17-16426

United States Court of Appeals for the Ninth Circuit

STATE OF HAWAI'I, ISMAIL ELSHIKH,

Plaintiffs-Appellees,

v.

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

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, and WASHINGTON, and the DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEES

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Dated: August 3, 2017

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INTRODUCTION AND INTERESTS OF AMICI

This appeal concerns the extent to which the United States may enforce certain provisions of Executive Order No. 13,780[1] during the time when a challenge to those provisions is pending before the United States Supreme Court. The United States District Court for the District of Hawaii issued a preliminary injunction prohibiting enforcement of the Executive Order's 90-day ban on the entry to the United States of nationals from six overwhelmingly Muslim countries, suspension of the U.S. Refugee Admissions Program, and lowering of the Program's refugee cap (ER 46-112). This Court affirmed that injunction; and on June 26, 2017, the Supreme Court granted certiorari in this case and a companion case addressing the legality of those provisions. *Trump v. International Refugee Assistance Project (IRAP),* 137 S. Ct. 2080 (2017).

When the Supreme Court granted review, it also granted a partial stay of the district court's injunction. That partial stay expressly left in place that part of the injunction prohibiting enforcement of the Executive Order against any person having a "bona fide relationship with a person

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[1] Executive Order No. 13,780, §§ 2(c), 6(a)-(b) (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017).

or entity in the United States," but lifted the injunction insofar as it enjoined enforcement of the order against persons who lack such a relationship. *Id.* at 2088. The Court explained that such a relationship can be either "a close familial relationship" with "a person" in the United States, or a "formal, documented" relationship with an entity or organization that was "formed in the ordinary course." *Id.*

Notwithstanding that ruling, defendants[2] shortly thereafter issued guidance narrowly defining the qualifying family relationships and stating that the federal government intends to enforce the enjoined provisions of the Executive Order against certain close family members of persons in the United States—including grandparents, grandchildren, aunts, uncles, nieces, nephews, and first cousins (ER 178, 180, 195-196). That exclusion conflicts with the language and rationale of the Supreme Court's order preserving the injunction with respect to foreign nationals

[2] The defendants in this action are: Donald J. Trump, as President of the United States; the United States Department of Homeland Security; John F. Kelly, as Secretary of Homeland Security; the United States Department of State; Rex Tillerson, as the Secretary of State; and the United States. This brief refers to them collectively as "defendants" or "the federal government."

who have a "bona fide relationship with a person or entity in the United States," as well as the meaning and purpose of the underlying injunction as modified by that Court's partial stay.[3]

Plaintiffs the State of Hawaii and Dr. Ismail Elshikh returned to the district court to challenge the federal government's guidance as inconsistent with the June 26 order of the Supreme Court that left in place the district court's injunction in part. Plaintiffs first filed a motion to clarify the scope of the remaining injunction, which the district court denied as beyond its authority (ER 201-206).[4] This Court dismissed the ensuing appeal, noting that the district court lacked "authority to *clarify* an order of the Supreme Court," but did "possess the ability to interpret and enforce the Supreme Court's order, as well as the authority to enjoin against, for example, a party's violation of the Supreme Court's order."[5]

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[3] Amici States also share the concerns raised by plaintiffs about other aspects of the federal government's guidance, *see* Brief for Hawai'i at 10-15, D. Ct. ECF No. 328-1. And amici States agree with plaintiffs that there is no basis for this Court to overturn the district court's measured approach to the refugee aspects of the injunction. These issues are addressed in detail by plaintiffs and other amici.

[4] *Hawaii v. Trump*, 2017 WL 2882696 (D. Haw. July 6, 2017).

[5] No. 17-16366, 9th Cir. ECF No. 3, at *Hawaii v. Trump*, 2017 WL 3048456 (9th Cir. July 7, 2017) (emphasis in original).

Plaintiffs then filed a motion for—among other things—interpretation and enforcement of the Supreme Court's order, which the district court partly granted on July 13, 2017 (ER 207-233). That order is the subject of this appeal.

With respect to the standard for determining close familial relationships, the district court held that the federal government's narrow definition conflicted with the Supreme Court's June 26 decision, and that the broader injunctive relief requested by plaintiffs was "necessary to preserve the status quo" pending that Court's hearing of the case in October 2017 (ER 220-221). Defendants filed a notice of appeal in this Court (ER 233-235) and moved simultaneously in the Supreme Court for clarification of that Court's June 26 ruling and a stay of the district court's July 13 order pending judicial review. The Supreme Court denied the motion for clarification; declined to stay the district court's injunction as to grandparents, grandchildren, aunts, uncles and cousins; and stayed the part of the district court's injunction as to certain refugees pending this Court's decision of the instant appeal (9th Cir. ECF No. 4).

