No. 17-16426

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII; ISMAIL ELSHIKH,

Plaintiffs – Appellees,

v.

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

Defendants – Appellants.

On Appeal from the United States District Court
for the District of Hawaii
(1:17-cv-00050-DKW-KSC)

BRIEF FOR APPELLANTS

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INTRODUCTION

Notwithstanding the Supreme Court's decision to grant review and to stay in significant part the preliminary injunction that this Court previously affirmed against certain sections of Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017), *see Trump v. IRAP*, 137 S. Ct. 2080 (2017), the district court has now entered a modified injunction that contravenes the Supreme Court's decision. Although the district court purported to be enforcing its injunction as partially stayed, it instead adopted constructions of the Supreme Court's stay that conflict with the Court's ruling, and that dramatically expand the scope of the injunction the Court equitably allowed to remain standing pending review. The modified injunction is the result of legal error, and should be vacated by this Court.

First, the Supreme Court limited the preliminary injunction of Sections 2(c), 6(a) and 6(b) of the Order to aliens with a "credible claim of a bona fide relationship" to a U.S. person or entity. *IRAP*, 137 S. Ct. at 2088. The district court has essentially eliminated that requirement for refugees by enjoining Sections 6(a) and (b) with respect to any refugee for whom the Department of State has received an "assurance" from a U.S.-based resettlement organization. An assurance is a commitment to provide certain services and assistance that is made pursuant to an agreement between the resettlement organization and the Department of State, *not* the refugee. Such an agreement between the government

and the organization does not create a "bona fide relationship" between the organization and the refugee—in fact, the resettlement organization typically has no contact with the refugee at all prior to the refugee's arrival in the United States. Furthermore, the Department of State enters into an agreement with a resettlement agency to provide assistance for *every* prospective refugee before the refugee comes to the United States. Treating an "assurance" as providing a qualifying "bona fide relationship" between the U.S.-based resettlement organization and the refugee largely nullifies the Supreme Court's limitation of the original injunction in this respect.

Second, the Supreme Court ruled that the alien abroad must have "a *close* familial relationship" with a U.S. person to satisfy the "bona fide relationship" standard based on a relationship to a U.S. individual. *IRAP*, 137 S. Ct. at 2088 (emphasis added). The district court has again essentially eliminated that requirement by requiring the government to treat a wide variety of extended family members as "close," including siblings-in-law, cousins, nieces, nephews, aunts, uncles, grandparents, and grandchildren. That expansive definition of "close" family members includes all but the most distant family members. It is inconsistent with the language and reasoning of the Supreme Court's stay ruling, the most relevant provisions of the Immigration and Nationality Act (INA), and the facts before the Supreme Court. The district court's modified injunction should be

vacated in this respect as well. At a minimum, even if the Court were to conclude that some of those family relationships are covered, it should not compel the government to include all of them.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. Excerpts of Record ("E.R.") 4. On July 13, 2017, the district court entered an order modifying its prior preliminary injunction. E.R. 207. Defendants filed a timely notice of appeal on July 14, 2017. E.R. 233. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that, under the Supreme Court's stay decision, a "bona fide relationship" to a U.S. entity exists for every refugee for whom the Department of State has obtained an assurance from a U.S.-based resettlement agency.

2. Whether the district court erred in holding that, under the Supreme Court's stay decision, a "close familial relationship" with a U.S. individual includes any sibling-in-law, cousin, aunt, uncle, niece, nephew, grandparent, or grandchild.

STATEMENT OF THE CASE

A. Executive Order 13,780 and Initial District Court Proceedings.

On March 6, 2017, the President issued Executive Order No. 13,780, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 13,209 (Mar. 6, 2017). Executive Order No. 13,780 revoked and replaced an earlier executive order that was previously challenged in this Court. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

Section 2(c) of the Order suspends for 90 days entry of certain nationals of six countries that present heightened terrorism-related risks, subject to case-by-case waivers under Section 3(c). 82 Fed. Reg. at 13,213, 13,214-15. Section 6(a) suspends for 120 days adjudications and travel under the United States Refugee Admission Program (Refugee Program). *Id.* at 13,215-16. Section 6(b) limits to 50,000 the number of persons who may be admitted as refugees in Fiscal Year 2017. *Id.* at 13,216.

The State of Hawaii and Dr. Ismail Elshikh brought suit in district court in Hawaii, alleging that Sections 2 and 6 of the Order exceed the President's statutory authority and also violate due process and the Establishment Clause. E.R. 33-37. Hawaii alleged that the Order would adversely affect students and faculty at its state-run educational institutions, reduce tourism, and damage the public welfare. E.R. 28-33. Dr. Elshikh, a U.S. citizen who is married to a U.S. citizen and lives

with his wife and children in Hawaii, alleged that his Syrian mother-in-law lacked a visa to enter the country and accordingly could not visit family members in Hawaii. E.R. 27-28.

The district court entered a nationwide TRO barring enforcement of Sections 2 and 6 of the Order in their entirety. E.R. 46. The court reasoned that Dr. Elshikh had Article III standing to bring an Establishment Clause claim based on his allegation that he was deeply upset by the Order's allegedly discriminatory message. E.R. 67-70. The district court also held that plaintiffs were likely to succeed on the merits of that claim, and that the balance of harms supported a TRO. E.R. 85-87. The district court subsequently converted the TRO to a preliminary injunction. E.R. 89.

B. This Court's Decision in *Hawaii v. Trump*.

On appeal, this Court affirmed in part and vacated in part the preliminary injunction. *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017). The Court declined to reach the question whether plaintiffs were likely to prevail on their Establishment Clause claim, instead ruling that they were likely to prevail on their statutory claim. *Id.* at 762, 782.

The Court held that Dr. Elshikh, who "seeks to reunite his mother-in-law with his family and similarly experiences prolonged separation from her," had standing to challenge the Order on statutory grounds, and that Hawaii had standing

based on injuries inflicted on its university from the exclusion of students and faculty pursuant to Section 2(c) of the Order, as well as harms resulting from its inability to resettle refugees as a result of the refugee-related provisions of the Order. 859 F.3d at 763-67.

