No. 16-1540 (16A-1191)

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Applicants,

v.

STATE OF HAWAII, *et al.*,

Respondents.

RESPONSE TO APPLICATION FOR A STAY OF THE MANDATE

DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
DONNA H. KALAMA
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

Counsel for the State of Hawaii

NEAL KUMAR KATYAL
Counsel of Record
COLLEEN ROH SINZDAK
MITCHELL P. REICH
ELIZABETH HAGERTY
SUNDEEP IYER*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
SARA SOLOW
ALEXANDER B. BOWERMAN
HOGAN LOVELLS US LLP

Counsel for Respondents

*Admitted only in Maryland; supervised by firm members

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INTRODUCTION

The Government has returned to this Court, for the third time, to ask that it superintend the application of the injunction in this case. The first time the Government was here, on June 26, 2017, this Court set forth the legal standard that governs the injunction of Executive Order 13,780 ("EO-2"): Any foreign national with a "bona fide relationship" with a U.S. entity—that is, a relationship that is "formal, documented, and formed in the ordinary course"—is protected from EO-2's travel and refugee bans. *Trump* v. *Int'l Refugee Assistance Project* (*"IRAP"*), 137 S. Ct. 2080, 2088 (2017). The second time, on July 19, 2017, the Court denied the Government's request to "clarify" that the injunction does not apply to refugees who have received a formal assurance from a refugee resettlement agency, instead directing the Ninth Circuit to resolve the question. Order, *Trump* v. *Hawaii*, 16-1540 (U.S. July 19, 2017).

The Ninth Circuit faithfully applied both of those directives. It determined—after reviewing hundreds of pages of declarations and exhibits, conducting full briefing, and hearing oral argument—that a refugee has a "bona fide" relationship with a resettlement agency that signs a formal, written assurance to provide for her housing, food, and other essentials of life. And the Ninth Circuit rejected the Government's invitation to treat this Court's July 19, 2017 stay as the merits decision the Court had declined to issue; instead, it performed the diligent analysis that is expected of an appellate court.

Nonetheless, the Government is back. It now demands that, in addition to setting forth the legal standard and directing the Ninth Circuit to apply it, this Court must engage in its own factbound review of the refugee-resettlement process in order to determine for itself whether the lower courts correctly applied the established standard to the record. Moreover, it asks the Court to engage in this complex factual inquiry mere weeks before hearing this case on the merits—insisting that the Court devote its immediate attention to ensuring that every possible refugee is excluded.

That is not this Court's role. The lower courts, not this Court, are "best qualified to deal with the flinty, intractable realities of day-to-day implementation of" the Court's "constitutional commands." *United States* v. *Paradise*, 480 U.S. 149, 184 (1987) (internal quotation marks omitted). The Court laid out a legal standard. The District Court and the Ninth Circuit diligently and correctly applied it. And contrary to the Government's hyperbole, they have not rendered the stay "functionally inoperative": The Government retains the authority to bar tens of thousands of refugees from entering the country, as indeed it has done for months. The lower courts have simply applied this Court's standard to protect vulnerable refugees and the American entities that have been eagerly preparing to welcome them to our shores. The Government's motion should be denied.

BACKGROUND

1. On June 26, 2017, this Court issued an order that stayed in part the Hawaii District Court's injunction of Sections 2(c) and 6 of EO-2. This Court

approved of the manner in which the District Court had "balance[d] the equities" with respect to U.S. persons "who have relationships with foreign nationals abroad, and whose rights might be affected if those foreign nationals were excluded." *IRAP*, 137 S. Ct. at 2087. But the Court held that the equities "do not balance the same way" for aliens "who have no connection to the United States at all," and whose exclusion "does not burden any American party by reason of that party's relationship with the foreign national." *Id.* at 2088. Excluding such aliens, the Court explained, would "prevent the Government from * * * enforcing" EO-2 "without alleviating obvious hardship to anyone else." *Id.*

The Court therefore "narrow[ed] the scope of the injunctions." *Id.* It held 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." *Id.* For "individuals," it explained, "a close familial relationship is required"; foreign nationals "like Doe's wife or Dr. Elshikh's mother-in-law[] clearly ha[ve] such a relationship." *Id.* "As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2." *Id.* As examples of foreign nationals with such relationships, the Court listed "students * * * who have been admitted to the University of Hawaii," "worker[s] who accepted an offer of employment from an American company," and "lecturer[s] invited to address an American audience." *Id.*

The Court also explained that the same "equitable balance" applies to EO-2's refugee provisions, and thus prohibits the Government from invoking Section 6(a)

or (b) to bar refugees with whom "[a]n American individual or entity * * * has a bona fide relationship," such that the American individual or entity "can legitimately claim concrete hardship if that [refugee] is excluded." *Id.* at 2089.

2. Three days after this Court's ruling—and after repeatedly rebuffing respondents' requests for any information about its plans—the Government issued guidance concerning its interpretation of this Court's stay. As relevant, the Government interpreted the term "close famil[y]" as limited largely to an alien's immediate family, and so excluded grandparents, grandchildren, aunts, uncles, nieces, nephews, siblings-in-law, and cousins. The Government also stated that a refugee who had received a formal assurance from a refugee resettlement agency lacked a "bona fide relationship" with a U.S. entity sufficient to fall within the scope of this Court's stay.

