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 MOTION FOR CLARIFICATION OF STAY RULING AND APPLICATION FOR TEMPORARY ADMINISTRATIVE STAY OF MODIFIED INJUNCTION


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## INTRODUCTION

The Government asks this Court for emergency relief that is procedurally improper and substantively unnecessary. It seeks to leapfrog its own pending motion and appeal in the Ninth Circuit and obtain an expansion of the stay this Court issued just three weeks ago. And it contends this extraordinary relief is appropriate because the District Court's recent modification order has "eviscerated" this Court's stay.

That is nonsense. The District Court faithfully applied this Court's opinion, holding that "close relatives" like grandparents and nieces are permitted to enter, and recognizing that the charities, non-profits, and churches that have made a formal, contractual commitment to shelter and clothe refugees would suffer "concrete hardship" if those refugees are excluded. By the Government's own account, the District Court's order does not disturb the Government's authority to enforce Executive Order 13,780 ("EO-2") against more than 85% of refugees, or to exclude countless extended family members—second cousins, great aunts, and so forth—and other individuals who indisputably lack close relationships with American individuals and entities.

The Government's complaint boils down to the belief that any interpretation that meaningfully diminishes the practical consequence of its bans must be wrong. But the lower courts and this Court explicitly sought to minimize these practical consequences to the extent they inflict concrete harms on American individuals and entities. That is appropriate with respect to an Executive Order that has been

adjudged unlawful by both Courts of Appeals to consider it, and that would otherwise effect a dramatic departure from the immigration status quo that has existed for decades.

The Government attempts to sweep this aside, carefully avoiding any mention of the wider context of its motion. But that context matters. Plaintiffs have alleged that the enjoined order violates the fundamental constitutional guarantee of freedom of religion, as well as basic tenets of the immigration laws. They have argued that EO-2 must be enjoined in order to prevent concrete harms, such as the perpetuation of the separation of Dr. Elshikh's children from their grandmother and the disruption to the State of Hawaii's refugee resettlement programs, educational institutions, and tourism industry. They have further asserted that the injunction is necessary to protect the citizens of Hawaii and the American public in general from the profound infringement on religious freedom that occurs when the Government inflicts these concrete hardships as part of a policy that establishes a disfavored religion.

The Court has not reached the merits of those allegations. It will do so in October. In the interim, it is well settled that the Government is entitled to a stay only to the extent that the equities favor it. And this Court has already settled that the equities in this case tip in the Government's favor only when an excluded foreign national lacks a bona fide relationship with an individual or entity in the United States.

In the decision below, the District Court carefully applied that instruction, accepting some of Plaintiffs' claims and rejecting others. In doing so, it protected American individuals and entities from the real harms that occur when a close relative is excluded from this country, or when a refugee family that a community has prepared to welcome is not permitted to enter after all.

There is no reason for this Court to take the extraordinary step of granting a stay, certiorari before judgment, or mandamus relief. The District Court's opinion is correct. And, in any event, the Ninth Circuit—where the Government has filed an almost identical set of requests—is fully capable of fulfilling its normal role as the first line of appellate review. The Government's motion should be denied.

## BACKGROUND

1. On June 26, 2017, this Court issued an order that stayed in part the 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." *Trump* v. *Int'l Refugee Assistance Project* ("*IRAP*"), 137 S. Ct. 2080, 2087 (2017). 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," and 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 aliens 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 explained that the same "equitable balance" applies to EO-2's refugee provisions, and thus prohibits the Government from invoking Sections 6(a) and 6(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. Shortly after this Court issued its stay order, Plaintiffs contacted the Government to try to reach agreement on the existing scope of the injunction. On the morning of June 27, Plaintiffs' counsel e-mailed the Government's attorneys and invited them to discuss the injunction's scope. The Government declined the

request, stating simply that it would make guidance publicly available before the travel and refugee bans went into effect. The following day, Plaintiffs in this case and in *Trump* v. *Int'l Refugee Assistance Project*, No. 16-1436, jointly presented the Government with a proposed list of foreign nationals protected by the Court's injunction, including refugees with a formal assurance from a resettlement agency, and grandchildren, nieces, and other close relatives of U.S. persons. Again the Government offered no response. On the morning and early afternoon of June 29—the day EO-2 was to go into effect—Plaintiffs asked the Government to confirm then-circulating reports that the Government intended to enforce EO-2 against refugees with formal assurances and grandparents and other close family members. The Government once again did not respond.

Finally, approximately three hours before the Government intended to begin enforcing EO-2, the Government's counsel sent Plaintiffs a copy of its publicly available guidance. This guidance made clear that the Government intended to carry out its unlawful plans as described in earlier reports. (It also provided that the Government would enforce the injunction against fiancés of U.S. persons—another violation—but the Government backtracked from that decision hours later.) In addition, the Government sent Plaintiffs a transcript of a teleconference it had earlier held with reporters, indicating that it had described its plans in detail to the press at the same time that it was refusing Plaintiffs' repeated requests for information about an injunction entered in their name.

3. At 7:00 PM on June 29, Plaintiffs filed a motion in the District Court to clarify the scope of its injunction as narrowed by this Court. Days later, the Government responded, addressing the merits of Plaintiffs' motion. *See* Gov't Br. in Opp. to Mot. to Clarify, D. Ct. Dkt. 301. Among other things, the Government justified its understanding of "close family" on the ground that the Immigration and Nationality Act (INA) "does not grant *any* immigration benefit for" grandparents, aunts, and the like, *id.* at 10 (emphasis added)—a representation it has since acknowledged is false, *see* Mot. 30 (now saying that "the INA does not provide *comparable* immigration benefits" for these relatives). The Government did not suggest that Plaintiffs' motion was procedurally improper, or that their request should have been filed directly in this Court.

Nonetheless, the District Court *sua sponte* held that it lacked authority to clarify the scope of this Court's order. Order Denying Plaintiffs' Mot. to Clarify Scope of Preliminary Injunction, D. Ct. Dkt. 322. Plaintiffs promptly appealed to the Ninth Circuit, seeking an emergency stay of the District Court's order. The Ninth Circuit dismissed the appeal under 28 U.S.C. § 1292(a) on the ground that it lacked jurisdiction to consider the denial of a motion to clarify. Order, *Hawaii* v. *Trump*, No. 17-16366 (9th Cir. July 7, 2017), ECF No. 3. The Court of Appeals explained, however, that even if the District Court were correct that it could not consider a motion to clarify its injunction in light of this Court's partial stay, it plainly did have authority to "interpret and enforce the Supreme Court's order" in

the context of a motion "to grant injunctive relief or to modify the injunction." *Id.* at 3.