On the merits, the Court held that, although 8 U.S.C. § 1182(f) "gives the President broad authority to suspend the entry of aliens or classes of aliens," the statute "requires that the President *find* that the entry of a class of aliens into the United States *would be detrimental* to the interests of the United States." 859 F.3d at 770 (emphasis in court's opinion). The Court held that "[t]here is no sufficient finding in [Executive Order 13,780] that the entry of the excluded classes [pursuant to Section 2(c) of the Order] would be detrimental to the interests of the United States." *Id.* The Court similarly concluded that there was not a sufficient justification in the Order to "support a finding that the travel and admission of refugees would be detrimental to the interests of the United States," or that "entry of more than 50,000 refugees this same fiscal year would be detrimental to the national interest." *Id.* at 775-76.

The Court also held that plaintiffs had a likelihood of success on their claims that Section 2(c)'s suspension of issuance of visas violates 8 U.S.C. § 1152(a)(1)(A), and that Section 6(b)'s refugee cap contravenes 8 U.S.C. § 1157. 859 F.3d at 779, 781. The Court concluded that plaintiffs had made a sufficient

equitable showing to warrant entry of a preliminary injunction, although the Court vacated the injunction as it applied to the President himself and as to "the inward-facing tasks of Section 2 and 6," *i.e.*, those provisions that required "internal review procedures that do not burden individuals outside of the executive branch of the federal government." *Id.* at 782-84, 786.

C. Proceedings in *International Refugee Assistance Project v. Trump*.

Executive Order 13,780 was also challenged in U.S. District Court for the District of Maryland, in *International Refugee Assistance Project v. Trump*, No. 8:17-cv-00361-TDC ("*IRAP*").

The individual plaintiffs in *IRAP* are U.S. citizens or lawful permanent residents who alleged that the Order would prevent or delay a foreign-national family member from entering the United States. As relevant here, John Doe #1 alleged that Section 2(c) would prevent his wife from obtaining a visa. The Order was also challenged by three organizational plaintiffs.

The district court held that John Doe #1 had standing to assert an Establishment Clause claim against Section 2(c) and was likely to succeed on the merits. *IRAP v. Trump*, 2017 WL 1018235 (D. Md. Mar. 15, 2017). The court entered a preliminary injunction barring any enforcement of Section 2(c). *Id.* at *17-18. The district court declined, however, to decide whether other plaintiffs,

including the organizational plaintiffs, had standing, and also declined to enjoin the refugee provisions of the Order, Sections 6(a) and (b). *Id.* at *8, *17.

The government appealed, and a divided *en banc* Fourth Circuit largely affirmed the injunction of Section 2(c) of the Order. *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017). The majority held that John Doe #1 had standing to raise an Establishment Clause claim, and that he was likely to prevail on the merits of that claim. *Id.* at 586, 601. The court denied a stay pending further review. *Id.* at 606.

D. Proceedings in the Supreme Court.

Following the *en banc* Fourth Circuit's decision in *IRAP*, the government filed a petition for certiorari as well as an application for a stay of the injunction in that case. *Trump v. IRAP*, No. 16A1190 (S. Ct.).

In addition, the government filed an application with the Supreme Court seeking a stay of the preliminary injunction entered by the Hawaii district court in this litigation, pending this Court's consideration and disposition of the government's appeal from that injunction and, if this Court affirmed, pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court. *See Trump v. Hawaii*, No. 16A1191 (S. Ct.). At the time the stay application was filed in the Supreme Court, this Court had not yet ruled on the government's stay motion or on the merits of the appeal in this litigation. The government's stay

application noted that the Court could construe the application as a petition for a writ of certiorari before judgment and grant review in this case as well as in *IRAP*.

This Court subsequently decided the appeal in *Hawaii v. Trump*, and granted the parties' joint motion for expedited issuance of the mandate. The government then filed a supplemental memorandum in the Supreme Court, renewing its request for a stay and urging the Court to grant certiorari in both this case and in *IRAP* and to hear the cases in tandem.

On June 26, 2017, the Supreme Court granted certiorari both in *IRAP* and in this case. The Court's per curiam order also granted in part the stay applications in the two cases. *IRAP*, 137 S. Ct. at 2083.

The Supreme Court explained that "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents," and further that the purpose of interim equitable relief "is not to conclusively determine the rights of the parties, * * * but to balance the equities as the litigation moves forward." *IRAP*, 137 S. Ct. at 2087.

The Court noted that this Court and the Fourth Circuit had concluded that the hardships imposed on Dr. Elshikh, Hawaii, and John Doe #1 as a result of enforcement of Section 2(c) of the Order "were sufficiently weighty and immediate to outweigh the Government's interest in enforcing" that provision, and that the

injunction had also been extended to "parties similarly situated to them—that is, people or entities in the United States who have relationships with foreign nationals abroad, and whose rights might be affected if those foreign nationals were excluded." 137 S. Ct. at 2087.

The Supreme Court recognized, however, that "the injunctions reach much further than that" to "bar enforcement of § 2(c) against foreign nationals abroad who have no connection to the United States at all." 137 S. Ct. at 2088. The Court reasoned that "[d]enying entry to such a foreign national does not burden any American party by reason of that party's relationship with the foreign national," and that the courts had not concluded "that exclusion in such circumstances would impose any legally relevant hardship on the foreign national himself." *Id.* Conversely, "the Government's interest in enforcing § 2(c), and the Executive's authority to do so, are undoubtedly at their peak when there is no tie between the foreign national and the United States." *Id.* The Court specifically noted that the Order itself, in the waiver provisions in Sections 3(c)(i)-(vi), "distinguishes between foreign nationals who have some connection to this country, and foreign nationals who do not." *Id.*

The Supreme Court accordingly narrowed the scope of the injunctions as to §2(c):

> The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawaii. In practical terms, this means that

> § 2(c) may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.

