No. 17-16426

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAII; ISMAIL ELSHIKH,

Plaintiffs – Appellees,

v.

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

Defendants – Appellants.

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

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INTRODUCTION

The Supreme Court's stay ruling limited the preliminary injunction against Sections 2(c), 6(a) and 6(b) of Executive Order 13,780 to those aliens with a "credible claim of a bona fide relationship" to an individual or entity in the United States. *Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017). The Court further specified the governing standards for a qualifying relationship. For a relationship with a U.S. individual, the Court held that "a close familial relationship is required." *Id.* Thus, any other type of relationship with a U.S. individual, such as a longstanding friendship or business partnership, does not count, no matter how close the connection or substantial the hardship from the alien's exclusion. Similarly, for a relationship with a U.S. entity, the Court held that "the relationship must be formal, documented, and formed in the ordinary course." *Id.* Thus, all informal or undocumented relationships with a U.S. entity do not count, no matter how close the connection or substantial the hardship from the alien's exclusion. And *a fortiori,* the U.S. entity's relationship must be with the alien personally.

Plaintiffs' construction of the Supreme Court's stay contravenes the plain terms of that ruling. Plaintiffs claim initially and repeatedly that the stay applies only to "those foreign nationals with 'no connection to the United States at all,' whose exclusion would cause no 'obvious hardship to anyone else.'" *E.g.*, Appellee Br. 1 (quoting *IRAP*, 137 S. Ct. at 2088). Plaintiffs focus on one part of

the rationale for the stay to the complete exclusion of the other part—namely, the government's strong interest in national security—and in so doing, completely ignore the specific standards that the Court adopted to implement this equitable balance. The Court carefully delineated the connections that would qualify as a bona fide relationship, limiting them to a "close familial relationship" with a U.S. person or a "formal, documented" relationship with a U.S. entity "formed in the ordinary course." Plaintiffs are simply wrong to assert that it is sufficient to evade the stay for an alien to have *any* connection to the United States, or for the alien's exclusion to cause *any* hardship to a U.S. person or entity. And once the appropriate standards are applied, plaintiffs' atextual and sweeping defense of the district court's modified injunction should be rejected.

Although plaintiffs emphasize the alleged harms that a U.S.-based resettlement organization will suffer if Sections 6(a) and 6(b) are applied to refugees for whom the organization has provided an "assurance," plaintiffs have no meaningful response to the point that the assurance reflects the resettlement organization's "formal, documented" relationship with the Department of State, *not* with the refugee (who typically has no contact with the resettlement organization until arriving in this country). Moreover, plaintiffs essentially concede that their construction of the Supreme Court's June 26 order would render it practically meaningless, as virtually all of the refugees whose entry would be

affected by Sections 6(a) and 6(b) already have assurances. Indeed, the Supreme Court has already ruled that the government is likely to prevail on its challenge to the district court's ruling, by unanimously granting a stay of this portion of the modified injunction—relief that plaintiffs correctly recognized could not be granted unless the government had met its burden to show that "reversal [is] likely." *Trump v. Hawaii*, No. 16-1540, Response to Motion, at 35-36 (S. Ct. filed Jul. 18, 2017) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Similarly, although plaintiffs accuse the government of basing its definition of a "close familial relationship" on cherry-picked provisions of the INA, they themselves indiscriminately rely on a host of inapposite sources that do not properly draw the line between those family members who are "close" and all other extended family. In fact, plaintiffs' acknowledgement that their test for a "close familial relationship" includes all extended family except "distant family members like second-cousins" (Appellee Br. 43) underscores their refusal to acknowledge the significant limits imposed by the Supreme Court's stay. Nor can plaintiffs obliterate those limits simply by emphasizing the Court's holding that Dr. Elshikh's mother-in-law counts as "close" family. The holding as to Dr. Elshikh's mother-in-law was expressly based on "the facts" of the case (which includes the fact that Dr. Elshikh's mother-in-law is also the mother of a U.S. citizen, Dr. Elshikh's wife, who unlike Dr. Elshikh could and did petition for classification of