Plaintiffs therefore returned to the District Court and filed a motion to enforce or, in the alternative, to modify the District Court's injunction. In their motion, Plaintiffs raised a number of claims: (1) that the Government's definition of "close familial relationship" was unlawful; (2) that refugees with a formal assurance from a refugee resettlement agency have a "bona fide relationship" with a U.S. entity; (3) that clients of legal services organizations necessarily have a "bona fide relationship" as well; and (4) that individuals in three specific refugee programs—the Direct Access Program for U.S.-Affiliated Iraqis, the Central American Minors Program, and the Lautenberg Program—are all categorically protected.

4. In a careful opinion, the District Court granted relief on some of Plaintiffs' claims and rejected others. The court concluded that the Government's definition of close family "finds no support in the careful language of the Supreme Court's opinion or even the immigration statutes on which the Government relies." Add. 12. It explained that the Government had "cherry-pick[ed]" favored provisions of the immigration laws, while ignoring others. *Id.* at 12-13. Moreover, the Government's interpretation was irreconcilable with this Court's holding that Dr. Elshikh's mother-in-law was "clearly" close family, and represented "the antithesis of common sense." *Id.* at 12-15. The District Court therefore modified its injunction to state that such relatives may not be excluded pursuant to EO-2. *Id.* at 15.

The court also concluded that a formal assurance from a resettlement agency necessarily establishes a "bona fide relationship" between a refugee and a U.S. entity. *Id.* at 17. The court explained that this relationship "meets each of the Supreme Court's touchstones: 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 17. The court also determined that refugees in the Lautenberg Program—which is limited to the "close family" of U.S. persons, including grandparents—are categorically protected by the injunction. *Id.* at 22-23. The court modified its injunction to reflect both of these conclusions, as well. *Id.* at 17, 23.

At the same time, the District Court agreed with the Government on several important issues. It held that a "categorical exemption" from the bans for foreign nationals with a client relationship with a legal services agency is inconsistent with this Court's opinion. *Id.* at 19. It also determined that neither the Direct Access Program for U.S.-Affiliated Iraqis nor the Central American Minors Program categorically requires a "bona fide relationship" with a U.S. person or entity. *Id.* at 20-22. And it rejected a modification that Plaintiffs had initially proposed to clarify the procedures for implementing EO-2. *Id.* at 24.

5. The day after the District Court ruled, the Government filed a notice of appeal in the Ninth Circuit. It then filed the present motion in this Court, asking it to skip over the Ninth Circuit, stay the District Court's order, and issue various

forms of relief itself. Hours later, the Government filed yet another stay request in the Ninth Circuit, asking it to halt implementation of the District Court's modified injunction pending this Court's resolution of the various claims the Government has raised.

## ARGUMENT

### I. THE GOVERNMENT'S MYRIAD REQUESTS FOR RELIEF ARE PROCEDURALLY IMPROPER.

The Government requests three forms of relief from this Court: First, it asks the Court to "clarify" its opinion in *IRAP*; second, it asks the Court to grant certiorari before judgment and summarily vacate the District Court's modified injunction; and third, it asks for mandamus. Putting aside the weakness of the Government's contentions on the merits, each of these requests is procedurally improper and should be denied for that reason alone.

1. The Government's primary request is that the Court should "clarify the scope of [its] stay." Mot. 15. That request is truly extraordinary, and has no basis in this Court's settled procedures and practices. There is no Rule of this Court authorizing a motion to clarify. The Government (at 15-16) rests its request entirely on a single example: *Swenson* v. *Stidham*, 410 U.S. 904 (1973). To call that case a thin reed would be generous. *Swenson* was a two-sentence order modifying an opinion to correct a clerical error. *Id*. at 904. That isolated example is far afield from this case, where the Government asks the Court to elucidate and apply the substantive standard announced in a prior opinion. In general, when this Court has

been presented with requests for clarification—and particularly *substantive clarification*—they have been routinely and summarily denied.[1]

It is not hard to see why the Court (and the Solicitor General, in the past) has followed this practice: This is "a court of review, not first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n. 7 (2005). It frequently happens that the Court "announce[s]" a legal "standard," and then "remand[s]" the case to the lower courts to interpret and apply that standard. *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014); *see McLane Co., Inc.* v. *EEOC*, 137 S. Ct. 1159, 1167-68 (2017). That is because it is the lower courts that "should define, in the first

[1] *See, e.g.*, *Stewart* v. *LaGrand*, 119 S. Ct. 1108 (1999); *Kleinschmidt* v. *U.S. Fid. & Guar. Ins. Co.*, 509 U.S. 946 (1993); *Coones* v. *FDIC*, 506 U.S. 951 (1992); *Michael H.* v. *Gerald D.*, 504 U.S. 905 (1992); *Marrese* v. *Am. Acad. of Orthopaedic Surgeons*, 471 U.S. 1062 (1985); *Arkansas Louisiana Gas Co.* v. *Hall*, 454 U.S. 809 (1981); *Geo Control & New Hampshire Ins. Co.* v. *Rasmussen*, 441 U.S. 930 (1979); *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor* v. *Rasmussen*, 441 U.S. 930 (1979); *Brown* v. *Thomson*, 435 U.S. 993 (1978); *Hazelwood Chronic & Convalescent Hosp., Inc.* v. *Califano*, 434 U.S. 811 (1977); *Doe* v. *McMillan*, 419 U.S. 1043 (1974); *Funicello* v. *New Jersey*, 404 U.S. 876 (1971); *Mathis* v. *New Jersey*, 404 U.S. 876 (1971); *Nez Perce Tribe of Indians* v. *United States*, 386 U.S. 1015 (1967); *State of Texas* v. *State of New Jersey*, 381 U.S. 931 (1965); *Willner* v. *Comm. on Character & Fitness*, 375 U.S. 950 (1963); *Fitzgerald* v. *U.S. Lines Co.*, 376 U.S. 901 (1964); *Harvey* v. *Cunningham*, 371 U.S. 803 (1962); *Chewning* v. *Cunningham*, 371 U.S. 803 (1962); *Van Hook* v. *United States*, 366 U.S. 915 (1961); *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U.S. 890 (1961); *Dyer* v. *Sec. & Exch. Comm'n*, 361 U.S. 803 (1959); *Erie R.R. Co.* v. *Baltimore & Ohio R.R. Co.*, 356 U.S. 970 (1958); *N.Y. Cent. R.R. Co.* v. *Baltimore & Ohio R.R. Co.*, 356 U.S. 970 (1958); *McBride* v. *Toledo Terminal R.R. Co.*, 355 U.S. 910 (1958); *Boston & Providence R.R. Corp. Stockholders* v. *N.Y., New Haven & Hartford R.R. Co.*, 350 U.S. 985 (1956); *F.W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 350 U.S. 810 (1955); *State of Rhode Island* v. *State of Louisiana*, 347 U.S. 950 (1954); *State of Alabama* v. *State of Texas*, 347 U.S. 950 (1954); *Klapprott* v. *United States*, 336 U.S. 949 (1949); *Marr* v. *A.B. Dick Co.*, 330 U.S. 810 (1947); *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 323 U.S. 672 (1944).

