JEFFREY B. WALL
Acting Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
ELLIOT ENOKI (No. 1528)
Acting United States Attorney
EDRIC M. CHING (No. 6697)
Assistant United States Attorney
JOHN R. TYLER
Assistant Branch Director
BRAD P. ROSENBERG (DC Bar No. 467513)
MICHELLE R. BENNETT (CO Bar No. 37050)
DANIEL SCHWEI (NY Bar)
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Tel: (202) 514-3374; Fax: (202) 616-8460
E-mail: brad.rosenberg@usdoj.gov
Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAI'I and ISMAIL ELSHIKH,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants.

No. 1:17-cv-00050-DKW-KSC

DEFENDANTS' OPPOSITION TO EMERGENCY MOTION TO CLARIFY SCOPE OF PRELIMINARY INJUNCTION

Judge: Hon. Derrick K. Watson

Related Documents: Dkt. No. 293

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The Supreme Court granted certiorari in this case and, in so doing, partially lifted this Court's preliminary injunction regarding Sections 2(c), 6(a), and 6(b) of Executive Order 13,780. *See Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436 and 16-1540 (U.S. June 26, 2017) (per curiam) ("Slip Op."); Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("EO-2"). The Supreme Court's opinion allows those provisions of the Executive Order to take effect, save for individuals who "have a credible claim of a bona fide relationship with a person or entity in the United States." Slip Op. at 12. "For individuals, a close family relationship is required." *Id.* For entities, "the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2." *Id.*

Sections 2(c), 6(a), and 6(b) became effective, to the extent covered by the Supreme Court's stay, on June 29, 2017. However, because the Supreme Court's stay did not precisely track the relief sought by the parties, the Government's implementation of that relief required it to study the ruling and governing law, coordinate among multiple Government agencies, and issue detailed guidance on implementation of the Supreme Court's stay, all within 72 hours. Most of the guidance was finalized the afternoon of June 29, 2017, absent a few subsequent modifications as issues were identified or further analyzed.

Despite these efforts, Plaintiffs challenge the Government's compliance with the Supreme Court's decision on three grounds, none of which has merit. Plaintiffs first contend the Government is too narrowly construing the phrase "close familial relationship." *See* Mem. in Support of Emergency Mot. to Clarify Scope of Prelim. Inj. ("Pls.' Mem.") at 7-11, ECF No. 293-1. The scope of the Government's definition, however, hews closely to the categorical determinations articulated by Congress in the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101, *et seq.*, which frames the backdrop for federal immigration policy, including the Executive Order. The Supreme Court's decision construing the Executive Order must also be read as having that touchstone in mind, not the broader, free-hand rules now constructed by Plaintiffs. (To the extent Plaintiffs have challenged the initial exclusion of fiancés from the definition of "close familial relationship," the Government has clarified in subsequent guidance that fiancés are included.)

Second, Plaintiffs argue that a sponsorship assurance from a refugee resettlement agency is, by itself, sufficient to create a qualifying "bona fide relationship" for a refugee with a U.S.-based entity. *See* Pls.' Mem. at 11-13. Plaintiffs' reading of the Supreme Court's decision, however, misconstrues the fundamental structure of the U.S. Refugee Assistance Program ("Refugee Program"). Under the Refugee Program, a refugee's relationship with a resettlement agency is created by direction of the Government through a cooperative agreement

entered into between the Government and the agency. In other words, a refugee's relationship with the agency flows from the Government, not from an independent relationship between the refugee and the resettlement agency. Allowing this Government-structured, universal refugee relationship to count as the sort of relationship the Supreme Court had in mind would render the Court's stay governing the refugee provisions largely meaningless, creating the proverbial exception that swallows the Court's articulated rule. Amici International Refugee Assistance Project and HIAS make a related argument that the Government cannot apply Sections 6(a) and 6(b) to refugees who are clients of U.S.-based entities that provide assistance to refugees abroad, but this issue is not even ripe.

Third, and finally, Plaintiffs attempt to create a dispute where there is none. Plaintiffs claim that the Government is failing to implement the Supreme Court's standard that a foreign national must have a "credible claim" of a bona fide relationship with a U.S.-based person or entity. But the Government's guidance explicitly references and incorporates this very standard. This claim thus provides no basis for relief.