Plaintiffs filed a motion in the District Court requesting that it modify its injunction to make clear that the Government was barred from enforcing EO-2 against these individuals. On July 13, 2017, the District Court granted the requested relief. It explained that the Government's definition of close family "finds no support in the careful language of the Supreme Court or even in the immigration statutes on which the Government relies." *Hawaii* v. *Trump*, --- F. Supp. 3d ----, 2017 WL 2989048, at *5 (D. Haw. July 13, 2017). It further explained that a formal assurance from a resettlement agency "meets each of the Supreme Court's touchstones" for a "bona fide relationship": "it is formal, it is a documented contract, it is binding, it triggers responsibilities and obligations, * * * it is issued specific to

an individual refugee * * * , and it is issued in the ordinary course, and historically has been for decades." *Id.* at *7.

3. The Government appealed the District Court's decision to the Ninth Circuit and, at the same time, sought review of that decision directly in this Court. The Government asked the Court to "clarify" that its partial stay order did not protect grandparents, grandchildren, and other close relatives of U.S. persons, or refugees with a formal assurance from a resettlement agency. Petitioners' Mot. for Clarification 19, *Trump* v. *Hawaii*, No. 16-1540 (July 14, 2017) ("S. Ct. Mot."). In the alternative, the Government proposed that the Supreme Court issue a writ of mandamus or "construe [its] motion as a petition for a writ of certiorari before judgment, grant certiorari, and vacate the district court's modified injunction." *Id.* at 17-18. Lastly, the Government stated that "if the Court concludes that the court of appeals should address the correctness of the district court's interpretation of this Court's stay ruling in the first instance," it should "grant a stay of the district court's modified injunction pending disposition of that appeal" so as to "minimize the disruption and practical difficulties" the modified injunction would ostensibly cause. *Id.* at 39; *see also* Petitioners' Reply in Support of Mot. for Clarification 3, 14-15, *Trump* v. *Hawaii*, No. 16-1540 (U.S. July 18, 2017) ("S. Ct. Reply").

On July 19, 2017, this Court summarily denied the Government's motion for clarification. Order, *Trump* v. *Hawaii*, No. 16-1540 (U.S. July 19, 2017). It also declined to grant mandamus or certiorari. But this Court granted in part the Government's request for a stay pending appeal, stating 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." *Id.*

4. The Ninth Circuit held full briefing on the merits of the Government's appeal. The appellate record consisted of hundreds of pages of declarations and exhibits, briefs from a resettlement agency and other interested parties, and numerous Government documents describing the resettlement and refugee admissions process. The court also conducted an oral argument on August 28, 2017.

On September 7, the Ninth Circuit issued a unanimous per curiam opinion affirming the District Court's modified injunction in full. The court first concluded that the Government "unreasonably interpret[ed] the Supreme Court's reference to 'close familial relationship[s]." Add. 13 (quoting *IRAP*, 137 S. Ct. at 2088) (brackets in original). As the court explained, the Government's definition of "close famil[y]" relied on "cherry-pick[ing]" certain provisions of the immigration laws that favored its position while ignoring others that did not. Add. 17. The court also deemed the Government's cramped definition irreconcilable with this Court's holding that "a mother-in-law is *clearly* a bona fide relationship." Add. 15.

The Ninth Circuit further determined that refugees with a formal assurance from a resettlement agency have a "bona fide relationship" with a U.S. entity. The court explained that resettlement agencies engage in an "intensive process" to match refugees to resources "even before the refugee is admitted." Add. 27. As the court noted: "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 on an agency if a refugee is not admitted." *Id.* at 27-28. The Ninth Circuit agreed with the District Court that refugees with a formal assurance meet "the requirements set out by the Court": They have relationships that are "formal, documented, and formed in the ordinary course, rather than for the purpose of evading" EO-2. Add. 31 (quoting *IRAP*, 137 S. Ct. at 2088).

The Ninth Circuit stated that its mandate would issue within five days. As it explained: "Refugees' lives remain in vulnerable limbo during the pendency of the Supreme Court's stay," and "[e]ven short delays may prolong a refugee's admittance." Add. 35.

5. Four days later, the Government filed its motion in this Court, challenging only the portion of the Ninth Circuit's decision regarding resettlement agencies. On September 11, Justice Kennedy stayed that aspect of the Ninth Circuit's decision pending further order by Justice Kennedy or of the Court.

ARGUMENT

I. THIS COURT'S INTERVENTION IS UNWARRANTED.

The Government has returned to this Court, for the third time in as many months, to ask it to review the application of the Court's interim stay judgment to a highly fact-intensive scenario that has already been considered in close detail by two lower courts. This Court does not typically involve itself in such matters—indeed, neither respondents nor the Government has identified any comparable instance in which this Court has reviewed the application of a stay pending appeal

to a set of facts. On the contrary, this Court has summarily rejected such requests. *See, e.g.*, *Pennhurst State Sch. & Hosp.* v. *Halderman*, 448 U.S. 905 (1980); *see also Daniel B.* v. *O'Bannon*, 588 F. Supp. 1095, 1102 (E.D. Pa. 1984) (explaining that the *Pennhurst* Court "declined to disturb [the lower courts'] interpretation of its stay").

This case should not be the first. The primary form of relief the Government requests—a stay pending resolution of the *underlying merits* of the case—is categorically improper. No statute or precedent authorizes the Government to obtain a stay of a judgment that this Court will never have an opportunity to review. And the Government's alternative request that the Court summarily reverse the Ninth Circuit's factbound stay decision, one month before this Court hears the case on the merits, is equally inappropriate.

