No. 17-16426

IN THE
United States Court of Appeals
for the Ninth Circuit

STATE OF HAWAII, *et al.*,
Plaintiffs-Appellees,
v.
DONALD J. TRUMP, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC
District Judge Derrick K. Watson

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 3

SUMMARY OF ARGUMENT 11

STANDARD OF REVIEW 15

ARGUMENT 16

I. REFUGEES WITH FORMAL ASSURANCES ARE COVERED BY THE INJUNCTION 18

A. A Formal Assurance Embodies A Bona Fide Relationship Between A Resettlement Agency And A Refugee 20

1. Barring a refugee inflicts a series of tangible injuries on the agency that provided her formal assurance 21

2. Excluding a refugee also results in intangible hardships to her resettlement agency 23

B. The Government Offers No Satisfactory Rationale For Excluding Refugees With Formal Assurances 26

1. The Supreme Court's July 19 Order did not decide the merits 26

2. The Government's definition of a bona fide relationship has no basis in plain language or the opinion of the Supreme Court 30

3. It is the Government's position—not the District Court's—that would eviscerate the Supreme Court's stay ruling 35

II. The District Court Correctly Held That the Supreme Court's Order Protects Grandchildren, Nieces, And Other Close Relatives Of Persons In The United States 39

CONCLUSION 53

STATEMENT OF RELATED CASES

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES:

A & M Records, Inc. v. *Napster, Inc.*,
284 F.3d 1091 (9th Cir. 2002) 16, 18

Armstrong v. *Brown*,
768 F.3d 975 (9th Cir. 2014) 52

Bank of Am. Corp. v. *City of Miami, Fla.*,
137 S. Ct. 1296 (2017)....................34

Barrientos v. *1801-1825 Morton LLC*,
583 F.3d 1197 (9th Cir. 2009) 52

Clinton v. *City of New York*,
524 U.S. 417 (1998)....................22, 33

Douglas v. *Indep. Living Ctr. of S. Cal., Inc.*,
565 U.S. 606 (2012)....................46

Exodus Refugee Immigration, Inc. v. *Pence*,
165 F. Supp. 3d 718, 729, 731-32 (S.D. Ind. 2016) 25

Haitian Refugee Ctr. v. *Gracey*,
809 F.2d 794 (D.C. Cir. 1987)....................12, 26

Haitian Refugee Ctr., Inc. v. *Baker*,
789 F. Supp. 1552 (S.D. Fla. 1991) 26

Hawaii v. *Trump*,
No. 17-16366 (9th Cir. July 7, 2017)....................7, 8, 17

Hawaii v. *Trump*,
859 F.3d 741 (9th Cir. 2017) 1, 3, 4

Hoffman ex rel. NLRB v. *Beer Drivers & Salesmen's Local Union No. 888, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 536 F.2d 1268 (9th Cir. 1976) 18

In re Gomez,
2006 WL 2391225 (BIA July 6, 2006) 47

In re Mulholland,
2007 WL 2299644 (BIA July 12, 2007) 47

In re Shoreline Concrete Co., Inc.,
831 F.2d 903 (9th Cir. 1987) 46

INS v. *Hector*,
479 U.S. 85 (1986) (per curiam) 45

Kowalski v. *Tesmer*,
543 U.S. 125 (2004) 38

McComb v. *Jacksonville Paper Co.*,
336 U.S. 187 (1949) 51

Meggitt San Juan Capistrano, Inc. v. *Yongzhong*,
575 F. App'x 801 (9th Cir. 2014) 52

Moore v. *City of E. Cleveland*,
431 U.S. 494 (1977) .....*passim*

Nat. Res. Def. Council, Inc. v. *Sw. Marine Inc.*,
242 F.3d 1163 (9th Cir. 2001) 15, 17

NLRB v. *Int'l Bhd. of Elec. Workers, Local 340*,
481 U.S. 573 (1987) 51

Overton v. *Bazzetta*,
539 U.S. 126 (2003) 42

Prince v. *Massachusetts*,
321 U.S. 158 (1944) 42

Rees v. *Watertown*,
19 Wall. 107 (1874) 46

Reno v. *Flores*,
507 U.S. 292 (1993) 14, 41, 42, 48

Scialabba v. *Cuellar de Osorio*,
134 S. Ct. 2191 (2014)..45

Smith v. *Org. of Foster Families for Equal. & Reform*,
431 U.S. 816 (1977)..42

Spokeo, Inc. v. *Robins*,
136 S. Ct. 1540 (2016)..19

Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. *Wright*,
364 U.S. 642 (1961)..18

Trump v. *Hawaii*,
No. 16-1540 (U.S. July 15, 2017)..*passim*

Trump v. *Int'l Refugee Assistance Project*,
137 S. Ct. 2080 (2017)..*passim*

Ukrainian-Am. Bar Ass'n, Inc. v. *Baker*,
893 F.2d 1374 (D.C. Cir. 1990)..26

Urbina-Osejo v. *INS*,
124 F.3d 1314 (9th Cir. 1997)..48

Vergara v. *INS*,
8 F.3d 33 (9th Cir. 1993)..48

Vill. of Arlington Heights v. *Metro Hous. Dev. Corp.*,
429 U.S. 252 (1977)..22

Villena v. *INS*,
622 F.2d 1352 (9th Cir. 1980)..48

Washington v. *Trump*,
847 F.3d 1151 (9th Cir. 2017)..3

STATUTES:

8 U.S.C § 1101(a)(15)(K)..48

8 U.S.C § 1101(a)(15)(T)..49

8 U.S.C § 1101(a)(15)(T)(ii)(II)..47

8 U.S.C. § 1151(b)(2)(A)(i) 48

8 U.S.C. § 1153(a)..48

8 U.S.C. § 1182 49

8 U.S.C. § 1182(a)(3)(D)(iv)...50

8 U.S.C. § 1182(a)(4) 49

8 U.S.C. § 1182(a)(4)(C)(ii)...49

8 U.S.C. § 1182(a)(9)(B)(v) 50

8 U.S.C. § 1182(d)(13)(B) 49

8 U.S.C. § 1182(f) 1, 4

8 U.S.C. § 1182(h)(1)(B) 50

8 U.S.C. § 1183a(f) 49

8 U.S.C. § 1183a(f)(5)...46

8 U.S.C. § 1183a(f)(5)(B) 49

8 U.S.C. § 1184(d) 48

8 U.S.C. § 1254(a)(1) 45

8 U.S.C § 1433(a)..47

28 U.S.C. § 1292(a)..7

Family Sponsor Immigration Act of 2002, Pub. L. No. 107-150...........................46

USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 421(b)(3) 47

RULES:

Fed. R. Civ. P. 62(c)...15, 17

REGULATIONS:

8 C.F.R. § 236.3(b)(1)(iii) 48

69 Fed. Reg. 69,480 (Nov. 29, 2004) 48

81 Fed. Reg. 92,266 (Dec. 19, 2016) 47, 49

Executive Order No. 13,780 .... *passim*

Presidential Determination on Refugee Admissions for Fiscal Year 2017, 81 Fed. Reg. 70315 (Oct. 11, 2016) 37

LEGISLATIVE MATERIAL:

H.R. Rep. 107-207 (2001) 46

OTHER AUTHORITIES:

Kendra Baker, *Wilton welcomes Syrian refugee family*, Wilton Bulletin (Mar. 10, 2016) 35

Camila Domonoske, *U.S. Refugee Admissions Pass Trump Administration Cap of 50,000*, NPR (July 12, 2017) 37, 41

Peter Feuerherd, *Parishes play a vital role in refugee resettlement*, U.S. Catholic (Nov. 22, 2016) 23

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Juliemar Ortiz, *3 Branford churches work together to bring in refugee family from Iraq*, New Haven Register (Mar. 20, 2016) 35

Oxford English Dictionary 19

U.S. Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2017* (Sept. 15, 2016) 47

U.S. Dep't of State, *The Reception and Placement Program* (last visited July 17, 2017 8:35 PM EDT) 34

INTRODUCTION

Less than two months ago, this Court unanimously held that Executive Order 13,780 ("EO-2") is unlawful. It explained that, by purporting to ban tens of millions of foreign nationals (most of them Muslim) based on little more than the President's say-so, EO-2 grossly exceeds the President's authority under 8 U.S.C. § 1182(f) and violates multiple express prohibitions in the immigration laws. *See Hawaii* v. *Trump*, 859 F.3d 741, 755-756 (9th Cir. 2017) (per curiam). When the Government asked the Supreme Court to stay that judgment in its entirety, the Court refused. Instead, it issued a partial stay only as to those foreign nationals with "no connection to the United States at all," whose exclusion would cause no "obvious hardship to anyone else." *Trump* v. *Int'l Refugee Assistance Project* ("*IRAP*"), 137 S. Ct. 2080, 2088 (2017). The Court made clear that EO-2 "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.*

Three days later, the Government set to work flouting that clear instruction. It ordered immigration officers to exclude refugees whom U.S. resettlement agencies have spent months preparing to welcome, house, and integrate into their new communities pursuant to formal agreements. It further declared that Americans lack a "close familial relationship" with their grandparents, grandchildren, nieces, aunts, and cousins, and that excluding those relations

burdens no one. That guidance is as wrong as it is cruel, and it finds no footing in the language or logic of the Supreme Court's opinion. The District Court rightly modified its injunction to halt this flagrant violation of the Court's command, restoring the rights that the Constitution and the laws of this country afford the State of Hawaii, Dr. Elshikh, and all Americans.

The Government now seeks to overturn the District Court's judgment based on a cascade of specious claims. It argues that the extensive relationship between a resettlement agency and a refugee is not good enough because it is "indirect" and does not arise "independent of the refugee admission process," U.S. Br. 19—requirements of the Government's own invention that have no basis in the Supreme Court's order. It also claims that grandchildren and nieces do not count as "close famil[y]" because they are not listed in a few cherry-picked provisions of the immigration laws, *id.* at 19-20, notwithstanding that the Supreme Court said that mothers-in-law—who are *also* absent from those provisions—are "clearly" protected. *IRAP*, 137 S. Ct. at 2088.

Perhaps most egregiously of all, the Government claims that the Supreme Court "confirmed" the Government's view when it stayed the District Court's injunction with respect to resettlement agencies. U.S. Br. 22. The Court issued that temporary stay, however, in response to the Government's express request that the Court pause implementation of the injunction so that "the *court of appeals*

[c]ould address the correctness of the district court's interpretation of this Court's stay ruling *in the first instance*." Petitioners' Mot. for Clarification 39, *Trump* v. *Hawaii*, No. 16-1540 (U.S. July 15, 2017) ("S. Ct. Mot.") (emphases added). Now that the Supreme Court has granted that request, the Government cannot do an about face and claim that the "correctness of the district court's interpretation" has already been resolved.

In the end, the Government's position simply represents the latest in its continually shifting effort to effectuate the Muslim ban the President promised 18 months ago. Stymied in its attempt to impose an overt religious test on admission, *Washington* v. *Trump*, 847 F.3d 1151 (9th Cir. 2017), thwarted in its efforts to mask that ban in hastily donned sheep's clothing, *Hawaii*, 859 F.3d at 756, and at last rebuffed in its request that the Supreme Court allow its policy to go into full effect anyway, *IRAP*, 137 S. Ct. at 2088, the Government has now settled on its newest policy of defiance. Just as it has twice before, it falls to this Court to affirm that the President remains subject to the law, and that "immigration, even for the President, is not a one-person show." *Hawaii*, 859 F.3d at 755. The District Court's judgment should be affirmed.

BACKGROUND

1. On June 12, 2017, this Court largely upheld an injunction prohibiting enforcement of Sections 2 and 6 of Executive Order 13,780 ("EO-2"). *Hawaii*,

859 F.3d at 756. The Court concluded that "the President, in issuing the Executive Order, exceeded the scope of authority delegated to him by Congress" under 8 U.S.C. § 1182(f). *Id.* at 755. It further held that the equities favored issuance of a preliminary injunction in light of the "irreparable harms threatening Plaintiffs"—including their "prolonged separation from family members" and "the State's inability to assist in refugee resettlement"—and the fact that an injunction merely "restore[d] immigration procedures and programs to the position they were in prior to [EO-2]'s issuance." *Id.* at 782-784. The Court vacated those portions of the injunction that ran against the President himself and that prevented the Government from conducting internal reviews. *Id.* at 789. The District Court modified the injunction in accord with this Court's opinion. *See* Amended Preliminary Injunction, D. Ct. Dkt. 291.

On June 26, the Supreme Court stayed this Court's judgment in part. It approved of the manner in which this Court had "balance[d] the equities" with respect to U.S. persons and entities "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," 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 the 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 presented the Government with a proposed list of foreign nationals still protected by the injunction, including refugees with a formal assurance from a resettlement agency, and fiancés, 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 against 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, counsel for the Government 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 stonewalling Plaintiffs' repeated requests for information about an injunction entered in their name.