Accordingly, this Court should deny Plaintiffs' motion. Should the Court grant any relief to Plaintiffs, however, the Government respectfully requests that the Court stay that relief pending the filing by the Government and disposition of an immediate request to the Supreme Court for clarification of its ruling.

BACKGROUND

1. The Court's Preliminary Injunction and the Supreme Court's Stay

The Court issued a preliminary injunction on March 29, 2017, ECF No. 270, which was affirmed in part and vacated in part by the Ninth Circuit. *See Hawaii v. Trump*, --- F.3d ---, 2017 WL 2529640 (9th Cir. June 12, 2017) (per curiam). After the mandate was issued, this Court amended its preliminary injunction to comply with the Ninth Circuit's decision. *See* ECF No. 291.

On June 26, 2017, the Supreme Court granted certiorari in this case and *Trump v. International Refugee Assistance Project* ("*IRAP*"). In so doing, the Court granted a significant part of the Government's application to stay the preliminary injunctions entered in this case and in *IRAP*. *See* Slip Op. at 9-13. Regarding the suspension of entry provision in Section 2(c) of the Executive Order, the Supreme Court held that the injunction against that provision remains in effect only for "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Id.* at 12. In defining a qualifying relationship for persons, the Court stated that "a close familial relationship is required." *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.* The Court also made clear, however, that "*[a]ll other foreign nationals are subject to the provisions of EO-2*." *Id.* (emphasis added).

The Court reached an analogous conclusion regarding Section 6(a) of the Executive Order, which suspends aspects of the Refugee Program for 120 days, and Section 6(b) of the Executive Order, which imposes a 50,000 person cap on refugee admissions for fiscal year 2017. *See id.* at 13. Applying the same "equitable balance" as it did for Section 2(c), the Court held that "[a]n American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. As to these individuals and entities, we do not disturb the injunction." *Id.* For refugees who lack such a connection, however, "the balance tips in favor of the Government's compelling need to provide for the Nation's security." *Id.* For "all [of those] other individuals, the provisions may take effect." *Id.*

2. Implementation of EO-2 Following the Supreme Court's Stay

As the Supreme Court noted, the President issued a memorandum to Executive Branch officials on June 14 clarifying that the effective date of the enjoined provisions of the Executive Order would "be the date on which the injunctions in these cases 'are lifted or stayed with respect to that provision.'" *Id.* at 7 (quoting Presidential Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence (June 14, 2017), 82 Fed. Reg. 16279 ("Presidential Mem."). That memorandum also directed the relevant agencies to begin implementing Sections 2

and 6 of the Executive Order 72 hours after applicable injunctions are lifted or stayed with respect to those provisions. *See* Presidential Mem. Because the Supreme Court issued its stay on June 26, the Government began implementation on June 29, and specifically commenced enforcement of Sections 2(c), 6(a), and 6(b) at 8:00 p.m. Eastern that day.

As noted, the relief granted by the Supreme Court, while substantial, was different in scope than the Government had requested. As a result, to prepare guidance for the relevant agencies and the public-at-large regarding the implementation of Sections 2(c), 6(a), and 6(b) to the extent permitted by the Supreme Court's stay, coordination was required among multiple Government agencies regarding numerous topics of legal and factual complexity. Accordingly, most of the guidance was not finalized until the afternoon of June 29, 2017 and, even after some of the guidance was released, revisions and changes were made as additional issues were identified or further analyzed.

Between June 27 and June 29, Plaintiffs' counsel and counsel in *IRAP* sent a series of emails to Government counsel regarding the implementation of the Executive Order in light of the Supreme Court's stay. During this period, however, the Government was still developing its guidance to address the Supreme Court's stay order. The Government was not in the position to provide an immediate, substantive response in view of the unique features of the stay order. Nor would it

have benefitted either Plaintiffs or the Government to share non-final conclusions during the Government's deliberative process. The Government concluded that process as expeditiously as possible, publishing information on June 29, before enforcement of Sections 2(c), 6(a), and 6(b) would commence.