Amici States New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode

Island, Vermont, Virginia, and Washington, and the District of Columbia submit this brief as amici curiae in support of affirmance. This brief supplements plaintiffs' brief by providing the perspective and experience of 15 additional sovereign States and the District of Columbia, all of which have an urgent interest in the proper enforcement of the district court's nationwide injunction and preservation of the status quo, given the irreparable harms that will result to the amici States and our residents if the injunction is not implemented in a manner consistent with the Supreme Court's order of June 26.

Like plaintiffs here, the amici States have brought suits challenging the Executive Order and its predecessor on the grounds that certain provisions of those Orders violate the Establishment Clause of the United States Constitution and various other constitutional and statutory provisions.[6] We have also previously filed briefs amicus curiae

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[6] Cases challenging this Executive Order: Second Am. Compl., *Washington v. Trump*, No. 17-cv-141 (W.D. Wash. Mar. 16, 2017) (challenge by Washington, California, Oregon, New York, Maryland, and Massachusetts, stayed pending appeal in *Hawaii v. Trump*), ECF No. 152.

Cases challenging predecessor Order: *Washington v. Trump*, No. 17-cv-141, 2017 WL 462040, at *2-*3 (W.D. Wash. Feb. 3, 2017)

in this case (including in this Court), including briefs supporting the entry of a preliminary injunction against the Executive Order, and briefs opposing any stay of such an injunction.[7] In particular, following the Supreme Court's June 26 decision, the amici States filed a brief supporting plaintiffs' motion to interpret and enforce the injunction in the district court, as well as a brief in the Supreme Court opposing a stay of the resulting order[8]—which is the subject of defendants' present appeal.

Amici have a strong interest in plaintiffs' challenge to this Executive Order because many of its provisions have threatened—indeed, have already caused—substantial harm to our residents,

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(enjoining travel and refugee bans), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); Mass. & N.Y. Amicus Br. (15 States and D.C.), *Washington v. Trump*, No. 17-141 (9th Cir. 2017), ECF No. 58-2; *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *11 (E.D. Va. Feb. 13, 2017) (enjoining travel ban as applied to Virginia).

[7] Va. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos. 16-A1190, 16A-1191 (U.S. June 12, 2017); N.Y. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos. 16-A1190, 16A-1191 (U.S. June 12, 2017); Ill. Amicus Br. (16 States and D.C.), *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Va. & Md. Amicus Br. (16 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153.

[8] D. Ct. ECF Nos. 331, 333; N.Y. Amicus Br. (15 States and D.C.), *Trump v. Hawaii*, No. 16-1540 (U.S. July 18, 2017).

communities, hospitals, universities, and businesses while courts continue to adjudicate the Order's lawfulness. The nationwide preliminary injunction initially entered by the district court in this case, along with the nationwide injunction entered in *Trump v. IRAP*, substantially mitigated the harm threatened by the Order. And the Supreme Court's June 26 decision to leave important aspects of those injunctions in place continues to provide critical protection to the state interests endangered by the Order. Accordingly, the amici States have a strong interest in ensuring that the protection provided by the remaining portions of the district court's injunction is not diminished by an interpretation that is inconsistent with the meaning and purpose of the Supreme Court's directives.

The amici States are particularly concerned that the federal government has construed the Supreme Court's phrase "bona fide relationship with a person or entity in the United States" so narrowly that the injunction will not adequately protect the ability of state universities, hospitals, and businesses to recruit and retain students and staff from the affected countries—or otherwise protect the rights of persons in the United States. When foreign nationals decide whether to

accept offers of employment or offers of admission to an educational institution in the United States, they take into account whether their close family members will be able to visit them. And during the time that such persons are actually working or studying in the United States, their fundamental familial relationships are profoundly burdened if close family members are prevented from visiting them. The artificially narrow line drawn by the federal government will thus likely impair the ability of institutions in the amici States to recruit and retain individuals from the affected countries who do not wish to endure the hardship of enforced separation from family members with whom they have bona fide "close familial relationship[s]." *Trump v. IRAP*, 137 S. Ct. at 2088.

SUMMARY OF ARGUMENT

Nothing in the text or rationale of the Supreme Court's June 26 order supports the federal government's decision to exclude grandparents, grandchildren, aunts, uncles, nieces, nephews, and cousins (including first cousins), from the list of "close familial relationship[s]" that qualify for the protection of the unstayed portion of the preliminary injunction. *Trump v. IRAP*, 137 S. Ct. at 2088. Thus, the

district court did not abuse its discretion in interpreting and enforcing the remaining portion of the injunction as it did.

