DOUGLAS S. CHIN (Bar No. 6465)
Attorney General of the State of Hawai‘i
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239
Attorneys for Plaintiff, State of Hawai‘i

NEAL K. KATYAL*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
**Admitted Pro Hac Vice*
Attorneys for Plaintiffs, State of Hawai‘i and Ismail Elshikh

(See Next Page For Additional Counsel)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

STATE OF HAWAI‘I and ISMAIL ELSHIKH,

Plaintiffs,

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 TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 1:17-cv-00050-DKW-KSC

REPLY IN SUPPORT OF MOTION TO ENFORCE OR, IN THE ALTERNATIVE, TO MODIFY PRELIMINARY INJUNCTION

ADDITIONAL COUNSEL

CLYDE J. WADSWORTH (Bar No. 8495)
Solicitor General of the State of Hawaiʻi
DEIRDRE MARIE-IHA (Bar No. 7923)
DONNA H. KALAMA (Bar No. 6051)
KIMBERLY T. GUIDRY (Bar No. 7813)
ROBERT T. NAKATSUJI (Bar No. 6743)
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAIʻI
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-1500
Fax: (808) 586-1239
Email: deirdre.marie-iha@hawaii.gov

Attorneys for Plaintiff, State of Hawaiʻi

COLLEEN ROH SINZDAK*
MITCHELL P. REICH*
ELIZABETH HAGERTY*
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
Email:
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT*
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Fax: (212) 918-3100

SARA SOLOW*
ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103
Telephone: (267) 675-4600
Fax: (267) 675-4601

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawaiʻi and Ismail Elshikh

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INTRODUCTION

The Government has spent two weeks carrying out its unconstitutional order against the vulnerable and the weak. It justifies its conduct on national security grounds, excluding people such as a Ukrainian granddaughter trying to reunite with her 93 year-old grandmother, Ex. G at 1 (Decl. of Erol Kekic); a refugee stranded in Malawi while his uncle waits for him here, Ex. H ¶¶ 10-11 (Decl. of John Feruzi); and countless individuals who have been promised housing and resettlement in this country by a dedicated refugee organization, Opp. at 10. The Government claims these individuals have no ties to the United States and their exclusion burdens no one. That position is as wrong as it is cruel, and it makes a mockery of the Supreme Court's directive that any alien with a "bona fide relationship" to this country cannot be denied entry.

The Government tries every possible avenue to ensure the Court does not halt its policy of defiance. It blames the Plaintiffs and insists that the Court should ignore this motion, or stay any judgment against it for weeks or months while it pursues every conceivable avenue of appellate review (or none at all). But Plaintiffs have heeded this Court's and the Ninth Circuit's recent admonitions; they have followed the precise roadmap the Ninth Circuit laid out, and invoked this Court's clear authority to enforce or modify its own injunction. Plaintiffs respectfully request that this Court give effect to its injunction and restore the

protections the Constitution and laws of this country afford the State of Hawaii, Dr. Elshikh, and all Americans.

ARGUMENT

I. This Court's Intervention Is Urgently Warranted.

1. This Court's authority to modify or enforce its injunction is indisputable. While "an appeal is pending from an interlocutory order * * * that grants * * * an injunction," the district court may "modify" that "injunction." Fed. R. Civ. P. 62(c). And the issuance of an injunction generally "requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *System Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961).

The Government asserts (at 3) that this Court's authority to modify its injunction is limited to what is necessary to preserve the status quo. Plaintiffs agree, but that simply means that "[w]hile a preliminary injunction is pending on appeal, a district court lacks jurisdiction to modify the injunction in such manner as to 'finally adjudicate substantial rights directly involved in the appeal.' " *A&M Records, Inc.* v. *Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002) (citation omitted). Instead, the Court may make only those modifications necessary to preserve the basic protections in the existing injunction. *Natural Resources Def. Council, Inc.* v. *Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). That

involves, for example, evaluating changed circumstances and modifying the injunction to ensure continued compliance with its letter and spirit. *A&M Records*, 284 F.3d at 1098-99; *Christian Science Reading Room* v. *City & Cnty. of San Francisco*, 784 F.2d 1010, 1017 (9th Cir. 1986).