1. The Government's principal submission is that this Court should "stay the court of appeals' mandate * * * pending this Court's resolution of the underlying merits." Appl. 19. As the Government candidly admits, the "stay" it requests would, for all practical purposes, be tantamount to a reversal: This dispute concerns the scope of this Court's stay *pending appeal*, and so it "will become moot" the moment the underlying merits are decided. *Id.*

It is entirely inappropriate to grant a stay that would have the effect of disposing of the issue under review. The purpose of a stay is to preserve the status quo *pending resolution of the underlying claim*. It "is not to conclusively determine the rights of the parties." *IRAP*, 137 S. Ct. at 2087. Accordingly, Justices of this Court have long refused to issue stays whose "result would be a determination on

the merits," *Cousins* v. *Wagoda*, 409 U.S. 1201, 1205 (1972) (Rehnquist, J., in chambers), or that "would be tantamount to a decision on the merits in favor of the applicants," *Nat'l Socialist Party of Am.* v. *Vill of Skokie*, 434 U.S. 1327, 1328 (1977) (Stevens, J., in chambers).

Indeed, the Government identifies no authority for a "stay" of this kind. The principal source of this Court's stay power, 28 U.S.C. § 2101(f), provides that a judgment "may be stayed for a reasonable time *to enable the party aggrieved to obtain a writ of certiorari*." *Id.* (emphasis added). As its text makes plain, this provision permits the Court to grant a stay where there is "a reasonable probability that certiorari will be granted" and "a significant possibility that the judgment below will be reversed." *Barnes* v. *E-Systems, Inc. Grp. Hosp. Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). It does not permit staying a judgment that the Court never expects to and never will have the opportunity to review.

Apparently recognizing as much, the Government does not attempt to invoke Section 2101(f), but instead hinges its request on the All Writs Act, 28 U.S.C. § 1651(a). That statute, however, is even more inapt. This Court has "consistently stated, and [its] own rules so require," that the power conferred by the All Writs Act "is to be used sparingly": It may be exercised only where (1) relief "is necessary or appropriate in aid of [the Court's] jurisdiction," and (2) "the legal rights at issue are indisputably clear." *Turner Broad. Sys., Inc.* v. *FCC*, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., in chambers) (internal quotation marks omitted); *see* S. Ct. R. 20.1

("Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised."). In addition, under this Court's rules, the applicant must demonstrate that "adequate relief cannot be obtained in any other form." Sup. Ct. R. 20.1.

The Government can make none of these showings. A stay of the decision below plainly is not necessary in aid of this Court's jurisdiction; the Court has already granted review in the primary merits case, and will have no difficulty deciding that case while the Ninth Circuit's judgment remains in effect. Nor is it "indisputably clear" that the Ninth Circuit erred. As discussed below, its decision was entirely correct, *see* Part II, *infra*; and even if there were some doubt on that score, it is plain that the Ninth Circuit meticulously considered the standard this Court set forth in its June 26 stay decision, and reasonably reviewed its application to the complicated factual situation before the court. *See* Add. 23-34. Furthermore, given that the Government *itself* argues that other forms of relief are available to it, *see* Appl. 19-20 & n.5 (identifying four other alternatives), and has not even attempted to obtain a stay of the mandate from the Court of Appeals, it cannot claim that "adequate relief cannot be obtained in any other form." S. Ct. R. 20.1.

2. That leaves the Government's request that this Court "construe [its] stay application as a petition for a writ of certiorari, * * * grant the petition[,] and summarily reverse the decision below." Appl. 20 & n.5. As Justice Scalia explained, "[a] summary reversal is a rare and exceptional disposition, usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in

dispute, and the decision below is clearly in error." *Mireles* v. *Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., joined by Kennedy, J., dissenting) (ellipsis and internal quotation marks omitted). This Court thus issues summary reversals only where the lower courts "have egregiously misapplied settled law." *Wearry* v. *Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam). "[A] summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law." *Maryland* v. *Dyson*, 527 U.S. 465, 467 n.* (1999) (per curiam).

In this case, the Ninth Circuit did not err, let alone egregiously so. It properly applied this Court's stay decision by its terms to reach the proper result. *See* Part II, *infra*. But even if the Court of Appeals had erred, its decision could not meet the high standard this Court has set for summary reversal. The Ninth Circuit cannot be said to have "egregiously misapplied settled law" given that the only question in this case is whether the District Court abused its discretion in applying a stay standard this Court issued less than two months ago.

Furthermore, the question presented in this case is intensely factbound. In the courts below, both parties introduced hundreds of pages of documents and affidavits describing the nature of refugee-resettlement arrangements. *See* C.A. E.R. 1-236, C.A. Doc. 9 (July 27, 2017); *see also* Br. of U.S. Comm. for Refugees & Immigrants as *Amicus Curiae* at 4-14, C.A. Doc. 51 (Aug. 9, 2017) (describing in detail the relationship between resettlement agencies and refugees). To understand the factual context fully, the Court of Appeals held an oral argument in which

judges questioned the Government at length about the resettlement process. *See* Oral Arg. Rec. at 12:10 to 19:15, C.A. Doc. 72 (Aug. 28, 2017). The court then issued a decision that relied heavily on the realities of that process, including the stage in the process at which a formal assurance is obtained, Add. 24-27, the type and nature of the bond each resettlement agency forms with each refugee, Add. 27-32, and the effect of its ruling on the refugee program as a whole, Add. 33-34. The Government would have the Court summarily overturn that fact-intensive judgment. But the lower courts, not this Court, are "best qualified to deal with the flinty, intractable realities of day-to-day implementation of" the Court's "constitutional commands." *Paradise*, 480 U.S. at 184 (internal quotation marks omitted).

