Nos. 17-2231(L), 17-2232, 17-2233, 17-2240 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Plaintiffs-Appellees-Cross-Appellants,

v.

DONALD J. TRUMP, *et al.*,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the District of Maryland, Southern Division
(8:17-cv-00361-TDC)

REPLY CROSS-APPEAL BRIEF FOR *IRAP* APPELLEES

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard,
Suite 1600
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org
espiritu@nilc.org
keaney@nilc.org
sung@nilc.org

Additional counsel on the next page

Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
David Hausman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org
lgelernt@aclu.org
hshamsi@aclu.org
hhandeyside@aclu.org
smehta@aclu.org
dhausman@aclu.org

Justin B. Cox
NATIONAL IMMIGRATION LAW CENTER
P.O. Box 170208
Atlanta, GA 30317
Tel: (678) 279-5441
Fax: (213) 639-3911
cox@nilc.org

Kathryn Claire Meyer
Mariko Hirose
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, New York 10006
Tel: (646) 459-3044
Fax: (212) 533-4598
kmeyer@refugeerights.org
mhirose@refugeerights.org

David Rocah
Deborah A. Jeon
Sonia Kumar
Nicholas Taichi Steiner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org
kumar@aclu-md.org
steiner@aclu-md.org

Cecillia D. Wang
Cody H. Wofsy
Spencer E. Amdur
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org
cwofsy@aclu.org
samdur@aclu.org

David Cole
Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, D.C. 20005
Tel: (202) 675-2330
Fax: (202) 457-0805
dcole@aclu.org
dmach@aclu.org
hweaver@aclu.org

Counsel for Plaintiffs-Appellees-Cross-Appellants IRAP, et al.

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INTRODUCTION

The government's primary argument on cross-appeal is an extension of the same argument that it has made at every stage of this case and that has been rejected at every level of the federal judiciary: that only particular, specifically identified individuals associated with the plaintiffs should be protected from the ban. Gov't Reply 27. "*A fortiori*," the government argues, the district court's preliminary injunction should not be expanded beyond its current limits, which already exceed what the government views as the proper scope. *Id*. at 28. The government's foundational argument is wrong, *see International Refugee Assistance Project v. Trump*, 857 F.3d 554, 604-05 (4th Cir. 2017) (en banc), *vacated as moot*, 86 USLW 3175 (U.S. Oct. 10, 2017); J.A. 1081-83, and its "*a fortiori*" extension of that argument necessarily fails as well.

As a fallback, the government suggests that the equitable balance here is no more favorable to the plaintiffs than it was in June, when the Supreme Court rejected the government's request to stay the preliminary injunctions of EO-2 entirely and instead fashioned "interim equitable relief" pending appeal, *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam), that protected persons who had bona fide relationships with individuals or entities in the United States. Gov't Reply 28.

That argument is also incorrect. The equities balance differently here. The harms that the Proclamation imposes on the plaintiffs are significantly greater than those that EO-2 imposed. The Proclamation's ban is indefinite, and so the preliminary injunction here will likely be in place longer—perhaps much longer—than the 90 days of EO-2's "short pause." *IRAP*, 857 F.3d at 583 (internal quotation marks omitted). And the uncontested record evidence before this Court now clearly demonstrates that even the partial ban currently in effect still injures the plaintiffs and others similarly situated. Moreover, the interests on the government's side of the balance are weaker.

In addition, the procedural posture is now meaningfully different. The Supreme Court entered a stay *pending* its consideration of the merits. But here, this Court will address the cross-appeal *after* considering the merits issues. If this Court finds that the plaintiffs are likely to succeed on the merits, and that the Proclamation's ban is therefore likely unconstitutional, otherwise illegal, or both, it is wholly appropriate to broaden the preliminary injunction to fully prohibit enforcement of the ban.