That is precisely what Plaintiffs ask this Court to do. Defendants have begun to implement the bans. The current circumstances demonstrate that unless this Court enforces the injunction or modifies it to specify that particular groups of individuals remain protected, the Government will continue to violate this Court's order and inflict the irreparable harms that the injunction was designed to prevent.

2. Next, the Government contends (at 3) that this Court should deny Plaintiffs' motion because "Plaintiffs do not seek to protect themselves, but, rather, third-party aliens abroad." But Plaintiffs *are* protecting their own rights. They won a preliminary injunction from this Court—affirmed by the Ninth Circuit—preventing the Government from enforcing its Order "across the Nation." Dkt. 291. Plaintiffs have a "'judicially cognizable' interest in ensuring compliance with that judgment," to the extent it has not been stayed. *Salazar* v. *Buono*, 559 U.S. 700, 712 (2010) (plurality opinion).

The Government also argues that Plaintiffs should "seek relief from the Supreme Court in the first instance." Opp. at 3. This Court and the Ninth Circuit certainly held that to be true for clarification motions. But the Ninth Circuit also

made clear that *this* Court "possess[es] the ability to interpret and enforce the Supreme Court's order, as well as the authority to enjoin against * * * a party's violation of the Supreme Court's order." Dkt. 327, at 3. Plaintiffs are merely following the path outlined by the Ninth Circuit.

3. Finally, this Court should decline the Government's request to stay any relief it grants pending further review. The Government's only argument is that "preventing the Government from enforcing the Executive Order against foreign nationals unconnected to the United States would appreciably injure its interests." Opp. at 4 (internal quotation marks omitted). Even setting aside the absurdity of the Government's reliance on national security threats to exclude malnourished Somali children, *see* Ex. G at 1, the Government's argument fails. Plaintiffs are not seeking to enjoin the Order as to foreign nationals "*unconnected* to the United States." *Trump* v. *Int'l Refugee Assistance Project* ("*IRAP*"), Nos. 16-1436 and 16-1540, slip op. at 11 (U.S. June 26, 2017) (per curiam) (emphasis added). To the contrary, Plaintiffs seek to enjoin application of the Order to foreign nationals that meet the Supreme Court's "bona fide relationship" test. As to those people, the Supreme Court has already performed the equitable balancing and determined that a stay is not warranted. *See* Slip Op. at 10-12. The Government also warns (at 4) of "significant confusion," but there is nothing in Plaintiffs' interpretation of the injunction that would be difficult to administer, and vague references to

"confusion" do not outweigh the severe human costs evidenced by the affidavits and other filings. Those human costs will mount while the appellate process unfolds, which, according to the Government, may involve trips to both the Supreme Court and the Ninth Circuit (if the Government appeals at all). Opp. at 2.

II. This Court's Injunction Continues To Protect Grandparents, Grandchildren, Brothers-In-Law, Sisters-In-Law, Aunts, Uncles, Nieces, Nephews, And Cousins Of Persons In The United States.

The Government has committed itself to the position that grandchildren, nieces, cousins, and other close relatives of U.S. persons must be excluded from the country, but it cannot identify a coherent reason why. Instead, it has offered a series of shifting and ever-more attenuated rationalizations, each one divorced from the Supreme Court's clear guidance and belied by common sense.