137 S. Ct. at 2088.

The Court explained that "[t]he facts of these cases illustrate the sort of relationship that qualifies." 137 S. Ct. at 2088. "For individuals, *a close familial relationship is required*." *Id.* (emphasis added). The Court cited as an example "[a] foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law." *Id.* "As for entities," the Court explained, "the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Order]." *Id.* The Court gave as examples "[t]he students from the designated countries who have been admitted to the University of Hawaii," "a worker who accepted an offer of employment from an American company," and "a lecturer invited to address an American audience." *Id.* By contrast, "a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion." *Id.*

The Supreme Court also granted a partial stay of the injunction affirmed by this Court with respect to Sections 6(a) and (b). *IRAP*, 137 S. Ct. at 2089. The Court ruled that Sections 6(a) and (b) "may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship

with a person or entity in the United States." *Id.* "As applied to all other individuals," however, the Supreme Court held that "the provisions may take effect." *Id.* As the Court explained, "when it comes to refugees who lack any such connection to the United States * * *, the balance tips in favor of the Government's compelling need to provide for the Nation's security." *Id.*

E. Proceedings Following the Supreme Court's Stay Ruling.

On June 14, 2017, the President had issued a memorandum to Executive Branch officials 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.'" *IRAP*, 137 S. Ct. at 2085 (quoting Presidential Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence, 82 Fed. Reg. 27,965 (June 14, 2017) (Presidential Memorandum)). The Presidential Memorandum directed the relevant agencies to "begin implementation of each relevant provision of sections 2 and 6 of the [Order] 72 hours after all applicable injunctions are lifted or stayed with respect to that provision." 82 Fed. Reg. at 27,966.

The Departments of State and Homeland Security accordingly began implementing Sections 2(c), 6(a), and 6(b) of the Order three days after issuance of the Supreme Court's stay, on June 29, 2017, and commenced enforcement of those

provisions at 8:00 p.m. Eastern Daylight Time on that day. In order to implement within 72 hours the Supreme Court's limitation of the injunction to individuals "who can credibly claim a bona fide relationship with a person or entity in the United States"—a standard that the Supreme Court had developed *sua sponte*—the agencies published public guidance, E.R. 176, 180, 182, which was subsequently updated and current versions of which are available online.[1]

On June 29, 2017, plaintiffs filed an emergency motion in district court to "clarify" the scope of its injunction in light of the Supreme Court's stay ruling. As relevant here, they urged the district court to interpret the ruling to exempt from the Order two broad categories of aliens.

First, plaintiffs argued that the stay ruling exempts from Sections 6(a) and 6(b) all refugee applicants for whom the State Department has obtained an assurance from a U.S.-based refugee-resettlement agency. An assurance is a contractual commitment between a refugee resettlement organization, and the

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

Department of State, to provide certain services and assistance to the refugee following the refugee's arrival in the United States. *See* E.R. 117 (Bartlett Decl. ¶¶ 14-17). In order to facilitate successful resettlement, the Department of State obtains an assurance for *every* refugee who is permitted to travel to this country before the refugee's arrival. *See* E.R. 117 (Bartlett Decl. ¶ 16). The resettlement agency, however, typically has no contact with the refugee until he or she arrives in the United States. *See* E.R. 119 (Bartlett Decl. ¶ 21). In the government's view, an assurance does not, by itself, establish a qualifying bona fide relationship between the refugee and a U.S. entity. *See* State Refugee Fact Sheet.

Second, plaintiffs argued that the government construed too narrowly the phrase "close familial relationship" in the Supreme Court's stay ruling. Relying on the Supreme Court's ruling and on provisions of the Order and the INA, the government interpreted that phrase to include a parent (including parent-in-law), spouse, fiancé(e), child, adult son or daughter, son-in-law, daughter-in-law, sibling (whether whole or half), and step relationships. See State Visa Guidance; DHS FAQs, Q29. The government's definition did not include other "extended" family members, such as siblings-in-law, cousins, nieces, nephews, aunts, uncles, grandparents, and grandchildren. Respondents argued that these excluded categories also constitute "close familial relationship[s]" and that such relatives should be categorically exempt from Sections 2(c), 6(a), and 6(b).

The district court denied the motion, ruling that "[b]ecause Plaintiffs seek clarification of the June 26, 2017 injunction modifications authored by the Supreme Court, clarification should be sought there, not here." E.R. 205. The district court declined to "upset the Supreme Court's careful balancing and 'equitable judgment,'" or "to substitute its own understanding of the stay for that of the originating Court[]." E.R. 205.

Plaintiffs appealed, and this Court *sua sponte* dismissed the appeal for lack of jurisdiction, holding that it was neither a final order nor immediately appealable under 28 U.S.C. § 1292(a). *Hawaii v. Trump*, No. 17-16366, Order, at 2 (9th Cir. Jul. 7, 2017). The Court noted, however, "that although the district court may not have authority to *clarify* an order of the Supreme Court, it does possess the ability to interpret and enforce the Supreme Court's order." *Id.* at 3.

The same day, plaintiffs filed a new motion in district court presenting substantially the same arguments as their clarification motion but seeking enforcement or modification of the district court's injunction. On July 13, 2017, the district court granted the motion in substantial part. E.R. 207.

The district court purported to recognize that, because its earlier injunction is now before the Supreme Court, its authority to issue further orders with respect to

the injunction (as partially stayed by the Supreme Court) is limited to "preserv[ing] the status quo or ensur[ing] compliance with its earlier orders." E.R. 215.[2]

The district court modified the injunction to bar the government from applying Sections 6(a) and 6(b) of the Order to any refugee for whom a resettlement agency in the United States has provided an assurance to the Department of State. E.R. 222. The district court reasoned that an assurance from a refugee resettlement agency to the Department of State is "formal," "a documented contract," "binding," and "issued in the ordinary course," concluding that "[b]ona fide does not get any more bona fide than that." E.R. 223. The district court deemed it irrelevant that "the assurance is an agreement between the State Department and a resettlement agency, not an agreement between the resettlement agency and the refugee." E.R. 223. The district court also deemed it irrelevant that, because the Department of State must receive an assurance "before *any* refugee is admitted to the United States under the USRAP," its modified injunction would apply to any refugee who had been approved by the Department of Homeland Security and given a satisfactory medical evaluation, thereby dramatically expanding the scope of injunctive relief. E.R. 222.

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[2] The district court also noted its authority to modify an earlier injunction if "informed of new facts that require supervisory action." E.R. 215 (citation omitted).