3. At 7:00 PM EDT on June 29—an hour before the bans were set to go into effect—Plaintiffs filed a motion in the District Court to clarify the scope of its injunction as narrowed by the Supreme 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 now acknowledges is false, *see* U.S. Br. 36 (saying that "[t]he INA does not provide *comparable* immigration benefits" for these relatives (emphasis added)). Though the Government had not contested the procedural propriety of Plaintiffs' motion, the District Court *sua sponte* held that it lacked authority to clarify the scope of the Supreme Court's order. E.R. 201-206 (Order Denying Plaintiffs' Mot. to Clarify Scope of Preliminary Injunction).

4. Plaintiffs promptly appealed to this Court, filing a motion the following morning for an injunction pending appeal. The Court 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 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.

5. 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 or even the immigration statutes on which the Government relies." E.R. 218. It explained that the Government had "cherry-pick[ed]" favored provisions of

the immigration laws, while ignoring others. E.R. 218-219. Moreover, the Government's interpretation was irreconcilable with the Court's holding that Dr. Elshikh's mother-in-law was "clearly" close family, and represented "the antithesis of common sense." E.R. 218-221. The District Court therefore modified its injunction to state that such relatives may not be excluded pursuant to EO-2. E.R. 221.[1]

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. E.R. 223. 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.* The court modified its injunction to reflect this conclusion. E.R. 223, 229.

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 the Supreme Court's opinion. E.R. 225. It also determined that neither the Direct

[1] 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. E.R. 228-229.

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. E.R. 226-228. And it rejected a modification that Plaintiffs had initially proposed to clarify the procedures for implementing EO-2. E.R. 230.

6. One day after the District Court ruled, the Government leapfrogged this Court and sought direct review of the District Court's decision in the Supreme Court. It asked the Supreme Court to "clarify" that its partial stay did not protect grandparents, grandchildren, and other close relatives or refugees with a formal assurance from a resettlement agency. S. Ct. Mot. 19. 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, 15, *Trump* v. *Hawaii*, No. 16-1540 (U.S. July 18, 2017) ("S. Ct. Reply").

The Government also filed what it characterized as a "protective appeal" in this Court, along with a similar motion for a stay pending appeal. S. Ct. Reply 14; *see* Appellants' Mot. for Stay Pending Appeal, Dkt. 3-1 ("Stay Mot."). Once again, the Government argued that a stay was appropriate "to minimize the disruptive effect of the district court's decision." Stay Mot. 8.

7. On July 19, the Supreme Court summarily "denied" the Government's motion for clarification. Order, *Trump* v. *Hawaii*, No. 16-1540 (July 19, 2017). It also declined to grant mandamus or certiorari. But the 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.*

8. On July 21, the parties filed a joint motion to expedite the Government's appeal. On July 25, this Court granted the joint motion to expedite and denied the Government's still-pending stay request as moot. Dkt. 7.

SUMMARY OF ARGUMENT

The Supreme Court's guidance was straightforward: EO-2 "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," because that would inflict "concrete hardships" on those persons and entities. *IRAP*, 137 S. Ct. at 2088. The

District Court rightly found that refugees who have received a "formal assurance" from a dedicated resettlement agency have a qualifying "bona fide relationship," as do grandparents, grandchildren, nephews, and other "close familial relations" of U.S. persons. *Id.* In both instances, a contrary holding would have permitted EO-2 to be enforced in ways that result in "concrete hardships" to American entities and individuals. Reversing the District Court would therefore narrow the scope of the preliminary injunction in ways that directly contradict the Supreme Court's dictates. There is no basis for ignoring the Court's guidance in that way.

I. A refugee who has received a formal assurance from a resettlement agency undoubtedly qualifies for protection under the Supreme Court's stay. Such a refugee has an extensive, formal, and documented relationship with a U.S. entity, which by definition has invested substantial resources in the refugee and signed an agreement promising to provide her numerous essentials of life upon her arrival. Excluding that refugee would inflict severe hardship on the U.S. agency, wasting its efforts and resources, depriving it of funding, and thwarting its mission. Accordingly, numerous courts have held that resettlement agencies have a cognizable stake in the admission of refugees to whom they have extended assurances. *See, e.g.*, *Haitian Refugee Ctr.* v. *Gracey*, 809 F.2d 794, 799 (D.C. Cir. 1987).

Lacking a viable argument on the merits, the Government seeks to short-circuit this question by claiming that the Supreme Court already resolved it through its partial stay order. That is incorrect. The Court expressly "denied" the Government's multiple invitations to address the merits of the issue. It instead granted the Government's fallback request to stay implementation of the injunction so that "the *court of appeals* [c]ould address the correctness of the district court's interpretation of the Court's stay ruling *in the first instance*." S. Ct. Mot. 39 (emphases added).

The Government is also wrong to assert that a refugee lacks a qualifying relationship with a resettlement agency because a relationship must involve "direct contact" and must be "independent of the refugee admissions process." U.S. Br. 19. Those requirements are entirely absent from the Supreme Court's opinion, and entirely unsupported by its logic. A lecturer, a student, or an adopted child would plainly be protected by the Court's order even if he or she had no "direct" contact with a U.S. person or entity. And a relationship is no less "bona fide" because it arises during the admissions process, so long as it does so "in the ordinary course," as formal assurances plainly do. Moreover, the relationship between a resettlement agency and a refugee readily exhibits the characteristic the Supreme Court found most compelling because the agency experiences "concrete hardships" when the

refugee is excluded. The Government's efforts to minimize those hardships are unavailing.

There is also no merit to the Government's claim that protecting these refugees would "eviscerate" the Supreme Court's order. By the Government's own admission, over 85% of refugees currently in the pipeline would not be protected by the District Court's order. Nor would the decision below protect refugees who do not yet have a formal assurance. At bottom, the Government's complaint is that the District Court's order will undermine its efforts to admit as few refugees as possible, but that policy argument is no basis for distorting the Supreme Court's opinion to say what it does not.

II. The District Court was also correct to hold that grandparents, grandchildren, aunts, uncles, nieces, nephews, siblings-in-law, and cousins are protected by the Supreme Court's stay. All of these relations are "close relatives" within at least the same "degree of kinship" as Dr. Elshikh's mother-in-law—a person to whom the Court said its order "clearly" extends. *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 505-506 (1977) (plurality opinion). And their exclusion would impose hardship of the utmost severity on their loved ones. Indeed, the Court has long held that grandparents, cousins, and the like are "close relatives" whose separation inflicts a significant and cognizable harm under the law. *Id.*; *see, e.g.*, *Reno* v. *Flores*, 507 U.S. 292, 297, 310 (1993)

The Government attempts to ground a more restrictive definition of "close family" in a few cherry-picked provisions of the INA. That request is meritless several times over. None of the provisions of the INA on which the Government relies includes mothers-in-law; that alone is fatal to its argument. Nor is there any reason the varied and inconsistent definitions of family in the INA *should* inform the scope of the Court's equitable judgment. And even if they did, there would be no basis for fixating on the provisions of the INA the Government prefers: Other parts of the immigration laws recognize the very relationships the Government demeans, and expressly refer to them as "close family."