The extraordinary relief the Government seeks is particularly inappropriate given that "time w[ill] soon bury the question." Robert L. Stern et al., *Supreme Court Practice* 230 (8th ed. 2002); *see, e.g.*, *United States* v. *Varca*, 896 F.2d 900, 906 n.9 (5th Cir. 1990), *cert. denied*, 498 U.S. 878 (1990) (declining review despite a 5-4 split because the statute at issue was no longer in force). As the Government acknowledges, the question under review "will become moot" after this Court hears the merits in less than a month. Appl. 19. The Court should not superintend the factbound application of its stay, on an emergency basis, for the last several weeks of the case's existence.

II. THE DECISION BELOW IS CORRECT.

Any form of relief in this case is doubly inappropriate given the weakness of the Government's position on the merits. The Government asks this Court to overturn the lower courts' carefully considered judgment that the relationship between a resettlement agency and a refugee it is sponsoring meets the stay standard articulated by this Court. Both of those courts, surveying the extensive factual record, determined that the relationship in question is "formal, documented, and formed in the ordinary course." And they determined that the exclusion of a refugee with a formal assurance inflicts a "concrete hardship" on the resettlement agency that has prepared her welcome.

The Government offers almost nothing to refute those determinations. Certainly it does not come close to the strong showing needed in light of the abuse of discretion standard that this Court "always applie[s]" in evaluating a district court's issuance of preliminary injunctive relief. *Ashcroft* v. *Am. Civil Liberties Union*, 542 U.S. 656, 664-665 (2004); *see also Keyes* v. *Sch. Dist. No. 1*, 396 U.S. 1215, 1216 (1969) (Brennan, J., in chambers) ("Where a preliminary injunction has issued to vindicate constitutional rights, the presumption in favor of the District Court's action applies with particular force.").

Instead, the Government relies on an erroneous understanding of the meaning of this Court's July 19 stay order, a distorted interpretation of the term "relationship," and a procedurally improper, substantively unfounded request for this Court to rewrite its June 26 stay decision. Ultimately, the Government's

arguments boil down to the assertion that it is entitled to the extraordinary relief of a stay because the lower courts applied the tailored, equitable standard that this Court announced, rather than the broad standard the Government thinks would have been preferable. Because a stay motion must follow and not rewrite this Court's decisions, relief should be denied.

1. The Government first attempts to argue that this Court already decided the merits of this question when it issued the prior stay. That is wrong on both the law and the facts of this case.

A stay order is, by definition, *not* a merits determination. This Court has flatly rejected the notion that a stay should "decide[] the merits, in an expedited manner," because such an order would "not so much preserve the availability of subsequent review as render it redundant." *Nken* v. *Holder*, 556 U.S. 418, 432 (2009). Moreover, it is clear that as a practical matter a stay does not dictate the outcome on the merits because this Court often grants a stay and then either denies certiorari outright or affirms the stayed decision on the merits. For example, in *McQuigg* v. *Bostic*, 135 S. Ct. 32 (2014), this Court granted a stay of the Fourth Circuit's decision striking down Virginia's ban on same-sex marriage. The Court ultimately denied certiorari, 135 S. Ct. 314 (2014), and then affirmed the invalidity of such bans in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). Similar examples abound. *See, e.g.*, *Wisconsin* v. *Moeck*, 545 U.S. 1111 (2005) (granting stay), 546 U.S. 998 (2005) (denying certiorari); *Arkansas Term Limits* v. *Donovan*, 519 U.S. 958 (1996) (granting stay), 519 U.S. 1149 (1997) (denying certiorari); *Bd. of Educ. of*

Kiryas Joel Vill. Sch. Dist. v. *Grumet*, 509 U.S. 938 (1993) (granting stay), 512 U.S. 687 (1994) (affirming judgment); *Robinson* v. *Dicenso*, 399 U.S. 918 (1970) (granting stay); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (affirming judgment in *Robinson*).

It would be particularly inappropriate to view this Court's July 19 stay as a decision on the merits. The Government itself told the Ninth Circuit that the July 19 order "did not resolve the merits of the government's appeal of the modified injunction." C.A. Opening Br. 30, C.A. Doc. 8 (July 27, 2017). For good reason.

Before the Ninth Circuit considered the appeal, the Government offered this Court *three* separate procedural mechanisms through which it could decide the merits in the Government's favor—a motion to clarify, a request for certiorari and summary reversal, and a request for mandamus relief. The Court rejected all three, instead granting the Government's alternative request to issue a stay "if and to the extent the Court [were to] determine[] that some or all of these issues should be addressed by the court of appeals *in the first instance*." S. Ct. Reply 14 (emphasis added); *see also* S. Ct. Mot. 39 ("if the Court concludes that the court of appeals should address the correctness of the district court's interpretation of this Court's stay ruling in the first instance, the Court should * * * grant a stay").

Thus, the Government expressly predicated its request for stay relief *not* on the merits, but rather on a need to avoid the "disruption and practical difficulties that would be created" if it were forced to implement the District Court's order, only to later have the order overturned by the Ninth Circuit. S. Ct. Mot. 39. And this Court may well have viewed such relief as appropriate with respect to the

resettlement agency question because of the difficulty of rapidly evaluating the extensive factual record on which the District Court relied. But having obtained a stay on the premise that such relief would maintain the status quo while the Ninth Circuit decided the merits, the Government should not now be permitted to chastise the Ninth Circuit for refusing to view the stay as a merits determination.

Moreover, accepting the Government's position would mean that the extensive proceedings in the Ninth Circuit—including full merits briefing and a forty minute oral argument—were nothing more than an empty exercise. Had this Court viewed the conclusion as preordained, it could have conserved judicial resources by issuing one of the three forms of merits relief that the Government requested. But the Court declined to do so.

