No. 17-16426

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATE OF HAWAI‘I; ISMAEL 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 Hawai‘i
(1:17-cv-00050-DKW-KSC)

MOTION OF DEFENDANTS-APPELLANTS FOR STAY PENDING APPEAL

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Bureau of Population, Refugees, and Migration, U.S. Dep't of State,
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https://www.state.gov/j/prm/releases/factsheets/2017/272316.htm 5, 15

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9 U.S. Dep't of State, Foreign Affairs Manual 102.8-3 (2016)...............................17

INTRODUCTION

Since the Supreme Court issued a per curiam decision partially staying the injunction in this case, *Trump v. IRAP*, No. 16-1436 (June 26, 2017), the government has faithfully implemented Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), consistent with the terms of that stay. But the district court has now entered a modified injunction that in two important respects strips the Supreme Court's stay of significant practical consequences, and imposes serious harm on the government and the public interest.

First, the Supreme Court ruled in its stay decision that, for aliens abroad who seek admission as refugees, the suspension in Section 6(a) of the Order and the annual cap in Section 6(b) "may not be enforced against an individual * * * who can credibly claim a bona fide relationship with a person or entity in the United States." *IRAP*, slip op. 13. For *every* prospective refugee, the government contracts with a resettlement agency to provide assistance to the alien once he eventually arrives in the United States; prior to the refugee's arrival, however, the relationship is between the government and the agency, not the agency and the refugee. Indeed, the resettlement agency typically has no contact with the refugee prior to arrival to the United States. The government has accordingly not treated that relationship alone as sufficient to trigger the injunctions. In enjoining the

government, the district court has effectively rendered the refugee portion of the Supreme Court's decision meaningless.

Second, the Supreme Court also held that, for aliens abroad who apply for visas, the suspension in Section 2(c) of the Order may not be enforced against an individual with a credible claim of a bona fide relationship to a U.S. person or entity, including "a *close* familial relationship" with a U.S. individual. *IRAP*, slip op. 12 (emphasis added). In interpreting the requisite degree of closeness, the government looked to the waiver provision in Section 3(c) of the Order, which allows waivers for aliens who seek "to visit or reside with a close family member (*e.g.*, a spouse, child, or parent)" in the United States, and to the provisions of the Immigration and Nationality Act (INA) governing eligibility for family-based immigrant visas, which are limited to spouses, children, parents, and siblings. In light of related INA provisions and the Supreme Court's stay decision, the government has further interpreted the phrase "close familial relationship" to include fiancé(e)s and parents- and children-in-law. But the district court has interpreted "*close* familial relationship[s]" to include virtually *all* family relationships and has thus read the term "close" out of the Supreme Court's decision.

Because the parties' disagreement turns on the meaning of the Supreme Court's stay ruling, the government has moved in the Supreme Court for

clarification of that ruling, and has sought a temporary administrative stay (copy attached, Add. 27-94). In order to protect the interests of the government and the public should the Supreme Court decline to rule pending this Court's consideration of the matter, the government respectfully seeks a stay from this Court pending appeal or the Supreme Court's disposition of the motion for clarification.

STATEMENT

1. Section 2(c) of the Executive Order suspends for 90 days entry of certain nationals of six countries that present heightened terrorism-related risks, subject to case-by-case waivers. *Trump v. IRAP*, No. 16-1436 (U.S. June 26, 2017) (per curiam), slip op. 3. Section 6(a) suspends for 120 days adjudications and travel under the United States Refugee Admission Program (Refugee Program). *Id.* at 3-4. Section 6(b) limits to 50,000 the number of persons who may be admitted as refugees in Fiscal Year 2017. *Id.* at 4.