The court also modified the injunction to compel the government to include grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins within the category of individuals with sufficiently close familial relationships with persons in the United States so as to be exempt from the Order. E.R. 221, 232. The district court reasoned that the Supreme Court had included mother-in-law within its definition of "close familial relationship," which it apparently viewed as at least as close at the relationships raised by plaintiffs. E.R. 217, 219-20. The district court also relied on a hodgepodge of federal immigration provisions and regulations addressing family relations in other contexts, as well as cases involving local housing ordinances and grandparents petitioning for visitation rights under state law. E.R. 219. The district court rejected the government's argument that a more appropriate source for defining close family members, for purposes of determining which U.S. citizens have a sufficiently strong interest in reunification to support interim injunctive relief, is the provisions of the INA governing which family members have a sufficient interest in unification to petition for an alien to receive an immigrant visa to come

to the United States. E.R. 218-19.[3] The district court denied a stay pending appeal. E.R. 230.

Defendants filed a notice of appeal from the district court's July 13 order the following day, see E.R. 233, along with a motion for a stay pending appeal.

On July 14, 2017, defendants filed a motion requesting the Supreme Court to clarify its stay ruling concerning the issues presented in this appeal, along with an application for a temporary administrative stay of the district court's modified injunction. On July 19, 2017, the Supreme Court denied the motion in a summary order, but stayed the district court's modified injunction pending resolution of the government's appeal to this Court "with respect to refugees covered by a formal assurance." *Trump v. Hawaii*, No. 16-1540 (16A1191), Order (S. Ct. July 19, 2017). Justice Thomas, Justice Alito, and Justice Gorsuch would have stayed the district court's modified injunction in its entirety.

SUMMARY OF ARGUMENT

I. The district court erred in holding that, under the Supreme Court's stay decision, a "bona fide relationship" to a U.S. entity exists for every refugee as to

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[3] The district court also enjoined the government from denying refugee status to applicants under the "Lautenberg Program," which "permits certain nationals of the former Soviet Union and other countries with 'close family in the United States' to apply for refugee status," and includes grandparents and grandchildren in the class of relevant family members. E.R. 228-29.

whom the Department of State has obtained an assurance from a U.S.-based resettlement agency. The assurance is provided pursuant to the resettlement organization's agreement with the Department of State, *i.e.*, a relationship between the organization and the government, *not* the refugee. The organization typically has no contact with the refugee himself prior to his arrival in the United States. This indirect connection is not comparable to the direct relationships identified by the Supreme Court in its stay ruling. Nor is it independent of the refugee admission process itself. Were an assurance sufficient to give an alien a qualifying "bona fide relationship" with the resettlement organization, the Supreme Court's stay of the district court's injunction of Sections 6(a) and 6(b) would be essentially nullified. The district court's interpretation of the stay ruling is untenable.

II. The district court also erred in holding that, under the Supreme Court's stay decision, a "close familial relationship" with a U.S. individual includes any sibling-in-law, cousin, aunt, uncle, niece, nephew, grandparent, or grandchild. The Supreme Court limited the injunction to individuals with "close familial relationship[s]," yet the district court included all but the most distant relatives. Furthermore, the Court's stay ruling, in adopting this limitation, cited approvingly to, and echoes the terms of, the waiver provisions of the Order, the relevant part of which refers to parents, children, and siblings. That waiver provision was itself derived from the provisions of the INA that provide the best guidance as to which

family relationships are sufficient to give a U.S. person a heightened interest in family unification: the provisions governing which family members can petition for an alien abroad to receive an immigrant visa to come to the United States. And that interpretation is consistent with the facts before the Supreme Court, to which the Supreme Court referred in describing the scope of the stay. Those sources, rather than strained analogies to cases involving local housing ordinances and grandparents petitioning for visitation rights under state law, provide the best guidepost to defining what relationships are sufficiently close to give the U.S. person a protected equitable interest in reuniting with that alien under the Supreme Court's stay ruling.

STANDARD OF REVIEW

A plaintiff seeking a preliminary injunction must show that "he is likely to succeed on the merits," that "he is likely to suffer irreparable harm," and that "the balance of equities" and "public interest" favor an injunction. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1289 (9th Cir. 2013). This Court generally reviews the grant of a preliminary injunction for "abuse of discretion," but it reviews the district court's "interpretation of the underlying legal principles" de novo. *Id.* 859

ARGUMENT

As the district court purported to recognize in issuing its modified injunction, E.R. 215-16, "[a] district court lacks jurisdiction to modify an injunction once it has been appealed except to maintain the status quo among the parties." *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000); *see also, e.g., Natural Resources Defense Council Inc. v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (noting that this rule does not permit a district court "to materially alter the status of the case on appeal"). But the district court concluded that modification of its injunction was necessary "to preserve status quo pending appeal." E.R. 208. The conclusion was erroneous: the Supreme Court itself established the status quo pending appeal in its stay ruling, and the district court disturbed that status quo by significantly expanding the preliminary injunction beyond the limits of the stay.

I. THE DISTRICT COURT ERRED IN HOLDING THAT A "BONA FIDE RELATIONSHIP" TO A U.S. ENTITY EXISTS FOR EVERY REFUGEE FOR WHOM A RESETTLEMENT AGENCY HAS PROVIDED AN ASSURANCE

In its stay ruling, the Supreme Court ordered that Section 6(a)'s refugee suspension and Section 6(b)'s refugee cap "may take effect" as to "all" refugee applicants except those "who can credibly claim a bona fide relationship with a person or entity in the United States." *IRAP*, 137 S. Ct. at 2089. The district court concluded, however, that every refugee applicant for whom the federal government

has entered an assurance agreement with a refugee-resettlement agency automatically has a qualifying bona fide relationship with a U.S. entity, and is therefore exempt from Sections 6(a) and 6(b). That construction is clearly erroneous and would eviscerate the Supreme Court's stay ruling, as confirmed by the fact that the Court has already stayed it as well. Accordingly, this Court should vacate that portion of the district court's modified preliminary injunction.

1. As part of its implementation of the Refugee Program, the Department of State enters into annual cooperative agreements with non-profit resettlement agencies in the United States. *See* E.R. 117 (Bartlett Decl. ¶¶14-15). Currently, nine agencies have entered into agreements with the United States to provide resettlement services. E.R. 117 (Bartlett Decl. ¶14). As the district court observed, "before *any* refugee is admitted to the United States under the [Refugee Program], the Department of State must first receive" an assurance agreement from a resettlement agency in the United States. E.R. 222; *see* E.R. 117 (Bartlett Decl. ¶ 16); E.R. 175.