As the district court correctly observed, the Supreme Court used broad language in its June 26 order that did not expressly limit the categories of family relationships that may qualify. Moreover, the Court's decision expressly preserved the portion of the injunction covering Dr. Elshikh's mother-in-law, consistent with the Court's long-standing recognition that relationships other than traditional nuclear family relations may constitute close family.

Defendants misplace their reliance on the particular provisions of the Immigration and Nationality Act (INA) that specify the relationships typically qualifying for family-based long-term immigration eligibility. Those provisions of the INA do not purport to define "close family relationships" for all entry-based purposes; indeed, in other provisions related to long-term immigration petitions, the INA sometimes privileges the very relationships that defendants would treat as "distant." In addition, the INA provisions serve a very different purpose from the preliminary injunction at issue here, which was entered to maintain the status quo pending the resolution of a legal challenge. The INA's family-

based visa provisions reflect a legislative judgment about how far in a family circle to extend the coveted privilege and benefits of *permanent* immigration. But the purpose of the unstayed portion of the district court's preliminary injunction is to provide *interim* equitable relief to U.S.-based persons whose close relatives are applying for visas that include *short-term non-immigrant* visas.

For this reason, the district court also correctly concluded that defendants' narrow interpretation is inconsistent with the rationale for the Supreme Court's June 26 decision. In distinguishing between those who have a bona fide family connection to a person in the United States and those who lack such a tie, the Supreme Court expressed concern that excluding certain relatives of U.S.-based persons may result in a profound constitutionally cognizable hardship to those U.S.-based persons sufficient to warrant temporary equitable protection. The district court thus reasonably identified a limited number of primary relationships—those most likely to be called upon to provide caregiving responsibilities for other family members—as protected under the unstayed portion of the preliminary injunction.

Defendants appear to assume that the district court used terms such as "cousin" to encompass "all but the most distant" family relationships. (Defs. Br. at 2, 19, 30, 41.) But that is not a sensible interpretation of the district court's order. "Cousin" is commonly and primarily defined to mean the child of one's parent's sibling (see *infra* n.19), and that is the definition that most reasonably fits the purpose of the district court's order: namely, to identify the close familial relationships contemplated by the Supreme Court's June 26 decision.

Giving effect to the federal government's arbitrarily narrow definition of what constitutes a "close" familial relationship will result in the improper exclusion of numerous foreign nationals who have the requisite bona fide connection to a person in the United States, despite the Supreme Court's unequivocal holding that the protections for such persons remain in full force.

ARGUMENT

THE DISTRICT COURT PROPERLY HELD THAT THE "CLOSE FAMILIAL RELATIONSHIP[S]" PROTECTED BY ITS INJUNCTION INCLUDE GRANDPARENTS, GRANDCHILDREN, AUNTS, UNCLES, AND COUSINS

The federal government proposes to limit the protections of the district court's injunction to a specified list of family relationships that do not include grandparents, grandchildren, aunts, uncles, nieces, nephews, and cousins (including first cousins). As the district court correctly concluded, this is an unduly restrictive interpretation of the "close familial relationship" standard set forth in the Supreme Court's June 26 decision (ER 217-221).

The district court thus properly exercised its discretion when it partially granted plaintiffs' motion to interpret and enforce the portion of the preliminary injunction left in place by the Supreme Court's June 26 order. *See, e.g., California Dep't of Social Servs. v. Leavitt*, 523 F. 3d 1025, 1031 (9th Cir. 2008) (grant of motion to enforce an injunction is reviewed only for "abuse of discretion"); *see also McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 867 (2005) (decisions about scope of a preliminary injunction are a matter for district court's sound discretion). Indeed, the Supreme Court—in considering defendants'

request for relief from the July 13 enforcement order—declined to stay the order in this respect (9th Cir. ECF No. 4).