Plaintiffs are the State of Hawaii and Dr. Ismail Elshikh, a U.S. citizen, who is married to a U.S. citizen, and whose Syrian mother-in-law seeks a visa to enter the United States. The district court previously enjoined application of Sections 2 and 6 in their entirety, and this Court affirmed with respect to Sections 2(c), 6(a), and 6(b). *Id.* at 4-6. In separate litigation, a district court in Maryland enjoined Section 2(c), which the Fourth Circuit affirmed in substantial part. *Id.* at 4-5.

2. The government sought certiorari and a stay of both injunctions. *IRAP*, slip op. 5-7. The Supreme Court granted certiorari and issued a partial stay. *Id.* at 9-13. With respect to Section 2(c), the Court ruled:

> 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.

Id. at 12. The Court explained that "[t]he facts of these cases illustrate the sort of relationship that qualifies." *Ibid.* "For individuals, *a close familial relationship is required*." *Ibid.* (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." *Ibid.* "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]." *Ibid.* 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." *Ibid.*

The Supreme Court also granted a partial stay of the district court's injunction of Sections 6(a) and (b), prohibiting enforcement of those provisions to

"an individual seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States." *IRAP*, slip op. 13.

3. In accordance with a Presidential memorandum, *IRAP*, slip op. 7, the Departments of State and Homeland Security commenced enforcement of Sections 2(c), 6(a), and 6(b) of the Order on June 29. The agencies published public guidance, D. Ct. Doc. 301, Exs. A, C, and D (July 3, 2017), which was subsequently updated, *id.* at 7, current versions of which are available online.[1]

4. a. 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. D. Ct. Doc. 293-1, at 2. 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 a sponsorship-assurance agreement from a U.S.-based refugee-resettlement agency.

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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.

D. Ct. Doc. 293-1, at 11-12. An assurance is a contractual commitment between one of nine nongovernmental organizations that have agreements with the government to provide resettlement services, and the Department of State, to provide certain services and assistance to the refugee following the refugee's arrival in the United States. D. Ct. Doc. 301-1, at 5 (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 *ibid.* (¶ 16); Add. 16. In the government's view, an assurance agreement 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. D. Ct. Doc. 293-1, at 7-11. The government interprets 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 definition does not include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law, and other "extended" family members.

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." D. Ct. Doc. 322, at 5. 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[]." *Ibid.*

c. This Court dismissed plaintiffs' 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), at 2. The Court stated, however, that the district court could entertain a request to enforce or modify its existing injunction. *Id.* at 3.

5. Plaintiffs filed a new motion presenting substantially the same arguments as their clarification motion but seeking enforcement or modification of the district court's injunction. The district court granted the motion in substantial part. The court held that every refugee as to whom the Department of State has obtained an assurance agreement from a resettlement agency has a qualifying bona fide relationship with a U.S. entity. Add. 16-17. The court also interpreted "close familial relationship" to include grandparents, grandchildren, brothers-in-law,

sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States." *Id.* at 15.[2]

The district court denied the government's request for a stay pending appeal. *Id.* at 24.

ARGUMENT

This Court should grant a stay pending appeal to permit the Supreme Court to rule on the government's motion for clarification filed on July 14, 2017. As the government has explained to the Supreme Court, the district court's modified injunction is based entirely on an interpretation of the Supreme Court's June 26 stay decision. For that reason, the Supreme Court—rather than the district court or this Court—is the appropriate arbiter of the dispute concerning the meaning of its decision. To minimize the disruptive effect of the district court's decision, the modified injunction should be stayed pending appeal and the Supreme Court's disposition of the pending clarification motion.

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[2] 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. Add. 22-23.

I. A STAY IS APPROPRIATE TO ALLOW THE SUPREME COURT TO CLARIFY THE SCOPE OF ITS EARLIER STAY DECISION.

A stay from this Court would be appropriate pending appeal or the Supreme Court's clarification of the meaning and effect of its partial stay of the injunction.