her mother as an immediate relative). *See IRAP*, 137 S. Ct. at 2088; D. Ct. Dkt. 10-8, at 1-2. Furthermore, parents-in-law are categorically closer than the extended family members identified by the plaintiffs and the district court. At a minimum, even if this Court were to conclude that the government should have included some of those members (*e.g.*, grandparents), plaintiffs have failed to establish that the government must include all of the relatively attenuated relationships endorsed by the district court (*e.g.*, cousins).

Finally, because the district court's modified injunction cuts deeply into the Supreme Court's stay of the preliminary injunction pending certiorari, the modified injunction is not just legally erroneous, but jurisdictionally improper. Rather than making "minor adjustments that effectuated the underlying purposes of the original requirements," the district court improperly has "materially alter[ed] the status [quo] of the case on appeal." *Natural Resources Defense Council, Inc. v. Southwest Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (quotation marks and citation omitted). Accordingly, the modified injunction should be vacated.

ARGUMENT

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

As the government explained in its opening brief (at 21-29), the fact that a U.S.-based resettlement organization has provided an assurance to the Department

of State for an individual refugee does not in itself satisfy the requirement that the refugee *himself* has a "bona fide relationship" with the U.S. organization that is "formal, documented, and formed in the ordinary course." The only "formal" and "documented" relationship is between the resettlement organization and the Department of State, not the alien. The agreement between the resettlement organization and the Department of State contemplates that a refugee will eventually benefit from that relationship, but no individual alien is party to the agreement and there is generally no contact between the refugee and the resettlement agency prior to arrival. Excerpts of Record (ER) 119. Moreover, interpreting the Supreme Court's stay to exclude refugees with assurances would drain the stay of all practical effect. Plaintiffs fail to refute any of these points.

1. Plaintiffs' primary argument is that every alien for whom an assurance has been provided must have the requisite relationship with the U.S. resettlement agency that provided the assurance because the agency will suffer harm if the refugee is excluded from the United States. Appellee Br. 21-26. What is required under the Supreme Court's stay ruling, however, is not current or anticipated harm to a U.S. entity traceable to the alien's exclusion, but rather a formal and documented relationship between the alien and a U.S. entity that is formed in the ordinary course, independent of the government's refugee program itself. The Court referred to "hardship" and "burden" to explain why it was limiting the

injunction to those aliens who could make a credible claim to a bona fide relationship with a U.S. person or entity. *IRAP*, 137 S. Ct. at 2088. But balancing the government's national-security interest against such hardship, *id.*, the Court drew an equitable line that included only some persons and entities in the United States that would suffer hardship—those who can demonstrate the kind of bona fide relationship the Court detailed.

By its plain terms, the Supreme Court's stay permits application of the Order to an alien with only an informal or undocumented relationship with a U.S. entity—such as an academic collaboration or exploratory business dealings—even if the U.S. entity could demonstrate some expectation of contact and some hardship from the Order's application. Resettlement agencies, which claim a relationship through an assurance *only* with the government to carry out the government's program, have no relationship at all with the alien, much less a "formal" one.

The Supreme Court also identified examples of qualifying relationships with U.S. entities: "students * * * 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." *IRAP*, 137 S. Ct. at 2088. Each of these examples, unlike the purported relationship between refugees and resettlement agencies based on an assurance alone, involved contact

between the alien abroad and the U.S. entity, independent of the admission process itself. A student must apply to and be accepted by the university, a worker must seek and be offered employment from the company, and a lecturer must obtain an invitation from an organization in this country—and each must then separately seek admission to the United States as a nonimmigrant. Plaintiffs point out (Appellee Br. 31) that sometimes those contacts will be conducted through intermediary agents, with, for example, a student's parent, a worker's employment service, or a speaker's bureau participating on behalf of either the alien abroad or the U.S. entity. Here, however, the U.S.-based resettlement agency is not a principal who has a relationship with a refugee indirectly through an agent; rather, the resettlement agency is the agent—and it is the government's agent, not the refugee's.