As the guidance was officially issued, the Government informed Plaintiffs of that guidance and provided relevant links to the publicly available materials. The Government also informed Plaintiffs of a subsequent change in guidance regarding the treatment of fiancés. While previously-issued guidance had indicated that fiancés would not be considered to be close family members for purposes of applying the Supreme Court's decision, that guidance was subsequently updated to indicate that fiancés would, in fact, satisfy the Supreme Court's "close familial relationship" test. *See* Department of State, Executive Order on Visas (June 29, 2017) at 3, attached hereto as Ex. A. Plaintiffs were informed that the guidance regarding fiancés was being reviewed and, subsequently, updated. *See* June 29, 2017 emails, attached hereto as Ex. B.

ARGUMENT

I. The Government's Definition of Close Family Member is Consistent with the INA and the Supreme Court's Decision.

As the Supreme Court instructed, not all relationships with a person in the United States suffice to fall outside the stay and within the injunction. Indeed, not

even all familial relationships suffice; rather, a "*close* familial relationship" is required. Slip Op. at 12 (emphasis added). Plaintiffs do not dispute that the Supreme Court's standard requires delineating some family relationships from others.

Under the Government's definition of "close familial relationships," as used in the Supreme Court's decision, the following relationships are exempt from the Executive Order: parent (including parent-in-law), spouse, fiancé, child, adult son or daughter, son-in-law, daughter-in-law, sibling (whether whole or half), and step relationships. To avoid any confusion, the Government emphasizes that its definition of "close family" does include fiancé.

The Government's definition, however, does not include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law, and any other "extended" family members. These delineations as to the definition of "close family" are rooted in what Plaintiffs have described as "the INA's finely reticulated system of immigration controls." Pls.' Mot. for TRO at 24, ECF No. 65-1. Indeed, the Government's categorical implementation of the standard the Court's balancing struck reflects policy in the INA that categorically privileges certain family relationships over others. *See Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197-98 (2014) (plurality opinion). Section 201 of the INA defines "immediate relatives"—the "most favored" family-based immigrant visa category, *id.* at 2197—as "the children, spouses, and parents" of U.S.

citizens. 8 U.S.C. § 1151(b)(2)(A)(i). Step-relationships are included in the INA's definitions of "child" and "parent." *See id.* § 1101(b)(1)-(2). Section 203, concerning family-based preferences in allotting numerically-limited visas, specially privileges the following relationships: unmarried and married sons and daughters (age 21 or older) of U.S. citizens; siblings of U.S. citizens; and spouses, unmarried children under the age of 21, and unmarried sons and daughters (age 21 or older) of lawful permanent residents. *See id.* § 1153(a). Half-siblings are included in the sibling preference. *See* 9 Foreign Affairs Manual 102.8-3. The fiancé relationship, as well, is recognized and given special accommodation in the INA. *See* 8 U.S.C. §§ 1101(a)(15)(K), 1184(d). The Government's definition treats all these family relationships as "close family" within the Supreme Court's meaning.

Other statutory provisions confirm this conclusion. Within the INA, a provision that establishes one of the various particular grounds on which aliens are inadmissible also builds in an "[e]xception for close family members," with reference specifically to "parent, spouse, son, daughter, brother, or sister" relationships. 8 U.S.C. § 1182(a)(3)(D)(iv). A law concerning Iraqi refugees enacted in 2008[1] employed the phrase "close family members" and stated that the

[1] This law, the Refugee Crisis in Iraq Act of 2007, is found at Subtitle C, sections 1241-49 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (codified as amended at 8 U.S.C. § 1157 note).

phrase's meaning is "described in section 201(b)(2)(A)(i) or 203(a) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i) and 1153(a))." Those statutes, of course, are the same sections of the INA on which the Government primarily relies here. In contrast to those "close family" relationships, the INA does not grant any immigration benefit for grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States. *See Cuellar de Osorio*, 134 S. Ct. at 2213 (noting that "the grandchildren, nieces, or nephews of citizens [are] relationships [that] d[o] not independently entitle [those family members] to visas"); *INS v. Hector*, 479 U.S. 85 (1986) (per curiam) (holding that INA did not permit consideration of hardship to niece of deportee, notwithstanding *de facto* parent-child relationship); *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1175-78 (9th Cir. 2007) (similar as to grandchild).