First, as explained below, the government is likely to prevail on the merits of the two questions raised here, which concern the interpretation of the stay ruling. Second, the balance of equities and public interest strongly support a stay. The Supreme Court already has granted a partial stay of the district court's original injunction. *IRAP*, slip op. 9-13. As the Court underscored in that ruling, the government's "interest in preserving national security is 'an urgent objective of the highest order,'" and both that interest and the Executive's authority "are undoubtedly at their peak when there is no tie between [a] foreign national and the United States." *Id.* at 11 (quoting *Holder v. Humanitarian Law Project*, 561 U. S. 1, 28 (2010)); see *id.* at 13 (holding that, for refugees who lack a qualifying bona fide relationship with a U.S. person or entity, the equitable "balance tips in favor of the Government's compelling need to provide for the Nation's security"). The same considerations strongly support a stay of the district court's ruling effectively abrogating the stay granted by the Supreme Court. Plaintiffs will suffer no irreparable harm from a stay pending appeal because, if the Supreme Court were to conclude that a broader interpretation of the injunction is appropriate, any

individuals denied entry on the basis of the stay pending appeal would be entitled to the benefit of that ruling.

The Supreme Court has already "balance[d] the equities" and determined to stay portions of the broad injunction previously entered by the district court. *IRAP*, slip op. 9; see also *id.* at 10-13. The dispute now centers on the meaning of the Supreme Court's determination that "[t]he equities relied on by the lower courts do not balance the same way in [the] context" of those "foreign nationals who [do not] have a credible claim of a bona fide relationship with a person or entity in the United States." *Id.* at 12. As explained below, the district court's modified injunction upends the equitable balance struck by the Supreme Court.

The fact that the government is now in the midst of implementing the Order pursuant to the Supreme Court's stay ruling magnifies the need for a stay pending appeal. The government began implementing the Order in accordance with the Supreme Court's stay ruling more than two weeks ago, on June 29, which has entailed extensive, worldwide coordination among multiple agencies and issuing public guidance to provide clarity and minimize confusion. The district court's ruling requires the government immediately to alter its implementation of the Order in substantial respects, inviting precisely the type of uncertainty and confusion that the government has worked diligently to prevent. This Court can and should prevent such needless uncertainty and confusion by staying the district

court's new injunction until the Supreme Court grants clarification or this Court considers on appeal the issues presented.

II. THE DISTRICT COURT'S READING OF THE SUPREME COURT'S STAY RULING IS WRONG AND WOULD SEVERELY IMPAIR IMPLEMENTATION OF THE ORDER.

A. An Assurance Agreement Between A Refugee-Resettlement Agency And The Government Does Not Itself Establish A Qualifying Bona Fide Relationship With A U.S. Entity.

The Supreme Court held 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*, slip op. 13. The district court concluded, however, that every refugee applicant as to 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 irreconcilable with the Supreme Court's reasoning and would as a practical matter render the partial stay that Court granted as to the refugee provisions a dead letter.

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. Add. 16. As part of its assurance, the resettlement agency (or a local affiliate) agrees to provide

certain benefits—including placement, planning, reception, and basic needs and core service activities for arriving refugees—once a refugee arrives in the United States, in exchange for payment from the government. D. Ct. Doc. 301-1, at 6-7 (Bartlett Decl. ¶ 20).

A government-arranged assurance agreement does not by itself establish a "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*, slip op. 3. 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. D. Ct. Doc. 301-1, at 7 (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. *Ibid.*

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*, slip op. 12, refugees do not have any freestanding connection to resettlement agencies that is separate and apart from the Refugee Program 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, apart from an opportunity to perform the resettlement services for which the government has contracted if a refugee is admitted. *Id.* at 11.

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." Add. 17. But the 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 thread among the hypothetical worker, student, and lecturer described by the Supreme Court that each has an independent relationship with a U.S. entity, such that the entity would suffer concrete hardship from the alien's inability to enter the United States. *IRAP*, slip op. 12. 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.

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. 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 one. Sections 6(a) and (b) thus would be unable to "take effect" as the Supreme Court explicitly intended. *IRAP*, slip op. 13. The Supreme Court's stay ruling should not be construed in a way that renders its application to Sections 6(a) and 6(b) 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)).