The Government begins by accusing Plaintiffs of "press[ing] a free-form definition" of close family that is "of their own making." Opp. at 1. That is wrong. Plaintiffs' definition is the "tradition[al]" one recognized time and again by the Supreme Court. *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 504 (1977). In *Moore*, the Court held that a "venerable" constitutional tradition protects the right of "*close relatives*" such as "uncles, aunts, cousins, * * * grandparents" and other "relatives in this degree of kinship" to "live together" and "shar[e] a household." *Id.* at 504-506 (emphasis added). In *Reno* v. *Flores*, 507 U.S. 292 (1993)—an immigration case—the Court explained that a person's "aunt[s],

uncle[s], [and] grandparent[s]" are "*close blood relatives*, whose protective relationship with children our society has * * * traditionally respected." *Id.* at 297, 310 (emphasis added); *see Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003).[1]

The Government ignores these precedents and attempts to restrict this Court's injunction to a narrower class: essentially, an alien's "nuclear family." *Moore*, 431 U.S. at 504. But this restrictive definition finds no footing in the Supreme Court's opinion. The Supreme Court held that the injunction "*clearly*" protects aliens "similarly situated" to a U.S. person's mother-in-law, Slip Op. at 12 (emphasis added), a relative that is—like a grandparent, a niece, and so on—two "degree[s] of kinship" removed from a U.S. person. *Moore*, 431 U.S. at 505-506. Furthermore, the touchstone of the Court's analysis was whether a U.S. person would suffer "concrete hardship" from an alien's exclusion. Slip Op. at 13. It is indisputable that a grandparent suffers concrete hardship from being separated from her grandchildren, or that the exclusion of Mr. Feruzi inflicts profound harm on the uncle he knows only as "Dad." Ex. H ¶¶ 10-11; *see* Ex. I ¶¶ 17-23 (Decl. of Mwenda Watata).

[1] The Ninth Circuit, too, has repeatedly recognized that a person's "close family" includes these relations. *See, e.g.*, *Villena* v. *INS*, 622 F.2d 1352, 1359 (9th Cir. 1980) (noting "hardship" caused by separation from "grandparents and other close relatives"); *Urbina-Osejo* v. *INS*, 124 F.3d 1314, 1318 (9th Cir. 1997); *Vergara* v. *INS*, 8 F.3d 33, at *2 (9th Cir. 1993). The Government's sole authority to the contrary is an unpublished district court opinion stating that a prisoner's sister-in-law and niece were "the functional *equivalent* of 'close family members.' " *United States* v. *Felipe*, 1997 WL 278111, at *1 (S.D.N.Y. May 22, 1997).

The Government rests its limiting definition on a handful of provisions in the Immigration and Nationality Act ("INA"). With each successive brief, however, the Government's argument has grown more strained. In its previous filing, the Government flatly asserted that "the INA does not grant *any* immigration benefit" to grandparents, grandchildren, and the like. Dkt. 301, at 8-10 (emphasis added). Now it essentially admits that representation was false. Numerous provisions of the immigration laws grant benefits to those relatives, and expressly refer to many of them as "close family." Mem. at 9-10; *see* Opp. at 6-8.[2]

The Government thus retreats to a new position: Its definition, it says, tracks those "familial relationships [that] are close enough to *petition for a[n] [immigrant] visa* under the INA." Opp. at 5 n.2 (emphasis added); *see id.* at 6, 7 n.3. This rationale was absent from the Government's last brief, which relied on several provisions that have nothing to do with petitioning for a visa. *See* Dkt. 301, at 9-10 (invoking 8 U.S.C. § 1182(a)(3)(D)(iv) and Pub. L. No. 110-181, §§ 1241-1249). And it makes no sense. Congress narrowly restricted which aliens

[2] The Government attempts to dismiss those provisions as "narrow exception[s] to the INA's general rules." Opp. at 7. But many of these provisions are entirely unrelated to the "general rules" regarding immigrant visas cited by the Government. *Compare, e.g.*, 8 U.S.C. § 1101(a)(15)(T)(ii)(III) (setting rules for T visas); *id.* § 1433(a) (naturalization); 69 Fed. Reg. 69,480, 69,488 (Nov. 29, 2004) (asylum); 8 C.F.R. § 236.3(b)(1)(iii) (detention), *with* Opp. at 5 (citing provisions concerning who may petition for an immigrant visa). And regardless of the scope of benefits they confer, these provisions make clear that Congress deemed grandparents, nieces, and the like to be "close family." Pub. L. 107-150, § 2(a).

could petition for immigrant visas because it was performing the "unavoidably zero-sum" task of "allocating a limited number of [immigrant] visas." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2213 (2014). The Supreme Court's order, in contrast, seeks to determine who has some "connection" to the United States, such that he can *seek* to enter the United States, even *temporarily*. Slip Op. at 10-11. There is no reason to think the Supreme Court wished to borrow from the INA at all—let alone from these highly restrictive and inapposite provisions—to delineate the sort of "connection" required to assert that barebones privilege.