As part of its assurance, the resettlement agency agrees that, once the refugee arrives in the United States, the resettlement agency (or a local affiliate) will provide certain benefits for that refugee in exchange for payment from the government. *See* E.R. 118 (Bartlett Decl. ¶ 20). The cooperative agreement specifies the services that the resettlement agency must provide to each refugee

and provides government-funded compensation to the resettlement agency for doing so. *See* E.R. 117 (Bartlett Decl. ¶ 15); E.R. 136. 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. *See* E.R. 118 (Bartlett Decl. ¶ 20). Once a given refugee has been approved by DHS and passes all required medical examinations, he is assigned to a resettlement agency, which submits the assurance agreeing to provide the required services after the refugee arrives in the United States. *See* E.R. 117 (Bartlett Decl. ¶¶ 13-15); E.R. 175.

A government-arranged assurance agreement does not by itself establish a qualifying "bona fide relationship" between the refugee and "a[n] * * * entity in the United States" of the type described in the Supreme Court's stay decision. *IRAP*, 137 S. Ct. at 2088. The assurance is not an agreement between the resettlement agency and the refugee; rather, it is an agreement between that agency and *the federal government*. In other words, the government enters into an agreement to provide the refugee with certain services once the refugee arrives, in order to ensure a smooth transition into the United States. Significantly, however, resettlement agencies typically do not have any direct contact with the refugees they assure before their arrival in the United States. *See* E.R. 119 (Bartlett Decl. ¶ 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. *See* E.R. 119 (Bartlett Decl. ¶ 21).

The indirect link between a resettlement agency and refugee that exists by virtue of such an assurance stands in stark contrast to the sort of relationships identified by the Supreme Court in its stay ruling. Unlike students who have been admitted to study at an American university, workers who have accepted jobs at an American company, and lecturers who come to speak to an American audience, *cf. IRAP*, 137 S. Ct. at 2088, refugees do not have any freestanding connection to resettlement agencies that is separate and apart from the Refugee Program itself solely by virtue of the agencies' sponsorship assurance with the government. Nor can the exclusion of an assured refugee plausibly be thought to "burden" a resettlement agency, *id.* at 2087, apart from an opportunity to perform the resettlement services for which the government has contracted if a refugee is ultimately admitted.

The district court nevertheless held that an assurance agreement standing alone establishes a qualifying bona fide relationship between the refugee and the resettlement agency because it is "formal," "binding," refugee-specific, and "issued in the ordinary course." E.R. 222-23. But the district court's focus on those features misses the fundamental point that an assurance agreement does not

create *any* relationship between the resettlement agency and the refugee—much less one that is independent of the refugee-admission process itself. The common characteristic of the hypothetical worker, the student admitted to a U.S. educational institution, and a lecturer hired by a U.S. entity to speak to an American audience described by the Supreme Court is that each has an independent relationship with a U.S. entity, such that, in the Court's view, the entity would suffer concrete hardship from the alien's inability to enter the United States. *See IRAP*, 137 S. Ct. at 2088. The same cannot be said of refugees merely because a resettlement agency has agreed to provide services under a contract with the United States government after the refugee arrives in this country.

Plaintiffs argued before the Supreme Court that, due to Sections 6(a) and 6(b) of the Order, the resettlement agency will lose the opportunity to provide the services it would render to a refugee *after* the refugee's arrival. But those services would be provided pursuant to a contract with, and paid for largely by, the government. Again, that does not establish any *existing* relationship with the refugee, much less one independent of the refugee-admission process. Indeed, as an entity that performs those services on behalf of the government in carrying out a governmental program, a resettlement agency has no cognizable stake in that program's application to the persons whom the program exists to benefit. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *accord Air Courier*

Conference of Am. v. American Postal Workers Union, AFL-CIO, 498 U.S. 517, 524-25 (1991). Plaintiffs' argument that the services such agencies plan to provide are sufficient to require entry of an alien lacks any limiting principle, and would appear to encompass any number of service providers who purportedly plan to provide services to an alien upon arrival.

Plaintiffs also asserted in district court that resettlement agencies are harmed because they have devoted private resources to refugee work and may lose federal funding. Even assuming this to be true, any such harm flows not from any independent, pre-existing relationship with the refugee formed in the ordinary course. It exists solely as a result of the resettlement agencies' contracts with the government. The district court stated that the Supreme Court's stay ruling does not "require[] a refugee to enter into a contract with a United States entity" to have a qualifying relationship. E.R. 223. But the refugee himself must have *some* independent relationship with a U.S. entity. Otherwise, the test the Supreme Court articulated would be meaningless.

2. As the government has shown, and neither plaintiffs nor the district court disputed, approximately 24,000 refugees already have been assured—which is more than the number of refugees who would likely be scheduled to enter during

the period Sections 6(a) and (b) are in effect.[4] The district court's reading of the stay thus would mean that all of those refugees have qualifying bona fide relationships, and all of them would therefore be exempt from the Order.

The district court's ruling, in short, would mean that the stay crafted by the Supreme Court after carefully balancing the equities covers virtually no refugee. Sections 6(a) and 6(b) thus would be unable to "take effect" as the Supreme Court explicitly intended. *IRAP*, 137 S. Ct. at 2089. The Supreme Court's stay ruling should not be construed in this way, which would, practically speaking, render its application to Sections 6(a) and 6(b) 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 asserted in district court that there are approximately 175,000 potential refugees who do not yet have assurances. But that is irrelevant to the intended scope of the Supreme Court's ruling, because those refugees were already unlikely to enter while the Order is in effect. Section 6(a) applies only for 120

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[4] *See* E.R. 117 (Bartlett Decl. ¶17) ("As of June 30, 2017, a total of 23,958 refugees in the [Refugee Program] were assured by a resettlement agency. It is unlikely that all the refugees who are already assured would travel to the United States during the next 120 days while [the Order's] refugee suspension is partially in effect.").

days from the Supreme Court's June 26 ruling, see pp. ___, *supra*, and thus will expire on October 24, 2017. And Section 6(b) applies only during Fiscal Year 2017, which ends on September 30, 2017. Refugees who would not enter during those periods are not affected by those provisions of the Order or, consequently, by the Supreme Court's stay.