instance, the contours" of a standard and the lower courts that should "decide how that standard applies" to the facts of the particular case. *Bank of America Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1306 (2017). Entertaining freewheeling motions to "clarify" (or their procedural equivalents) would upset this settled principle and open the floodgates to litigants wishing for this Court to resolve ambiguities in its opinions prior to or during remand proceedings. It would also involve this Court in evidentiary determinations and fact finding to which it is ill-suited. *See Brown* v. *Plata*, 563 U.S. 493, 517 (2011) ("It is not this Court's place to duplicate the role of the trial court." (internal quotation marks omitted)). For example, in this case, both parties submitted affidavits and other evidence supporting their interpretations of the scope of the injunction. It is the lower courts and not this Court that are best equipped to evaluate these submissions in the first instance.[2]

The Government attempts (at 15) to excuse its procedurally improper request on the basis that "the dispute concerns the meaning and operative effect of this Court's own stay order." But this Court has previously rejected analogous relief in precisely the same context. In *Pennhurst State School & Hospital* v. *Halderman*, 448 U.S. 905 (1980), this Court partially stayed a district court injunction. *Id*. at 905-906. The district court then held a hearing to determine the application of the injunction in light of this Court's partial stay. Those defendants, like the

[2] It is notable that, when Plaintiffs filed their initial motion to clarify in the District Court, the Government never once suggested that it was procedurally improper, or that the motion should have been directed to this Court in the first instance. *See* D. Ct. Dkt. 301.

Government here, sought to bypass the traditional lower court process, filing a petition for mandamus asking this Court to correct the district court's interpretation of the stay while the merits appeal was pending. The Court, in a one sentence order, "declined to disturb [the district court's] interpretation and application of its stay order." *Halderman* v. *Pennhurst State Sch. & Hosp.*, 555 F. Supp. 1144, 1147 (E.D. Pa. 1983); *see In re Pennhurst Parents-Staff Ass'n*, 449 U.S. 1009 (1980); *Halderman* v. *Pennhurst State Sch. & Hosp.*, 673 F.2d 628, 631 (3d Cir. 1982). There is no reason a different result should obtain here.

2. The Government also—"[o]ut of an abundance of caution"—asks this Court to construe its motion as a petition for a writ of certiorari before judgment, to grant certiorari, and to vacate the District Court's modified injunction. Mot. 17-18. The Court should deny that request for three reasons.

a. First, the present dispute does not warrant certiorari at all, let alone certiorari before judgment. This Court has already settled the relevant legal standard governing the petition—that the travel and refugee bans may be applied only to "foreign nationals who lack any bona fide relationship with a person or entity in the United States." 137 S. Ct. at 2087, 2089. The Government suggests (at 37) that the Court has "recogniz[ed] the important governmental interests at stake" in this dispute by granting certiorari in the underlying *merits* appeal, but there is an obvious difference between the resolution of an executive order's legality and the factbound administration of an injunction that this Court partially stayed just three weeks ago.

At bottom, the Government's present contention is simply that the District Court "misappli[ed] *** a properly stated rule of law" to two discrete classes of foreign nationals—refugees with formal assurances and some close relatives. S. Ct. R. 10. That is a classic situation in which certiorari is unwarranted. *Id*. And certiorari is particularly inappropriate here in light of the broad latitude district courts are afforded to oversee and administer injunctions. After all, a district court is "best qualified to deal with the flinty, intractable realities of day-to-day implementation of constitutional commands." *United States* v. *Paradise*, 480 U.S. 149, 184 (1987) (internal quotation marks omitted); *see also id*. (explaining that a district court's "broad equitable powers mandate substantial respect" for its remedial "judgment").

b. Second, certiorari before judgment is "an extremely rare occurrence," *Coleman* v. *PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers), and it is unwarranted here. The Ninth Circuit is perfectly capable of "recogniz[ing] the vital importance of the time element in this litigation" and acting quickly on any stay request and appeal. *Aaron* v. *Cooper*, 357 U.S. 566, 567 (1958) (denying certiorari before judgment). Moreover, the Government's insistence that it is necessary to bypass the Court of Appeals now is at odds with its own decision to eschew any immediate resort to this Court to challenge the District Court's injunction when it was much broader.[3]

[3] It is also at odds with the traditional position of the Solicitor General's Office. For example, the Office has opined that certiorari before judgment is inappropriate

c. Finally, the Government does not actually request plenary review; it asks only for vacatur on a summary basis. That even more exceptional relief is entirely unwarranted. Summary reversal and vacatur are generally reserved for cases where lower courts are not merely wrong, but "have egregiously misapplied settled law." *Wearry* v. *Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam); *see generally* Stephen M. Shapiro et al., Supreme Court Practice 280 (10th ed. 2013). As explained below, *see infra* pp. 16-35, the District Court's interpretation of this Court's stay is correct, and there is certainly no error that is "so apparent as to warrant the bitter medicine of summary reversal." *Spears* v. *United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting). Summary reversal is especially inappropriate in a certiorari before judgment posture; if the error is actually obvious enough to warrant summary reversal, it can be quickly corrected by the Court of Appeals without necessitating this Court's involvement.

3. Lastly, the Government asks for a writ of mandamus. That relief is also unwarranted.

a. First, a party seeking mandamus must "have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Cheney* v. *U.S. Dist. Court for*

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when (1) "[t]his Court would * * * benefit from review by the court of appeals, which could provide helpful guidance" on the issues presented; (2) "consideration of the appeal by the" circuit court could "entirely obviate the need for this Court's review at this interlocutory stage"; and (3) there is no "previous appellate consideration of the questions presented." U.S. Brief in Opp. to Pet. for Certiorari at 10-11 & n.4, *Hamdan* v. *Rumsfeld*, No. 04-702 (U.S. 2004). All three of those considerations apply here.