At a minimum, the District Court's preliminary injunction should be modified or clarified to provide that relationships between entities in the United States and their clients are protected by the preliminary injunction so long as they

are "formal, documented, and formed in the ordinary course." *IRAP*, 137 S. Ct. at 2088.

ARGUMENT

I. THE PROCLAMATION'S SYSTEM-WIDE IMPACT JUSTIFIES AN INJUNCTION PROVIDING A SYSTEM-WIDE REMEDY.

1. The government does not dispute plaintiffs' showing that the district court's preliminary injunction fails to prevent all the harms that the Proclamation imposes on plaintiffs. Those ongoing harms result from the exclusion of loved ones who do not qualify as "close relatives," and from the exclusion of others with whom the plaintiffs have relationships that are genuine and meaningful, but not sufficiently formal or documented to qualify for protection under the injunction. Pfs. Br. 58-60. The government also does not contest that those injuries are as irreparable as plaintiffs' injuries based on "bona fide relationships." Thus, the uncontested facts establish that the partial preliminary injunction fails to "redress plaintiffs' own injuries." Gov't Reply 27.

For example, clients of plaintiff Arab American Association of New York ("AAANY"), as well as members of the Yemeni American Merchants Association ("YAMA"), have friends banned from the United States because of the Proclamation. J.A. 567, 570, 611. The Proclamation's exclusion of nonmember scholars who would otherwise seek to attend MESA's annual meeting will harm

MESA's finances and its mission of fostering study and collaboration. J.A. 559-60. The partial ban will likewise harm plaintiff Iranian Alliances Across Borders ("IAAB"), who will have many fewer participants attending its international conference, including participants who would attend but are not invited as speakers. J.A. 1154.

The government mischaracterizes these injuries, suggesting that they rely on the exclusion of those "with whom [the plaintiffs] lack any relationship at all." Gov't Reply 27-28. But in fact many important relationships fall outside of the injunction's protection, including relationships with extended family members, friends, and colleagues, and ties based on shared religious, cultural, and educational affiliation. Indeed, it is common sense that a close friend may be as important as a parent—and his indefinite exclusion from the United States may thus be as devastating. A professor's scholarship may be as impoverished by her inability to exchange ideas with a researcher whom she does not yet know as it is by the exclusion of a colleague with whom she has a formal relationship. The district court's injunction fails to account for such injuries, which accrue over time and are far more severe in the context of an indefinite ban than a 90-day pause. The Supreme Court's decision on the inherently time-limited EO-2 stay did not mandate that broader injunctive relief be denied for longer as this litigation progresses.

2. Defendants suggest that plaintiffs' injuries under the partial ban, if they can be considered at all, are outweighed by the government's national security and foreign policy interests, particularly in light of the "multi-agency review and recommendation" that preceded the Proclamation. Gov't Reply 28. But as plaintiffs previously explained, that justification is exceedingly weak. Pfs. Br. 39-40, 45, 50-51. Nothing in the government's response remotely rebuts plaintiffs' showing, and nothing supports the view that the government's interests justify any application of the ban.

The government again invokes only generalized "national-security and foreign-policy interests" to justify banning those without qualifying relationships. Gov't Reply 28. But it still has not offered any evidence that the ban will avert any security threat, or any reason to believe that such evidence exists.[1] And, as plaintiffs explained, the government vastly overstates the significance of the review and recommendation process. Pfs. Br. 49-50. The government has disclosed only selected facts about that process, and would not even say whether there were "material inconsistencies" between the DHS report, the DHS recommendation, and the Proclamation as actually issued. J.A. 952-54; *see id*.

[1] And, as always, where consular officers or border control officials entertain any doubts about an individual's admissibility, they have the authority to demand further information or deny the visa or admission. 8 U.S.C. § 1201(g); 9 FAM 306.2-2(A)(a)(1); 8 C.F.R. § 235.1(f)(1).

(conceding that "it's potentially possible that various government advisors disagree among themselves"). This selective disclosure and secrecy makes the government's complaint that "any material difference" between the recommendations and Proclamation is "unidentified" ring hollow. Gov't Reply 22.