That is fatal to plaintiffs' argument, because they correctly do not contend that a refugee's relationship *with the government* can satisfy the Supreme Court's requirement of a "bona fide relationship" with a person or entity in the United States. *IRAP*, 137 S. Ct. at 2089. Indeed, the Court's reasoning demonstrates that the government's interests lie in enforcement of the Order. *Id.* ("when it comes to refugees who lack any such connection to the United States * * *, the balance tips in favor of the Government's compelling need to provide for the Nation's security"). The fact that both the alien and the resettlement agency have a

relationship with the government does not create a relationship *between* the alien and the agency. For example, if the agency proves unable to provide services or otherwise seeks to terminate its obligation, with the government's consent, or if the government decides to reassign a refugee to a different agency, the individual refugee cannot compel performance by the agency, precisely because there is no relationship between the individual and the agency.

2. Accordingly, the hardship to U.S.-based refugee resettlement organizations about which plaintiffs complain results not from any formal and documented relationships with individual aliens abroad, but instead from the organizations' relationships with the Department of State. The Refugee Program is a creature of federal statute. ER 114 (citing Refugee Act of 1980). It requires a partnership between the federal government and others, including resettlement agencies, which provide services essential to the success of the program. ER 114 (Refugee Program "is a public-private partnership involving U.S. Government agencies, domestic non-profit organizations, and international organizations"). But the federal government retains the sole "authority to determine which refugees will be granted admission to the United States." ER 115.

Thus, a resettlement agency has no authority or claim with respect to any particular alien abroad for whom it has provided an assurance. A resettlement agency might plan its budget and hiring based on an expectation that it will provide

services to a certain number of refugees, but there is no guarantee that those plans will reflect the number of refugees actually admitted. And any change is due to the government's decisions about the program it administers, not due to any pre-existing relationship between the resettlement agency and particular aliens abroad.

Nor does the fact that an individual alien is assigned to a particular resettlement agency as part of the assurance process establish a qualifying relationship between them. The government assigns responsibility for each refugee as part of its routine processing in the Refugee Program. ER 117. Plaintiffs emphasize that the assignment process takes account of the individual refugee's situation and the resources available (Appellee Br. 34), but the refugee plays no role in that process and the only relationship that the resettlement agency has established prior to the refugee's arrival in the United States is with the government.

Plaintiffs also suggest that the assurance establishes a relationship between the refugee and the resettlement agency because the resettlement agency expects to provide services (on behalf of the government, and largely using public funds) once the individual arrives in this country. Appellee Br. 19-20. But such an expectation of furnishing future services *if* the refugee enters the United States is not the kind of formal, existing relationship required by the Supreme Court as a basis for determining that the refugee may enter in the first place. A U.S. entity

cannot demonstrate a formal relationship based on such expectations, even if it could argue that it would suffer some hardship as a result of Sections 6(a) and 6(b) of the Order. For example, businesses in a community may expect to benefit from providing services or selling goods to refugees after their arrival in this country, and volunteers, churches, and other organizations may have an interest in aiding those individuals in the future, but none of them has an *existing* relationship that would allow entry under the Supreme Court's partial stay. *Cf.* Appellee Br. 22, 25.[1]

Notably, in describing the types of relationships between an alien and a U.S. entity that constitute "bona fide relationship[s]," the Supreme Court did not identify a relationship between a U.S.-based resettlement agency and aliens outside the United States whom the agency might assist in resettling in the future. *IRAP*, 137 S. Ct. at 2088. This omission is significant, given that the plaintiffs before the