*D.C.*, 542 U.S. 367, 380-381 (2004) (internal quotation marks and citation omitted); *see In re Tiffany*, 252 U.S. 32, 37 (1920) ("It is well settled that where a party has the right to a writ of error or appeal, resort may not be had to the extraordinary writ of mandamus or prohibition."). Here, the Government is transparently seeking to use the writ "as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380-381. Indeed, there is an appeal currently pending in the Ninth Circuit presenting the precise question raised in the mandamus petition. The only reason the Government gives for why relief in the Ninth Circuit is inadequate is that "no lower court can conclusively determine the correct scope of a decision of this Court." Mot. 18. But that is true in every case; if that fact were enough to make relief in a lower court "inadequate" it would upend the settled rule that mandamus "is not to be used as a substitute for appeal, even though hardship may result from delay." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964) (citation omitted); *see also In re Pennhurst Parents-Staff Ass'n*, 449 U.S. at 1009 (denying petition for mandamus relief to clarify a partial stay by the Supreme Court).

b. Second, for mandamus to issue, the decision below must be more than just wrong. The "writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.'" *Schlagenhauf*, 379 U.S. at 112 (quoting *Parr* v. *United States*, 351 U.S. 513, 520 (1956)). Rather, mandamus is justified "[o]nly in exceptional circumstances, amounting to a judicial usurpation of power," *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980), where the "right to issuance of the writ is 'clear

and indisputable,'" *Cheney*, 542 U.S. at 381 (quoting *Kerr* v. *U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)). It is well settled that a district court has the right—and sometimes the *duty*—to modify its own injunction. *System Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961). The District Court did not engage in a "judicial usurpation of power" by exercising that well-established authority to ensure that the Government complied with the terms of this Court's stay.[4]

## II. THE GOVERNMENT'S GUIDANCE FLOUTS THIS COURT'S ORDER.

The District Court's decision was also plainly correct. This Court's order was clear: The Government may not apply Section 2(c) or Section 6(a) and (b) to exclude a foreign national "who ha[s] a credible claim of a bona fide relationship with a person or entity in the United States." *IRAP*, 137 S. Ct. at 2088. The Government may, however, apply EO-2 to those "who lack[] any connection to this country." *Id.*

This Court's rationale for its order was equally clear: In tailoring its stay, the Court "balance[d] the equities," giving proper consideration to "the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 2087 (internal quotation mark omitted). The Court observed that "prevent[ing] the Government from" enforcing EO-2 "against foreign nationals unconnected to the United States would appreciably injure [the Government's] interests, without alleviating obvious hardship to anyone else." *Id.* at 2088. On the other hand, when

[4] Again, the position of the Office of the Solicitor General here is inconsistent with the prior views of the Office. The District Court's order is not "obviously incorrect," which the Government itself has previously viewed as a prerequisite to mandamus review. Brief for the United States as *Amicus Curiae* at 8, *Arab Bank* v. *Linde*, No. 12-1485 (U.S. May 23, 2014).

an American party has a "bona fide relationship with a particular person seeking to enter the country," that American entity or individual can "legitimately claim concrete hardship if that person is excluded." *Id.* at 2089. Thus, the "balance tips in favor of the Government's" asserted interest in national security only when the foreign national "lack[s] any such connection to the United States." *Id.*

This Court also spoke clearly in specifying the types of connections that necessarily exempt a foreign national from the bans. A relationship between an American entity and a foreign national "must be formal, documented, and formed in the ordinary course." *Id.* at 2088. Such a connection will be similar to the one between an admitted student and an American university, a worker and her would-be American employer, or a lecturer and the American audience she is invited to address. *See id.* As for American individuals, their connection with a foreign national qualifies so long as it is a "close familial relationship" such as the one that a man has with his wife or his mother-in-law. *Id.*

The Government's implementation of the travel and refugee bans flouts these clear dictates. The relationship between a refugee and the resettlement agency that promises to prepare for her arrival is formal, documented, and formed in the ordinary course. Blocking the refugee's admission indisputably inflicts a "concrete hardship" on that resettlement agency and its local partners that is easily as severe as that inflicted by a university's inability to welcome an admitted student, or a group's inability to hear a desired lecturer. The same is true when the Government

bars the entry of a grandparent, grandchild, aunt, uncle, niece, nephew, sibling-in-law, or cousin.

Nor will permitting the entrance of these individuals "eviscerate" this Court's stay. Mot. 14. Just as this Court intended, the stay will continue to apply to *every* foreign national that lacks a bona fide relationship with a person or entity in the United States. That is no minor outcome: As the Government itself acknowledges, some 175,000 refugees currently lack a formal assurance. Mot. 24. Many of those refugees—as well as countless visa applicants from the targeted nations—will be unable to demonstrate any other form of bona fide relationship with an American party, meaning that they will be absolutely barred from entering the country in the next several months. In the case of refugees, the Government's guidance suggests it will not even process many of their applications, meaning the delay on entry will extend well past the 120 day life of the ban.

To be sure, these effects may be less dramatic than the Government hoped, but they are precisely what an equitable balance of the hardships demands. At issue are some of the world's most vulnerable people, and when they have a bona fide relationship with a person or entity in the United States, the injunction applies.

### A. Refugees With Formal Assurances Remain Covered By The Injunction.

1. This Court's guidance with respect to refugees was straightforward: The injunction continues to apply where a U.S. entity "has a bona fide relationship with a particular" refugee such that the entity "can legitimately claim concrete hardship if that person is excluded." *IRAP*, 137 S. Ct. at 2089. As this Court recently

explained, "when we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Spokeo Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016). The Government's own submissions in the District Court easily establish both that there is a bona fide relationship between a refugee and the resettlement agency that provides the refugee's formal assurance, and that—as a result of this relationship—the agency and its local partners will suffer real hardship if the refugee is excluded.

As the Government's declaration explains, when a resettlement agency submits an "assurance," it makes a "written commitment * * * to provide, or ensure the provision of" basic services to the "refugee[] named on the assurance form." Bartlett Decl., Att. 2, D. Ct. Dkt. 301-1, at Page ID # 5694. The same document demonstrates that the resettlement agency must invest extensively in its relationship with the named refugee well before she arrives. Notably, the agency must provide "[p]re-[a]rrival services" for the refugee, including "[a]ssum[ing] responsibility for sponsorship," "plan[ning] for the provision" of "health services," *id.* at Page ID # 5702, and making arrangements for children who must be placed in foster care, *id.* at Page ID # 5715. The resettlement agency must also 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. *Id.* at Page ID ## 5704-5708. And 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 *Amicus Curiae* at 6-7, D. Ct. Dkt. 297-1; Hetfield Decl., D. Ct. Dkt. 297-3, (detailing the investment by resettlement agencies).

When a refugee is not permitted to enter the country, this extensive investment is wasted, and the agency experiences concrete economic hardship. Agencies pour private resources into their refugee services. *See, e.g.*, Decl. of L. Bartlett at 80, 83, 86, *Texas Health and Human Services Comm'n* v. *United States*, No. 3:15-cv-3851 (N.D. Tex. Jan. 5, 2016), ECF No. 304-1 (documenting the private resources resettlement agencies devote to refuges). If a particular refugee does not enter the country, the resources the agency expends preparing for her arrival are deprived of their value, 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 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." Bartlett Decl., Att. 2, D. Ct. Dkt. 301-1, at Page ID # 5684. 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 Group of Religious & Interreligious Organizations as *Amicus Curiae* at 20-21, *Trump* v. *Hawaii*, No. 16-1540 (U.S. June 12, 2017) ("Interfaith Amicus Br.").