In any event, there are serious reasons to doubt the weight of the report and justification. The government contests that the imposition of a new ban was pre-ordained before the agency study had been conducted. Gov't Reply 21-22. But as plaintiffs already explained, the plain text of EO-2, along with the President's repeated calls for a "tougher" ban during the review process, amply support the district court's finding in this regard. Pfs. Br. 48. The government's response—that EO-2 "did not require" the outcome, Gov't Reply 22—is not a fair reading of EO-2's command that the Secretary "shall" submit a list of countries to be subject to a ban (as opposed to recommending other measures she might deem appropriate). And it is the government that is "tellingly silent," *id.*, about the public statements the President made indicating the outcome he preferred and intended: not an elimination of EO-1 and EO-2's sweeping country-based bans, but an even "tougher" version. It is also telling that the government does not contest that the White House placed an individual with extreme and notorious anti-Muslim views at the head of the DHS taskforce charged with implementing EO-2's

directives, including the report and recommendation process. Pfs. Br. 5-6, 49; Gov't Reply 21 n.2.

Moreover, the government's own intelligence reports have concluded that citizenship is an unreliable indicator of terrorist threat and that screening and vetting are of limited value in preventing terrorism in the United States. *IRAP*, 857 F.3d at 575, 596. These reports, which were publicly available when the President issued the Proclamation, contradict the premise of both the Proclamation and its predecessor bans. *See, e.g.*, Amicus Br. of the Cato Institute at 24-26. But the Proclamation does nothing to address or refute their findings. Rather, additional evidence points in the same direction: a sworn declaration by a bipartisan group of 49 former national security officials explains that the ban "does not further . . . U.S. national security" because of the "rigorous system of security vetting" already in place, and will instead "cause serious harm" to national security. J.A. 897-98, 901; *see also* Amicus Br. of T.A. at 21-29 (listing various tools that would still be available to the government to address genuine national security concerns if a full preliminary injunction were in place); Amicus Br. of the Cato Institute at 21-24 (same).

Indeed, the government's interests are, if anything, weaker than when the Supreme Court established the "bona fide relationship" standard. The government no longer relies on the assertion, noted by the Supreme Court, that a ban was

needed to free up resources to conduct the review, and its decision to exempt more categories of visa applicants from the ban further undermines the suggestion of problems with existing visa vetting. Pfs. Br. 60. Moreover, even more time has now elapsed since the President first sought to impose a broad nationality ban—some ten months as of the date of this filing—and the government still has not developed any evidence or allegation of actual urgency.

3. A comprehensive injunction is also appropriate because this Court will reach the cross-appeal issues only after it makes a decision on the plaintiffs' likelihood of success *on the merits*. *Cf. IRAP*, 137 S. Ct. at 2087-89 (not addressing merits); *see also* Pfs. Br. 62-63. The government fails to address this point. Instead, it conflates the scope of the preliminary injunction with the scope of relief at the stay stage. Gov't Reply 27 ("the injunction against the Proclamation should not be extended beyond foreign nationals with a credible claim of a bona fide relationship with a person or entity in the United States, under the Supreme Court's stay of the EO-2 injunctions"). But the difference in posture is critical; indeed, the plaintiffs have not sought interim relief pending appeal with respect to the district court's limitation of the injunction. And they have explained that, at a minimum, entering a full preliminary injunction would be appropriate even if this Court were to then consider partially staying that injunction pending further review. Pfs. Br. 62 n.24. That would leave the case in the same posture as

Hawai‘i, in which the preliminary injunction has no bona fide relationship limitation, but the Ninth Circuit has stayed the injunction for the time being with respect to noncitizens without qualifying relationships. *Hawai‘i v. Trump*, No. 17-17168, Order (Doc. No. 39, 9th Cir. filed Nov. 13, 2017).

