No. 16-1540 (16A1191)

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF HAWAII, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF MOTION FOR CLARIFICATION OF JUNE 26, 2017, STAY RULING AND APPLICATION FOR TEMPORARY ADMINISTRATIVE STAY OF MODIFIED INJUNCTION

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This Court's June 26, 2017, stay ruling was intended to allow Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), to take effect, except for those aliens with a substantial connection to a U.S. person or entity. Respondents, however, seek to drain it of meaning. As to refugees, they claim that a sponsorship-assurance agreement between the government and a resettlement agency suffices to exempt the refugee from the stay. But that agreement does not reflect any relationship with the

refugee, let alone one independent of the refugee-admission process itself. Moreover, as the district court noted, respondents "do not dispute that before any refugee is admitted to the United States under the [United States Refugee Admission Program (Refugee Program)], the Department of State must receive" an "assurance." Addendum to Gov't Mot. for Clarification (Add.) 16; see Resps. Opp. to Gov't Mot. for Clarification (Opp.) 24-25. Respondents thus do not dispute that, under their interpretation, this Court's stay ruling would bar enforcement of Sections 6(a) and 6(b) as to virtually all refugee applicants who would have entered but for those provisions while they are in effect. Opp. 18-27. Respondents likewise assert (Opp. 29) that "close" family members include all family members except such "distant" relatives as "second-cousins" and "great-aunts." But as this Court made clear, its stay ruling applies only to aliens with certain immediate relations analogous to the "[t]he facts of these cases," Trump v. IRAP, No. 16-1436 (June 26, 2017) (per curiam), slip op. 12, and neither of these cases involved the extended family relationships posited by respondents. In short, respondents seek to distort this Court's carefully crafted stay and render a significant part of it a virtual nullity. The government respectfully requests that the Court reject that proposal.

The stark division between the parties' interpretations -- and the practical need for immediate clarity -- likewise warrant this Court's intervention now. Despite commencing emergency

litigation precisely to bring clarity to these issues, respondents now urge this Court to withhold clarification -- not due to any purported lack of authority to do so, but rather to await the outcome of further litigation in the lower courts. That makes no sense. This Court issued its stay ruling pending its resolution of the merits; it is the only court that can provide definitive clarification of the meaning of its stay order. Awaiting the outcome of lower-court litigation would needlessly delay resolution of these issues and exacerbate the confusion and disruption already caused by the district court's ruling. This Court should therefore grant the motion for clarification and confirm that the government's interpretation is correct. In the interim -- and in the event it prefers the court of appeals to pass on these issues first -- the Court should stay the district court's modified injunction.

I. THIS COURT CAN AND SHOULD CLARIFY THE SCOPE OF ITS STAY RULING

Respondents argue at length (Opp. 9-16) that the Court should decline to provide definitive guidance about its own stay ruling, but they offer no valid reason for withholding clarity and prolonging the uncertainty and potential confusion that the district court's ruling created. Respondents do not dispute the Court's authority to resolve these issues concerning the correct interpretation of its June 26, 2017, stay order -- whether in the form of a clarifying order, or by granting certiorari before judgment or mandamus to correct the district court's error. Cf.

Gov't Mot. for Clarification (Gov't Mot.) 15-18. They assert instead that this Court should wait for the court of appeals to interpret this Court's stay ruling in the first instance. That assertion is without merit.

A. Further proceedings in the lower courts would serve no important purpose because the dispute turns entirely on the meaning of this Court's own stay ruling, which only this Court can conclusively resolve. To be sure, the court of appeals has authority to review and overturn the district court's ruling modifying its injunction. But as the district court itself recognized in holding that respondents should have sought clarification from this Court in the first instance, the lower courts cannot conclusively resolve the meaning of this Court's rulings. See D. Ct. Doc. 322, at 5 (July 6, 2017). Only this Court can do so.

The court of appeals is in no better position than the district court to resolve the legal dispute about the intended scope of this Court's stay. It is certainly no better "equipped" (Opp. 11) than this Court to determine what this Court's stay ruling was intended to reach. This is not a circumstance where "the court of appeals * * * could provide helpful guidance" to this Court. Opp. 14 n.3 (citation omitted). And there is no realistic prospect that intermediate appellate review would "obviate the need for this Court's review," ibid. (citation

omitted), given the virtual certainty that the nonprevailing party in the court of appeals would seek this Court's intervention.

