resides in the United States, 69 Fed. Reg. 69480, 69488 (Nov. 29, 2004); to apply for naturalization on behalf of a grandchild, 8 U.S.C. § 1433(a); or to qualify as a special immigrant if he or she is the "grandparent" of a child orphaned by the September 11, 2001 attacks, USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 421(b)(3). The Board of Immigration Appeals has also held that an alien has "close family ties in the United States" for purposes of obtaining cancellation of removal or waiver of inadmissibility if a sibling-in-law or grandchild lives here. *See, e.g.*, *In re Mulholland*, No. A42 655 803 - DALL, 2007 WL 2299644, at *1 (BIA July 12, 2007) (considering mother, step-father, and brother-in-law as close family ties); *In re Gomez*, No. A28 911 501 - DANB, 2006 WL 2391225, at *1 (BIA July 6, 2006) (considering children and grandchildren as close family ties).

case-by-case waivers, including one for a foreign national seeking "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, and the denial of entry during the suspension period would cause undue hardship." 82 Fed. Reg. at 13214. The Supreme Court cited to this waiver provision as further evidence in support of its conclusion that the equities "do not balance the same way" for all parties. *Trump*, 137 S. Ct. at 2088. In the Supreme Court's view, the Executive Order's allowance for waivers serves as evidence that even the Government distinguishes between "foreign nationals who have some connection to this country, and foreign nationals who do not." *Id.* Moreover, the waiver provision does not state or imply that the waiver for close family members gives an exhaustive list of qualifying relationships. The waiver provision on its face only notes examples of the types of relationships that the Executive Order considers "close." This list does not include fiancés, siblings, and parents-in-law, which are familial relationships that the Government now includes in its guidance. Nor did the Supreme Court's stay order import these examples as the only types of close family relationships that should fall within the scope of the injunction. To reiterate, the Supreme Court's stay order considered whether a foreign national lacked *any* bona fide relationship with a person in the United States. It is hard to see how a grandparent, grandchild, aunt,

uncle, niece, nephew, sibling-in-law, or cousin can be considered to have no bona fide relationship with their relative in the United States.

Finally, the Government argues that the district court erred by creating a much larger exception "unmoored from the INA and the Order's waiver provision" by referring to Dr. Elshikh's mother-in-law. The Government urges that Dr. Elshikh's wife is a U.S. citizen, and that "parents-in-law of persons in the United States will typically also be parents of persons in the United States." The Supreme Court, however, did not rely on the relationship between Dr. Elshikh's wife and her mother. Instead, the Court emphasized the relationship between Dr. Elshikh and his mother-in-law—who "clearly [have] such a [close familial] relationship." *Trump*, 137 S. Ct. at 2088. Plaintiffs correctly point out that the familial relationships the Government seeks to bar from entry are within the same "degree of kinship" as a mother-in-law. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 505–06 (1977) (plurality). As Plaintiffs aptly state, "[a] brother-in-law is the brother of a person's spouse; a niece is the daughter of one's brother or sister. These relations are just as 'close,' if not closer, than the mother of a person's spouse." If mothers-in-law *clearly* fall within the scope of the injunction, then so too should grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins.

We find further support in other Supreme Court decisions, albeit that arise in

different contexts from immigration law, for this broad definition of "close familial relationship." These cases show how the denial of entry can cause concrete hardship to family members in the United States. In *Moore v. City of East Cleveland*, the Court invalidated as unconstitutional a housing ordinance that limited occupancy of a dwelling unit to members of a nuclear family. 431 U.S. at 495–96, 506. The Court discussed "a larger conception of [] family," derived from "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history," that was worthy of constitutional protection. *Id.* at 505. To that end, the Court recognized and protected the tradition of "close relatives"—"uncles, aunts, cousins, and especially grandparents"—"sharing a household along with parents and children." *Id.* at 504–05. Other cases have likewise addressed extended family relationships. *See Troxel v. Granville*, 530 U.S. 57, 64–65 (2000) (discussing the "important role" grandparents often play); *Tooahnippah v. Hickel*, 397 U.S. 598, 608 (1970) (noting the "close and sustained familial relationship" between a testator and his niece). In these cases, the Court described the importance of close relatives such as grandparents, aunts, uncles, nieces, nephews, and cousins. The recognition of close family relationships, whether in particular INA statutory provisions or in other Supreme Court cases describing family relationships, are relevant to determining the proper scope of the Supreme Court's June 26, 2017 stay order.