Nor is the resettlement agencies' concrete hardship merely economic. Resettlement agencies are motivated by a moral—and typically 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.* The experience of sponsoring refugees creates "a connection with the people who are the least of these," making "the gospel a real thing." *Id.* Other religious organizations similarly regard preparing for and ministering to refugees as part of their religious practice. *See, e.g.*, Interfaith Amicus Br. at 19-20: Kekic Decl., D. Ct. Dkt. 344-1; Hetfield Decl., D. Ct. Dkt. 297-1. Preventing the arrival of these refugees interferes with this religious exercise by severing the relationship between the religious organizations and the particular refugees whom they are prepared to welcome. And these agencies' hardship is compounded by the knowledge that their ministries are being impeded by an Executive Order that itself violates the religious freedoms enshrined in the First Amendment.

2. The Government offers a series of reasons why it believes the District Court should have discounted these obvious hardships. None of them, however, has any basis in the equitable logic of this Court's opinion or the realities of how resettlement agencies operate.

The Government first argues (at 22) that there is no relationship between a resettlement agency and the particular refugees it has agreed to sponsor because an agency may "prepare for the refugee's arrival without directly interacting with the refugee abroad." But the same is true of the relationship between a U.S. entity and an invited lecturer. *See IRAP*, 137 S. Ct. at 2088. Entities often arrange lecturers through the speaker's organization or agent, but this Court made clear that a bona fide relationship exists all the same. Likewise, there is no requirement in the Court's order that a foreign national have any direct contact with—or even have met—his "close familial relations" in the United States. *Id.* As these examples demonstrate, it is not "direct[] interact[ion]" that defines a qualifying relationship; it is the extent to which excluding the particular alien will inflict direct, cognizable harm on an American individual or entity.

The Government next denies (at 23) that a resettlement agency will experience any concrete hardship from the exclusion of a refugee it has agreed to sponsor, suggesting that the agency's injury is no greater than that experienced by an entity that forms a relationship "simply to avoid" the Order. That is wrong. An agency that decides to form a relationship with a refugee in an attempt to skirt EO-2 courts its own injury, and fails under the plain terms of the Court's order. *See*

*IRAP*, 137 S. Ct. at 2088 (stating that a relationship qualifies only if it is "formed in the ordinary course"). Not so for an agency that, prior to the issuance of the partial stay, formed a sponsorship relationship because it had a decades-old mission to welcome refugees and a contract with the Government to do so. The latter agency, unlike the former, has every right to expect that its investment in the relationship will culminate in the refugee's admission. The Government has no basis to argue that the harm such an agency suffers from losing that investment and being unable to carry out its mission is less "concrete" or "weighty" than the harm a university suffers from being unable to educate students or an audience suffers from being unable to hear a lecturer. *IRAP*, 137 S. Ct. at 2087-88.

The Government also attempts to minimize the hardship to the resettlement agencies by mischaracterizing the extent of their individualized investment in the refugees they sponsor. For example, the Government states (at 21) that a refugee is simply "assigned to a resettlement agency." In fact, as the State Department explains, the nine major resettlement agencies meet weekly to "review the biographic and other case records" of refugees in order to decide which agency will sponsor the refugee and where the refugee will be resettled. U.S. Dep't of State, *The Reception and Placement Program* (last visited July 17, 2017 8:35 PM EDT), https://goo.gl/XXgAWV. "During this meeting, the resettlement agencies *match the particular needs of each incoming refugee* with the specific resources available in a local community." *Id.* (emphasis added). As a result of that meeting, a resettlement agency or its affiliate submits the formal assurance promising to meet those needs

itself or to cooperate with state and local groups to ensure that the needs are met. *See id.*

The Government also suggests several times that a resettlement agency merely provides services "after the refugee arrives in the United States," or "once the refugee arrives." Mot. 20-21, 23. But as mentioned, the Government itself requires resettlement agencies to perform "*pre*-arrival services." *Supra* p. 19. And the agencies and their partners often spend months preparing to meet the needs of a particular refugee family. For example, a church community may agree to cosponsor a family, devoting extensive time to finding suitable housing and schooling opportunities for the refugees, and even purchasing gifts for the children.[5] Those activities are occurring *now*.

3. Finally, lacking any basis in the reasoning of this Court's opinion for its argument, the Government throws up its hands and asserts that the stay *must* permit the exclusion of refugees with formal assurances because otherwise its "application to Section 6(a) and 6(b)" will be "largely inoperative." Mot. 25. That is wrong, root and branch.

First, as the Government ultimately acknowledges, it is simply untrue that the District Court's decision would deprive Sections 6(a) and 6(b) of meaningful practical effect. The Government does not deny that approximately 175,000

[5] *See, e.g.*, Kendra Baker, *Wilton welcomes Syrian refugee family*, Wilton Bulletin (Mar. 10, 2016), https://goo.gl/5qyct5; Juliemar Ortiz, *3 Branford churches work together to bring in refugee family from Iraq*, New Haven Register (Mar. 20, 2016), https://goo.gl/y4jKHY.

refugees currently lack formal assurances. *See* Mot. 24. Unless those refugees have another bona fide relationship with an American, the stay will prevent them from obtaining one, since the Government adjudicates applications for refugee status *before* a formal assurance is issued, and its current guidance indicates that it will suspend the adjudication of applications for those without a bona fide relationship. *See* Dep't of Homeland Security FAQs at Q.28, D. Ct. Dkt. 301-5. That means that the District Court's decision regarding formal assurances 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 it is unlikely to admit many more than that before the end of this fiscal year. *See* Mot. 24-25. That is simply 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. *See* Presidential Determination on Refugee Admissions for Fiscal Year 2017, 81 Fed. Reg. 70315 (Sept. 28, 2016) (setting 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). Rather, the Government has simply processed applications

slowly (indeed, more slowly than in prior years,[6] despite the injunctions) and it expects to continue to do so. But this Court has no obligation to tailor its injunction to ensure that Government's deliberate pace grinds to a halt. That is particularly so because this 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.

In any event, Sections 6(a) and 6(b) will continue to have a profound effect on hundreds of thousands of individuals whether or not those provisions actually lead them to be stopped at the border. So long as the Court's stay is in force, the Government is free to deny refugee status to individuals without a formal assurance (or any other relation), halting the processing of their refugee applications and causing them to lose precious time.

Moreover, the Government's demand runs directly contrary to this Court's opinion announcing its stay. The Court held that the equities tip in the Government's favor only when the exclusion of a refugee will not impose "concrete hardship" on an American entity. *IRAP*, 137 S. Ct. at 2089. Here, it is obvious that excluding refugees with a formal assurance will severely burden the resettlement agencies and the state and local entities with which they partner.[7] That is the end

[6] *See, e.g.*, Lomi Kriel, *Flow of refugees to U.S. declines*, Houston Chronicle (May 26, 2017), *available at* https://goo.gl/Je1eEH.