Respondents erroneously assert (Opp. 11-12) that the lower courts are better situated to confront the issue in the first instance because the "parties submitted affidavits and other evidence supporting their interpretations" and the dispute concerns "factbound administration of an injunction." Nothing about the parties' dispute over the meaning of this Court's stay ruling, however, requires resolving any disputed facts. The dispute stems from fundamentally different understandings of the correct interpretation of this Court's ruling -- pure questions of law. The district court's relevant holdings did not rest on any "evidentiary determinations and fact finding," Opp. 11, but on its understanding of this Court's decision in light of its terms, various statutory and regulatory provisions, and case law. Add. 11-15, 16-17.

Nor does the district court's ruling entail exercise of any "latitude" that lower courts have in other circumstances "to oversee and administer injunctions." Opp. 13. As the district court here appreciated, it was not exercising discretion to balance the equities anew; its role was limited to "preserv[ing] the status quo or ensur[ing] compliance with its earlier orders," which in turn depended entirely on its understanding of this Court's ruling. Add. 9. In any event, now that the district court has ruled, appellate review of its decision -- which is de novo review of the

legal issues concerning the meaning of this Court's stay ruling -- would be the same in this Court as in the court of appeals.[1]

B. Requiring the parties to pursue further, potentially protracted litigation in the lower courts would only delay nearly inevitable review in this Court after the court of appeals rules. Respondents offer no justification for such a delay. Having filed three emergency motions in the district court and court of appeals since June 29, 2017, seeking urgent judicial intervention, see D. Ct. Doc. 293 (June 29, 2017); C.A. Doc. 2, No. 17-16366 (July 7, 2017); D. Ct. Doc. 328 (July 7, 2017), respondents cannot plausibly dispute that the issues warrant immediate resolution or that delaying definitive resolution would serve no proper purpose. Leaving the district court's modified injunction in effect would only compound the confusion and disruption that its ruling will cause. Respondents' desire to entrench the unwarranted relief the district court granted them is no basis to forestall immediate, authoritative resolution. That is especially so because the Court has already granted certiorari in this case and because the finite periods of Section 2(c)'s and Section 6(a)'s suspensions and

[1] Respondents' reliance (Opp. 12) on a one-line order denying a writ of mandamus or prohibition in In re Pennhurst Parents-Staff Ass'n, 449 U.S. 1009 (1980), adds nothing to their argument. That order, like others respondents cite that "summarily denied" relief without explanation (Opp. 10; see Opp. 10-11 & n.1), does not reflect the reason for the denial -- for instance, whether the Court agreed with the lower court's conclusions -- nor does it indicate that the request for relief was improper.

Section 6(b)'s refugee cap under the Order commenced almost three weeks ago.

II. RESPONDENTS' INTERPRETATION OF THIS COURT'S RULING IS WRONG

On the merits, respondents' submission (Opp. 16-35) confirms that the district court's ruling is deeply misguided and that it would substantially prevent implementation of the very measures this Court directed should be permitted to take effect. As to the refugee provisions of Sections 6(a) and 6(b), respondents have no meaningful answer either to the language of this Court's opinion or the practical reality that their reading would effectively nullify the stay as to those provisions while they are in effect. Respondents' understanding of qualifying family relationships is similarly irreconcilable with this Court's decision.

A. Respondents' Position That An Assurance Agreement Alone Establishes A Bona Fide Relationship Effectively Renders This Court's Stay A Nullity As To Sections 6(a) And 6(b)

1. Respondents' position that a sponsorship-assurance agreement between a refugee-resettlement agency and the federal government by itself creates a qualifying relationship between the agency and the refugee that exempts the refugee from this Court's stay fails on its own terms. This Court made clear that only refugee applicants "who can credibly claim a bona fide relationship with a person or entity in the United States" are exempt from Sections 6(a) and 6(b). IRAP, slip op. 13. Assurance agreements fail that test. Respondents do not dispute that the refugee is not a party to the assurance agreement -- which is entered into

between the resettlement agency and the government. Nor do they deny that the agency typically has no contact with the refugee prior to her arrival. See Opp. 18-24; cf. Gov't Mot. 20-24.