Even if the Court's stay order suggested a preliminary view that the Government *might* prevail on the merits, subsequent developments have conclusively demonstrated the opposite. Most notably, the weeks after this Court issued the July 19 stay marked the first extended period of time in which refugees with formal assurances were barred by EO-2 from entering the country.[1] They therefore represented the first time that resettlement agencies were forced to confront fully the consequences that ensue when the refugees they have sponsored are suddenly excluded. Thus, this Court has concrete information as to the actual

[1] While the Government announced an intent to bar some refugees with formal assurances on June 30, it ultimately permitted all refugees with travel plans to continue to enter the country until July 12. Email from Lawrence E. Bartlett to Voluntary Agencies at 3, D. Ct. Doc. 304-4 (July 3, 2017). On July 13, the District Court issued its modified injunction, which remained in force until the Supreme Court's July 19 order.

harms inflicted on resettlement agencies by the exclusions that simply was not available when the Government first requested a stay. *See* Decl. of Lavinia Limon ¶¶ 3, 32-37, C.A. Doc. 10-2 (July 27, 2017) ("Limon Decl."). The profound harms those agencies have experienced—which were severe enough to prompt an intervention attempt at the Ninth Circuit by one of the major resettlement organizations—put to rest any doubts as to the concrete hardships experienced by resettlement agencies when the Government suddenly excludes refugees with whom they have a relationship. *Id.*

The passage of time has also permitted a fuller ventilation of the basic question: whether a refugee has a *bona fide* relationship with her resettlement agency. The urgency of the situation and the compressed time table of the proceedings did not give this Court an opportunity to evaluate fully the connection between a refugee and the entity that welcomes and resettles her in the United States. But, as the Ninth Circuit's thorough opinion demonstrates, once the nature of that relationship is properly understood, there can be no doubt that it qualifies under this Court's stay standard.

2. This Court's June 26 stay standard is straightforward: The injunction continues to apply where a U.S. individual or entity has a "bona fide relationship" with a refugee such that the individual or entity "can legitimately claim concrete hardship if that person is excluded." *IRAP*, 137 S. Ct. at 2089. In the case of an entity, that means the "connection" must be "formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2." *Id.* at 2088. And,

lest there be any confusion in the application of the standard, this Court provided three examples of foreign nationals that have a qualifying relationship with a foreign entity sufficient to cause concrete hardship if the individual is excluded: a student that has been admitted by a university, a worker that has an offer from an American employer, and a lecturer that has been invited to address an audience in the United States. *IRAP*, 137 S. Ct. at 2088.

As the Ninth Circuit held, the State Department website and the Government's own declarations establish that a resettlement agency has a "connection" with the refugees that it sponsors that is "formal, documented, and formed in the ordinary course." That relationship begins when a resettlement agency "undertakes a careful selection process that 'match[es] the particular needs of each incoming refugee with the specific resources available in a local community.'" Add. 31-32 (quoting U.S. Dep't of State, *The Reception and Placement Program*, https://www.state.gov/j/prm/ra/receptionplacement/). Once it has specifically chosen a refugee or refugee family through this process, the resettlement agency submits an "assurance." C.A. E.R. 151 (Decl. of Lawrence E. Bartlett ("Bartlett Decl.")). That is a "written commitment * * * to provide, or ensure the provision of," basic services to the "refugee[] named on the assurance form." *Id*. In other words, the resettlement agency establishes a "relationship" with a particular refugee or refugee family and then memorializes that relationship in a "formal, documented" commitment lodged with the Government, all in the "ordinary course" of its operations.

The Government's evidence also readily establishes the "concrete hardship" that the resettlement agency will experience if a refugee it has agreed to sponsor is excluded. Notably, the Government's declaration catalogues the "[p]re-[a]rrival [s]ervices" that an agency must begin to provide for the refugee as soon as it submits the formal assurance. C.A. E.R. 159, 172 (Bartlett Decl.). Those include "[a]ssum[ing] responsibility for sponsorship," "plan[ning] for the provision" of "health services," C.A. E.R. 159, and making arrangements for children who must be placed in foster care, C.A. E.R. 172. The agency also must take all steps necessary to ensure that, as soon as the refugee gets off the plane, she is "transported to furnished living quarters," receives "culturally appropriate, ready-to-eat food and seasonal clothing," and has her "basic needs" met for at least thirty days. C.A. E.R. 161-165. That is only the beginning of the countless tasks, large and small, that the entity must prepare to undertake as soon as it submits the formal assurance. *See* Br. of HIAS & IRAP as *Amici Curiae* at 6-7, D. Ct. Doc. 297-1 (June 30, 2017); Decl. of Mark Hetfield, D. Ct. Doc. 297-3 (June 30, 2017) ("Hetfield Decl.").

When a refugee is barred from the country, this extensive investment is wasted, and the agency experiences a variety of concrete hardships that are at least as severe as those experienced by a university suddenly confronted with an open enrollment slot, or a company unable to employ its chosen job candidate. Agencies pour private resources into their refugee services. *See, e.g.*, Decl. of Lawrence E. Bartlett in *Texas Health and Human Services Comm'n* v. *United States* at Page ID #

5858, 5861, 5864, D. Ct. Doc. 304-1 (July 5, 2017) (documenting the private resources resettlement agencies devote to refugees). If a particular refugee does not enter the country, the resources the agency expended preparing for her arrival are wasted, ultimately doing nothing to forward the agency's mission. *See Vill. of Arlington Heights* v. *Metro Hous. Dev. Corp.*, 429 U.S. 252, 262-263 (1977) (organization experiences concrete "economic injury" as a result of expenditures on planning and review).