As the plaintiffs have explained, where an executive action is facially invalid on the merits, a comprehensive injunction is the "ordinary result." *Natl. Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citation and quotation marks omitted); Pfs. Br. 62. That follows where, as here, the plaintiffs do not merely challenge the application of a policy "in an illegal manner on a particular occasion," but instead facially challenge the validity of a policy "of broad applicability." *Id*. (quoting *Lujan v. Natl. Wildlife Fedn.*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting, but not disagreeing with the majority on this point)). Any other result would "merely . . . generate a flood of duplicative litigation." *Id*. Similarly, the typical remedy on the merits in an Establishment Clause case is invalidation of the challenged government action as a whole: The remedy for an unconstitutional religious display is not to cover it with a curtain when plaintiffs walk by. *See Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) (invalidating school prayer policy after facial challenge).

In protecting noncitizens with qualifying relationships on an interim basis under the prior time-limited Executive Order, the Supreme Court did not suggest

that other ties and relationships could not give rise to sufficiently weighty injuries *on the merits*. And for Establishment Clause injuries arising through such nonqualifying but nonetheless significant relationships, the fact that the Proclamation is now indefinite only compounds the ban's palpable effect, reinforcing the message that the plaintiffs "are not welcome in this country." J.A. 611; *see, e.g.*, *id.* (every YAMA member knows of someone banned from coming to the United States by President Trump's Muslim bans).

The Proclamation's violation of structural constitutional guarantees makes a full preliminary injunction particularly vital. The Supreme Court has explained that the Establishment Clause not only protects the free exercise of religion but also prevents the "political tyranny and subversion of civil authority" accompanying establishment of religion. *McGowan v. Maryland*, 366 U.S. 420, 430 (1961). Recognizing that principle does not amount to "Establishment Clause exceptionalism," Gov't Reply Br. 19—it simply acknowledges the role the Establishment Clause plays in our constitutional scheme. And the separation of powers is similarly fundamental to the constitutional structure: The Framers ensured that "the legislative power of the Federal government [would] be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *INS v. Chadha*, 462 U.S. 919, 951 (1983). That procedure does not allow the President to enact, amend, or repeal laws. *Clinton v. City of New York*, 524 U.S.

417, 438 (1998). The Proclamation should thus be preliminarily enjoined without an exception for those lacking designated bona fide relationships.

II. THE DISTRICT COURT ERRED TO THE EXTENT IT SUGGESTED THAT IRAP AND HIAS CLIENTS CATEGORICALLY LACK BONA FIDE RELATIONSHIPS.

The government does not appear to dispute that client relationships—like the relationship between a legal service provider and its clients—qualify under the Supreme Court's "bona fide relationship" standard as long as they are "formal, documented, and formed in the ordinary course." *IRAP*, 137 S. Ct. at 2088; *see* Gov't Reply 28; *see also* Pfs. Br. 64 (government concession). But the district court's opinion stated that "clients of IRAP and HIAS, and those similarly situated, are not covered by the injunction absent a *separate* bona fide relationship as defined above," J.A. 1080 (emphasis added), suggesting that clients of IRAP, HIAS, and similar organizations are categorically prohibited from demonstrating that their relationships with those organizations are "bona fide" relationships that qualify them for protection under the preliminary injunction.

The government's position seems to be that the district court's injunction can nevertheless be read to encompass such client relationships. If this Court agrees, it should authoritatively construe the district court's injunction accordingly; if not, the Court should reverse. But in either case, if this Court leaves in place the district court's limitation of the injunction to individuals who can show a bona fide

relationship with a person or entity in the United States, it should make clear that clients of organizational plaintiffs IRAP and HIAS do not categorically lack a bona fide relationship.[2]