Moreover, plaintiffs' argument highlights the arbitrariness of the distinction they seek to draw based on assurances. It makes no sense to exempt from Sections 6(a) and 6(b) of the Order the roughly 24,000 refugees for whom assurances exist, based on the happenstance that they had reached a later stage of the administrative process in which the government routinely obtained an assurance. In both cases, the refugees' relationship to a U.S. entity is the same: they have none.

Plaintiffs also argued in district court that it was irrelevant that modifying the injunction to apply to any refugee on whose behalf an assurance had been provided would eviscerate the Supreme Court's stay ruling as to the refugee provisions, because "a stay is not a statute for which a court is obligated to ensure that each word has a substantial real-world effect." D. Ct. Doc. 303, at 12. Notably, plaintiffs did not repeat this argument in the Supreme Court, in opposing the government's motion for clarification and/or a stay. And for good reason—the Supreme Court surely did not mean for this portion of its stay ruling to be a dead letter. *See, e.g.*, *In re Tronox Inc.*, 855 F.3d 84, 107 (2d Cir. 2017) (courts

"construe terms of an injunction according to the general interpretive principles of contract law"); *see also* 11 Richard A. Lord, *Williston on Contracts* § 32.11 (4th ed. 2012) ("all parts of a contract will be given effect when possible"). In fact, the Supreme Court has since stayed this portion of the district court's modified injunction.

There is no basis for this unjustified extension of the district court's injunction, which the district court lacked jurisdiction to enter. The district court thus erred in modifying its injunction to exempt from Sections 6(a) and 6(b) those refugees for whom an assurance had been provided, given the lack of a bona fide relationship between those refugees and the resettlement organization that provided the assurance.

II. THE DISTRICT COURT ERRED IN HOLDING THAT, UNDER THE SUPREME COURT'S STAY DECISION, A "CLOSE FAMILIAL RELATIONSHIP" WITH A U.S. INDIVIDUAL INCLUDES ANY SIBLING-IN-LAW, COUSIN, AUNT, UNCLE, NIECE, NEPHEW, GRANDPARENT, OR GRANDCHILD.

For aliens invoking a connection to a U.S. person, the Supreme Court was clear that only "*close* familial relationship[s]" count, *IRAP*, 137 S. Ct. at 2088 (emphasis added), requiring a line to be drawn between such relationships and more attenuated family connections. The government appropriately construed the stay to include certain immediate relationships—parent (including parent-in-law), spouse, fiancé(e), child, adult son or daughter, son-in-law, daughter-in-law, sibling

(whether whole or half), and step relationships—but to exclude other, more distant relatives. State Visa Guidance; State Refugee Fact Sheet; DHS FAQs Q29.

The government's tailored understanding of what family members have "close familial relationship[s]" comports with the language and reasoning of the Supreme Court's June 26 stay order, the most relevant provisions of the INA, and the facts before the Supreme Court. By contrast, the district court disregarded those interpretive guideposts and adopted a standard—covering siblings-in-law, cousins, nieces, nephews, aunts, uncles, grandparents, and grandchildren—that covers all but the most distant familial connections. Although the Supreme Court declined to stay that aspect of the district court's injunction pending appeal, that interim ruling could have been based on stay factors besides the government's likelihood of success on the merits, and thus it does not resolve the merits of the government's appeal of the modified injunction. This Court should reverse the district court's erroneous ruling and vacate that portion of the injunction.

1. When the Supreme Court balanced the equities and identified circumstances in which a foreign national's connection to the United States is insufficient to outweigh the government's national security interests, it pointed specifically to the Order itself, which "distinguishes between foreign nationals who have some connection to this country, and foreign nationals who do not, by

establishing a case-by-case waiver system primarily for the benefit of individuals in the former category." *IRAP*, 137 S. Ct. at 2088.

The relevant waiver provision cited by the Court applies to a foreign national who "seeks to enter the United States to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa," where "the denial of entry during the suspension period would cause undue hardship." Order § 3(c)(iv), 82 Fed. Reg. at 13,214 (emphases added); *see IRAP*, 137 S. Ct. at 2088. The Court's reference to "close familial relationship," which echoes the waiver provision for "close family member," as well as the specific reference to that provision in explaining the types of connections that are sufficient, indicate that the Court envisioned exempting a similarly limited set of family members from the Order. The district court disregarded the Order's waiver provision and the Supreme Court's express reference to it.

2. Moreover, the specific lines the government had drawn in implementing the Supreme Court's partial stay of the district court's initial injunction—like the definition of "close family member" in Section 3(c)(iv) of the Order—were derived from the INA. The INA reflects congressional policies that accord special status to certain family relationships over others. *See Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197-98 (2014) (opinion of Kagan, J.). Because "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 County*, 150 U.S. 182, 192 (1893)), federal immigration law is an appropriate point of reference.

Section 201 of the INA defines "immediate relatives"—the "most favored" family-based immigrant visa category, *Cuellar de Osorio*, 134 S. Ct. at 2197 (opinion of Kagan, J.)—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* 8 U.S.C. § 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* 8 U.S.C. § 1153(a). Half-siblings are included in the sibling preference. *See* 9 U.S. Dep't of State, *Foreign Affairs Manual* 102.8-3 (2016). The fiancé(e) relationship also 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 these relationships as "close familial relationships" within the meaning of the Supreme Court's ruling.

Contrary to the district court's characterization, the government's reliance on the family-based visa provision of the INA is hardly "cherry-picking." E.R. 218. The government's definition of close family members is drawn from the INA provisions identifying those persons with a sufficient interest in unification to petition for an alien to come to the United States. While such a petition does not create legal rights or an entitlement for the alien to enter the United States—the alien must independently satisfy the eligibility criteria for a visa and for entry—Congress's judgment is the most obvious touchstone for the class of close family members for whom the denial of a visa could even plausibly be thought to affect the rights of "people * * * in the United States who have relationships with foreign nationals abroad." *IRAP*, 137 S. Ct. at 2087; *see id.* at 2087-88 (explaining that, under *Kleindienst v. Mandel*, 408 U.S. 753, 763-65 (1972), U.S. plaintiffs may challenge the exclusion of a foreign national that assertedly affects their own First Amendment interests).