In sum, the district court did not err in rejecting the Government's restricted reading of the Supreme Court's June 26, 2017 stay ruling and in modifying the injunction to prohibit enforcement of the Executive Order against grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States.[8] Denying entry to these foreign nationals would burden persons in the United States "by reason of that party's relationship with the foreign national."[9] *Trump*, 137 S. Ct. at 2088.

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[8] We reject the Government's invitation to "evaluate the [familial] relationships separately rather than on a blanket basis," for all relationships or at least for siblings-in law, cousins, aunts, uncles, nieces, and nephews. That argument is without merit because it starts from the false premise that each individual must prove a close family relationship, while the Supreme Court clearly intended the exception to the stay order to allow continuing relief to the categories of persons with a close family relationship without additional inquiry. Moreover, the Government did not raise this argument regarding the scope of the injunction before the district court, and has therefore waived it. *See Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. 2014) (explaining that a party waived arguments about scope of injunction by not raising them before the district court). The Government also does not meaningfully argue the distinction between a grandparent and the other familial relationships it seeks to exclude from the modified injunction.

[9] In a related argument, the Government challenges the district court's modified injunction with respect to the Lautenberg Program—a program "permit[ting] certain nationals of the former Soviet Union and other countries with 'close family in the United States' to apply for refugee status." *Hawai'i*, 2017 WL 2989048, at *9 (citing U.S. Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2017* (Sept. 15, 2016), https://www.state.gov/j/prm/releases/docsforcongress/261956.htm). The Government's challenge regards the Lautenberg Amendment's inclusion of grandparents and grandchildren as qualifying "close family." *See* Public Law No. 1010-167, § 599, 103 Stat. 1261 (1989) (codified at 8 U.S.C. § 1157). Because the district court did not err in its analysis of what constitutes a "close familial relationship," it did not err by

B

We next address the Government's challenge to the district court's modified injunction that enjoins the Government from excluding refugees covered by formal assurances.[10] *See Hawai'i*, 2017 WL 2989048, at *7. The Government's guidance had specified 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." U.S. Dep't of State, *Fact Sheet: Information Regarding the U.S. Refugee Admissions Program*, June 30, 2017, https://www.state.gov/j/prm/releases/factsheets/2017/272316.htm.

The Government argues that the district court erred because a formal assurance denotes the relationship between a resettlement organization and the Department of State, *not* a relationship between the organization and the refugee. The Government also contends that affirming the district court would mean that the Supreme Court's stay would cover "virtually no refugee" because about 24,000

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modifying the injunction as to refugees in USRAP through the Lautenberg Program.

[10] Notably, many refugees lack close familial relationships with persons in the United States, and the Government's interpretation of the Supreme Court's stay order interposes another barrier for refugees seeking admission into the United States. *See* Declaration of Erol Kekic, Executive Director of Church World Service, Dist. Ct. Dkt. No. 344-1 at 1–2 (noting that more than one-thousand refugees with formal assurances from Church World Service do not have a qualifying family relationship as defined by the Government).

refugees have been assured.

As the district court correctly identified, a refugee is covered by the preliminary injunction, as modified by the Supreme Court's stay order, if the refugee has a bona fide relationship with an entity in the United States, meaning a relationship that is formal, documented, and formed in the ordinary course rather than to evade the Executive Order. *See Trump*, 137 S. Ct. at 2088–89. Applying this standard, the district court held that formally assured refugees have bona fide relationships with resettlement agencies and are covered by the injunction because the assurance is formal, documented, and formed in the ordinary course rather than to evade the Executive Order. Mindful of the narrow standard that governs our review, we affirm, considering the individualized screening process necessary to obtain a formal assurance and the concrete harms faced by a resettlement agency because of that refugee's exclusion.