Doing so will ensure that the district court's injunction will not subject clients of organizational plaintiffs IRAP and HIAS, and those similarly situated, to a more stringent standard than the Supreme Court applied in its EO-2 stay—one that would exclude even formal and documented client relationships. As plaintiffs explained, the district court's statement about IRAP and HIAS's clients appears to trace back to the Supreme Court's September 2017 order providing that "refugees covered by a formal assurance" were not protected from EO-2's ban on the basis of that assurance. *Trump v. Hawai'i*, --- S. Ct. ---, 2017 WL 4014838 (Sept. 12, 2017). But the Court did not stay the previous injunction as to any *other* client relationships of HIAS or IRAP.[3] Indeed, everyone in the lower court proceedings in *Hawai'i*—the district court, the government, and the plaintiffs—was in

[2] As Defendants note, Gov't Reply 29, plaintiffs have requested permission to file a motion asking that the District Court clarify or in the alternative modify its October 17 Order to reflect this understanding, D. Ct. Doc. No. 226-1 (filed Oct. 20, 2017). As of the date of this filing, plaintiffs' request to file this clarification motion remains pending.

[3] A formal assurance is a promise of resettlement assistance by a resettlement agency contracted with the government. *Hawai'i v. Trump*, 871 F.3d 646, 663 (9th Cir. 2017) (per curiam). Although HIAS is a resettlement agency, it also provides other client services, including legal services. IRAP is not a resettlement agency and therefore does not provide formal assurances.

agreement that such relationships can and do qualify as long as they are formal, documented, and formed in the ordinary course. Pfs. Br. 64-65.

Thus, to the extent the bona fide relationship standard remains in place, plaintiffs seek clarification that individuals who have client relationships with entities in the United States that are "formal, documented, and formed in the ordinary course," *IRAP*, 137 S. Ct. at 2088, qualify for the protection of the preliminary injunction, and that clients of IRAP and HIAS, and others similarly situated, are not categorically excluded from demonstrating that their relationships with those organizations meet that standard.

CONCLUSION

The preliminary injunction should be affirmed, except as to its limitation to persons with a bona fide relationship with an individual or entity in the United States.

Dated: November 29, 2017

Respectfully submitted,

/s/ Omar C. Jadwat

Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
David Hausman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org
lgelernt@aclu.org
hshamsi@aclu.org
hhandeyside@aclu.org
smehta@aclu.org
dhausman@aclu.org

Cecillia D. Wang
Cody H. Wofsy
Spencer E. Amdur
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard,
Suite 1600
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org
espiritu@nilc.org
keaney@nilc.org
sung@nilc.org

Justin B. Cox
NATIONAL IMMIGRATION LAW CENTER
P.O. Box 170208
Atlanta, GA 30317
Tel: (678) 279-5441
Fax: (213) 639-3911
cox@nilc.org

Kathryn Claire Meyer
Mariko Hirose
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, New York 10006
Tel: (646) 459-3044
Fax: (212) 533-4598
kmeyer@refugeerights.org
mhirose@refugeerights.org

David Rocah
Deborah A. Jeon
Sonia Kumar
Nicholas Taichi Steiner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org
kumar@aclu-md.org
steiner@aclu-md.org

cwang@aclu.org
cwofsy@aclu.org
samdur@aclu.org

David Cole
Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, D.C. 20005
Tel: (202) 675-2330
Fax: (202) 457-0805
dcole@aclu.org
dmach@aclu.org
hweaver@aclu.org

Counsel for Plaintiffs-Appellees-Cross-Appellants IRAP, et al.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 28.1(e)(2)(B)(ii) and the type-volume limitations of Rule 28.1(e)(2)(C). The brief contains 2,926 words, excluding the parts of the brief described in Rule 32(f).

/s/ Omar C. Jadwat
Omar. C. Jadwat

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth 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, except for the following, who will be served by first class mail on November 29, 2017:

Hashim M. Mooppan
U.S. Department of Justice
Civil Division, Appellate Section
950 Pennsylvania Avenue, NW
Washington, DC 20530-0000

/s/ Omar C. Jadwat
Omar C. Jadwat