This Court should also reject the Government's newfound request to narrow the District Court's injunction. The Government never made that request below, or in any of its prior filings to this Court or the Supreme Court. It is therefore waived. In any event, the narrowing the Government proposes would simply introduce more arbitrary distinctions that have no basis in the longstanding meaning of "close family" or the equitable logic of the Court's opinion. The District Court's judgment was correct in its entirety and should be affirmed.

STANDARD OF REVIEW

This Court "review[s] for abuse of discretion a district court's orders under Rule 62(c)" modifying injunctions, "as well as its determination of the scope of an injunction." *Nat. Res. Def. Council, Inc.* v. *Sw. Marine Inc.*, 242 F.3d 1163, 1168

(9th Cir. 2001). "As long as the district court got the law right, it will not be reversed simply because [the court of appeals] would have arrived at a different result if [it] had applied the law to the facts of the case." *A&M Records, Inc.* v. *Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002) (internal quotation marks omitted).

ARGUMENT

The Supreme Court's initial stay 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.*

The Supreme 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 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. The Supreme Court affirmed this Court's view that this kind of concrete hardship is "sufficiently weighty and immediate to outweigh the Government's interest in enforcing" the Executive Order. *Id.* at 2087.

The Supreme 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 District Court faithfully and correctly applied this standard.[2] It held that its injunction continues to protect refugees who have an extensive, formal,

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[2] The Government intimates (at 21) that the District Court lacked jurisdiction to modify its injunction. That is wrong. While "an appeal is pending from an interlocutory order * * * that grants * * * an injunction," the district court may "modify" that "injunction." Fed. R. Civ. P. 62(c). A District Court thus "retains jurisdiction during the pendency of an appeal to act to preserve the status quo." *Sw. Marine*, 242 F.3d at 1166; *see also* Order 3, *Hawaii* v. *Trump*, No. 17-16366 (9th Cir. July 7, 2017), ECF No. 3 (explaining that the District Court may

relationship with a U.S. resettlement agency. And it held that the Government may not exclude Americans' grandchildren, nieces, cousins, and other "close familial relations." Both decisions were plainly correct, and both should be quickly affirmed.

I. REFUGEES WITH FORMAL ASSURANCES ARE COVERED BY THE INJUNCTION.

The Supreme Court's opinion in *IRAP* provides simple guidance with respect to refugees: The injunction continues to apply where a U.S. individual or 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. That instruction is not difficult to parse. "Relationship" is hardly an

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"interpret and enforce the Supreme Court's order" in the context of a motion "to modify the injunction"). That is precisely what the District Court did here. As the court noted, "[t]he current status quo pending appeal is the preliminary injunction which enjoins defendants from enforcing portions of EO-2, as modified by the Supreme Court's June 26, 2017 order." E.R. 215 n.4. And the District Court modified its injunction to ensure that the Government would not *change* the status quo by flouting the Supreme Court's order. E.R. 215-216. That was entirely proper; indeed, the issuance of an injunction generally "requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO* v. *Wright*, 364 U.S. 642, 647 (1961); *see also Sw. Marine*, 242 F.3d at 1166; *A & M Records*, 284 F.3d at 1098-99; *Hoffman ex rel. NLRB* v. *Beer Drivers & Salesmen's Local Union No. 888, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 536 F.2d 1268, 1276 (9th Cir. 1976).

obscure term, and the Court used it synonymously with its dictionary definition, "connection." *See* Oxford English Dictionary (3d ed. 2009) (defining relationship as a "connection" or "association"); 137 S. Ct. at 2088-89 (the Government may not apply EO-2 to anyone with a "bona fide *relationship* with a person or entity in the United States" but may apply it to those "who lack any such *connection*" (emphases added)).

The phrase "concrete hardship" is also a familiar one, appearing often in the Supreme Court's standing precedent, where it means simply a "real" harm, rather than one that is too "abstract." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016). And, lest there be any doubt, the Court helpfully provided three examples of foreign nationals that have a 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.

The relationship between a refugee and the resettlement agency that has agreed to sponsor her easily qualifies under this standard. The Government's own submissions in the District Court establish that a formal assurance initiates a "connection" with a refugee that will result in "real" harm to the agency if the refugee is excluded. Those submissions further demonstrate that the relationship

between a refugee and her resettlement agency is as strong as—for example—the one between a prospective student and her university. And they demonstrate that, like a university facing the exclusion of an admitted student, a resettlement agency will experience tangible harms to its pocketbook and intangible injuries to its ethos and mission if the refugee is not permitted to enter. Because the Government's extensive protestations to the contrary ring hollow, the District Court's injunction must be affirmed.

A. A Formal Assurance Embodies A Bona Fide Relationship Between A Resettlement Agency And A Refugee.

A signed formal assurance initiates an individualized relationship between a refugee and the resettlement agency that will welcome her into the United States. 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." E.R. 151 (Bartlett Decl., Att. 2); *see also* Decl. of Lavinia Limon in Support of Emergency Mot. to Intervene ¶¶ 15, 26-28, Dkt. 10-2. 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 [s]ervices" for the refugee, including "[a]ssum[ing] responsibility for sponsorship," "plan[ning] for the provision" of "health services," E.R. 159 (Bartlett Decl., Att. 2), and making

arrangements for children who must be placed in foster care, E.R. 172. 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. E.R. 161-165. 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); Limon Decl. ¶¶ 12-13, Dkt. 10-2 (describing initial resettlement services, including locating safe and sanitary housing; obtaining furnishings, food, and other basic necessities; providing medical referrals and transportation to job interviews and trainings; and assisting with Social Security card applications and school registrations).

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.

1. *Barring a refugee inflicts a series of tangible injuries on the agency that provided her formal assurance.*

To begin, agencies pour private resources into their refugee services. *See, e.g.*, Decl. of Lawrence Bartlett in *Texas Health and Human Services Comm'n* v.