Further, the agency loses financial support from the Government that it would otherwise receive. Each resettlement agency receives "partial" funding from the Government for the resettlement services it performs as a result of its relationship with a particular refugee, but a substantial portion of that funding is withheld unless the refugee "actually arrive[s] in the United States." C.A. E.R. 141 (Bartlett Decl.). The loss of these federal funds is itself a "concrete injury." *Clinton* v. *City of New York*, 524 U.S. 417, 430-431 (1998). Indeed, the financial harms threatened by EO-2 have already forced some agencies to downsize. *See* Br. for Interfaith Grp. of Religious & Interreligious Orgs. as *Amici Curiae* at 20-21, *Trump* v. *Hawaii*, No. 16-1540 (U.S. June 12, 2017) ("Interfaith Amicus Br."); *see* Limon Decl. ¶¶ 34-37 (one major resettlement agency laid off seventeen full-time employees by mid-June).

The harms inflicted on a resettlement agency are more than just pecuniary. Resettlement agencies are motivated by a moral—and often a religious—commitment to serve refugees. Six of the nine major resettlement agencies have an

explicitly religious mission. For example, the U.S. Conference of Catholic Bishops and its local affiliates receive the largest share of federal resettlement funding. *See* Peter Feuerherd, *Parishes play a vital role in refugee resettlement*, U.S. Catholic (Nov. 22, 2016), https://goo.gl/2sgfdc. That organization and the parishes that participate in preparing for and welcoming refugees do so because it is part of "the church's social justice vision." *Id.* Sponsoring refugees creates "a connection with the people who are the least of these," making "the gospel a real thing." *Id.* Other organizations similarly regard preparing for and ministering to refugees as part of their religious practice. *See, e.g.*, Interfaith Amicus Br. at 19-20; Decl. of Erol Kekic, D. Ct. Doc. 344-1 (July 13, 2017); Hetfield Decl. Preventing the arrival of these refugees interferes with this religious mission. It severs the relationship between the organizations and the particular refugees they are prepared to welcome.

The secular resettlement agencies, too, experience profound injuries—far beyond the purely economic—when the refugees for whom they prepare are excluded. One of those agencies, U.S. Committee for Refugees and Immigrants ("USCRI"), has a 106-year history of "protecting the rights and upholding the freedom" of uprooted refugees. Limon Decl. ¶ 4. USCRI invests significant human capital building partnerships with service providers, such as landlords, employers, faith-based groups, and volunteers, in direct reliance on the refugee caseloads that can be expected from formal assurances. *Id.* ¶¶ 13-14, 32. Those efforts are

severely compromised when the Government excludes a refugee with a formal assurance.

In short, the Government's own evidence establishes that resettlement agencies have qualifying, "*bona fide* relationships" with the refugees that they sponsor, and that these agencies experience "concrete hardship" when those refugees are excluded.

3. The Government barely disputes that a resettlement agency has a connection with a refugee it has agreed to resettle that is "formal, documented, and formed in the ordinary course." And it makes only a conclusory attempt to deny the "burden" imposed on a resettlement agency by the exclusion of a refugee the agency has agreed to resettle. Instead, the Government's primary argument is that there is *no* relationship between a resettlement agency and a refugee it agrees to sponsor because resettlement agencies "typically ha[ve] no contact" with the refugees they assure and because the formal assurance is a contract "between that agency and *the federal government*" rather than the agency and the refugee. Appl. 23-24.

Neither of those constraints finds any foundation in the plain meaning of the term "relationship." One would not, for example, deny the existence of a "relationship" between a couple and the child they plan to adopt from overseas, even though the couple has not had "direct contact" with the child, and even though the only formal agreement is between the couple and the adoption agency. Moreover, the Government's artificial constraints on what may be considered a "relationship" run headlong into the language of the *IRAP* opinion. Every one of the three

relationships that this Court cited as an exemplar may exist without direct contact or a contract between the entity and the foreign national. *See IRAP*, 137 S. Ct. at 2088. A teenager's mother may enroll her in school in the United States; an employee may obtain her placement in an American company through a contract with a personnel service in her home country; and a dignitary's lecture may be arranged through a speaker service.

In an attempt to resuscitate its argument, the Government suggests (at 27) that the term "relationship" is necessarily limited by conceptions of "agency" pulled from contract law. But this Court's June 26 stay opinion gives no hint of such a limitation. The same is true of the Government's suggestion that a qualifying relationship must be "separate and apart from the refugee-admission process itself." Appl. 24. One may search in vain for such language in the Court's June 26 opinion. Indeed, the only passage that even obliquely addresses the issue says the opposite: This Court explained that the relationship between an immigration nonprofit and its client would not qualify if it was created "simply to avoid § 2(c)." That suggests that it is the improper motivation for forming the relationship—and not the nature of the connection itself—that is disqualifying. *IRAP*, 137 S. Ct. at 2088.

Resettlement agencies have been forming relationships with refugees, and embodying those relationships in formal assurances, for over *four decades*. *See* Limon Decl. ¶¶ 19, 25-28. There is no question that these relationships are "formed in the ordinary course, rather than for the purpose of evading EO-2." *IRAP*, 137 S. Ct. at 2088. Resettlement agencies are therefore nothing like nonprofit groups that

seek to evade the requirements of EO-2 by "contact[ing] foreign nationals from the designated countries, add[ing] them to client lists, and then secur[ing] their entry by claiming injury from their exclusion." *Id.* Nor could they be: Resettlement agencies issue formal assurances as part of a multi-step process they could not circumvent even if they wanted to.