In any event, the Government's newly minted rationalization lasts all of four pages. As the Government ultimately must acknowledge (at 9-10), two sets of relations the Supreme Court made clear must be protected by the injunction—parents-in-law and children-in-law—cannot petition for immigrant visas under the immigration laws. The Government responds to that problem by manufacturing yet another *ad hoc* rule: Relatives like these count, the Government says, because they "will *often also* be" parents or children of individuals who *can* petition on an alien's behalf. *Id.* (emphasis added). It defies credulity that this is what the Supreme Court had in mind when it mentioned Dr. Elshikh's mother-in-law; if anything, the record reflects the profound harm her *grandchildren* would suffer from her exclusion. *See* Elshikh Decl. ¶ 3, Dkt. 66-1. And it is entirely unclear what basis, if any, the Government has to claim that the grandparents,

grandchildren, and siblings-in-law of U.S. persons are less likely to have children, parents, or siblings present in the United States than mothers-in-law. *Cf.* Amicus Br. of New York *et al.* at 8 & nn.6-7, Dkt. 333 (detailing research showing that immigrant grandparents, aunts, and uncles frequently assist their immediate relatives in raising children).

In the end, the Government falls back on a plea for "deference." Opp. at 9. It claims that if there is "*any* ambiguity," the Government's construction must prevail. *Id.* (emphasis added). The Government cites no authority for this proposition, and there is none. It is this Court's responsibility, not the Government's, to "interpret and enforce the Supreme Court's order." Dkt. 327, at 3. If the Government thought the stay unclear—which it is not—the *Government* had the responsibility to "seek clarification of [its] obligations." *Inst. of Cetacean Research* v. *Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 954 (9th Cir. 2014). It instead chose to embark on a "program of experimentation with disobedience of the law" that imperils the rights of countless Americans. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). This Court must therefore enforce or modify its injunction to ensure that order does not "go[] for naught." *Id.* at 193.

III. Refugees With A Formal Assurance Must Be Permitted To Enter.

The Government makes no real attempt to deny that a resettlement agency experiences a "concrete hardship" from the exclusion of a refugee with whom it

has a relationship documented in a formal assurance. *See* Mem. at 10-13. That should be the end of the matter: Sections 6(a) and 6(b) "may not be enforced against an individual seeking admission as a refugee who can credibly claim" a relationship with an entity in the United States that is "formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2." Slip Op. at 12-13. The Government nevertheless throws out a handful of irrelevant and inaccurate assertions in an attempt to defend the indefensible.

The Government first claims (at 10) that this Court cannot enforce the injunction with respect to refugees that have a formal assurance because that would "eviscerate" the Supreme Court's stay by permitting the entrance of too many refugees. But the Supreme Court did not establish a numerical cap on refugee admissions; indeed, it flatly barred the Government from enforcing the refugee cap in Section 6(b) against any individual with a bona fide relationship with a U.S. entity. Slip Op. at 13. The Supreme Court's stay is fully vindicated so long as the refugee provisions are permitted to take effect "[a]s applied to all *other* individuals." *Id.* (emphasis added).

Nor is there any truth to the Government's suggestion that there are *no* "other individuals." The Government does not dispute that there are approximately175,000 potential refugees that currently lack formal assurances. Unless they have some other bona fide relationship with a U.S. entity, the Supreme

Court's stay currently permits the Government to apply Section 6(a) to "suspend [their] travel" and to "suspend decisions on [their] applications for refugee status." The Government seems to be disappointed that the slow pace of refugee admissions means those individuals were unlikely to enter even without the ban. But the Supreme Court's purpose was to balance the equities, not to assist the Government in its program of excluding as many refugees as it can.