United States at 80, 83, 86, D. Ct. Dkt. 304-1 (documenting the private resources resettlement agencies devote to refugees); Limon Decl. ¶¶ 17-18, Dkt. 10-2 (detailing sources of funding for U.S. Committee for Refugees and Immigrants ("USCRI"), including cash and in-kind contributions). If a particular refugee does not enter the country, the resources the agency expended 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 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." E.R. 141 (Bartlett Decl., Att. 2); Limon Decl. ¶ 17, Dkt. 10-2 (USCRI and its partner agencies advance per capita payments of $2,075 to secure lodging and other necessities for each refugee, and receive reimbursement from the State Department the month *after* each refugee arrives). 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."). For example, as of mid-June, one of the major resettlement agencies had already laid off seventeen full-time employees, and its resettlement partners had laid off an additional seventy. Limon Decl. ¶¶ 34-37, Dkt. 10-2. That agency's employees have also had their benefits slashed by more than $1 million, and more layoffs are expected in the next sixty days. *Id.* ¶ 35.

2. *Excluding a refugee also results in intangible hardships to her resettlement agency.*

The harms inflicted on a resettlement agency when the Government excludes a refugee the agency has sponsored are not merely 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.* 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 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 mission by severing the relationship between the 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.

The secular resettlement agencies, too, experience profound injuries—far beyond the purely economic—when the refugees for whom they prepare are excluded. Indeed, one of those agencies, USCRI, has been so profoundly affected by the exclusion of refugees under EO-2 that it attempted to intervene in this Court to emphasize the extent of the hardships that the new exclusions have wrought. *See* USCRI Emergency Mot. to Intervene, Dkt. 10-1. USCRI has a 106-year history of "protecting the rights and upholding the freedom" of uprooted refugees. Limon Decl. ¶ 4, Dkt. 10-2. In accordance with that moral mission, USCRI works primarily with refugees who are disabled, children, female heads of households, individuals who identify as lesbian, gay, bisexual, or transgender, torture victims, the elderly, and those seeking to rejoin family—in short, the most vulnerable

members of an already marginalized refugee population. *Id.* ¶ 11. USCRI invests significant human and emotional 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 extended formal assurances. *Id.* ¶¶ 13-14, 32. Those efforts on behalf of the vulnerable populations that USCRI serves are severely compromised when the Government excludes a refugee with a formal assurance. *See id.* ¶¶ 32, 37.

As other courts of appeals have recognized in analogous circumstances, these extensive harms are themselves evidence that there is a legally cognizable relationship between a resettlement agency and a refugee it has agreed to sponsor. For example, in a case recently affirmed by the Seventh Circuit, the district court held that a resettlement agency had third party standing to represent refugees for whom it had provided assurances. *Exodus Refugee Immigration, Inc.* v. *Pence*, 165 F. Supp. 3d 718, 729, 731-732 (S.D. Ind. 2016), *aff'd* 838 F.3d 902 (7th Cir. 2016). The court explained that the agency "undoubtedly has a sufficiently close relationship with the[] refugees" it "has been assigned to resettle * * * in the next few weeks or months," and undoubtedly suffers a "concrete injury" when that resettlement is impeded. *Id.* (internal quotation marks omitted). Similarly, the D.C. Circuit has held that a refugee resettlement agency experiences a "concrete injury" when the Government bars the admission of a population with which it

works. *Haitian Refugee Ctr.*v. *Gracey*, 809 F.2d at 799; *see also Ukrainian-Am. Bar Ass'n, Inc.* v. *Baker*, 893 F.2d 1374, 1378-80 (D.C. Cir. 1990); *Haitian Refugee Ctr., Inc.* v. *Baker,* 789 F. Supp. 1552, 1558-60 (S.D. Fla. 1991), *aff'd* 949 F.2d 1109, 1116-17 (11th Cir. 1991).

B. The Government Offers No Satisfactory Rationale For Excluding Refugees With Formal Assurances.

Rather than facing these realities, the Government attempts to defy them. It pretends the Supreme Court has decided the question, contorts the meaning of the word "relationship," engrafts new requirements onto the Supreme Court's original stay, and minimizes the real harms that EO-2 inflicts on resettlement agencies. And, when all that fails, the Government argues that the Supreme Court has announced a policy of excluding refugees that this Court is obligated to perpetuate. That argument is as wanting as the rest, and the District Court's order must be affirmed.

1. The Supreme Court's July 19 Order did not decide the merits.

The Government begins and ends its argument (at 23 and 29) with suggestions that the Supreme Court's five-line stay order on July 19 somehow decided the merits of the question. But as the Government ultimately has to admit (at 30), that order "does not resolve the merits of the government's appeal of the modified injunction." In fact, the Government offered the Supreme Court *three* separate procedural mechanisms through which that Court could decide the merits

in the Government's favor—a motion to clarify, a request for certiorari and summary reversal, and an alternate request for mandamus relief. The Court rejected all three, instead issuing only a partial stay.

The Government itself explained that a stay pending appeal was appropriate "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; *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"). In this context, the implications of the Court's July 19 order are obvious: The Court believed the Ninth Circuit should "address" the resettlement agency "issue[]" in the first instance, while it found that the merits of the familial relationship question were too clear even to warrant the fallback relief of a stay. That makes sense, given that resolution of the resettlement agency question involves the evaluation of hundreds of pages of factual declarations, some reflective of recent factual developments, *see* Decl. of Lawrence Bartlett in *Texas Health and Human Services Comm'n* v. *United States*, D. Ct. Dkt. 304-1; Hetfield Decl., D. Ct. Dkt. 297-1; Bartlett Decl., D. Ct. Dkt. 301-1; Limon Decl., Dkt. 10-2, while the evidentiary record with respect to the familial relationship question was decidedly more compact.

The Supreme Court's July 19 order also says nothing about the equities of the resettlement agency issue as it is presented to this Court. As the District Court correctly held—and as USCRI's attempted intervention made even more apparent—excluding refugees with a formal assurance inflicts harms on the resettlement agencies that outweigh any government interest in excluding these individuals. *See IRAP*, 137 S. Ct. at 2088-89. But the equitable balance the Supreme Court had to evaluate in choosing to issue a partial stay pending the resolution of this appeal was very different. The question for the Supreme Court was not whether the equities favor the issuance of a modified preliminary injunction, but whether they favored allowing the modified injunction to go into force before appellate review is complete.

The Government recognized as much in its Supreme Court briefing, urging that a stay was appropriate because of the "disruption and practical difficulties that would be created if the district court's order remains operative for a substantial period but is later vacated or stayed." S. Ct. Mot. 39. Plaintiffs argued that this harm did not justify staying the modified injunction during the pendency of the appeal. In issuing its July 19 order, the Court partially rejected that narrow contention, apparently concluding that the practical difficulties associated with changing the Government's position warranted a stay until this Court conclusively decides the issue.