Respondents stress (Opp. 19-21) that, due to Sections 6(a) and 6(b), the resettlement agency will not have an occasion to provide the services it renders to a refugee after the refugee's arrival -- pursuant to a contract with, and paid for largely by, the government. But that does not establish any relationship with the refugee, much less a relationship that is independent of the refugee-resettlement process itself. Indeed, as an entity that performs those services on behalf of the government in carrying out a governmental program, a resettlement agency has no cognizable stake in that program's application to the persons whom the program exists to benefit. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990); accord Air Courier Conference of Am. v. American Postal Workers Union, AFL-CIO, 498 U.S. 517, 524-525 (1991). An assurance thus certainly does not make the resettlement agency "similarly situated" to those entities this Court described: an employer that has hired a worker, a school that has admitted a student, or an entity that has engaged a lecturer to speak to an American audience (and whose exclusion might affect the constitutional interests of U.S. persons). IRAP, slip op. 12; see id. at 10-11 (citing Kleindienst v. Mandel, 408 U.S. 753 (1972)). Those entities all have relationships with an alien independent of the process of admission itself under the Immigration and

Nationality Act (INA), 8 U.S.C. 1101 et seq. Respondents' proffered analogy (Opp. 22) to the interaction between a U.S. entity inviting a foreign speaker and the "speaker's organization or agent" elides the fact that the resettlement agency provides services for the refugee under a contract with the U.S. government, not as a result of any existing relationship with the refugee.

This Court never mentioned services that resettlement agencies provide pursuant to a contract with the government in its stay ruling. Respondents' position that the services such agencies provide are nevertheless sufficient to require entry of the alien in the first place lacks any limiting principle and would appear to encompass any number of service providers who purportedly plan to provide services to an alien upon arrival. This Court's ruling cannot plausibly be read so expansively.

2. Respondents' submission also confirms that their reading of this Court's June 26 stay ruling, which the district court adopted, would effectively render that stay a dead letter as to Section 6(a)'s Refugee Program suspension and Section 6(b)'s refugee cap. This Court expressly contemplated that Sections 6(a) and 6(b) would apply to a significant class of refugees. IRAP, slip op. 13 ("As applied to all other individuals," i.e., all except aliens with a qualifying relationship, "the provisions may take effect."). Yet respondents do not dispute that their position would exempt from the Order virtually all of the refugees likely to enter while Sections 6(a) and 6(b) are in effect.

As in the district court, respondents "do not dispute that before any refugee is admitted to the United States under the [Refugee Program], the Department of State must receive" an "assurance." Add. 16; see Opp. 24-25. And they do not deny that the approximately 24,000 refugees who had assurances as of June 30, 2017, are more than the number likely to enter during the relevant period (i.e., while Sections 6(a) and 6(b) are in effect). Gov't Mot. 24 & n.7; see Opp. 25. Respondents also do not dispute that, under their reading, every one of those approximately 24,000 refugees likely to enter thus would be exempt from the stay. They do not and cannot explain why this Court would have granted a stay as to Sections 6(a) and 6(b) if that stay would nevertheless allow virtually every refugee who would otherwise enter during the relevant period to do so.

Respondents argue instead (Opp. 24-25) that their reading does not render this Court's stay ineffectual because approximately 175,000 other refugee applicants do not yet have assurances. They contend that, because assurances are obtained only after a refugee's application is adjudicated, and because Section 6(a) suspends refugee adjudications (except for refugees who have another, independent qualifying relationship with a U.S. person or entity), the government still can prevent those refugees from entering. Ibid. But those additional refugees are unlikely to enter until after Sections 6(a) and 6(b) expire -- i.e., after the 120-day review contemplated by Section 6(a) is complete, and

after the end of this fiscal year (to which the cap under Section 6(b) applies). Gov't Mot. 24 & n.7. From the standpoint of the national-security objectives that underlay Sections 6(a) and 6(b), such a hollow stay is no different than no stay at all.

Moreover, respondents' argument highlights the arbitrariness of the distinction they seek to draw based on assurances. They do not dispute that, going forward, the government may and will adjudicate a refugee application before an assurance has been obtained. Opp. 25. This means that the refugees must have some other qualifying relationship independent of the assurance. It makes no sense to exempt the roughly 24,000 refugees for whom assurances exist from the Order based on the happenstance that they had reached a later stage of the administrative process in which the government routinely obtained an assurance. In both cases, the refugees' relationship to a U.S. entity is the same: they have none. The only difference is that for the 24,000 refugees, the government has entered into a services contract with a refugee-resettlement agency.