The Government next reasserts its claim (at 11) that the relationship between a resettlement agency and a refugee somehow does not count because it is facilitated by a government contract. The Supreme Court did not even hint that government facilitation disqualifies a relationship.[3] Rather, the Court stated that a relationship qualifies where the refugee's exclusion would inflict "concrete hardship" on the American entity. In the related context of third party standing, multiple courts have found that the relationship between a refugee organization and the clients it wishes to serve fit the bill. For example, in a case recently affirmed by the Seventh Circuit, the district court held that a resettlement agency "undoubtedly has a sufficiently close relationship with the[] refugees" it "has been assigned to resettle * * * in the next few weeks or months," and that the

[3] In fact, the Court suggested the opposite. The Court explained that foreign students like those admitted to the University of Hawaii would obviously be covered by the injunction. Slip Op. at 12. The Federal Government facilitates numerous scholarships and foreign exchange programs for such scholars, *see* https://exchanges.state.gov/non-us/alphabetical-list-programs, but the Court mentioned no exception to the injunction's application to students.

agency suffers a "concrete injury" when that resettlement is impeded. *Exodus Refugee Immigration, Inc.* v. *Pence*, 165 F. Supp. 3d 718, 729, 731-732 (S.D. Ind. 2016), *aff'd* 838 F.3d 902 (7th Cir. 2016). Similarly, the D.C. Circuit has held that a refugee resettlement agency experiences a "concrete injury" when the Government bars the admission of a population with which it works. *Haitian Refugee Ctr.* v. *Gracey*, 809 F.2d 794, 799 (D.C. Cir. 1987); *see Ukrainian-Am. Bar Ass'n, Inc.* v. *Baker*, 893 F.2d 1374, 1378-80 (D.C. Cir. 1990); *Haitian Refugee Ctr.* v. *Baker*, 789 F. Supp. 1552, 1558-60 (S.D. Fla. 1991), *aff'd* 949 F.2d 1109, 1116-17 (11th Cir. 1991).

In any event, the Government's intimation that resettlement agencies suffer no more than a contractual loss when refugees are excluded borders on the insulting.[4] Many resettlement agencies carried out their work long before the Government got involved, IRAP & HIAS Am. Br. at 8 n. 4, Dkt. 339-1, and for reasons having nothing to do with funding, Hetfield Decl. ¶ 2, Dkt. 336-2; *see, e.g.*, https://www.ccmke.org/Catholic-Charities/Get-Help/Refugee-Resettlement-Services.htm (describing mission to "serve and advocate" for refugees).

The Government also returns (at 12) to its argument that there is no qualifying relationship between the refugee and the resettlement agency because

[4] Even more troubling is the Government's suggestion (at 11 n.4) that in the interests of implementing its cramped understanding of what constitutes a bona fide relationship with a U.S. entity, it may be willing to deny entry even to those that risked their lives on behalf of the United States military abroad.

they may not have personally interacted. But the Government offers no basis to distinguish other such relationships that indisputably qualify: a lecturer whose visit was arranged through third parties, a man who has never met his son-in-law, or even an applicant to the University of Hawaii who never sets foot on campus. The Government observes that those relationships are different in other ways, but that in no way refutes the point that personal interaction is not a prerequisite.

The Government also asserts (at 12-13) that the Supreme Court may have sustained the injunction with respect to refugees without finding that either of the Plaintiffs will suffer any harm from their exclusion. But that is contrary to black-letter law that establishes that an injunction cannot be sustained in the absence of harm to the plaintiffs. The Ninth Circuit found that Hawaii was harmed because of its inability to resettle refugees, and the Supreme Court did not disturb that holding. For that reason, the Government cannot implement the ban to impose a similar harm on other States and resettlement agencies.