[1] In arguing that resettlement agencies will be harmed, plaintiffs also improperly rely on factual material outside the district court record. Appellee Br. 20-25, 27 (citing Limon Declaration accompanying USCRI motion to intervene, which this Court denied). And their appellate brief cites material in the record below that they did not rely on in their motion to enforce or modify the injunction. Appellee Br. 21-22, 27 (citing D. Ct. Dkt. 297-3, D. Ct. Dkt. 304-1). It is no answer to suggest (Appellee Br. 30 n.4) that the information could be considered on remand. Plaintiffs must constrain their arguments in defense of the modified injunction to the record on appeal, and cannot invoke new evidence that the government did not have an opportunity to rebut in the district court. In any event, such evidence of alleged harms to resettlement agencies is insufficient to demonstrate a formal relationship with the refugees.

Court included a resettlement agency (HIAS). *See IRAP v. Trump*, 857 F.3d 554, 578 (4th Cir. 2017) (en banc); *Trump v. IRAP*, No. 16A1190, Respondents' Opposition, at 11 (S. Ct. filed June 12, 2017). The Court's careful reticulation of examples of relationships with entities that *do* count—*e.g.*, between a university and an admitted student, a company and the worker to whom it has offered employment, and an organization and the lecturer whom it has invited to speak—underscores that the Court plainly did not contemplate that a mere assurance by a resettlement agency would qualify.

For the same reason, plaintiffs' citation of cases concerning the standing of resettlement agencies (Appellee Br. 25-26) is inapposite. The existence of an injury for standing purposes is not sufficient to demonstrate a formal relationship within the meaning of the Supreme Court's stay ruling. And the relationship required by the third-party standing inquiry turns on whether the third party seeks to enjoy a right inextricably bound up with the activity a litigant seeks to pursue, as well as the effectiveness of the litigant's advocacy of the third party's rights. *See Singleton v. Wulff*, 428 U.S. 106, 114-115 (1976) (cited in *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 729, 731-732 (S.D. Ind. 2016)); *see also Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (same). Those standards differ markedly from the bona fide relationship requirement set out by the Supreme Court here, which is based not on Article III, but on striking an equitable balance

between the hardships to certain individuals or entities and the important national security interests of the United States.

3. Plaintiffs' position would eviscerate the effect of the Supreme Court's partial stay. After balancing the equities, the Court narrowed the district court's original injunction, permitting Sections 6(a) and 6(b) of the Order to "take effect" except as to individuals with a credible claim to a bona fide relationship with a U.S. person or entity. *IRAP*, 137 S. Ct. at 2089. But plaintiffs do not dispute that their argument, if accepted, would exclude from the stay virtually every refugee who otherwise would be scheduled to enter during the period Sections 6(a) and (b) are in effect, thus draining the Supreme Court's stay as to those provisions of all practical effect. *See* ER 117.

Plaintiffs continue to highlight (Appellee Br. 36-38) that there are other potential refugees who have not yet reached the point of assignment to a resettlement agency. But that is a red herring. Plaintiffs do not dispute that, as of June 30, 2017, nearly 24,000 refugees were already the subject of assurances, ER 117, and that this number exceeds the number of refugees who would normally be scheduled for travel to this country during the relevant time period: for Section 6(a), a 120-day period beginning on June 26, 2017, and ending on October 24, 2017; for Section 6(b), through Fiscal Year 2017, which ends on September 30, 2017. *See* Appellant Br. 12; Order, §§ 6(a), (b). The Supreme Court's partial stay

only matters while Sections 6(a) and 6(b) are still in effect. Thus, the district court's modified injunction would vitiate the partial stay of Sections 6(a) and 6(b) altogether.

Plaintiffs urge this Court to disregard the impact of their argument on the Supreme Court's stay, suggesting that, unlike with statutes and contracts, it is permissible to interpret part of a Supreme Court order to be a nullity in practice. Appellee Br. 35-36. Notably, and unsurprisingly, plaintiffs did not make that argument to the Supreme Court in their opposition to the government's recent motion to stay the modified injunction, which the Court unanimously granted in relevant part. As plaintiffs implicitly acknowledged by this omission, the Supreme Court does not typically enter rulings as empty gestures. This Court should respect the balance struck by the Supreme Court and reverse the modified injunction.