[7] Indeed, it is notable that the Ninth Circuit recognized that the implementation of the Order inflicts concrete harms on the *State* refugee programs, even though those programs have—if anything—a less direct connection with the refugees that will be resettled in the State. *See Hawaii* v. *Trump*, 859 F.3d 741, 767 (9th Cir. 2017).

of the matter: The District Court correctly held that EO-2 may not be applied to refugees with formal assurances.

### B. The District Court Correctly Held That This Court's Order Protects Grandchildren, Nieces, And Other Close Relatives Of Persons In The United States.

The District Court was also correct to reject the Government's unduly restrictive definition of "close family." The Government maintained, in the District Court as here, that Americans lack a "close familial relationship" with their grandparents, grandchildren, aunts, nieces, and cousins, and that excluding those relatives inflicts no "concrete * * * hardship[]" on anyone in the United States. *IRAP*, 137 S. Ct. at 2088. That argument is as wrong as it sounds, and nothing in this Court's opinion, the immigration laws, or common sense supports it.

1. This Court made plain that EO-2 "may not be enforced against foreign nationals who have *** a close familial relationship" with a U.S. person. *Id.* Further, the Court explained, "Dr. Elshikh's mother-in-law[] *clearly* has such a relationship." *Id.* (emphasis added). Yet all of the relations the Government seeks to bar from this country—from brothers-in-law to grandparents—are within at least the same "degree of kinship" as a mother-in-law. *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 505-506 (1977) (plurality opinion). 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. *IRAP*, 137 S. Ct. at 2088. If a mother-in-law is "*clearly*" within the scope of the injunction's protection, then these relatives must be as well. *Id.* (emphasis added).

Furthermore, U.S. persons indisputably suffer "concrete *** hardship[]" from the exclusion of these relatives. *Id.* Compelling a grandparent to be apart from his grandchild—especially one seeking refuge from violence or persecution—inflicts hardship of unbearable severity. So does separating an individual from his nephew or cousin; Mwenda Watata, one of the affiants in this case, has attested to the profound suffering he, his wife, and his children have experienced from being separated from their nephew and cousin, currently stranded in a Malawi refugee camp, whom they know only as a "son" and "sibling[]." Watata Decl. ¶¶ 17-23, D. Ct. Dkt. 344-3; *see also* Feruzi Decl. ¶¶ 10-11, D. Ct. Dkt. 344-2.[8] That harm is appreciably greater than the burden of being unable to hear a "lecturer" or employ a "worker" of one's choosing. *IRAP*, 137 S. Ct. at 2088.

Indeed, this Court has repeatedly recognized that grandparents, cousins, and the like are "close relatives" whose separation inflicts a significant and cognizable harm under the law. In *Moore*, the Court held that a "venerable" constitutional tradition protects the right of "*close relatives*" such as "uncles, aunts, cousins, ***

[8] The Government suggests (at 33-34) that aliens like Watata might be able to obtain relief through EO-2's waiver provision. That is only true, however, of individuals covered by Section 2(c). The Government has instructed refugee officers, in contrast, that they may grant waivers from the refugee ban "until the 50,000 [refugee] ceiling" in Section 6(b) "has been met," Dep't of Homeland Security FAQs at Q.28, D. Ct. Dkt. 301-5, and that ceiling was surpassed last week, *see* Camila Domonoske, *U.S. Refugee Admissions Pass Trump Administration Cap of 50,000*, NPR (July 12, 2017), https://goo.gl/Vs52jP. Accordingly, refugees like Watata's nephew can no longer obtain waivers, regardless of how profound the hardship their exclusion would cause. Anyway, foreign nationals whose exclusion would "burden" U.S. persons are entitled to the protection of this Court's order, not merely whatever discretionary relief administrative officers choose to provide.

grandparents" and other "relatives in this degree of kinship" to "live together" and "shar[e] a household." 431 U.S. at 504-506 (emphasis added). In *Reno* v. *Flores*, 507 U.S. 292 (1993)—an immigration case—the Court explained that a person's "aunt[s], uncle[s], [and] grandparent[s]" are "*close blood relatives*, whose protective relationship with children our society has * * * traditionally respected." *Id.* at 297, 310 (emphasis added). Other decisions are to the same effect. *See Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003) (describing "right to maintain * * * association between grandchildren and grandparents"); *Smith* v. *Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 843 & n. 49. (1977) (explaining that this right "extends beyond natural parents" to a child's "aunt and legal custodian" (citing *Prince v. Massachusetts*, 321 U.S. 158, 159 (1944))).

The Government responds (at 29) that foreign relatives may not have the same "due-process rights" as Americans. But this Court's focus was on their family members living in the United States, who—as the Government admits—"indisputably ha[ve] due process rights." In any event, what matters under the plain text of this Court's opinion is that they are "close relatives," and these precedents make plain that they are. *E.g.*, *Moore*, 431 U.S. at 504-505.

Reading this Court's order to extend to such elemental family relationships does not "empt[y] the Court's decision of meaning." Mot. 3-4. Plaintiffs do not dispute that the Court's order affords no protection to distant family members, such as second-cousins and great-aunts. Nor does it protect non-familial associates of individuals within the United States. Such connections are sufficiently remote or

informal that impairing them imposes burdens that are, "at a minimum, a good deal less concrete" than what close relatives suffer. *IRAP*, 137 S. Ct. at 2088. The barest common sense, however, confirms that severing the relationship between grandfather and granddaughter, or uncle and nephew, inflicts "legally relevant hardship" on a U.S. person. *Id.*; *see* Add. 15.

2. The Government's argument to the contrary rests principally on its claim that an alien's "close family" should be limited to those relations listed in certain provisions of the Immigration and Nationality Act. This argument is meritless: It flatly contradicts this Court's opinion and fails even on its own terms.

The first problem is straightforward. As the Government ultimately must acknowledge, one of the two familial relationships this Court said was "clearly" close—that between Dr. Elshikh and his mother-in-law—is not found in any provision of the immigration laws the Government cites. Mot. 35. Rather than accepting this fact as fatal to its argument, the Government soldiers on, speculating that when the Court said "mother-in-law," it really meant "mother," because it was *sub silentio* relying on the fact that Dr. Elshikh's wife is a U.S. citizen. *See id.* The Court never so much as hinted, however, that it was concerned with the burden on Dr. Elshikh's wife; on the contrary, it said that the injunction was justified because of "the concrete burdens that would fall on * * * *Dr. Elshikh*"; that EO-2 may not be enforced against "parties similarly situated to * * * *Dr. Elshikh*"; and that "*Dr. Elshikh's mother-in-law*[] clearly has [a qualifying] relationship." *IRAP*, 137 S. Ct. at 2087-88 (emphases added). Even the Government tacitly acknowledges as much,

as it categorically deems mothers-in-law and children-in-law of U.S. persons "close family," regardless of whether they actually have a child or parent in the country. Mot. 34-35.