IV. There Is An Urgent Need To Prevent The Government From Violating This Court's Injunction With Respect to Refugees.

The Government attempts to dismiss Plaintiffs' remaining challenges to the implementation of the refugee provisions as unripe. Opp. at 13. That is obviously false. The declarations presented by Plaintiffs and their amici amply demonstrate that the Government's unlawful interpretation of the existing injunction is currently inflicting terrible harm on refugees with formal assurances, travel plans,

and other bona fide relationships with those in the United States. *See, e.g.*, Exs. G, H. And it is about to get far worse. The Government has stated that it will stop permitting those with formal assurances and booked travel to enter the country after *today*. Opp. at 14. That means that a refugee child set to board the plane tomorrow will be barred unless she can point to a bona fide relationship beyond the one she already has with the resettlement agency, state and local entities, and community organizations that have been busy preparing her welcome.

Moreover, the Government acknowledges in a footnote (at 14 n. 5) that it is currently violating the injunction even with respect to refugees who have a bona fide relationship the Government is willing to recognize: The Government does not deny that it has completely stopped making travel booking for such individuals, but waves that away by asserting that it will release guidance sometime soon explaining when it will lift that suspension. The Government cannot be permitted to flagrantly violate the injunction in this way. Any delay in the admission of refugees that are indisputably covered by this Court's order not only flouts judicial authority but puts lives at risk. Every day, and every minute, matters.

Finally, the Government continues to refuse to acknowledge that certain groups of refugees must be categorically excluded from the refugee ban. In particular, the Government maintains that it must evaluate attorney-client relationships on a case-by-case basis even though the Supreme Court itself has

held that an attorney has a legally cognizable relationship with an existing client sufficient even to confer third party standing. *See Caplin & Drysdale, Chartered* v. *United States,* 491 U.S. 617, 623 n.3 (1989); *Dep't of Labor* v. *Triplett,* 494 U.S. 715, 720-721 (1990). The Government's only defense of this illogical position is that it needs to ensure the relationships were not formed to "evade EO-2." But the same is true of every other relationship protected by the injunction, and that has not stopped the Government from issuing other categorical guidance. In any event, this concern would only justify, at most, excluding some aliens with a relationship with an immigration nonprofit formed after June 26.[5]

CONCLUSION

For the foregoing reasons, the Court should issue an order enforcing or modifying its preliminary injunction.

DATED: Washington, D.C., July 12, 2017.

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[5] The Government likewise refuses to categorically exempt those in three refugee programs designed expressly to secure admission to those with close relationships with United States individuals and entities, including a program created for individuals who "worked for Americans and American entities" as part of the United States' mission in Iraq and who are in danger of persecution "because of those relationships." IRAP & HIAS Amicus Br. at 11-12, Dkt. 339-1. Forcing these individuals to prove that they have a qualifying bona fide relationship is wasteful as they have already proved as much to gain entrance to the program. Further, the additional time these men, women, and children will spend attempting to prove their eligibility for entrance is time they must remain in jeopardy overseas.

Respectfully submitted,

/s/ Neal K. Katyal

DOUGLAS S. CHIN (Bar No. 6465)
Attorney General of the State of Hawai‘i
CLYDE J. WADSWORTH (Bar No. 8495)
Solicitor General of the State of Hawai‘i
DEIRDRE MARIE-IHA (Bar No. 7923)
DONNA H. KALAMA (Bar No. 6051)
KIMBERLY T. GUIDRY (Bar No. 7813)
ROBERT T. NAKATSUJI (Bar No. 6743)
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAI‘I

Attorneys for Plaintiff, State of Hawai‘i

NEAL K. KATYAL*
COLLEEN ROH SINZDAK*
MITCHELL P. REICH*
ELIZABETH HAGERTY*
THOMAS P. SCHMIDT*
SARA SOLOW*
ALEXANDER B. BOWERMAN*
HOGAN LOVELLS US LLP

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs, State of Hawai‘i and Ismail Elshikh