Plaintiffs try to sweep in a host of extended family relationships that Congress in the INA did not privilege, but provide no explanation to justify overriding the INA as the best reference for line-drawing. The posture here is one of equitable relief, and "a fundamental principle of equity jurisprudence is that 'equity follows the law.'" *In re Shoreline Concrete Co.*, 831 F.2d 903, 905 (9th Cir. 1987) (quoting *Hedges v. Dixon Cty.*, 150 U.S. 182, 192 (1893)). Here, the relevant law is plainly the INA. Plaintiffs forego reliance on that authority, instead inventing a new, ad hoc definition of "close family" for purposes of a case involving federal immigration

law. Tellingly, however, the principal authority they cite is a decision addressing a local housing ordinance. *See* Pls.' Mem. at 10 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977)). Even were the Court to accept Plaintiffs' invitation to craft a standard unmoored to Congressional determination of federal immigration law, Plaintiffs' classifications lack any universal or cohesive support. After all, the phrase "close family member" is frequently construed more narrowly than Plaintiffs' definition, *see, e.g.*, *United States v. Felipe*, 1997 WL 278111, at *1 (S.D.N.Y. May 22, 1997) (noting concession that "a sister-in-law and a niece" did not "fit the normal definition of 'close family member'"), and, as noted above, uniformly is so under the INA.

The Supreme Court's reference to Dr. Elshikh's mother-in-law as having a "close familial relationship" does not support departing from the INA as a touchstone. The Supreme Court did not declare that "mother-in-law" is a "close familial relationship"; rather, the Supreme Court examined "[t]he facts of the[] cases" presented to it, Slip Op. at 12, from which it was apparent that Dr. Elshikh's mother-in-law would in fact have a qualifying relationship as the mother of Dr. Elshikh's wife (herself an American citizen). *See* Elshikh Decl. ¶¶ 1, 4, ECF No. 66-1. The statement that this particular individual has a "close familial relationship" was not a categorical determination to privilege the mother-in-law relationship here, even though Congress in the INA did not. Nevertheless, out of an abundance of

caution given the potential ambiguity created by the Supreme Court's phrasing, the Government's definition includes parents-in-law and children-in-law.[2]

Plaintiffs seek to justify their broader classifications by reading the Supreme Court's decision as focused solely on whether "an alien had '*no* connection to the United States *at all*' and exclusion did 'not burden *any* American party.'" Pls.' Mem. at 11 (quoting Slip Op. at 11) (emphasis added by Plaintiffs). That reading is plainly wrong. The Supreme Court unambiguously excluded *all* other relationships with individuals, no matter how close: "For individuals, a close familial relationship *is required*." Slip Op. at 12 (emphasis added).

Finally, Plaintiffs ignore that the Supreme Court's use of the phrase "close familial relationship" is almost identical to language used in the Executive Order itself. Specifically, the Order's waiver provisions—discussed by the parties in their Supreme Court filings—indicate that a waiver of Section 2(c)'s entry suspension may be appropriate where a "foreign national seeks to enter the United States to visit

[2] Importantly, as with Dr. Elshikh's mother-in-law, parents-in-law of persons in the U.S. will typically also be parents of persons in the U.S., because spouses typically live together. By contrast, siblings-in-law of persons in the U.S. are far less likely to be siblings of persons in the U.S., because siblings often live apart. Thus, the categorical inclusion of parents-in-law does not justify the categorical inclusion of siblings-in-law. Of course, a particular U.S. person's sibling-in-law may be covered through their relationship with a sibling or spouse who in fact is in the U.S., just as a particular U.S. person's grandmother or aunt, while not categorically included as close family, may be covered as the mother of a different U.S. person.

or reside with *a close family member (e.g., a spouse, child, or parent)* who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship[.]" EO-2 § 3(c)(iv) (emphasis added). The Order itself thus provides a further guidepost as to what the Supreme Court anticipated would qualify as a "close familial relationship." *See also* Slip Op. at 12 (citing the Order's waiver provisions as reflecting aspects of "the Government's interest in enforcing" the Order). The illustrative examples used in the Order—spouse, child, and parent—do not support Plaintiffs' attempt to impose a much more expansive definition.

For all of these reasons, the Government's INA-based definition of "close familial relationship" comports with the Supreme Court's narrowing of the injunction. The Court should reject Plaintiffs' attempt to broaden the injunction to reach extended family relationships.

II. A Sponsorship Assurance for a Refugee Seeking Admission is Insufficient in and of Itself to Establish a Qualifying Relationship.