The harm that carried the day for the Government in obtaining the Supreme Court stay, however, has no relevance to the outcome of this appeal. This Court must decide whether the District Court appropriately determined that the injunction applies to refugees with formal assurances. If it did, the Government cannot avoid the need to comply on the ground that it will be hard to stop violating the court's order. That would set a dangerous precedent by which the Government could adopt an erroneous interpretation of an injunction, and then resist any effort to compel compliance by pointing to the difficulty of shifting course.

Finally, any attempt by the Government to gain support for its position from the July 19 stay order is confounded by the effects of the stay order itself. The two weeks since that order was issued mark the first extended period of time in which refugees with formal assurances have been barred by EO2 from entering the country.[3] They therefore represent the first time that resettlement agencies have been forced to confront fully the consequences that ensue when the refugees they have sponsored are suddenly excluded. Thus, because of the stay, this Court has information the Supreme Court lacked as to the actual harms inflicted on these resettlement agencies by the exclusions. *See* Limon Decl. ¶¶ 3, 32-37, Dkt. 10-2.

[3] 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. D. Ct. Dkt. 336-3, Ex. A (Bartlett email). On July 13, the District Court issued its modified injunction, which remained in force until the Supreme Court's July 19 order.

The profound harms these agencies have experienced in the wake of the stay—which were severe enough to prompt an intervention attempt by USCRI before this Court—put to rest any doubts as to the concrete hardships experienced by resettlement agencies when the Government suddenly excludes refugees with formal assurances. *Id.*[4]

2. *The Government's definition of a bona fide relationship has no basis in plain language or the opinion of the Supreme Court.*

a. The Government's substantive arguments are no better. Those claims rest heavily on the remarkable assertion (at 23) that there is *no* relationship between a resettlement agency and a refugee it agrees to sponsor because "resettlement agencies typically do not have any direct contact with the refugees they assure" and because the formal assurance is a contract between the agency and the government rather than the agency and the refugee. Neither of these 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

[4] While the District Court usually considers new information in the first instance, that is plainly unnecessary in this case. The District Court *already held* that excluding refugees with formal assurances would inflict concrete harm on resettlement agencies. The hardships that these agencies have, in fact, experienced since the Supreme Court's stay went into effect confirm the validity of that assessment. It would unnecessarily waste precious time to return the case to the District Court to consider additional evidence that will further convince that court of what it already concluded: Refugees with formal assurances are protected by the injunction.

child they plan to adopt from overseas, even though the couple has not had "direct contact" with the baby, and even though the only formal agreement is between the couple and the adoption agency. By the same token, it distorts the meaning of the term to assert that a resettlement agency has no "relationship" with a refugee whose welcome the agency has prepared and whose needs the agency has begun to address.

The Government's artificial constraints on what may be considered a "relationship" also run headlong into the language of the *IRAP* opinion. Every one of the three relationships that the Court cited as an exemplar may exist without direct contact or a formal agreement 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 her organization. But even the Government admits (at 24) that each of these categories of relationships is broadly protected.

Nor would it make any sense to, for example, make a student's ability to enter the United States turn on whether or not she completed her own application and enrollment forms. The student's exclusion will inflict the same concrete hardship on the university no matter who fills out her paperwork. It is that hardship that justifies applying the injunction to all admitted students, *IRAP*, 137 S.

Ct. at 2087, just as the resettlement agency's hardship justifies applying the injunction to a refugee with a formal assurance, regardless of who is a party to the document.

Moreover, by fixating on the parties to the formal assurance, the Government misses the point. It is not the piece of paper itself that matters. It is the careful selection process the resettlement agency engages in before it signs the formal assurance, *see infra* p. 34, and—more importantly—the extensive preparations that the agency undertakes for the refugee immediately after the formal assurance is signed. Those actions, tailored by the agency and its partners to the individualized needs of a particular refugee, are what create the relationship. And again, those actions are analogous to those undertaken by a university with respect to a prospective student.

b. The Government next attempts (at 24-26) to rely on a wholly invented qualifier with respect to the *type* of relationship that merits a refugee's protection. It insists (at 25) that a relationship must be established "independent of the refugee-admission process itself." One may search in vain for such a qualifier in the *IRAP* opinion. The Government cites no specific language, and the only passage that even obliquely addresses the issue says the opposite: The *IRAP* Court explained that the relationship between an immigration nonprofit and its client would not qualify if it was created "simply to avoid § 2(c)," suggesting that it is the

improper motivation for forming the relationship—and not the nature of the connection itself—that would be 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, Dkt. 10-2. There is therefore no question that these relationships are "formed in the ordinary course." *IRAP*, 137 S. Ct. at 2088.

c. Hewing more closely to the opinion, the Government asserts (at 25) that a relationship only qualifies if "the entity would suffer concrete hardship from the alien's inability to enter the United States." That is, of course, true, but the relationship between a refugee and the resettlement agency that provides her formal assurances meets that requirement several times over. *See supra* Part I.A.1-2. The resettlement agency must grapple with the loss of government funding, the waste of private resources, and the severe harm to its clients and its mission.

The Government attempts to minimize these hardships, suggesting (at 26) that a resettlement agency's harms are no different than those experienced by other service providers that wish to cater to an arriving alien.[5] But that contention relies

[5] The Government (at 25) also rather oddly points to Supreme Court decisions regarding the "zone of interests," claiming that precedent suggests that an entity cooperating with the government in a program to benefit individuals has no "cognizable stake" in seeing that program carried out. The cited precedent says nothing of the kind, and *Clinton* v. *City of New York* is far more directly on point. *See supra* p. 22. But even if the "zone of interests" precedent were somehow

on the Government's systematic mischaracterization of the relationship between a refugee and the resettlement agency. For example, the Government states (at 23) 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. Much like a university admissions committee making its selections, "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 (at 25) that a resettlement agency merely provides services "*after* the refugee's arrival" (emphasis in original). But again, the Government itself requires resettlement agencies to perform "*pre*-arrival services." *Supra* p. 21. And the resettlement agencies and their partners often

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relevant, the Supreme Court's most recent case on the issue makes clear that a financial injury tied to a statute's purpose is enough to demonstrate than an entity is an "aggrieved" party. *Bank of Am. Corp.* v. *City of Miami, Fla.*, 137 S. Ct. 1296, 1303 (2017).

spend months catering to the needs of particular refugees *before* they enter the country. 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.[6]

3. It is the Government's position—not the District Court's decision—that would eviscerate the Supreme Court's stay ruling.