The Supreme Court's stay of this aspect of the modified injunction itself reinforces this conclusion. The standards for a stay in the Supreme Court require a likelihood of success on the merits. *See, e.g.*, *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (litigant seeking a stay pending appeal must, *inter alia*, make "a strong showing that he is likely to succeed on the merits"). Plaintiffs opposed the stay sought by the government on those grounds, emphasizing to the Supreme Court that they believed the government had not met its burden to demonstrate that "both certiorari and reversal are likely." *Trump v. Hawaii*, No. 16-1540, Response to

Motion, at 36 (S. Ct. filed Jul. 18, 2017). The Court nevertheless issued a stay of the district court's modified injunction concerning resettlement agencies, implicitly demonstrating unanimous disagreement with plaintiffs' position that the government was not likely to prevail on the merits.

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

The government also explained in its opening brief (at 29-42) that the Supreme Court's limitation of the stay to aliens with a "close familial relationship" with a U.S. person requires distinguishing between those close family members and others with more attenuated connections. The most relevant sources to define "close" family are the provisions of the Immigration and Nationality Act governing which family members have a sufficiently close relationship that they receive priority consideration to seek an immigrant visa that permits family reunification. The provision of the Order permitting case-by-case waivers for "close family member[s]" is derived from those INA provisions, and the Supreme Court specifically invoked that waiver provision in entering the stay, which echoes the provision's terms. Unlike the plaintiffs' arguments, furthermore, the government's position gives meaning to the Court's limitation of qualifying family members to "close" relationships. Plaintiffs' efforts to expand "close" family to include

siblings-in-law, cousins, nieces and nephews, aunts and uncles, and grandparents —*i.e.*, any familial relationship but the most distant—are unpersuasive.[2]

1. Plaintiffs essentially concede that there is no uniform definition of "close family." Although they contend that the government has cherry-picked a definition that is principally reflected in the provisions of the INA addressing which family members can petition for an immigrant visa, they themselves invoke inconsistent and inapposite sources that include a wide variety of relationships. In contrast to the government, plaintiffs have not attempted to give the Supreme Court's stay order a reasonable interpretation grounded in the most relevant sources, instead urging an unreasonably expansive interpretation that redefines "close" family to mean "not distant" family.

Plaintiffs' primary argument under the INA is that the Court should look to provisions governing who can act as a financial sponsor for certain aliens. Appellee Br. 46-47. Those provisions, however, do not allow more distant family members to petition for a visa that would permit reunification, but simply to act as a financial sponsor for an alien for whom a petition has been filed by a spouse,

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[2] As the government noted in its opening brief (at 30), and plaintiffs do not contest, the Supreme Court's order declining to stay the family-relationship aspect of the district court's modified injunction pending appeal could have been based on non-merits stay factors. Unlike the part of the order granting the stay on the refugee-assurance issue, this part of the order is not premised on an implicit determination of the government's likelihood of success on the merits.

parent, child, or sibling—that is, by a close family member. *See* 8 U.S.C. § 1183a(f)(5)(B). Even as to family financial sponsorship, the provision only permits more extended family members to act as sponsors if the petitioning spouse, parent, child, or sibling has died—and it does not apply to aunts, uncles, nieces, nephews, or cousins. *Id.* Plaintiffs offer no logical reason why a statutory provision permitting more distant family members to promise to provide financial support for an alien, but giving those family members no right to petition for those aliens to receive a visa that would allow their entry to the United States, is an appropriate definition of the class of U.S. persons whose close familial relationship with an alien abroad gives them a protected interest in reunification in the United States. *See IRAP*, 137 S. Ct. at 2089 (U.S. relative "can legitimately claim concrete hardship if [their close family member] is excluded"). And plaintiffs' other isolated statutory sources are even less relevant, as the government explained in its opening brief (at 38).