The Supreme Court stayed the preliminary injunction regarding Sections 6(a) and 6(b) of the Executive Order, except for any "individual[s] seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States." Slip Op. at 13. Plaintiffs and the amici, the International Refugee Assistance Project and HIAS (hereinafter "IRAP/HIAS" and "Amicus Br."), both

argue that a sponsorship assurance by a resettlement agency is sufficient—in and of itself—to establish such a relationship. Amicus IRAP further argues that its activities representing and providing other assistance to refugees abroad in the admission process create a qualifying bona fide relationship. Plaintiffs' and Amici's first argument is wrong and would largely eviscerate the Supreme Court's order as to refugees. And their second argument is not ripe.

A. Assurances Provided by Refugee Resettlement Agencies Do Not Constitute a Qualifying Bona Fide Relationship Between a Refugee and a U.S.-Based Organization.

To implement the Refugee Program, the Department of State enters into annual cooperative agreements with non-profit resettlement agencies in the United States. *See* Decl. of Lawrence E. Bartlett ("Bartlett Decl.") ¶¶ 14-15 (attached hereto). Currently, nine agencies have entered into agreements with the United States to provide resettlement services. *Id.* ¶ 14.[3] Before any refugee is admitted to the United States under the Refugee Program, the Department of State obtains a commitment (called an "assurance") from a resettlement agency. *Id.* ¶ 16 & Att. 3. As part of its assurance, the resettlement agency agrees that, once the refugee arrives

[3] The nine resettlement agencies are Church World Service, Episcopal Migration Ministries, Ethiopian Community Development Council, HIAS, International Rescue Committee, Lutheran Immigration and Refugee Service, United States Committee for Refugees and Immigrants, United States Conference of Catholic Bishops, and World Relief. *Id.*

in the United States, the resettlement agency will provide certain benefits for that refugee in exchange for payment from the Government. *Id.* ¶ 20. The cooperative agreement specifies the services that the resettlement agency must provide to each refugee and provides Government-funded compensation to the resettlement agency for doing so. *Id.* ¶ 15 & Att. 2. The services provided by resettlement agencies and their local affiliates throughout the country include placement, planning, reception, and basic needs and core service activities for arriving refugees. *Id.* ¶ 20. Once a particular refugee has been approved by the Department of Homeland Security and provides satisfactory medical results, the refugee is assigned to a resettlement agency, which submits the assurance agreeing to provide the required services if and when the refugee arrives in the United States. *Id.* ¶¶ 13-14 & Att. 3.

Such a Government-arranged assurance is not a qualifying "bona fide relationship" between the refugee and "a[n] . . . entity in the United States." Slip Op. at 13. The assurance itself is not an agreement between the resettlement agency and the refugee; rather, it is an agreement between the agency and the *Government* in which the resettlement agency agrees to furnish resettlement services to a particular refugee on the Government's behalf, utilizing funds provided by the Government. Indeed, resettlement agencies typically do not have any direct contact with the refugees they assure before their arrival in the United States. *Id.* ¶ 21. Rather, the resettlement agency works with individuals and organizations in the

United States, including any U.S. ties a refugee may otherwise have in the United States, to prepare for the refugee's arrival without directly interacting with the refugee abroad. *Id.*

The indirect link between a resettlement agency and refugee that results from such an assurance is in stark contrast to the sort of relationship the Supreme Court identified as sufficient in its order. Unlike students who have been admitted to study at an American university, workers who have accepted jobs at an American company, and lecturers who come to speak to an American audience, *see* Slip Op. at 12, resettlement agencies do not have any freestanding connection to a refugee by virtue of the sponsorship assurance that is separate and apart from the Refugee Program. Therefore, the exclusion of an assured refugee could not even plausibly be thought to "burden" a resettlement agency, apart from its ability to perform the resettlement services for which the Government has contracted with it to provide. *Id.* at 11.