Furthermore, the Government has failed to identify a coherent reason why the immigration laws *should* serve as an "appropriate point of reference" in determining the scope of this Court's stay. Mot. 27. This Court based its stay on the "equitable judgment" that aliens whose exclusion would inflict "concrete hardship" on a U.S. person should be protected. *IRAP*, 137 S. Ct. at 2088. When Congress enacted the numerous, widely divergent definitions of "family" in the INA, in contrast, its attention was trained on entirely different problems: in some cases, performing the "unavoidably zero-sum" task of "allocating a limited number of [immigrant] visas," *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2213 (2014) (plurality opinion) (discussing 8 U.S.C. § 1153(a)); in others, providing a clear but "unyielding" definition that would be easy to apply, *INS* v. *Hector*, 479 U.S. 85, 88, 90 n.6 (1986) (per curiam) (discussing 8 U.S.C. § 1254(a)(1) (1986)). Those provisions shed no light on the equitable question this Court sought to answer. Nor does the maxim that "equity follows the law" require the Court to blindly transplant those judgments to this different and inapposite circumstance; contrary to the Government's insinuation (at 27), all that principle means is that courts "may not 'create a remedy in violation of law, or even without the authority of law.'" *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (quoting *Rees* v. *Watertown*, 19 Wall. 107 122 (1874)).

In any event, to the extent Congress and the Executive have considered who counts as "close family," their judgments contradict the Government's definition. In the Family Sponsor Immigration Act of 2002, Pub. L. No. 107-150, Congress amended the immigration laws to provide that where the sponsor of an alien's immigrant visa petition has died, another member of the alien's "close family" may sponsor her for admission, and it included in that term an alien's "sister-in-law, brother-in-law, grandparent, or grandchild." *Id.* § 2(a) (codified at 8 U.S.C. § 1183a(f)(5)); *see* H.R. Rep. 107-207, at 2 (2001) (provision permits "close family member[s]" to be sponsors). In a remarkable bit of doublespeak, the Government suggests (at 31) that this provision supports its distinction between "close" and "extended" family. But the provision explicitly refers to siblings-in-law, grandparents, and grandchildren as "close family"; there is no ambiguity about it. Other provisions of the INA likewise permit persons in the United States to sponsor their "grandchildren," "grandparents," "nieces," and "nephews" for immigration or naturalization[9]—in each instance indicating that Congress believed such persons have a concrete and cognizable stake in their relatives' entry.

For decades, the Executive has made the same judgment. The Board of Immigration Appeals has long held that an alien has "close family ties" with this

[9] *See* 8 U.S.C § 1433(a) (permitting a child's grandparent to sponsor him for naturalization if his parent has died); *id.* § 1101(a)(15)(T)(ii)(III) (authorizing a victim of human trafficking admitted on a T visa to obtain admission on behalf of her "[g]randchild(ren)," "[n]iece[s]," and "nephew[s]," 81 Fed. Reg. 92,266, 92,280 (Dec. 19, 2016)); USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 421(b)(3) (permitting the grandparent of a child orphaned by the September 11, 2001 attacks to apply for admission).

country for purposes of obtaining cancellation of removal or waiver of inadmissibility if a sibling-in-law, grandchild, or similar relation lives here. *See, e.g.*, *In re Mulholland*, 2007 WL 2299644, at *1 (BIA July 12, 2007); *In re Gomez*, 2006 WL 2391225, at *1-*2 (BIA July 6, 2006). The Lautenberg Amendment permits certain aliens with "close family in the United States" to apply for refugee status, a term the Executive itself has interpreted to include grandparents.[10] U.S. Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2017* (Sept. 15, 2016), https://goo.gl/K7vvgs; *see* Add. 23. And a longstanding regulation provides that juvenile aliens may be released to the custody of an "aunt, uncle, [or] grandparent," 8 C.F.R. § 236.3(b)(1)(iii), relations whom this Court in *Reno* referred to more than half a dozen times as an alien's "close relatives," 507 U.S. at 302, 303, 306, 310, 313; *see also* 69 Fed. Reg. 69,480, 69,488 (Nov. 29, 2004) (authorizing certain aliens to apply for asylum if a "grandparent, grandchild, aunt, uncle, niece, or nephew" resides in the United States).

Rather than relying on these provisions defining the very sort of "close family relationship" the Court's opinion discusses, the Government fixates on those provisions that determine who "can petition for an *immigrant* visa." Mot. 28 (emphasis added). But those provisions provide an exceptionally poor guide to determining the scope of this Court's stay. They expressly denominate the listed

[10] For precisely this reason, the District Court was correct to hold that refugees in the U.S. Refugee Admissions Program by virtue of the Lautenberg Amendment are categorically protected by the injunction. Every such refugee, by definition, has close family in the United States.

family members as "*immediate* relatives," not close relatives. 8 U.S.C. § 1151(b)(2)(A)(i) (emphasis added). They are underinclusive even by the Government's own lights—excluding not only mothers-in-law, but also children-in-law, parents of minors, and fiancés. *See id.* §§ 1151(b)(2)(A)(i), 1153(a); *cf. id.* §§ 1101(a)(15)(K), 1184(d) (authorizing fiancés to obtain only nonimmigrant visas). And they are used to determine access to one of the most restricted and "highly sought-after" benefits in the immigration laws: the right to reside in the United States *permanently*. *Cuellar de Osorio*, 134 S. Ct. at 2197. The Court's order, in contrast, merely allows aliens to *seek* entry the country on any basis, even *temporarily*, whether as an immigrant, a nonimmigrant, or a refugee. There is no reason to think Congress would have wished its restrictive definition of "immediate family" for purposes of immigrant visas to control access to that barebones right.[11]

3. Finally, grasping at any straw it can find, the Government points to EO-2's own waiver provisions. *See* Mot. 26-27. Those provisions are triply irrelevant. First, the Court said that "[t]he facts of these cases," not the terms of the very order it left enjoined, "illustrate the sort of relationship that qualifies." *IRAP*, 137 S. Ct. at 2088. Second, nearly all of the examples the Court gave—Dr. Elshikh's mother-in-law, the newly-admitted University students, and the invited lecturer—do not

[11] The Government (at 30) claims that its reading is "confirm[ed]" by 8 U.S.C. § 1182(a)(3)(D)(iv), a provision establishing an exception to the bar on entry by members of Communist and totalitarian parties for persons with a parent, spouse, child, or sibling in the United States. The Government does not offer a theory as to why this obscure provision is relevant to the scope of the Court's stay, let alone more relevant than the provisions the District Court identified, and none is apparent.

fall within any of the waiver provisions. Order § 3(c). And, third, the waiver provisions themselves offer only a very short illustrative list of close family members—"e.g., a spouse, child, or parent," *id.* § 3(c)(iv)—that is grossly under-inclusive even by the Government's standard, omitting fiancés, siblings, and parents-in-law. They therefore shed no light whatsoever on the current extent of the injunction.