A. Defendants' Interpretation Is Not Supported by the Language of the Supreme Court's June 26 Decision.

As the district court correctly observed (ER 218), the federal government's interpretation is not supported by the "careful language" used by the Supreme Court in its June 26 decision. The Supreme Court, in staying the underlying injunction in part, broadly held that §§ 2(c), 6(a), and 6(b) of the Executive Order "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S. Ct. at 2088. The Court made clear that the exclusionary provisions of these sections can be enforced only against those "who have no connection" or "no tie" to the United States. *Id.*

With respect to foreign nationals claiming a bona fide relationship with *a person* in the United States, the Supreme Court held that "a close familial relationship is required," but did not expressly limit what constitutes such a relationship or enumerate an exhaustive list of

relationship categories, *id.*, as the district court recognized (ER 218).[9] Instead, the Supreme Court provided two examples of the "sort of relationship" that continues to be protected under the injunction—being a wife or a mother-in-law of a person in the United States. 137 S. Ct. at 2088. This recognition that a person's relationship to his or her mother-in-law "clearly" presents a close enough relationship to qualify for protection, *id.*, shows that the Court viewed the injunction as encompassing a broader category of close familial relationships than those found within a traditional nuclear family.

Indeed, the Supreme Court has long recognized in various contexts that relatives other than nuclear family members may constitute close family relations for various purposes, and that this country's "deeply rooted" history and tradition "support[] a larger conception of the family." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503-05 (1977). In *Moore*, for example, the Court invalidated as unconstitutional an ordinance prohibiting a grandmother from living with her grandchild,

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[9] Defendants candidly acknowledge (Defs. Br. at 39) that the Supreme Court did not "catalogue exhaustively" which close family relationships will qualify.

noting that the "tradition of uncles, aunts, cousins, and especially grandparents sharing a household with parents and children" has "venerable" roots. *Id.*; *see also Troxel v. Granville*, 530 U.S. 57, 64 (2000) (recognizing in grandparent visitation case the "changing realities of the American family" where "grandparents and other relatives undertake duties of a parental nature in many households"). And in *Reno v. Flores*, the Court held that the Immigration and Naturalization Service had rationally decided to treat aunts, uncles, and grandparents as "close blood relatives" who were presumptively appropriate custodians for detained alien juveniles, recognizing that "society has . . . traditionally respected" those relatives' "protective relationship with children." 507 U.S. 292, 297, 310 (1993).

This Court too has recognized that close family relationships can extend beyond those of the nuclear family, and that such family relationships are entitled to constitutional protection. *See Lipscomb ex rel. DeFehr v. Simmons*, 884 F.2d 1242, 1244-45 (9th Cir. 1989) (citing social significance of non-nuclear family relationships discussed in *Moore* and recognizing in foster care funding challenge that constitutional "right of children to live with close relatives extends to [those] who seek to live

with their aunts and uncles");[10] *see also Hawaii v. Trump*, 859 F.3d 741, 783 (9th Cir. 2017) (citing *Moore* for its statement that "the Constitution protects the sanctity of the family").

This Court has also specifically declined to adopt a narrow or limited definition of close family relationships in the immigration context. For example, in considering whether "a family" may constitute "a particular social group" for purposes of the statutory provisions governing asylum, this Court expressly stated that its recognition of "the nuclear family" as a "prototypical" example of such a family "does not imply that other sets of identified close family relationships might not qualify." *Chen v. Ashcroft*, 289 F.3d 1113, 1116 n.1, *vacated on other grounds*, 314 F.3d 995 (9th Cir. 2002).

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[10] While the *Lipscomb* panel's holding that a state government had violated the 14th Amendment's substantive due process guarantees by denying certain foster care funding to children who lived with close relatives was later vacated by the Court en banc, that decision did not call into question the panel's conclusion that the plaintiff children in that case had a "right to maintain [particular] family relationships free from government interference." 962 F.2d 1374, 1379 (9th Cir. 1992) (en banc). Rather, the en banc Court held only that a state had "no affirmative obligation to fund" the exercise of that right. *Id.*

The federal government, however, has sought to narrowly define "close family" for purposes of the Supreme Court's June 26 order in this case as only "a parent (including parent-in-law), spouse, child, adult son or daughter, son-in-law, daughter-in-law, sibling, whether whole or half," including "step relationships." (ER 178, 180, 195-196.) That definition expressly excludes "grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law." (*Id.*)

Defendants purport to derive this definition from the waiver provision of the Executive Order § 3(c)(iv), and from certain provisions of the INA concerning eligibility for permanent entry as an immigrant based on an individual's relationship with particular family members (Defs. Br. at 19, 30-31), but nothing in the Supreme Court's June 26 ruling links the scope of the unstayed portion of the injunction to these more limited provisions. To the contrary, the Supreme Court expressly stated that plaintiff Dr. Elshikh's relationship with his mother-in-law qualified for protection under the remaining injunction, 137 S. Ct. at 2088, although a mother-in-law is not defined as a "close family member" under the Order's waiver provisions (Order § 3(c)(iv)) or as a relative eligible for a family-based permanent entry visa under the INA, *see, e.g.*,

8 U.S.C. §§ 1151(b)(2)(A), 1153(a). To be sure, Dr. Elshikh's mother-in-law is also the mother of his wife (*see* Defs. Br. at 39-40), but the Supreme Court did not rely on that fact in its June 26 decision. *See Trump v. IRAP*, 137 S. Ct. at 2088.