Unable to explain its position by the terms of the Supreme Court's order, the Government throws up its hands and asserts that this Court *must* permit the exclusion of refugees with formal assurances because otherwise the bulk of Section 6(a) and 6(b) will not "'take effect' as the Supreme Court explicitly intended." U.S. Br. 27; Stay Mot. 14. That is wrong, root and branch.

First and foremost, the Government fundamentally misinterprets the Supreme Court's holding in *IRAP*. The Government suggests (at 27) that, in crafting a stay based on the equities, the Supreme Court implicitly announced its own policy favoring refugee exclusion. That is false, and the Government compounds its error by asserting that this newly invented Supreme Court dictate must be vindicated in the manner of a statute (at 27) or a contract (at 28-29). In fact, the Supreme Court's opinion considered the *Government's* policy in favor of

[6] *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.

refugee exclusion, and held that it must give way whenever excluding a refugee would inflict "concrete hardship" on an American entity. *IRAP*, 137 S. Ct. at 2089. And the District Court vindicated *that* holding by issuing a modification order that will prevent the Government from excluding refugees with formal assurances. Because excluding those refugees for the duration of the 120-day ban would inflict concrete hardships on resettlement agencies, vacating the District Court's order would render the Supreme Court's carefully crafted stay a "dead letter." Affirming it certainly would not.

In any event, 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 refugees currently lack formal assurances. *See* U.S. Br. 27. 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* U.S. Br. 27-28; Stay Mot. 14. That is 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) (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,[7] despite the injunctions) and it expects to continue to do so. The District Court was certainly under no obligation to tailor the injunction to ensure that the Government's deliberate pace grinds to a halt. That is particularly so because the Supreme 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.

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

Moreover, 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.

That does not mean that applying the injunction to refugees with formal assurances renders its application "arbitrar[y]," as the Government also claims (at 28). Refugees that currently have a formal assurance have a direct connection with a particular resettlement agency. The Supreme Court has long recognized that an entity's agreement to serve a particular individual creates a legally significant relationship in a way that an entity's *prospective* representation of a category of similar individuals may not. *See Kowalski* v. *Tesmer*, 543 U.S. 125, 131 (2004) (a "future attorney-client relationship with as yet unascertained Michigan criminal defendants" does not confer third party standing, but an attorney may "invok[e] the rights of an existing client").

At bottom, it is the Government's interpretation of the scope of the injunction that is arbitrary. The Government seeks to exclude a wide swathe of refugees despite the concrete harms the exclusions will inflict on American entities, and despite the fact that this category of refugees is the *least* likely to

implicate the national security rationales the Government has pointed to in the past. By the Government's own admission (at 23)—these refugees have already "*been approved by DHS* and pass[ed] all required medical examinations" (emphasis added). 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. In short, as the District Court properly held, there is no reason to exclude these refugees and every reason to admit them.

II. The District Court Correctly Held That the Supreme 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 maintains that Americans lack a "close familial relationship" with their grandparents, grandchildren, aunts, nieces, brothers-in-law, 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 the Supreme Court's opinion, the immigration laws, or common sense supports it.

1. The Supreme 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*, 431 U.S. at 505-506. 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, the Supreme 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, * * * 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*—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." 507 U.S. at 310 (emphasis added). Other decisions are to the same effect. *See*

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[8] The Government suggests (at 38-39) 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, E.R. 195, and that ceiling was surpassed more than two weeks ago, *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 the Supreme Court's order, not merely whatever discretionary relief administrative officers choose to provide.

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 Equal. & 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 dismisses these cases (at 33) on the ground that they "involv[e] local housing ordinances and grandparents petitioning for visitation rights." That is an empty distinction. What matters under the plain text of the Court's opinion is which persons count as close family, and these precedents make clear that a person's "close relatives" do not end at the "arbitrary boundary * * * of the nuclear family," but include the same relationships the Government now disparages. *Moore*, 431 U.S. at 504-505. Further, these cases recognize that Americans suffer cognizable harm if denied the ability to "live together," *id.* at 505, or "associat[e] with" such relatives, *Overton*, 539 U.S. at 131, the very harm the Government's guidance would inflict. The fact that some of these cases did not arise in the immigration context is irrelevant, particularly given that *Reno* applied the same "traditional[]" understanding of "close relatives" in delineating a person's rights under immigration law. 507 U.S. at 310.

Reading the Supreme Court's order to extend to such elemental family relationships does not "essentially eliminate[]" the requirement of a "close familial

relationship," as the Government claims. U.S. Br. 2. Plaintiffs do not dispute that the Court's order affords no protection to distant family members like second-cousins. 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* E.R. 221 (D. Ct. Opinion).

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 the Supreme 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 the 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. U.S. Br. 40. 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.* That is nonsense. The Court never so much as hinted 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. U.S. Br. 40.

The Government attempts to salvage its position by asserting (at 40-41) that most parents-in-law probably have a biological child in the United States, too. This *ad hoc* rationalization makes no sense. The premise of the Government argument is that only persons who can file a family-based immigrant visa petition should be deemed close family. *See* U.S. Br. 34. It is impossible to discern why, by this logic, persons who are merely *likely* to have such a relationship should count, particularly when the Government is perfectly capable of determining whether such a relationship in fact exists. Nor is there any apparent basis for the Government's claim that mothers-in-law are more likely to have immediate relatives in the United States than, say, grandparents, grandchildren, and siblings-

in-law of U.S. persons. *See, e.g.*, Br. of New York *et al.* as *Amici Curiae* at 8 & nn.6-7, D. Ct. Dkt. 333 (detailing research showing that immigrant grandparents, aunts, and uncles frequently assist their immediate relatives in raising children).

Even putting these various problems to one side, the Government fails to identify a coherent reason why the immigration laws *should* serve as an "appropriate point of reference" in determining the scope of the Supreme Court's stay. U.S. Br. 32. The 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 the Court sought to answer. And, contrary to the Government's insinuation (at 32), the maxim that "equity follows the law" does not require the Court to blindly transplant those judgments to this different and inapposite circumstance. That principle simply dictates 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)); *see In re Shoreline Concrete Co., Inc.*, 831 F.2d 903, 905 (9th Cir. 1987) (explaining that "[c]ourts of equity are bound to follow express statutory commands").

In any event, to the extent Congress has considered who counts as "close family," its judgment contradicts 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 also* 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 37) that this provision supports its distinction between "close" and "extended" family. But the statute Congress enacted explicitly refers to siblings-in-law, grandparents, and grandchildren as "close family"; there is no ambiguity about it. Pub. L. No. 107-150, § 2(a). 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 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* E.R. 229 (D. Ct. Opinion). And a longstanding regulation provides that juvenile aliens may be released to the custody of an "aunt,

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[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).