A declaration submitted with the IRAP/HIAS amicus brief notes that, "after a refugee has been given an assurance, . . . HIAS and its affiliates begin the involved process of arranging for the reception, placement, and appropriate initial resettlement assistance for the refugee" by identifying housing, arranging for necessities, and the like. Decl. of Mark Hetfield, President and CEO of HIAS, Inc. ¶ 18, ECF No. 297-3; *see* Amicus Br. at 6. But these services are a component of

the Refugee Program itself, and they are performed as a result of HIAS's cooperative agreement with the Government, not any agreement or other independent relationship HIAS has with a particular refugee. Indeed, as noted above, resettlement agencies usually do not have direct contact with the refugees before their arrival in this country.[4]

Indeed, Plaintiffs' and amici's contrary position that a sponsorship assurance alone establishes a qualifying bona fide relationship would largely eviscerate the Supreme Court's stay ruling with respect to the Executive Order's refugee provisions, creating an exception to the Supreme Court's order that swallows the rule. The Supreme Court made clear it was staying the preliminary injunction against Sections 6(a) and 6(b) in part, declaring that those sections "may take effect" "[a]s applied to all other individuals" who do not have the requisite relationship. Slip Op. at 13. Because the Department of State obtains an assurance from a resettlement agency for *every* refugee who is admitted to the United States before the refugee enters, Bartlett Decl. ¶ 16, every refugee who was found to satisfy the

[4] There may be instances in which an entity that performs services as a resettlement agency under contract with the Government also has a connection to a particular refugee independent of its cooperative agreement with the Government and the sponsorship assurance process. Under those circumstances, the sufficiency of any such connections to establish a qualifying bona fide relationship would be assessed by officials on a case-by-case basis. The guidance at issue here merely provides that sponsorship assurance *alone* is not sufficient to establish a qualifying bona fide relationship. *See* Department of State, Fact Sheet, attached hereto as Ex. C.

other requirements for refugee admission, under Plaintiffs' and amici's theory, would necessarily have a bona fide relationship. Indeed, as of June 30, 2017, 23,958 refugees in the Refugee Program were already assured by a resettlement agency. *Id.* ¶ 17. Not all of these individuals, however, likely would even be scheduled to enter in the next 120 days. *Id.* This Court should reject a reading of the Supreme Court's order that renders it largely inoperative. *Cf. Corley v. United States*, 556 U.S. 303, 314 (2009) ("basic interpretive" principles require that "[a] statute should be construed [to give effect] to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (citation omitted)).

Plaintiffs also assert that the Government has run afoul of the Supreme Court's order by "only permit[ing] the entrance of refugees booked for travel through July 6, 2017." Pls.' Mem. at 12 (citing Pls.' Ex. B, ECF No. 294-2). Plaintiffs, however, mischaracterize the Government's guidance, which provides a "reminder" that "refugees already scheduled for travel through July 6 will be permitted to travel regardless of whether they have" a "bona fide relationship" with a person or entity in the United States. *Id*., Pls.' Ex. B. That is because refugees already scheduled for travel on the Order's effective date are exempt from Section 6(a)'s suspension, and the refugees who have been scheduled for travel through July 6 would not exceed the 50,000 person cap. Moreover, the background briefing that Plaintiffs filed with their motion indicates that the Government has yet to "determine which

folks can travel after" July 6. Pls.' Ex. D, ECF No. 294-4 at 6. Accordingly, Plaintiffs' assertion is unfounded, and their challenge to a decision the Government has not yet made is unripe.[5]

Finally, amici express the concern that, while "the government properly recognized that many categories of visas are categorically exempt under the Supreme Court's decision," it did not issue similar guidance regarding refugee programs. *See* Amicus Br. at 8. The programs that amici identify in their brief generally are limited to refugees who have a close relationship with a person or entity in the United States, though the scope of the programs vary and there are some significant exceptions.[6] Regardless of the definition of the program, refugees are

[5] Amici—who are not even parties to this action—also seek to have this Court "clarify that all components of the [Refugee Program] must remain in operation." Amicus Br. at 11. This proposed relief is based on nothing more than amici's concern that the Government "has suggested that it plans to suspend certain components of the refugee pipeline." *Id.* Amici fail to identify anything specific to justify this concern, other than the Government's assurance that refugees scheduled for travel through July 6 will be permitted to travel to the United States. *See id.*; Hetfield Decl. ¶ 25. The vague relief that amici seek presents issues that are not yet ripe and would have this Court enter a sweeping order that conflicts with the Supreme Court's opinion allowing for the implementation of Sections 6(a) and 6(b).