Plaintiffs also urge this Court to rely on cases involving local housing ordinances and immigration regulations allowing juvenile aliens to be released from detention to the custody of an aunt, uncle, or grandparent to interpret the meaning of "close familial relationship." The fact that the Department of Homeland Security allows a juvenile alien who cannot be released to the custody of a parent, and might otherwise remain in detention, to be released to a sibling,

aunt, uncle, or grandparent sheds no light on what type of familial relationships, under the Supreme Court's stay ruling, give rise to a protected interest on the part of the U.S. person to have the alien family member enter the United States. Nor does a ruling that a U.S. citizen grandmother has a constitutionally protected interest in living with her motherless 10-year-old grandson notwithstanding a local housing ordinance that criminalizes such conduct when the grandson's cousin and uncle also live in the home. None of these examples provides a persuasive analogy for determining when a U.S. interest in having an alien family member abroad enter the United States is so substantial that it outweighs the government's interest in national security in the equitable balance.

Indeed, plaintiffs all but admit that they seek to rewrite rather than interpret the Supreme Court's "close familial relationship" standard. They seek to include all extended relatives other than "distant family members like second cousins." Appellee Br. 40-43. But the Supreme Court excluded from the stay only "close" relatives, not all "non-distant" relatives.

2. Plaintiffs additionally criticize the government for bolstering its interpretation of the Supreme Court's "close familial relationship" standard by pointing to the waiver provision in the Executive Order that applies to "close family members." Appellee Br. 50. But the Supreme Court itself pointed to that waiver provision in distinguishing between the classes of aliens subject to the

injunction as partially stayed, and aliens against whom Section 2(c) of the Order could permissibly be enforced. *IRAP*, 137 S. Ct. at 2088. The government thus reasonably relied on the waiver provision as further support for its interpretation.

Plaintiffs also contend that other examples of "bona fide relationships" cited by the Supreme Court in its stay ruling do not fall within any of the non-exclusive waiver categories in Section 3(c). Appellee Br. 50. In fact, however, most if not all of the examples would likely be covered. Dr. Elshikh's mother-in-law is the parent of a U.S. citizen, *see* Order, § 3(c)(iv); and students and lecturers could be "seek[ing] to enter the United States for significant business or professional obligations" that the denial of entry during the suspension period would impair, *see* Order, § 3(c)(iii). In any event, the fact that Section 3(c) does not describe exhaustively the relationships with an alien that could cause his exclusion to affect the rights of a U.S. entity does not mean that Section 3(c)(iv)'s reference to, and description of, "close family members" is irrelevant. To the contrary, it is highly probative of the meaning of "close familial relationship," a standard the Court adopted almost immediately after citing Section 3(c)(iv). *IRAP*, 137 S. Ct. at 2088. Likewise, the government's decision to define "close famil[y]" to include a handful of additional family members (*e.g.*, siblings, fiancé(e)s, parents-in-law, and children-in-law) that are not expressly named in Section 3(c)(iv)'s illustrative list does nothing to undermine the force of the Supreme Court's citation of that

provision. The government has simply relied on other relevant sources, including the most analogous INA provisions, to identify familial relationships that are reasonably deemed comparable in closeness to the family members identified in Section 3(c)(iv).

3. Finally, plaintiffs heavily emphasize that the Supreme Court held that Dr. Elshikh's mother-in-law "clearly has such a [close familial] relationship." Appellee Br. 40. From that single sentence, plaintiffs infer that all parents-in-law must categorically be covered, and further that any relative "within at least the same 'degree of kinship' as a mother-in-law" must be covered by the injunction. *Id.* Plaintiffs read far too much into that brief comment.