1

It typically takes a refugee applicant eighteen to twenty-four months to successfully complete the application and screening process before he or she can be resettled in the United States. Most refugees first register with the United Nations High Commissioner for Refugees ("UNHCR") in the country to which he or she has fled. UNHCR interviews each refugee applicant and collects identifying documents. After UNHCR determines that an applicant meets the United States'

criteria for resettlement consideration and presents no disqualifying information, UNHCR refers the case to a U.S. Embassy, which then sends the case to one of nine Resettlement Support Centers ("RSC"). An RSC, under the guidance of the State Department, next refers an applicant for resettlement consideration and helps with completing other technical requirements. The RSC interviews the applicant, collects identification documents and information, and initiates security checks.

United States Citizenship and Immigration Services ("USCIS"), a component of the Department of Homeland Security, then conducts a personal interview with the refugee in the country in which the refugee is located and determines whether the applicant qualifies for refugee status under U.S. law and meets other resettlement criteria. A refugee who meets these qualifications is then security screened. USCIS next notifies the Bureau of Population, Refugees, and Migration ("PRM"), a division of the State Department, that a refugee applicant is approved. The applicant then undergoes medical screening.

After refugees have cleared these hurdles,[11] the RSC then obtains a "sponsorship assurance" from one of nine private non-profit organizations, known

[11] The sum total of these hurdles means that refugees with formal assurances have been reviewed by: UNHCR, the National Counterterrorism Center, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Defense, the Department of State, and others in the U.S. intelligence community.

as resettlement agencies.[12] All refugees receive a sponsorship assurance from a resettlement agency before they travel to the United States. The assurance is a "written commitment, submitted by a [resettlement agency], to provide, or ensure the provision of, the basic needs . . . and core services . . . for the refugee(s) named on the assurance form." As of June 30, 2017, 23,958 refugees had formal assurances from a resettlement agency. Resettlement agencies determine the best resettlement location for a refugee candidate, and consider whether a refugee has family ties in a certain locality, whether the local agency has the language skills necessary to communicate with the refugee, whether the refugee's medical needs can be addressed in the local community, and whether employment opportunities are available and accessible.

Once an applicant has been approved for resettlement, the applicant has passed all required medical exams, and the RSC has obtained the necessary sponsorship assurance from the resettlement agency, the RSC only then refers the case for transportation to the United States through a PRM-funded program.[13]

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[12] 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.

[13] According to amici curiae the International Refugee Assistance Project and HIAS, Inc., a refugee who has received an assurance typically travels to the United States within two to six weeks, and must take care of matters such as selling possessions and terminating leases.

Once a refugee reaches his or her resettlement location in the United States, the resettlement agency and its local affiliate facilitate the initial reception; provide core services, including housing, furnishings, seasonal clothing, and food; and assist in obtaining medical care, employment, educational services, and other needed services.

2

Plaintiffs, as well as amici curiae, discuss two types of concrete hardships that will be faced by resettlement agencies and local affiliates if formally assured refugees are barred: (1) tangible injuries through the loss of invested resources and financial support; and (2) intangible injuries from the inability to effectuate their spiritual and moral missions.[14]

Tangible Injuries: A resettlement agency provides pre-arrival services for a formally assured refugee and engages in an intensive process to match the individual to resources even before the refugee is admitted. These efforts, which the formal assurance embodies, evince a bona fide relationship between a resettlement agency and a refugee, and further demonstrate the hardship inflicted

[14] Other entities, including church congregations, volunteers, and landlords, who must wait to learn whether refugees with an assurance will be admitted, also will experience harm. For example, resettlement organizations recruit foster families in the United States for refugee children living abroad without parental support, and refugee children receive an assurance *after* they have been assigned to a foster family or other placement. Enforcing the Executive Order against such children harms American families who are waiting to welcome them.