To downplay the meaningful relationship between refugees and resettlement agencies, the Government also asserts that "*every* refugee who is permitted to travel to this country" receives a formal assurance from a resettlement agency. Appl. 10. But every student who is allowed to enter has received an offer of admission from a university; every worker who is allowed to enter has received a formal offer of employment; every lecturer who is allowed to enter has received an invitation to address an American audience. *Cf. IRAP*, 137 S. Ct. at 2088. Formal assurances are no different. The mere fact that every refugee who is permitted to travel to the United States receives a formal assurance does not diminish the value of that assurance in establishing a bona fide relationship with the resettlement agency.

4. Unable to explain its position by the terms of this Court's order, the Government throws up its hands and asserts that refugees with formal assurances must be excluded because otherwise the bulk of Section 6(a) and 6(b) will not take full effect as this Court allegedly intended. That is wrong, root and branch.

First and foremost, the Government fundamentally misinterprets this Court's holding in *IRAP*. The Government suggests that, in crafting a stay based on the equities, this Court implicitly determined that the Government should be able

to continue to apply EO-2 to some large proportion of the refugees it wished to exclude. That is false. In fact, this Court's opinion held that EO-2's refugee ban must give way whenever excluding a refugee would inflict "concrete hardship" on an American entity. *IRAP*, 137 S. Ct. at 2089. Because excluding refugees with formal assurances for the duration of the 120-day ban would inflict concrete hardships on resettlement agencies, vacating the Ninth Circuit's decision would gut this Court's carefully crafted stay. Affirming it certainly would not.[2]

In any event, as the Ninth Circuit explained, "the Government's assertion that the modified injunction renders the Court's stay order inoperative is false." Add. 33. The Government does not deny that approximately 175,000 refugees currently lack formal assurances. Unless those refugees have another bona fide relationship with an American, the stay will prevent them from obtaining one. That is because the Government adjudicates applications for refugee status *before* a formal assurance is issued, and EO-2 suspends not only refugee admissions, but also "decisions on refugee applications." The current guidance implementing this part of the ban indicates that the Government has suspended the adjudication of applications for those without a bona fide relationship. *See* C.A. E.R. 195 (Dep't of

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[2] The Government (at 30 n.8) claims that its view does not nullify the injunction because "hundreds" of refugees would come in under their interpretation as "family members." Even apart from the problem that it cites nothing more than its statements at oral argument as evidence for this proposition, such an interpretation gives no weight to this Court's statement that a refugee is protected if she has a qualifying relationship with "an individual *or entity*." The Government's interpretation reads half of this protection out of the Court's opinion, an action that comes far closer to "eviscerating" this Court's standard than anything respondents have argued.

Homeland Security FAQs at Q.28). Therefore, the Ninth Circuit's decision does not affect the Government's authority to apply its refugee ban to more than 85% of refugee applicants already in the pipeline.

The Government complains that that is not good enough, because approximately 24,000 refugees already have a formal assurance, and as a practical matter the Government is unlikely to admit many more than that before the end of this fiscal year. That is both incorrect and irrelevant. The Government's professed inability to admit more refugees has no basis in law: The Government is nowhere near the original 2017 cap of 110,000 refugee admissions. *See* Presidential Determination on Refugee Admissions for Fiscal Year 2017, 81 Fed. Reg. 70315 (Oct. 11, 2016) (110,000-refugee cap for fiscal year 2017); Camila Domonoske, *U.S. Refugee Admissions Pass Trump Administration Cap of 50,000*, NPR (July 12, 2017), https://goo.gl/DWm8QT (reporting that the Government surpassed 50,000 refugee admissions on July 12). And last year, during August, September, and October, the Government admitted over *35,000* refugees.[3] The Government has no basis for its assertion that it would ordinarily admit only 24,000 refugees during a similar time this year beyond the fact that—despite the injunctions—the Government has substantially slowed the process of refugee admissions.[4]

This Court has no obligation to tailor the injunction to ensure that the Government's deliberate pace grinds to a halt. That is particularly so because this

[3] *See* U.S. Dep't of State, Refugee Processing Ctr., *Summary of Refugee Admissions as of August 31, 2017*, https://goo.gl/EgQjvM.
[4] *See, e.g.*, Lomi Kriel, *Flow of refugees to U.S. declines*, Houston Chronicle (May 26, 2017), https://goo.gl/Je1eEH.

Court expressly declined to stay the injunction of EO-2's reduced refugee cap as to aliens who have a bona fide relationship with a U.S. entity. *IRAP*, 137 S. Ct. at 2089. Moreover, the Government has now had almost 8 weeks in which it has been able to implement its refugee ban to the extent it wished, despite the District Court's modification order. Thus, far from being "defunct," Appl. 29, the ban has been substantially in force for nearly half of its 120-day lifespan.

5. In the end, then, the Government is not contending that the lower courts abused their discretion in applying this Court's June 26 stay standard. They clearly did not. It is arguing that the Court should announce *new* limits and restrictions on the injunction. It should, in the Government's view, announce that a relationship qualifies only where there is a contract or an agency relationship between a refugee and an entity, and only where that contract is formed "independent" of the refugee admission process. Even then, refugees should be permitted to enter only if there are not too many other refugees that might qualify under the Government's newly minted standard.

This is not the stay this Court issued, and the Government's attempts to expand the June 26 order are procedurally improper and substantively unsupported. Procedurally, the Government is hardly entitled to the extraordinary relief of a stay based on its view that this Court's prior stay opinion should have gone further than it did. Substantively, the Government has not offered a compelling foundation for this Court to expand the equitable relief it awarded. After all, that relief was based on a balancing of the harms to the plaintiffs and the

public against the national security harms alleged by the Government. But the Government's stay motion makes no attempt to explain why its national security interests would be best served by introducing a new stay, gerrymandered to exclude refugees with formal assurances. Nor could it.