[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.

uncle, [or] grandparent," 8 C.F.R. § 236.3(b)(1)(iii), relations whom the 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).[11]

Rather than relying on these provisions defining the very sort of "close family relationship" the Supreme Court's opinion discusses, the Government fixates on those provisions that determine who can "petition for an *immigrant* visa." U.S. Br. 34 (emphasis added). But those provisions provide an exceptionally poor guide to determining the scope of the Court's stay. They expressly denominate the listed 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

[11] The Ninth Circuit, too, has repeatedly identified these relations as part of an alien's "close family" when adjudicating applications for asylum or cancellation of removal. *See, e.g.*, *Villena* v. *INS*, 622 F.2d 1352, 1359 (9th Cir. 1980) (noting "hardship" caused by separation from "grandparents and other close relatives"); *Urbina-Osejo* v. *INS*, 124 F.3d 1314, 1318 (9th Cir. 1997) (noting person's "close family ties" with the United States because of her niece's presence); *Vergara* v. *INS*, 8 F.3d 33, at *2 (9th Cir. 1993) (finding that an alien has "close family ties in the United States" because her grandmother and aunts reside here).

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 into 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.

The Government claims that its narrow understanding of close family is "confirm[ed]" by a smattering of subsections in 8 U.S.C. § 1182. U.S. Br. 34-35. But the Government's string cite mostly just confirms the District Court's finding that the Government's argument rests on "cherry-picking." E.R. 218. The Government's list conspicuously omits Section 1182(a)(4), a provision authorizing foreign nationals to obtain an affidavit of support from a "sister-in-law, brother-in-law, grandparent, * * * grandchild," or other close relative listed in Section 1183a(f). 8 U.S.C. §§ 1182(a)(4)(C)(ii), (D), 1183a(f)(5)(B). It also omits Section 1182(d)(13)(B), which waives numerous grounds of inadmissibility for nonimmigrants covered by Section 1101(a)(15)(T), a provision that protects the "[g]randchild(ren)," "[n]iece[s]," and "nephew[s]" of victims of human trafficking. 81 Fed. Reg. 92,266, 92,280 (Dec. 19, 2016) (describing this provision).

Those portions of Section 1182 that the Government does see fit to mention, moreover, are no better a guide to the scope of the Court's stay than the immigrant visa provisions. They too guard access to an exceptionally narrow privilege—the right to enter the country notwithstanding an express statutory bar on admissibility—that is entirely dissimilar to the basic right preserved by the Supreme Court's stay. Moreover, many of these provisions permit relief to be granted only in circumstances of "*extreme* hardship," a stark contrast to the Supreme Court's instruction that entry must be granted whenever a U.S. person would suffer "concrete hardship." *See* 8 U.S.C. §§ 1182(a)(9)(B)(v), (h)(1)(B), (i)(1). And, again, each of these provisions is underinclusive even under the Government's definition, excluding parents-in-law, children-in-law, fiancés, and (except for one provision of surpassing obscurity, *see id.* § 1182(a)(3)(D)(iv)) siblings, too.

3. Grasping at any straw it can find, the Government points to EO-2's own waiver provisions for support. *See* U.S. Br. 31. But those provisions are triply irrelevant. First, the Supreme 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 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* E.R. 221 n. 10 (D. Ct. Opinion). It abandoned that contention in the Supreme Court, and has made no attempt to revive it here. That concession is well-placed: As the Supreme 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), and courts defer to the Executive in the "construction of * * * statutes, not of [the Supreme 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).

4. Finally, the Government suggests, "at a minimum," that this Court narrow the injunction to exclude *some* of the relatives Plaintiffs urged the District Court to protect. U.S. Br. 41-42. The Government never made this argument below. Nor did it press this argument in its motion to clarify before the Supreme Court, or in its requests for a stay in that court or in this one. Even now, the Government does not identify any specific way it wants the injunction narrowed; it

simply asks the Court to "evaluate the relationships separately." *Id.* at 41. This argument is therefore waived, and this Court should not consider it. *See Barrientos* v. *1801-1825 Morton LLC*, 583 F.3d 1197, 1215 (9th Cir. 2009) (explaining that where a defendant "did not object to the scope of the injunction before the district court" it "waived the objection"); *see also, e.g.*, *Armstrong* v. *Brown*, 768 F.3d 975, 981 (9th Cir. 2014) (same); *Meggitt San Juan Capistrano, Inc.* v. *Yongzhong*, 575 F. App'x 801, 804 (9th Cir. 2014) (same).

The argument is also without merit. There is no principled reason to include grandparents and grandchildren in the definition of close family but to exclude other relatives in precisely the same "degree of kinship," including "aunts, uncles, cousins," and siblings-in-law. *Moore*, 431 U.S. at 504-505. The Government suggests (at 42) that "cousins" are particularly unworthy of protection, but *Moore* expressly included them in its definition of "close relatives," *id.*, and two declarants before this Court have attested to the profound hardship U.S. persons would suffer from the exclusion of their cousin, a 21 year-old refugee stranded in Malawi who cannot even appeal to EO-2's formless waiver provisions for protection. Feruzi Decl. ¶¶ 4, 10-11, D. Ct. Dkt. 344-2; Watata Decl. ¶ 20, D. Ct. Dkt. 344-3; *see supra* p. 41 n.8. The Court's stay order protects those individuals, and others like them, from the sting of the President's illegal order. The District

Court rightly held that the Government's guidance to the contrary was unlawful, and there is no basis to disturb that conclusion.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases within the meaning of Ninth Circuit Rule 28-2.6 currently pending in this Court. An appeal from the same underlying case was previously before this Court in *Hawaii v. Trump*, No. 17-15589. That appeal was decided on June 12, 2017, in a published opinion, by a panel composed of Judges Hawkins, Gould, and Paez. 859 F.3d 741. The mandate issued on June 19, 2017. An appeal from the same underlying case also was before this Court in *Hawaii v. Trump*, No. 17-16366. That appeal was summarily dismissed on July 7, 2017.

This case would have been related to *Washington v. Trump*, No. 17-35105, 847 F.3d 1151 (2017) (per curiam), but that appeal was dismissed on March 8, 2017. The Washington appeal involved a challenge to Executive Order No. 13,769 (Jan. 27, 2017), which was revoked and replaced by Executive Order No. 13,780 (Mar. 6, 2017). Executive Order No. 13,780 is the subject of this case.

CERTIFICATE OF COMPLIANCE

I certify that the forgoing document complies with the type-face and type-volume requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(7)(B), because it contains 12,727 words and has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

/s/ Neal K. Katyal
Neal K. Katyal

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2017, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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