[6] For example, amici assert that the Central American Minors Program is limited to petitioners who "have a parent who is lawfully present in the United States." Amicus Br. at 10. That is not entirely correct: For example, the program also allows caregivers who are related to the parent or child to apply to the program. *See* https://www.state.gov/j/prm/ra/cam/index.htm. That caregiver, however, does not necessarily have a sufficiently close relationship to a U.S.-based parent to qualify as a "close family member." *See* Part I, *supra.*

not subject to Sections 6(a) or 6(b) of the Executive Order so long as they have a bona fide relationship with a person or entity in the United States who meets the Government's definition of a close family member. *See* Slip Op. at 13.

Nonetheless, and in the interests of clarity, the Government has now provided further information on the application of the Executive Order to the refugee programs amici has identified. *See* Dep't of Homeland Sec., *Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry into the United States* (June 29, 2017) at 18-19, Question 36, attached hereto as Ex. D.

B. Amici IRAP's Claim That Representational Activity Creates a Bona Fide Relationship Between an Organization and a Refugee is Not Ripe.

Amici IRAP is not a refugee resettlement agency. Instead, IRAP states that it "provides direct legal services to refugees" located abroad. Amicus Br. at 4. As such, IRAP argues that its client relationships create bona fide relationships with refugees and, on that basis, asks the Court to clarify that the Government cannot apply the Executive Order to "any clients of IRAP or any other U.S.-based provider of legal services to refugees." *Id.* at 7.

IRAP's claims are not ripe. To make its argument, IRAP relies on guidance that had previously stated that representational activity *in and of itself* is not sufficient to establish a qualifying bona fide relationship. As amici correctly note, however, that particular guidance was removed and, while there is guidance

regarding resettlement agencies, *see* Ex. C, there currently is no applicable guidance regarding the treatment of legal services providers. That is because the nature of such representational services could vary significantly; thus, the adequacy of IRAP's (or any similar organization's) connection to any particular refugee will be evaluated on a case-by-case basis to determine whether a qualifying bona fide relationship exists. This is, of course, both consistent with the Supreme Court's stay and appropriate in light of the various types of relationships that might exist between organizations and refugees. There is therefore nothing to clarify and, thus, no basis for an order that would sweep-in any relationship that a refugee might have with a U.S.-based legal services provider, regardless of the nature or scope of that individualized relationship.

III. The Government Is Properly Implementing the Supreme Court's "Credible Claim" Standard.

Plaintiffs also argue that the Government is improperly implementing the Supreme Court's "credible claim" standard, and therefore request that this Court "clarify the standard that should be applied by the Government in deciding whether a foreign national is covered by the injunction." Pls.' Mem. at 13. Plaintiffs' argument, however, misconstrues the Government's guidance.

As an initial matter, there is no need for this Court to "clarify" the appropriate standard. The Government fully agrees that, as the Supreme Court made clear, the

Order "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." Slip Op. at 12. The Government is implementing that "credible claim" standard, fully consistent with the Supreme Court's opinion.

Indeed, this "credible claim" standard is reflected in the Government's official public guidance documents. *See, e.g.*, Ex. A (State Department Guidance at 1) ("The Supreme Court's order specified that the suspension of entry provisions in section 2(c) of Executive Order 13780 *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." (emphases added)); *see also* Ex. D at 14-15, Question 29 ("A refugee will be considered to have a *credible claim* to a bona fide relationship with a person in the United States upon presentation of sufficient documentation or other verifiable information supporting that claim." (emphasis added)).

Rather than identifying problems in these official guidance documents, Plaintiffs contest the Government's implementation of the "credible claim" standard based on an internal State Department cable. Plaintiffs believe this cable demonstrates the Government's non-compliance with the "credible claim" standard because it instructs "consular officers to 'determine' whether a bona fide relationship exists and to *deny* visas if the answer is 'unclear.'" Pls.' Mem. at 13 (citing Pls.' Ex. A at 5, ¶ 13, ECF No. 294-1).