Refugees with formal assurances are the category of foreign nationals *least* likely to implicate the national security rationales the Government has pointed to in the past. By the Government's own admission, these refugees have already been approved by the Department of Homeland Security. It is therefore exceedingly unlikely that they represent a security threat, *see* Br. for Former Nat'l Security Officials as *Amici Curiae* at 5-9, *Trump* v. *Hawaii*, No. 16-1540 (U.S. July 18, 2017), and *impossible* that their already-completed vetting will divert resources from the Government's overhaul of its screening process.

III. THE EQUITIES FAVOR MAINTAINING THE INJUNCTION.

Relief is also unwarranted because the balance of the equities and the public interest favor respondents, not the Government.

The Government asserts (at 31-32) that this Court's June 26 stay already balanced the equities. The Government is right. But the Government turns a blind eye to what this Court actually concluded. This Court reiterated time and again that the equities favor a stay only with respect to "foreign nationals abroad *who have no connection to the United States at all*." *IRAP*, 137 S. Ct. at 2088 (emphasis added); *see id.* (hardships are less severe for "a foreign national who lacks *any connection to this country*" (emphasis added)); *id.* (Government's interests are "at

their peak when there is *no tie between the foreign national and the United States*" (emphasis added)); *id.* (Government's interests are harmed if Government cannot enforce EO-2 "against foreign nationals *unconnected to the United States*" (emphasis added)); *id.* at 2089 (balance tips in Government's favor with respect to "refugees *who lack any such connection to the United States*" (emphasis added)).

The upshot is this: As long as a foreign national has a connection with the United States, the balance of the equities does not favor a stay. As noted above, refugees with a formal assurance from a resettlement agency have a connection with a U.S. entity. *See supra* pp. 17-24. This Court's June 26 decision therefore compels the conclusion that a stay is unwarranted.

In any event, the equities also plainly favor respondents in the first instance. The only harms the Government has identified are either abstract or non-existent. As noted, the Government's motion barely mentions national security, merely waving it like a "talisman" and then quickly moving on. *Cf. Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017). Instead, the Government falls back on the assertion that the modified injunction "would require the government to change course in substantial respects." Appl. 32. But that is true of every injunction. The Government's position would effectively allow it to continue acting unlawfully just because it is currently doing so. Nothing in this Court's rules or cases supports such an extraordinary assertion. And while the Government claims that the modified injunction would create "uncertainty and confusion," *id.*, it is hard to see how. The modified injunction is crystal clear: Refugees who currently have formal assurances

are permitted to enter; refugees who do not have formal assurances (or some other *bona fide* relationship) are not permitted to enter.

On the other side of the ledger, the harms from the Government's exclusion of refugees with formal assurances are imminent and real. The Government entirely ignores the serious harms to respondents. Hawaii is harmed when refugees with formal assurances are excluded; the State has a policy of assisting in the resettlement of refugees and cannot implement that policy if refugees with formal assurances are unable to enter the country. *See, e.g.*, Haw. Rev. Stat. § 371K-4. Dr. Elshikh is also harmed by the exclusion of refugees with formal assurances because the mosque of which he is imam serves refugees and their families as members. *See* Br. of Dr. Ismail Elshikh as *Amicus Curiae* at 11, *Int'l Refugee Assistance Project* v. *Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017).

Moreover, as this Court has made clear, the harms suffered by respondents are not the only harms relevant to the analysis. In its June 26 stay, this Court recognized as much. The Court made clear that the possible mootness of the claims raised by one of the plaintiffs "does not affect" the Court's "analysis of the stay issues." *IRAP*, 137 S. Ct. at 2086 n.*. That is because the issuance of a stay depends not just on the harms to respondents, but also on the "interests of the public at large." *Id.* at 2087 (internal quotation marks omitted); *see Indiana State Police Pension Trust* v. *Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam); *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers); *Barnes*, 501 U.S. at 1305. Here, the harms to the public interest are significant. As

noted above, resettlement agencies will suffer substantial hardship. *See supra* pp. 19-22. And, as the Ninth Circuit explained, "[o]ther entities, including church congregations, volunteers, and landlords, who must wait to learn whether refugees with an assurance will be admitted, also will experience harm." Add. 27.

Moreover, the stakes could not be higher for those outside the United States, who these American entities are eager to welcome:

> 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 reinitiated. Even short delays may prolong a refugee's admittance.

Add. 35.

In other words, the Government's procedurally improper, substantively unwarranted request for relief is also profoundly inequitable.

CONCLUSION

For the foregoing reasons, the Government's Application should be denied.

Respectfully submitted,

/s/ Neal Kumar Katyal

DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
DONNA H. KALAMA
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL,
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

Counsel for the State of Hawaii

NEAL KUMAR KATYAL
Counsel of Record
COLLEEN ROH SINZDAK
MITCHELL P. REICH
ELIZABETH HAGERTY
SUNDEEP IYER*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
SARA SOLOW
ALEXANDER B. BOWERMAN
HOGAN LOVELLS US LLP

Counsel for Respondents

*Admitted only in Maryland; supervised by firm members

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Neal Kumar Katyal, a member of the Supreme Court Bar, hereby certify that one copy of the foregoing Response to Application for Stay was served via electronic mail and Federal Express on September 12, 2017 on:

JEFFREY B. WALL
Acting Solicitor General
U.S. DEPARTMENT OF JUSTICE
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217
Counsel for Applicants

/s/ Neal Kumar Katyal
Neal Kumar Katyal