The federal government's cramped view of what counts as a "close familial relationship" is also contradicted by both common experience and decades of social science research. In particular, the relationship between grandparents and grandchildren is widely recognized as close to—and sometimes a substitute for—the relationship between parents and children.[11] Other excluded family relationships, including those with

[11] Indeed, grandparents are frequently responsible for caring for and nurturing their grandchildren. *See, e.g.*, Teresa Wiltz, *Why More Grandparents Are Raising Children*, The Pew Charitable Trusts (Nov. 2, 2016) (internet) (stating that in 2015, approximately 2.9 million children in this country were living with grandparents who were responsible for their care and discussing reasons for this increase); Cheryl Smithgall, et al., *Caring for their Children's Children* 1, 4 (Chapin Hall Ctr. for Children, Univ. of Chicago 2006) (internet) (in 2000-2001 there were over 100,000 households in Illinois in which a grandparent had primary caregiving responsibility for grandchildren living in the home); Xiaolin Xie & Yan Xia, *Grandparenting in Chinese Immigrant Families*, 47 Marriage & Family Rev. 383 (2011) (internet) (studying cultural trend in Chinese immigrant families of bringing grandparents to United States, often on temporary visas only, to be primary caregivers for grandchildren

uncles and aunts—and likewise with cousins who are the children of those uncles and aunts—can also be close and significant.[12] Since at least the early 1970s, social scientists have rejected the notion that the nuclear family is a historical or universal norm, recognizing that these and other

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while parents worked outside the home). (For authorities available on the internet, full URLs are listed in the table of authorities.)

[12] *See, e.g.,* Native American Training Inst., *Kinship Relationships and Expectations* (internet) (describing relationship between an aunt and niece as akin to that of a mother and child and relationship between an uncle and nephew as "similar to the relationship between a young boy and his father"; and observing that a brother-in-law may appropriately "help a brother raise male children"); Margaret Slade, *Relationships: The Role of Uncles and Aunts*, N.Y. Times, Apr. 9, 1984 (internet) ("Among some ethnic groups, aunts and uncles serve as a network that can absorb children from another household when needed, as in a divorce or after a parent's death"); Alexander Pashos, *Asymmetric Caregiving by Grandparents, Aunts, and Uncles and the Theories of Kin Selection and Paternity Certainty: How Does Evolution Explain Human Behavior Toward Close Relatives?*, 51 Cross-Cultural Res. 263, 272 (2017) (in addition to discussing grandparent, aunt, and uncle caregiving patterns, noting one study finding kinship caregiving and "closeness toward first cousins"); *id.* at 272-275 (also discussing recent studies finding "more cultural variety in kin caregiving patterns than often previously assumed"); *see also* Chapin Hall, Univ. of Chicago, *What Are Important Differences Among Kinship Foster Families* (2016) (internet) (noting in recent study of Illinois kinship foster families that over 43% of those families "were almost exclusively headed" by relatives such as aunts, uncles, and cousins).

close family relationships often provide critical caregiving and resources, particularly for families in economic and social distress.[13]

As the Supreme Court has noted, "[e]specially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." *Moore,* 431 U.S. at 505; *see also id.* at 506-13 (Brennan, J., concurring) (observing that early American immigrants relied on extended family for "social services and economic and emotional support in times of hardship" and that this remains a "means of survival" for the poor and underprivileged). The district court thus correctly recognized that there is simply no justifiable basis for categorically excluding these significant and often essential relationships from the class of close family relationships that qualify for protection under the

[13] Pashos, *Asymmetric Caregiving, supra*, 51 Cross-Cultural Res. at 264-278; Naomi Gerstel, *Rethinking Families and Community: The Color, Class, and Centrality of Extended Kin Ties*, 26 Sociological F. 1, 2-10, 17 (2011); *see also* Carol B. Stack, *All Our Kin: Strategies for Survival in a Black Community* (1974) (foundational work illustrating the significance of extended family networks on the social and economic survival of disadvantaged Black American families).

injunction issued by the district court in light of the Supreme Court's June 26 partial stay.