B. The Government Properly Construed "Close Familial Relationship"

1. Respondents' submission (Opp. 27-35) similarly confirms the unreasonableness of the district court's broad reading of qualifying family relationships. This Court expressly limited the injunctions to "close familial relationship[s]," not every relative. IRAP, slip op. 12. And it explained that "[t]he facts

of these cases" -- which involve a spouse (of Doe #1 in No. 16-1436), and a mother-in-law (of Dr. Elshikh in No. 16-1540) whose U.S.-citizen daughter also resides in the United States -- "illustrate the sort of relationship that qualifies." Ibid. The government's interpretation of close family members, grounded in the INA, faithfully implements that direction. Gov't Mot. 25-36.

Respondents' position, in contrast, presents a caricature of the standard this Court established. By their lights, in cabining the injunctions to "close familial relationship[s]," this Court carved out only "distant family members, such as second-cousins and great-aunts" (as well as "non-familial associates"). Opp. 29. Nothing in this Court's decision suggests that it had such an expansive definition of "close famil[y]" members in mind, or that it meant Section 2(c) to remain inoperative except for aliens who lack even a U.S. uncle, cousin, or sister-in-law.

Respondents suggest (Opp. 28) that in some circumstances, a U.S. person may have especially close ties to such distant relations. There is no reason, however, to assume categorically that every relative covered by their reading has such a connection. A U.S. citizen whose foreign-national sister marries an alien abroad may have never met that brother-in-law. Respondents cannot explain why this Court's stay ruling should be skewed to exempt that brother-in-law from the Order's provisions.

2. Respondents also resist (Opp. 30-34) the government's reliance on the INA provisions in implementing this Court's

standard of a "close familial relationship." But given the Court's language echoing the Order's waiver provision for "close family member[s]," Order § 3(c)(iv); see IRAP, slip op. 11-12 -- which in turn reflects lines drawn by Congress in the INA -- and given the need to draw some distinctions among family members, it was wholly reasonable for the government to follow the framework Congress created in the INA. Gov't Mot. 26-29. As the government has shown, the Court's reference to Dr. Elshikh's mother-in-law does not undermine that sound approach. Id. at 35.

Like the district court, respondents also attempt (Opp. 32-34) to cobble together a broader definition of close family members based on other, inapposite statutory and regulatory provisions and case law from other contexts. Even the authorities they cite lend them no support.[2] More fundamentally, respondents fail to refute the government's showing that the most relevant statutory provisions -- which govern which relatives may petition for a visa for a relative -- support the government's

[2] For example, the description of certain relatives as "close family members" that they quote (Opp. 32 (brackets and citation omitted)) in connection with 8 U.S.C. 1183a(f)(5) comes not from the statute, but from a committee report. H.R. Rep. 127, 107th Cong., 1st Sess. 2 (2001). And none of the other provisions they cite, including the statute addressing the Lautenberg Program, Pub. L. No. 101-167, 599D-599E, 103 Stat. 1261-1264 (1989), uses the term "close family member." Indeed, as respondents' description of them makes clear (Opp. 32), a relationship to a more distant relative is covered only if a parent or more immediate family member has died or some other context-specific contingency is satisfied.

interpretation. The government's reliance on those provisions is far more reasonable than respondents' freeform approach.

III. THIS COURT SHOULD STAY THE DISTRICT COURT'S MODIFIED INJUNCTION PENDING CONCLUSIVE RESOLUTION BY THIS COURT OR THE COURT OF APPEALS

For the reasons set forth in the government's motion, the Court should temporarily stay the district court's modified injunction while the Court considers and decides the merits of these issues. Gov't Mot. 36-40. At a minimum, if and to the extent the Court determines that some or all of these issues should be addressed by the court of appeals in the first instance, it should grant a stay pending the disposition of the government's protective appeal and any subsequent proceedings in this Court. Requiring the government to adhere to the district court's erroneous ruling during the pendency of potentially protracted lower-court litigation would only compound the confusion and uncertainty the district court's ruling is already creating.

Respondents offer no valid reason why the government should be required to implement that modified injunction based on the district court's misreading of this Court's stay ruling while the correctness of that court's interpretation is adjudicated. Their claim (Opp. 36) that this Court has "already found that the balance of the harms counsels against a stay" is wrong. This Court granted a stay; the only question is its scope. Respondents also suggest (Opp. 37) that leaving the district court's misguided decision in place would minimize disruption by preventing multiple changes.

But permitting the government to resume orderly implementation of this Court's stay ruling, as it had done until July 13, would be far less disruptive than halting that implementation for an unknown period pending further litigation, only to resume implementation days, weeks, or even months later if the government's position prevails.

Respectfully submitted.

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