In the District Court, the Government supplemented this request with a plea for "deference." *See* Add. 15 n.10. It has apparently abandoned that contention here, and wisely so. For one thing, as this Court has explained, the subject of an injunction cannot "undert[ake] to make [its] own determination of what the decree mean[s]." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). For another, this Court defers to the Executive in the "construction of * * * statutes, not of [the Court's] opinions." *NLRB* v. *Int'l Bhd. of Elec. Workers, Local 340*, 481 U.S. 573, 597 (1987) (Scalia, J., concurring in the judgment). The District Court carefully interpreted this Court's order, and held that it protects grandchildren, grandparents, and other "close blood relatives" whose exclusion would plainly inflict hardship on Americans. That judgment was correct, and there is no basis for this Court to disturb it.

## III. THIS COURT SHOULD NOT STAY THE DISTRICT COURT'S ORDER MODIFYING THE INJUNCTION.

The Government closes its procedurally inappropriate motion with yet another request for unwarranted relief. It asks this Court (at 36) to stay the District Court's modified injunction pending disposition of its motion. But as the

Government acknowledges, that relief is available only where both certiorari and reversal are likely, *and* the equities favor the applicant. *See, e.g.*, *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987). The Government obviously has not met its burden with respect to the first two factors: The Court is unlikely to review—and even less likely to reverse—the District Court's correct, fact-bound determination that the Government has been violating the injunction.[12]

Moreover, even if the Government could overcome that obstacle, this Court has already found that the balance of the harms counsel *against* a stay. *See IRAP*, 137 S. Ct. at 2087-88. The Government's current implementation of EO-2 inflicts profound harms on individuals and entities within the United States, separating families and thwarting entities' spiritual and tangible investments in the arrival of particular refugees. These are precisely the kind of injuries that this Court held sufficient to justify an injunction. *Id.* at 2087. The Government counters that its own national security interests are also profound, but the very quotation it uses from this Court's opinion observes that those harms are most pressing "when there is *no* tie between [a] foreign national and the United States." Mot. 38 (quoting *IRAP*, slip op. at 13) (brackets in Motion). No amount of deference to the

[12] The day after making its stay request in this case, the Government filed an identical stay request in the Ninth Circuit, which is currently pending. The pendency of that request is reason alone to deny a stay. *See, e.g.*, *Krause* v. *Rhodes*, 434 U.S. 1335, 1335-36 (1977) (Stewart, J., in chambers); *see also* Barbara J. Van Arsdale et al., Federal Procedure, Lawyers Edition § 3:304, Westlaw (June 2017 Update) ("While an application for a stay is pending in the lower court, a similar application will normally be denied by the Supreme Court Justice.").

Executive's national security interests can erase the existence of the ties held by relatives and refugees with sponsorship agreements.[13]

The Government also points to the fact that it is "in the midst of implementing the Order," and that the District Court's decision will lead to the "uncertainty and confusion that the government has worked diligently to prevent." Mot. 38. First of all, the Government has already implemented the District Court's order. *See* Suppl. Add. 2; *see also* U.S. Dep't State, *Revised Guidance on Determining Close Family Under Executive Order 13780 Section 2C* (July 14, 2017), *reproduced at* https://goo.gl/ER1LRQ (updating definition of "close family" exempted from Order § 2(c) to include "grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts and uncles, nephews and nieces, and cousins"). If shifting policy engenders confusion, then that is all the more reason to *deny* the stay now. *Louisiana* v. *United States*, 1966 WL 87237, at *1 (U.S. Aug. 12, 1966) (Black, J., in chambers) (denying stay because the contested order had already been implemented). In any event, the new guidance and administrative process the Government announced to implement the District Court's order is *simpler* than

[13] The Government cites *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 134 S. Ct. 893 (2013), as precedent supporting the issuance of a stay here. But the cases could not be more different. In *Little Sisters*, the applicants first requested the relief from the court of appeals and proceeded to this Court only *after* that request was denied. More importantly, because of a statutory deadline for compliance, the applicants in *Little Sisters* could credibly demonstrate that they would face irreparable harm *within hours* unless their stay was granted. And, ironically, the irreparable harm the Court presumably found sufficient to merit a stay was the Government 's interference in the applicants' religious practice. That harm, of course, is one of the chief injuries the District Court's injunction is designed to prevent.

what it sought to do before the District Court ruled. *Compare* D. Ct. Dkt. 329-6, *with* Suppl. Add. 2.

Second, this is a problem entirely of the Government's own creation. If the Government thought the scope of this Court's stay unclear—which it is not—it should have sought clarification of its obligations before implementing the bans. *See Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 15 (1945); 11A Charles Alan Wright et al., Federal Practice & Procedure § 2956, Westlaw (3d ed., April 2017 Update) ("[A]n interested individual who is confused as to the applicability of an injunction to him or whether the scope of an order applies to certain conduct may request the granting court to construe or modify the decree."). Instead, the Government chose to embark on "program of experimentation with disobedience of the law," imperiling the rights of countless Americans. *McComb*, 336 U.S. at 192. The Government should not be heard to complain if that "program" did not turn out well. *Id*.

## CONCLUSION

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

Respectfully submitted,

/s/ Neal Kumar Katyal


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## 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 July 18, 2017 on:

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**RESPONDENTS' SUPPLEMENTAL ADDENDUM**



[*] The identities of the recipients of this communication and all e-mail addresses, mailing addresses, and telephone numbers have been redacted.

**From:** Bartlett, Lawrence E. [redacted]
**Sent:** Friday, July 14, 2017 2:59 PM
**To:** [redacted]

[redacted]

**Subject:** Message #20: Update on Refugee Admissions and Operations

Dear Colleagues,

On July 13, 2017, the District Court in Hawaii enjoined the U.S. Government from applying the 120-day refugee suspension and 50,000 refugee cap to: refugees who have received a formal assurance from a resettlement agency in the United States; those who are in the Lautenberg Program; or those individuals who have the following family relationships to an individual in the United States (regardless of lawful status): grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States. (These family relationships are in addition to the relationships previously included in the definition of close family relationships, specifically: a parent (including parent-in-law), spouse, fiancé, fiancée, child, adult son or daughter, son-in-law, daughter-in-law, sibling (whether whole or half), including step relationships.)

Accordingly, please proceed to book travel for all refugees who already have an assurance and are otherwise cleared for travel or as they become cleared in the future.

Because a refugee with an assurance who is cleared for travel to the United States does not require any additional basis to come within the district court's injunction, there is no need to assess in connection with booking travel whether the refugee is in the Lautenberg Program or otherwise has a credible claim to a bona fide relationship with a family member or entity in the United States at this time.

With respect to refugees who have not yet received an assurance, we will provide further advice as we develop guidance on this issue.

**Lawrence Bartlett**

**Director, Refugee Admissions • Bureau of Population, Refugees, and Migration • U.S. Department of State**

[redacted]