Defendants misplace their reliance (Defs. Br. at 19-20, 31-36) on the categories of close relationships that are typically eligible for family-based long-term immigrant visas under the INA, 8 U.S.C. § 1101 et seq. Their argument is based on the faulty assumption that the types of family relationships qualifying as "close" must be the same for all purposes, in all contexts. But that assumption is neither rational, nor supported by existing practice. There is no reason to believe that every decision to privilege a family relationship should reach exactly the same relationships. And there is no reason to select the INA provisions relied upon by defendants here to define the "close familial relationships" protected by the Supreme Court's June 26 ruling.

First, the INA itself does not always recognize the same list of close family relationships for all purposes. For example, as the district court observed in its July 13 order (ER 219), other INA provisions related to long-term immigration petitions treat relatives such as grandparents, nieces and nephews, and siblings-in-law as close family members in

certain circumstances—as defendants acknowledge (Defs. Br. at 36-38).[14] And even the very INA provisions that defendants rely upon (*id.* at 32-34) use different lists of covered family members in different circumstances. A United States citizen may petition for the immigration of a spouse, parent, sibling, or married or unmarried child, *see* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a)(1), (3)-(4), while a lawful permanent resident may petition only for a spouse or unmarried child, *see id.* §§ 1151(a)(1), 1153(a)(2). This is not because permanent residents are less close to their siblings and married children than citizens are, but rather because Congress chose to give citizens—as distinguished from permanent residents—the right to petition for immigration regarding a slightly

[14] *See, e.g.*, 8 U.S.C. § 1183a(f)(5) (sisters-in-law, brothers-in-law, grandparents, and grandchildren may serve as financial sponsors for certain aliens when petitioning family member dies); *id.* § 1101(a)(15)(T)(ii)(III) and 8 C.F.R. § 214.11(a)(3) (grandchildren, nieces, and nephews of a person may be eligible for special visas for victims of human trafficking if they face danger of retaliation based on that person's escape from trafficking or cooperation with law enforcement); 8 U.S.C. § 1433(a) (permitting application for naturalization on behalf of a grandchild under limited circumstances, such as death of an American citizen parent).

broader list of close relatives.[15] Neither list defines the term "close relative" for all purposes under the INA much less for purposes of the Supreme Court's June 26 stay ruling. Indeed, the Court's ruling made that clear when it held that the injunction should continue to protect mothers-in-law, *see* 137 S. Ct. at 2088, who are outside the INA's definition of family members eligible for a family-based immigration petition, *see, e.g.*, 8 U.S.C. §§ 1151(b)(2)(A), 1153(a).

Second, the Supreme Court's June 26 stay ruling, and the district court order enforcing it, serve a purpose quite different from the purposes served by the INA's family-based visa program. That INA program reflects a Congressional policy determination about how far to extend the opportunity for *permanent* immigration with a path to American citizenship. The district court's preliminary injunction here, in contrast, is intended to provide *interim* protection to applicants for visas that include *shorter-term non-immigrant* visas in order to protect the ability

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[15] *See also* 8 U.S.C. § 1182(a)(3)(D)(iv) (permitting discretionary waiver of inadmissibility for membership in a totalitarian party for immigrants who are parents, spouses, children, or siblings of U.S. citizens, but permitting such waiver only for the spouse or child of lawful permanent residents).

of persons in the United States to receive visits from close family members while courts adjudicate the legality of the disputed provisions of the Executive Order.

Indeed, the Supreme Court expressly recognized that it was leaving in place an injunction that protects not only those close family members who want to "live with" a U.S.-based person, but also those foreign nationals who "wish[ ] to enter the United States to . . . *visit* a family member." *Trump v. IRAP*, 137 S. Ct. at 2088 (emphasis added). And the INA itself permits the issuance of short-term visas for the *temporary* admission of foreign nationals without requiring the visa applicant to have any relationship with persons in this country, let alone a relationship with a particular category of relative. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(B) (governing issuance of short-term non-immigrant visa known as the "B" visa).[16]

[16] For further discussion of this INA provision and its implementing regulations, which have long allowed grandparents and other family members to visit their U.S.-based relatives, *see* Members of Congress Amicus Br. at 8-10, *Trump v. Hawaii*, No. 16-1540 (U.S. July 18, 2017).