The Supreme Court's statement was made in the context of looking to "[t]he facts of these cases [to] illustrate the sort of relationship that qualifies" as a "close familial relationship." *IRAP*, 137 S. Ct. at 2088. The Court pointed to two examples: John Doe #1's wife, and Dr. Elshikh's mother-in-law, the mother of a U.S. citizen, Dr. Elshikh's wife. *See id.* Each of those individuals is just a single degree of kinship from a U.S. person. Far from a "*sub silentio*" limitation (Appellee Br. 44), the Court expressly invoked the concrete "facts" of the cases, not an abstract family tree.

Furthermore, even if a parent-in-law categorically has a "close familial relationship," parents-in-laws are differently situated from siblings-in-law, aunts

and uncles, nieces and nephews, and cousins. As the government explained in its opening brief (at 40-41), the parent-in-law relationship is fundamentally different from other family relationships with two degrees of kinship: parents-in-law of individuals in the United States are much more likely to also be parents of individuals in the United States, because their children typically will also live in the United States with their spouses. Plaintiffs claim that there is no "apparent basis" for this argument, but it is basic common sense that spouses are more likely to live together than are grandparents and their adult children, or adult siblings and their spouses, not to mention the other more distant relatives plaintiffs seek to shoehorn into the category of "close" family.[3]

4. At a minimum, as the government has previously explained, even if the Court concludes that certain family members, such as grandparents, are included within the class of "close familial relationship[s]," it should reject the

[3] Plaintiffs also rely heavily on the example of Mwenda Watata and his nephew to assert that separating any nephew or cousin from reconciliation with a U.S. relative must "inflict[] hardship of unbearable severity." Appellee Br. 40. But the fact that particular individuals may have deep connections with particular extended family members does not render them "close family," let alone categorically mean that all such relationships involve "close family." Rather, particularized circumstances such as this may warrant relief under the Order's waiver authority for the entry suspension and refugee provisions, including the refugee cap (*contra* Appellee Br. 41 n.8).

district court's expansion of the injunction to include even siblings-in-law, cousins, and other relatives, and should instead consider each relationship separately.

Plaintiffs' contention that this request has been waived (Appellee Br. 51-52) is meritless. In opposition to the only motion filed in district court that sought to modify the injunction to cover more distant relatives, the government objected to the expansion of the injunction to cover siblings-in-law, nieces, nephews, aunts, uncles, cousins, and grandparents. D. Ct. Doc. 338, at 6-10. Plaintiffs were seeking to modify the injunction to include each additional relationship, and the government opposed that relief. The government's argument that *none* of the relationships was sufficiently "close" to be covered by the Supreme Court's stay fairly encompassed the argument that at least some of them did not, and the district court erred in rejecting that narrower argument.

In the same vein, the relief sought by the government is obvious. Even if this Court were to conclude that, for example, grandparents are sufficiently "close" to come within the scope of the injunction as partially stayed, it should not conclude *a fortiori* that all the other relationships are also "close," but should consider each separately and examine plaintiffs' arguments for particular family members. If the Court declines to vacate this aspect of the district court's modified injunction in its entirety, it should vacate it in part as to family members with a

relationship that the Court determines is not "close" within the meaning of the Supreme Court's opinion.

CONCLUSION

Defendants-appellants respectfully request that the district court's modified injunction be vacated. Insofar as the Court instead affirms the injunction, defendants-appellants respectfully request that the Court stay issuance of its mandate pending the disposition of a petition for certiorari.

Respectfully submitted,

/s/ Jeffrey B. Wall

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JULY 2017

STATEMENT OF RELATED CASES

This appeal is related to *Hawaii v. Trump*, 859 F.3d 741 (9th Cir.), *cert. granted*, *Trump v. IRAP*, 137 S. Ct. 2080 (2017), within the meaning of Ninth Circuit Rule 28-2.6.

/s/ Sharon Swingle
Sharon Swingle

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 32(a)(7)(B). The brief contains 5,175 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(iii).

/s/ Sharon Swingle
Sharon Swingle

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sharon Swingle
Sharon Swingle