However, as Plaintiffs themselves acknowledge, the cable on which they rely likewise embraces the Supreme Court's "credible claim" standard. *See id.* Plaintiffs thus attempt to create an inconsistency within the document, by asserting that the use of the word "determination" improperly supplants the "credible claim" standard and imposes "a presumption against the applicant[.]" *Id.* But the document's use of the word "determination" does not conflict with the "credible claim" standard announced by the Supreme Court and reiterated in the cable: Pursuant to the guidance, the "determination" that the consular officer makes is *whether a credible claim* exists. Indeed, the cable makes this point clear in an earlier statement: "[A]pplicants who are nationals of the affected countries who are *determined* to be otherwise eligible for visas *and to have a credible claim of a bona fide relationship* with a person or entity in the United States are exempt from the suspension of entry in the United States as described in section 2(c) of the E.O." Pls.' Mem., Ex. A at 1, ¶ 3 (emphasis added). Thus, there is no basis for Plaintiffs' contention that the Government appears to apply a presumption against the applicant that is not consistent with the "credible claim" standard. Further, the guidance is consistent with the INA, which places the burden on a visa applicant to "establish that he is eligible to receive such visa," 8 U.S.C. § 1361, and generally presumes that a nonimmigrant visa applicant is an intending immigrant "until he establishes to the satisfaction of the consular officer . . . that he is entitled to a nonimmigrant visa

status." 8 U.S.C. § 1184(b). No visa can be issued to an applicant who fails to overcome that burden. 22 C.F.R. § 41.11(b).

Finally, Plaintiffs complain that the State Department cable instructs consular officers to refuse visas if they are unsure whether an exemption from the Executive Order applies. But Plaintiffs fail to provide the requisite context for the guidance. The full sentence challenged by Plaintiffs states: "If consular officers are unclear if an applicant qualifies for an exemption, the cases should be refused under INA 221(g) and the consular officer should request an advisory opinion from VO/L/A following current guidance in 9 FAM 304.3-1." Pls.' Mem., Ex. A at 5, ¶ 13. In other words, if a consular officer is unclear about whether an individual is exempt from the Executive Order as modified by the Supreme Court's decision, then the proper course is for the consular officer to request additional guidance from other State Department officials.

There is nothing improper about that instruction. Consular officers are required to either issue or refuse visas once the visa applications are complete, *e.g.*, once the visa interview is complete. *See* 22 C.F.R. §§ 41.101-41.121 (nonimmigrant visas), 42.61-42.81 (immigrant visas). The Supreme Court's decision, in Plaintiffs' view, would therefore *require* a consular officer to issue a visa to an individual even when the officer is uncertain about the individual's entitlement to such a visa. That plainly cannot be correct. Therefore, the only appropriate action a consular official

unsure about the application of the Executive Order can take is to refuse the visa and obtain further guidance. And although the guidance instructs consular officers to refuse the visa for administrative processing pursuant to section 221(g) of the INA, *see* 8 U.S.C. § 1201(g), if further guidance clarifies that the individual is entitled to a visa, then the consular officer will "overcome" the prior refusal and issue the visa. *See* 9 Foreign Affairs Manual 306.2-2(A), *When a Refusal May Be Overcome*, § (a)(2)(a) ("INA 221(g) refusals entered for administrative processing may be overcome once you can determine administrative processing is completed and you receive any required advisory opinion or other needed information.").

In short, the Government is properly implementing the Supreme Court's "credible claim" standard, consistent with its official guidance unchallenged by Plaintiffs here. Plaintiffs' request for "clarification" as to the appropriate standard is therefore unnecessary and should be denied.

CONCLUSION

The Court should deny Plaintiffs' Emergency Motion to Clarify the Scope of the Preliminary Injunction. Should the Court grant any relief to Plaintiffs, however, the Government respectfully requests that the Court stay that relief pending the filing by the Government and disposition of an immediate request to the Supreme Court for clarification of its ruling.

Dated: July 3, 2017

Respectfully submitted,

JEFFREY B. WALL
Acting Solicitor General

CHAD A. READLER
Acting Assistant Attorney General

ELLIOT ENOKI (No. 1528)
Acting United States Attorney
EDRIC M. CHING (No. 6697)
Assistant United States Attorney

JOHN R. TYLER
Assistant Director, Federal Programs Branch

/s/ Brad P. Rosenberg
BRAD P. ROSENBERG (DC Bar. No. 467513)
MICHELLE R. BENNETT (CO Bar. No. 37050)
DANIEL SCHWEI (NY Bar)
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Tel: (202) 514-3374
Fax: (202) 616-8460
E-mail: brad.rosenberg@usdoj.gov

Attorneys for Defendants