B. Defendants' Interpretation Is Not Supported by the Rationale of the June 26 Decision

Defendants' interpretation of the injunction left in place by the Supreme Court on June 26 is utterly inconsistent with the rationale the Supreme Court gave for distinguishing between foreign nationals who have a bona fide "connection" or "tie" to someone in the United States and those who lack such a relationship. As the Court reasoned, denying entry to a foreign national with no close ties to the United States "does not burden any American party by reason of that party's relationship with the foreign national," whereas the exclusion of a close family member of a person in the United States results in an "obvious hardship" to that person.[17] *Trump v. IRAP*, 137 S. Ct. at 2088. The Court applied the same analysis to the suspension of refugee admissions under §§ 6(a) and (b) of the Executive Order, emphasizing that it was "not disturb[ing] the

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[17] The Supreme Court's use of the term "*a person* . . . in the United States," 137 S. Ct. at 2088 (emphasis added), to serve as the reference point for evaluating the relevant hardship further demonstrates that the Court did not intend the scope of the injunction at issue here to be governed by the sections of the INA which authorize only citizens and legal permanent residents—and not all persons in the United States—to sponsor family members for permanent immigration. *See* 8 U.S.C. §§ 1151(a)-(b), 1153(a).

injunction" where "[a]n American individual . . . that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded." *Id.* at 2089. The district court correctly recognized (ER 218) that these essential underlying considerations should serve to guide subsequent enforcement of the unstayed portion of the preliminary injunction.

In suggesting that the district court's interpretation of "close familial relationship[s]" is too sweeping and includes "all but the most distant" family members (Defs. Br. at 2, 19, 30, 41), defendants fundamentally misunderstand the relationships covered by the injunction. For example, defendants presume (*id.* at 30, 41, 42) that the terms "uncle" and "cousin" reflect "distant" family relationships. But as explained above (at 14-16, 18-20), both the Supreme Court and this Court have long respected and confirmed the status of uncles, aunts, and cousins as close blood relatives, and such relationships have also been widely recognized as close and significant in the social science literature generally.

Indeed, when parents die or are unavailable to care for a child, aunts and uncles—like grandparents—often become the primary caregivers for the child, who is then raised as one of the aunt's or uncle's own children.[18] In support of their motion below, plaintiffs provided a compelling illustration of exactly this circumstance: after both biological parents of John, a young Congolese man, died of cholera when he was one month old, he went to live with his paternal uncle, who raised him as a son alongside the uncle's ten biological children. John's uncle never legally adopted John, however, because that practice was not part of their culture and there was no need to do so; the uncle already considered John a son and John's cousins considered him a brother. After fleeing for their lives as refugees in 2009, the family was finally resettled in the United States on July 4th of this year—but without John, who was forced to stay behind (presumably under application of the federal government's guidance to him). John is now separated from the only "parents" and "siblings" he has ever known, a frightening and emotionally devastating

[18] Defendants provide no support for their conclusory alternative claim (Defs. Br. at 3, 41-42) that, at the very least, this Court should make a distinction between the closeness of grandparents and other extended family relationships.

experience for both John and his U.S.-based family. (D. Ct. ECF Nos. 343-2, 343-3.).

The federal government's guidance completely fails to account for the experiences of families such as John's, as does the federal government's unsupported suggestion (Defs. Br. at 30, 41) that being an uncle or first cousin is such a distant relationship that it does not constitute a close familial relationship. As explained above (at 11), while the term cousin can sometimes embrace distant relationships, it is entirely implausible that the district court used the term that way, both because the common and primary definition of "cousin" is "a child of one's uncle or aunt,"[19] and because the district court understood that the Supreme Court's opinion required drawing a line between "close" familial relationships and other familial relationships.

Thus the district court rationally identified a limited number of primary familial relations that often shoulder fundamental family

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[19] *See Oxford Dictionaries*, s.v. cousin (internet); *Merriam-Webster Dictionary,* s.v. cousin (internet). The terms "uncle" and "aunt" are commonly defined to mean a parent's sibling or the spouse of such a sibling. *See Oxford Dictionaries*, s.v. uncle; *Merriam-Webster Dictionary*, s.v. uncle; *Oxford Dictionaries*, s.v., aunt; *Merriam-Webster Dictionary*, s.v. aunt.

caregiving responsibilities—and whose exclusion might therefore profoundly burden the rights of U.S.-based persons. Under the federal government's narrow interpretation of the June 26 decision, an ailing grandmother could not receive end-of-life care from her foreign granddaughter. A niece whose foreign aunt was like a mother to her could not bring that aunt to witness and celebrate her wedding. And an orphaned child would not be permitted to receive a visit from the uncle who took care of her financial and emotional needs after her father's untimely death.