In contrast, the district court relied on a strained analogy to cases involving local housing ordinances and grandparents petitioning for visitation rights under state law. E.R. 220 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977), and *Troxel v. Granville*, 530 U.S. 57, 63-65 (2000) (plurality opinion)). Those cases hardly support the proposition that such distant family members have a cognizable stake in whether their alien relatives abroad can enter the country or a

cognizable harm under the Supreme Court's stay if the alien is denied entry. In this very different context, the appropriate definition of "close family members" is the relationship that permits an individual in the United States to petition for an immigrant visa on the alien's behalf. *See Cuellar de Osorio*, 134 S. Ct. at 2213 (opinion of Kagan, J.) (noting that "the grandchildren, nieces, or nephews of citizens [are] relationships [that] d[o] not independently entitle [those family members] to visas").

Other provisions of the INA confirm this conclusion. For example, numerous provisions of the INA link the ability to enter or remain in the United States on hardship to a qualifying family member absent the relief, or other similar connection to a qualifying family member, and typically limit their terms to close family members, without including extended relatives such as nieces, nephews, aunts, uncles, grandparents, or grandchildren. *See, e.g.*, 8 U.S.C. § 1182(a)(3)(D)(iv) (discretionary waiver of inadmissibility ground, entitled "Exception for Close Family Members," for membership in a totalitarian party for an immigrant who is a parent, spouse, child, or sibling of a U.S. citizen or a spouse or child of a lawful permanent resident); 8 U.S.C. § 1182(a)(6)(E)(ii) (exception to ground of inadmissibility for alien smuggling in the case of certain immigrants who smuggled their spouse, parent, or child); 8 U.S.C. § 1182(a)(9)(B)(v) (waiver of unlawful presence ground of inadmissibility for immigrants if refusal of

admission would result in extreme hardship to U.S. citizen or lawful permanent resident spouse or parent); 8 U.S.C. §1182(d)(12) (waiver for civil document fraud ground of inadmissibility for offense committed solely to assist, aid, or support spouse or child); 8 U.S.C. § 1182(g)(1) (waiver of public health ground of inadmissibility for spouse, unmarried son or daughter, or minor lawfully adopted unmarried child of U.S. citizen or lawful permanent resident); 8 U.S.C. § 1182(h)(1)(B) (waiver of certain criminal grounds of inadmissibility for spouse, parent, or child of U.S. citizen or lawful permanent resident if denial of admission would result in extreme hardship to the alien's U.S. spouse, parent, or child); 8 U.S.C. § 1182(i) (waiver of fraud/misrepresentation ground of inadmissibility for spouse, parent, or child of U.S. citizen or lawful permanent resident if denial of admission would result in extreme hardship to the alien's U.S. spouse, parent, or child).

Similar priority status is accorded by regulation to close family members of certain refugees, but not to family members in the more attenuated categories included in the district court's modified injunction. Under 8 C.F.R. § 207.7, a principal refugee admitted to the United States may request following-to-join benefits for a spouse and unmarried child under the age of 21, but not for more distant family members. A law concerning Iraqi refugees employed the phrase "close family members" and stated that the 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))"[5]—the same provisions upon which the government principally relies here. The INA does not provide comparable immigration benefits for siblings-in-law, cousins, nieces, nephews, aunts, uncles, grandparents, or grandchildren of persons in the United States.

To the extent the district court addressed the INA at all, it relied on statutory provisions or implementing regulations that are not relevant to visa issuance or that otherwise reflect narrow exceptions to the general rules. For example, the court relied on the fact that, by regulation, a juvenile alien who cannot be released to the custody of his or her parents may be released to an aunt, uncle, or grandparent. E.R. 219 (citing *Reno v. Flores*, 507 U.S. 292, 297, 310 (1993), and 8 C.F.R. § 236.3(b)(1)(iii)). But that regulation sheds no light on the most relevant inquiry for purposes of implementing the injunction, *i.e.*, what family relationship is sufficient to permit an individual to petition for a visa for aliens abroad.

The district court also relied on a section of the Family Sponsor Immigration Act of 2002, Pub. L. No. 107-150, 116 Stat. 74, which refers to an alien's sister-in-law, brother-in-law, grandparents, and grandchildren as "close family." E.R. 219 (citing § 2(a), 116 Stat. 74). The codified statutory provision (which does not use

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[5] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1243(a)(4), 122 Stat. 396 (codified as amended at 8 U.S.C. § 1157 note).

the phrase "close family") does not create the ability to petition for a visa; it only establishes who may serve as a financial sponsor for certain aliens. *See* 8 U.S.C. § 1183a. Even in that context, the provision reflects the same distinction between close and extended family drawn by the government. Under 8 U.S.C. § 1183a(f)(1)(D) and (4), a family sponsor must be the same relative who is petitioning under 8 U.S.C. § 1154 to classify the alien as a family-sponsored or employment-based immigrant (or a relative with a significant ownership interest in the entity filing an employment-based petition). *See* 8 U.S.C. § 1153(a) and (b). Only spouses, parents, children, and siblings may file family-sponsored petitions, and the eligible "relatives" in the employment-based context are limited to the same family members. *See* 8 U.S.C. § 1154(a); 8 C.F.R. § 213a.1 (defining relative to include spouse, parents, children, and siblings); *see also* 71 Fed. Reg. 35,732, 35,733 (June 21, 2006) (defining "'relative,' for purposes of the affidavit of support requirement, to include only those family members who can file alien relative visa petitions"). Only when a petitioner has died and the petition either converts to a widow(er) petition or the Secretary of Homeland Security reinstates the petition on humanitarian grounds can one of the extended family members serve as a financial sponsor under this provision. *See* 8 U.S.C. § 1183a(f)(5)(B)(i) and (ii). And even then, siblings-in-law and grandparents only serve as financial sponsors; they cannot petition for a visa applicant. *Cf. Cuellar de Osorio*, 134 S.

Ct. at 2213 (opinion of Kagan, J.) ("grandchildren, nieces, or nephews of citizens [are] relationships [that] d[o] not independently entitle [those family members] to visas").