on an agency if a refugee is not admitted. Once an agency provides an assurance, but before the refugee arrives in the United States, the agency makes substantial investments in preparing for resettlement. *See* Declaration of Mark Hetfield, President and CEO of HIAS, Inc., Dist. Ct. Dkt. No. 336-2 at 6, ¶ 18 ("After a refugee has been given an assurance, but before the refugee has been issued a visa, HIAS and its affiliates begin the involved process of arranging for the reception, placement, and appropriate initial resettlement assistance for the refugee."); *see also* Brief of Amicus Curiae U.S. Committee for Refugees and Immigrants in Support of Plaintiffs-Appellees ("USCRI Amicus Brief"), Dkt. No. 51 at 7 ("Most of the groundwork USCRI and the local agency perform in integrating a refugee into a community is the result of significant investments of money, time, effort, and emotion made after USCRI provides its written assurance of services to the State Department, but before the refugee arrives here."). If a refugee does not arrive in the United States, or is delayed in arriving, the agency will lose the money and resources it has already expended in preparing for arrival, including securing rental housing, buying furniture, and arranging for basic necessities. *Cf. Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 262–63 (1977) (determining that a nonprofit real estate developer had a sufficient injury to confer standing based on resources expended on planning and studies in anticipation of a project).

Resettlement agencies will not receive expected Government reimbursements if a refugee with a formal assurance is not admitted. Each agency receives partial grant funding from the Government for the resettlement services it performs on behalf of each particular refugee covered by an assurance. Resettlement agencies and their affiliates advance these funds, for example, to secure lodging, purchase furniture, clothing and other necessities, and receive reimbursement from the State Department the month after the refugee's arrival in the United States. *See* Declaration of Mark Hetfield, President and CEO of HIAS, Inc., Dist. Ct. Dkt. No. 336-2 at 7, ¶ 22; USCRI Amicus Brief, Dkt. No. 51 at 7. Reimbursements are withheld, however, if a refugee does not arrive in the United States. For USCRI, these per capita payments accounted for over $25 million—nearly 43% of its total revenue—for the fiscal year ending September 30, 2016. USCRI Amicus Brief, Dkt. No. 51 at 7. Since mid-June 2017, USCRI has been forced to lay off 17 full-time employees and its partner affiliates have laid off an additional 70 employees. USCRI Amicus Brief, Dkt. No. 51 at 13. USCRI plans to make additional layoffs in the next two months, and has already cut employee benefits by more than $1 million. USCRI Amicus Brief, Dkt. No. 51 at 13. Resettlement agencies experience concrete hardship through the loss of federal funds withheld. *Cf. Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 730 (S.D. Ind. 2016) (holding that loss of federal funding to a resettlement

nonprofit is an Article III injury), *aff'd*, 838 F.3d 902 (7th Cir. 2016).

Intangible Injuries: Resettlement agencies also will face non-economic harms if formally assured refugees are barred from entry. Assisting refugees and providing humanitarian aid are central to the core belief systems of resettlement entities and their employees. Efforts to work on behalf of marginalized and vulnerable populations are undercut when the Government bars from entry formally assured refugees. *Cf. Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 (D.C. Cir. 1987) (holding that a nonprofit satisfied Article III standing, including its injury component, where the nonprofit alleged that the government's interdiction program thwarted its organizational purpose).

Resettlement agencies have bona fide relationships with refugees seeking to be admitted to this country and "can legitimately claim concrete hardship if [these refugees are] excluded." *Trump*, 137 S. Ct. at 2089. Other courts have identified harms as evidence of a legally cognizable relationship between a resettlement organization and a refugee for whom it provided a formal assurance. For example, in *Exodus Refugee Immigration, Inc. v. Pence*, the State of Indiana had directed state agencies not to pay federal grant funds to local refugee resettlement agencies for services the agencies provided to Syrian refugees. 165 F. Supp. 3d at 726–27. In concluding that the nonprofit had third-party standing, the district court determined that the resettlement organization "undoubtedly ha[d] a sufficiently

close relationship" that was "current [and] ongoing" with the specific refugees it had been assigned to resettle "in the next few weeks or months." *Id.* at 732 (internal quotation marks omitted).

The Government contends that a formal assurance does not create a bona fide relationship between a resettlement agency and a refugee, and stresses that "[t]he assurance is not an agreement between the resettlement agency and the refugee; rather, it is an agreement between the agency and *the federal government*." But the Supreme Court's stay decision specifies that a qualifying relationship is one that is "formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Executive Order]." *Trump*, 137 S. Ct. at 2088. We cannot say that the district court clearly erred in its factual findings or ultimately abused its discretion in holding that the written assurance an agency submits, obligating the agency to provide core services for the specific refugee(s) listed on the assurance form, meets the requirements set out by the Court. Although the assurance is technically between the agency and the Government, the Government's intermediary function does not diminish the bona fide relationship between the resettlement agency and the specific refugee covered by the assurance.[15] Before signing the formal assurance, the agency undertakes a careful