Such deprivations present a constitutionally cognizable hardship to the affected U.S.-based persons strong enough to warrant the interim equitable relief awarded here, as the Supreme Court already recognized in its June 26 order. *See Trump v. IRAP*, 137 S.Ct. at 2087-88 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 763-65 (1972) and observing that rights of persons in the United States "who have relationships with foreign nationals abroad" might be affected if those individuals are

excluded).[20] Moreover, the exclusions at issue hinder the amici States' ability to protect their residents' fundamental familial relationships to the extent allowed under other federal laws.[21] *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607-08 (1982) (discussing a State's interests in ensuring that its residents are "not excluded from benefits that are to flow from participation in the federal system" and in "securing observance of the terms under which it participates in" that

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[20] *See also Moore*, 431 U.S. at 502-04 (tradition of sharing household with extended family "deserving of constitutional recognition"); *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (noting in prisoner visitation case "a right to maintain certain familial relationships, including . . . [the] association between grandchildren and grandparents").

[21] The federal government is mistaken in contending (Defs. Br. at 38-39) that the Executive Order's case-by-case waiver provisions avert any such harm because a foreign national who "has a particularly close relationship with a more distant relative" may still qualify for entry and there is "no reason to assume categorically" that every such relative has the requisite close tie. To the contrary, there is no reason to assume that the family members at issue *lack* close ties in view of the profound burdens and hardships at stake here. Moreover, the Executive Order never describes the process of applying for a waiver, specifies a time frame for receiving a waiver, or sets any concrete guidelines for issuance of a waiver beyond providing a list of circumstances in which waivers "could be appropriate." Order § 3(c). And there is no guarantee that a waiver will be issued because the ultimate decision on whether to grant it lies solely within a consular official's discretion. *See id.* Thus, given the extreme uncertainty of obtaining timely individualized waivers, the waiver provisions fail to serve the purposes of the injunction, mandating that its protections remain in place.

system); *see also* Gerstel, *Rethinking Families, supra*, 26 Sociological F. 4-5 ("Th[e] focus on . . . the nuclear family contains strong racial and ethnic—as well as class—biases.").

Finally, the federal government's impermissible exclusions will also result in continuing concrete and irreparable harms to amici States' economic and proprietary interests. The specter of unlawful exclusions creates barriers to attracting and retaining foreign students and employees at our universities, hospitals, and businesses. Many such persons may be unwilling to accept offers to work and study in our States in light of the federal government's stated intention to ban visits from their grandparents, grandchildren, or other close relatives. *Cf.* Gerstel, *Rethinking Families, supra*, 26 Sociological F. at 7-9 (discussing significance of extended family networks particularly for those in medical profession who often work long hours and have limited ability to control schedules). And the amici States will lose significant sources of taxes and other revenues that would otherwise be collected from the foreign visitors whom the Executive Order improperly excludes. These are some of the same interests that the district court's preliminary injunction was originally designed to protect, and some of the same harms both this

Court and the Supreme Court carefully sought to avoid when leaving portions of the preliminary injunction in place. *See Hawaii v. Trump*, 859 F.3d at 763-65, 782-85; *see also* Ill. Amicus Br. (16 States and D.C.) at 5-20, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Va. Amicus Br. (16 States and D.C.) at 4-14, *Trump v. IRAP*, Nos. 16-A1190, 16A-1191 (U.S. June 12, 2017).

In sum, the federal government's restrictive definition of close familial relationships will result in the improper and arbitrary exclusion of numerous foreign nationals who have the requisite bona fide connection to a person in the United States, despite the Supreme Court's unequivocal holding that the preliminary injunction's protections for such persons remain in full force—and would allow irreparable harm to be imposed on the amici States and our residents. *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (court granting injunctive relief must consider the balance of equities in exploring the relative harms as well as the public interest). The district court thus committed no legal error here and carefully and reasonably exercised its broad discretion to issue an order specifying the injunction's scope so as to "preserve the status quo" while the underlying litigation continues.

Natural Res. Def. Council, Inc. v. Southwest Marine, Inc., 242 F.3d 1163, 1166 (9th Cir. 2001); *see also Flores v. Huppenthal*, 789 F.3d 994, 1001 (9th Cir. 2015) (no abuse of discretion unless "court committed a clear error of judgment" in law or fact) (internal quotation marks omitted).[22] Accordingly, this Court should affirm.

[22] On the other hand, contrary to defendants' claim (Defs. Br. at 21), a reversal by this Court would disturb the status quo inasmuch as the federal government has already implemented the district court's July 13 order by updating its guidance to include all currently protected close familial relationships, and defendants' brief claims no disastrous result from having done so. *See* U.S. Department of State, Revised Guidance on Determining Close Family (July 14, 2017) (internet).

CONCLUSION

The district court's order granting, in part, plaintiffs' motion to enforce the preliminary injunction should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an attorney in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,781 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

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