B. The Government Has Properly Construed "Close Familial Relationship" To Include Only Certain Immediate Relatives.

The district court also misconstrued the Supreme Court's stay order that, for a foreign national to be exempt from the Order based on a "credible claim of a bona fide relationship with a person * * * in the United States," "a close familial relationship is required." *IRAP*, slip op. 12. Because the Court was clear that only "*close* familial relationship[s]" count, *ibid.* (emphasis added), a line necessarily must be drawn between such relationships and more attenuated family connections. The government has 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. That tailored understanding comports with the Supreme Court's language and reasoning, 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 grandparents, grandchildren, siblings-in-law, aunts, uncles, nieces, nephews, and cousins—that covers virtually every conceivable familial connection.

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 Executive 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." *Ibid.*

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) (emphases added); see *IRAP*, slip op. 11. The Court's reference to "close familial relationships," which echoes the waiver provision for "close family member[s]," 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.

2. Moreover, the specific lines the government has drawn in implementing the partially stayed injunction—like the definition of "close family member" in Section 3(c)(iv) of the Executive Order—are 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,

2197-2198 (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." Add. 12. 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 an entitlement for the alien to enter the United States—the alien must independently satisfy the eligibility criteria 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 plausibly be thought to affect the rights of "people * * * in the United States who have relationships with foreign nationals abroad." *IRAP*, slip op. 10.

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. Add. 14 (citing *Moore v. City of East Cleveland*, 431 U.S. 494 (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. In this very different context, the appropriate definition of "close family members" is the relationship that entitles 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, a statutory provision that establishes a ground on which aliens are inadmissible contains an "[e]xception for close family members," with reference specifically to a "parent, spouse, son, daughter, brother, or sister." 8 U.S.C. § 1182(a)(3)(D)(iv). 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))"[3]—the same provisions upon which the government principally relies here. The INA does not provide comparable immigration benefits for grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins 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

[3] 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).

custody of his or her parents may be released to an aunt, uncle, or grandparent. Add. 13 (citing *Reno v. Flores*, 507 U.S. 292, 297, 301 (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 the fact that a provision in the Family Sponsor Immigration Act of 2002, Pub. L. No. 107-150, 116 Stat. 74, defines an alien's sister-in-law, brother-in-law, grandparents, and grandchildren as "close family." Add. 13 (citing § 2(a), 116 Stat. 74 (codified at 8 U.S.C. § 1183a(f)(5))). That provision 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, sons, daughters, 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 (Add. 13 & 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 in persons 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 compelled by an agreement with Canada. *Id.* at 69,480. 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. Notably, in cases in which an alien abroad has a particularly close relationship with a more distant relative, he 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 family relationships that might qualify an individual for a waiver. But those narrow exceptions are not a basis for disregarding the INA's typical definition of close familial relationships.

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 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*, slip op. 10. The 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). *Ibid.* The Court held that the U.S. relative "can legitimately claim concrete hardship if that person is

excluded." *Id.* at 13. The same is true of other original plaintiffs in these cases before the Court, who sought entry of fiancé(e)s and siblings.

The district court erroneously read the Supreme Court's reference to Dr. Elshikh's mother-in-law as creating a much larger exception. But 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*, slip op. 12, 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. D. Ct. Doc. 66-1, ¶¶ 1, 4). Out of an abundance of caution, however, the government has implemented the Order in its guidance to include parents-in-law and children-in-law as having qualifying bona fide relationships.

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 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*, slip op. 12 (emphasis added).

CONCLUSION

For these reasons, the Court should stay the district court's July 13 modification of the injunction pending appeal.

Respectfully submitted,

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JULY 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of this Court's Rules 27-1(1)(d) and 32-3 because it contains 5,405 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ Sharon Swingle
Sharon Swingle

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2017, I electronically filed the foregoing motion 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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