[15] In fact, at oral argument, the government conceded as much stating, "We acknowledge that if an alien had a relationship with a U.S. entity indirectly, through an intermediary, that would count." Oral Arg. Vid. at 14:19–14:27.

selection process that "match[es] the particular needs of each incoming refugee with the specific resources available in a local community." U.S. Dep't of State, *The Reception and Placement Program*, https://www.state.gov/j/prm/ra/receptionplacement/ (last visited Aug. 5, 2017). After the assurance is executed but before the refugee arrives, the agency makes extensive preparations that are individualized to each refugee. This advance preparation and expenditure of resources supports the district court's determination that a bona fide relationship with the refugee exists.

Even if a resettlement agency does not have "direct contact" with a refugee before arrival, this does not negate the finding that a relationship has formed. The agency still expends resources and arranges for individualized services based on the specific refugees that the agency has agreed to resettle. Further, relationships can exist even without direct contact between the foreign national and the entity, as demonstrated by three examples of qualifying non-familial relationships in the Supreme Court's June 26, 2017 stay order. *See Trump*, 137 S. Ct. at 2088. An academic's lecture may be arranged through her organization, rather than between the academic and the American university. An employer may make a job offer to a foreign national through a third-party recruiter. An applicant may apply and receive an offer of admission through a coordinating organization separate from the university. And, likewise, a resettlement agency commits to provide basic

needs and core services to a specific refugee through the formal assurance it executes with the Government.

The Government also raises concerns that because about 24,000 refugees have been assured, the district court's ruling causes the Supreme Court's stay order to "cover[] virtually no refugee" and renders the order inoperative. The Supreme Court's stay considered the concrete hardship of U.S.-based persons and entities. *See Trump*, 137 S. Ct. at 2088–89. The Court's equitable decision did not express concern about the number of refugees that would fall within the scope of the injunction; rather, the Court's order clarifies that the Government is still enjoined from enforcing the 50,000-person cap of § 6(b) to exclude refugees who have a bona fide relationship with a U.S. person or entity and are otherwise eligible to enter the United States. *Id.* at 2089.

Furthermore, the Government's assertion that the modified injunction renders the Court's stay order inoperative is false. More than 175,000 refugees currently lack formal assurances. Without another bona fide relationship with a person or entity in the United States, the Executive Order suspends those refugees' applications. *See* U.S. Dep't of Homeland Security, *Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry into the United States* at Q.27, https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states (last visited Aug. 30, 2017)

("USCIS officers have been instructed that they should not approve a refugee application unless the officer is satisfied that the applicant's relationship complies with the requirement to have a credible claim of a bona fide relationship with a person or entity in the United States and was not formed for the purpose of evading the Executive Order.").

Resettlement agencies will face concrete harms and burdens if refugees with formal assurances are not admitted. In the same way that the Court considered the harms of the U.S. citizen who wants to be reunited with his mother-in-law and the permanent resident who wants to be reunited with his wife, the employer that hired an employee, the university that admitted a student, and the American audience that invited a lecturer, the district court correctly considered the resettlement agency that has given a formal assurance for specific refugees. The district court did not abuse its discretion with regard to this portion of the modified preliminary injunction.

IV

Our decision affirming the district court's modified preliminary injunction will not take effect until the mandate issues, which would not ordinarily occur until at least 52 days after this opinion is filed. *See* Fed. R. App. P. 41; Fed. R. App. P. 40(a)(1).

Refugees' lives remain in vulnerable limbo during the pendency of the Supreme Court's stay. Refugees have only a narrow window of time to complete their travel, as certain security and medical checks expire and must then be re-initiated. Even short delays may prolong a refugee's admittance.

Because this case is governed by equitable principles, and because many refugees without the benefit of the injunction are gravely imperiled, we shorten the time for the mandate to issue. *See* Fed. R. App. P. 41(b). The mandate shall issue five days after the filing of this opinion.

V

We affirm the district court's order modifying the preliminary injunction. The mandate shall issue five days after the filing of this opinion.

AFFIRMED.

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