The other regulations and statutory provisions relied on by the district court (E.R. 219 & n.8)) are even further afield. The court cited a regulation that allows grandchildren, nieces, and nephews to be eligible for T visas (for victims of human trafficking), but only if they face "a present danger of retaliation as a result of the principal's escape from the severe form of trafficking or cooperation with law enforcement." 81 Fed. Reg. 92,266, 92,280 (Dec. 19, 2016). The court also relied on DHS regulations that allow an individual to "apply for asylum if a 'grandparent, grandchild, aunt, uncle, niece, or nephew' resides in the United States" 69 Fed. Reg. 69,480, 69,488 (Nov. 29, 2004), but those provisions were required by an agreement with Canada that includes broader familial definitions than are typically available under the INA. *See id.* at 69,480 (discussing "Safe Third Country Agreement"). And the remaining INA provisions relied on by the district court apply only where the usual close family member has died. *See* 8 U.S.C. § 1433(a); Pub. L. No. 107-56, § 421(b)(3), 115 Stat. 272. Those narrow exceptions are not a basis for disregarding the INA's typical definition of close familial relationships.

Notably, moreover, in cases in which an alien abroad has a particularly close relationship with a more distant relative, the alien would be a potential candidate

for a case-by-case waiver under Section 3(c) of the Order, which provides a non-exclusive list of relationships that might qualify an individual for a waiver. There is no reason, however, to assume categorically that every brother-in-law, cousin, or nephew, for example, has the requisite close ties to make them a "close familial relationship."

3. Finally, the government's definition of a close familial relationship is consistent with the factual context of the Supreme Court's stay order. Although the Supreme Court did not catalogue exhaustively which "close familial relationships" are sufficient to exempt an alien from the Order, the partial stay left the injunction in place only for persons "similarly situated" to John Doe #1 and Dr. Elshikh. *IRAP*, 137 S. Ct. at 2088. The Supreme Court also explained that "[t]he facts of these cases illustrate the sort of relationship that qualifies," citing Doe #1's wife and Dr. Elshikh's mother-in-law (who is the mother of Elshikh's U.S.-citizen wife). *Id.* Those types of immediate relationships reflect the reason why the Court determined that certain ties to family members in the United States weigh in favor of leaving the injunction in effect as to such persons: the U.S. relative "can legitimately claim concrete hardship if that person is excluded." *Id.* at 2089. The same is true of other original plaintiffs in these cases before the Supreme Court, who sought entry of fiancé(e)s and siblings. 16-1436 Pet. 15 n.7.

The district court erroneously read the Supreme Court's reference to Dr. Elshikh's mother-in-law as creating a much larger exception, unmoored from the INA and the Order's waiver provision. The Supreme Court did not declare that every "mother-in-law" automatically has a qualifying "close familial relationship"; rather, it examined "[t]he facts of these cases," *IRAP*, 137 S. Ct. at 2088, from which it was apparent that Dr. Elshikh's mother-in-law would have a qualifying relationship as the mother of Dr. Elshikh's wife, herself a U.S. citizen. *See* E.R. 42-43 (Elshikh Decl. ¶¶ 1, 4). And the Supreme Court described Dr. Elshikh's mother-in-law as a "foreign national who wishes to enter the United States to live with or visit a family member," *IRAP*, 137 S. Ct. at 2088, which she of course would do by living with or visiting her U.S. citizen daughter. The Court's statement that Dr. Elshikh's mother-in-law has a "close familial relationship" thus did not necessarily reflect a categorical determination to privilege the mother-in-law relationship as such, even though Congress in the INA did not. Out of an abundance of caution, however, the government has implemented the Order in its guidance to include parents-in-law (and the reciprocal relationship, children-in-law) as having qualifying bona fide relationships. *See* p. 14, *supra.*

Importantly, as with Dr. Elshikh's mother-in-law, parents-in-law of persons in the United States will typically also be parents of persons in the United States, because spouses typically live together. This places the parent-in-law relationship

in a fundamentally different position from the other relatives that the district court included. For examples, siblings-in-law of persons in the United States are far less likely to be siblings of persons in the United States, because siblings often live apart. And the likelihood is even lower for cousins and the other types of more distant relatives that the district court held are not covered by the Supreme Court's stay. The Supreme Court's holding that Dr. Elshikh's mother-in-law is exempt from the Order's application cannot reasonably be understood to hold that virtually all family members are exempt from the Order, especially given the Supreme Court's clear admonition that "a *close* familial relationship is required." *IRAP*, 137 S. Ct. at 2088 (emphasis added).[6]

At a minimum, however, if this Court were to conclude that the government's definition of "close familial relationship" is too narrow, it should evaluate the relationships separately rather than on a blanket basis. The district court invoked "common sense" to conclude, for example, that "grandparents are the *epitome* of close family members." E.R. 221. Even if this Court were to agree,

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[6] The district court's injunction compelling the government to exempt from Sections 6(a) and 6(b) of the Order refugees admitted through the Lautenberg Program was also predicated on the district court's analysis of what constitutes a "close familial relationship." E.R. 228-29. Should the Court vacate the injunction insofar as it compels the government to include extended family within the class of exempt "close familial relationships," therefore, the injunction must also be vacated as applied to refugees under the Lautenberg Program.

that would not support the district court's extension of the injunction to siblings-in-law, cousins, aunts, uncles, nieces, and nephews—relationships that are hardly the "epitome" of a close familial relationship. And, critically, not one of the immigration law-related sources that the district court pointed to in adopting its expansive definition of "close familial relationship" applied to cousins. Even if this Court declines to vacate this portion of the preliminary injunction in its entirety, it should narrow its scope.

CONCLUSION

Defendants-appellants respectfully suggest that the district court's modified injunction should be vacated.

Respectfully submitted,

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JULY 2017

STATEMENT OF RELATED CASES

There are no related cases within the meaning of Ninth Circuit Rule 28-2.6. This appeal involves a challenge to Executive Order No. 13,780 (Mar. 6, 2017). That Executive Order revokes and replaces an earlier Executive Order, No. 13,769 (Jan. 27, 2017), which was challenged in *Washington v. Trump*, 847 F.3d 1151 (2017) (per curiam).

/s/ Sharon Swingle
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 32(a)(7)(B). The brief contains 9,709 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(iii).

/s/ Sharon Swingle
Sharon Swingle

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sharon Swingle
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