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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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*.	No. 1:17-cv-00050-DKW-KSC **DEFENDANTS' OPPOSION TO MOTION TO ENFORCE OR, IN THE ALTERNATIVE, TO MODIFY PRELIMINARY INJUNCTION** Judge: Hon. Derrick K. Watson Related Documents: Dkt. No. 328

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INTRODUCTION

In denying Plaintiffs' motion to clarify, this Court recognized that the Supreme Court is the appropriate court to provide definitive guidance on the scope of its stay. Rather than seeking relief from that Court, Plaintiffs took an improper appeal that was summarily dismissed. Returning now to this Court, they repackage their motion to clarify as a motion to enforce or modify this Court's preliminary injunction. This Court, however, lacks authority to modify the injunction to grant additional relief beyond what the Supreme Court permitted. And because Plaintiffs are not really seeking "enforcement" as to them, but instead are effectively attempting to clarify the Supreme Court's stay on behalf of third parties, Plaintiffs should address their request to the Supreme Court in the first instance.

Regardless, there is no basis to provide the relief that Plaintiffs seek. As the Government previously explained, its definition of "close family" is derived from the Immigration and Nationality Act ("INA") as it relates to eligibility for a family-based immigrant visa, and from the terms of the Executive Order itself. Plaintiffs instead press a free-form definition of their own making. To the extent Plaintiffs address the INA, they cite provisions and regulations that are either inapposite or reflect narrow exceptions to general rules.

Nor are Plaintiffs entitled to any relief regarding the refugee provisions of the Executive Order. Indeed, Plaintiffs' blanket rule that every assurance creates a

qualifying, bona fide relationship between a refugee and a resettlement agency would eviscerate the Supreme Court's holding regarding Section 6(a). But as the Government has demonstrated, assurances are agreements between the Government and those agencies. Nor do Plaintiffs dispute that resettlement agencies typically have no contact with refugees prior to their admission to the United States. Finally, the remaining relief that Plaintiffs seek is not ripe, assumes a dispute where none might exist, and conflicts with the analysis of the Supreme Court's decision.[1]

For the reasons set forth below and in the Government's prior filing, *see* ECF No. 301 ("Gov. Mem."), this Court should deny Plaintiffs' motion. Should this Court grant any relief to Plaintiffs, the Government requests that the Court stay that relief pending the later of the prompt filing and disposition of a request by the Government to the Supreme Court for clarification of its stay (and appeal to the Ninth Circuit if the Supreme Court denies the clarification request), or the prompt notification by the Government that it does not intend to seek any such further review.

[1] Plaintiffs no longer argue that the Government is improperly applying the Supreme Court's "credible claim" standard.

ARGUMENT

I. This Court Lacks Jurisdiction to Modify Its Preliminary Injunction To Grant Additional Relief, and Any Order "Enforcing" That Injunction Should Be Stayed Pending Immediate Supreme Court Review.

Plaintiffs have repackaged their "motion to clarify" as a motion to enforce or, in the alternative, to modify this Court's preliminary injunction. *See* Pls.' Mem. at 4-7, ECF No. 328-1. As an initial matter, this Court lacks jurisdiction to modify its preliminary injunction, except to maintain the status quo under the Supreme Court's ruling, because certiorari has been granted in this case. *See Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000).

Nor should this Court grant Plaintiffs' putative motion to "enforce" the injunction. Plaintiffs do not seek to protect themselves but, rather, third-party aliens abroad who fall outside the scope of the Supreme Court's stay; their arguments are thus indistinguishable from those in their prior motion to clarify. This dispute remains a "quarrel over the meaning and intent of words and phrases authored not by this Court, but by the Supreme Court." Order at 2, ECF No. 322. Resolving the motion will, as before, require this Court to "substitute its own understanding of the stay" for that of the Supreme Court. *Id*. at 5.

Accordingly, the appropriate course is for Plaintiffs to seek relief from the Supreme Court in the first instance. This Court correctly noted that originating courts are best positioned to interpret their own orders. *See id*. The Supreme Court

undoubtedly has authority to clarify or modify its own rulings and has done so even after issuing an opinion on the merits. *See Swenson v. Stidham*, 410 U.S. 904 (1973); Stephen M. Shapiro, *Supreme Court Practice* 841 (10th ed. 2013) (where a party before the Supreme Court "is not seeking a change in the Court's judgment on the merits," it may file a motion to clarify or modify an opinion of the Court). Thus, the Supreme Court can clarify or amend its own stay in this case, which is still pending before it.

To the extent this Court nonetheless grants any relief to Plaintiffs, it should grant an interim stay of that relief. In partially granting the Government's request for a stay, the Supreme Court recognized that "[t]he interest in preserving national security is 'an urgent objective of the highest order'" and that preventing the Government from enforcing the Executive Order "against foreign nationals unconnected to the United States would appreciably injure its interests." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2017 WL 2722580, at *6 (U.S. June 26, 2017) (per curiam). Because the parties dispute the scope of the stay, any immediate relief this Court may grant would threaten these same interests, potentially upset the equitable balance that the Supreme Court struck, and create significant confusion as the Government continues to implement the Executive Order consistent with court orders. Indeed, a stay is particularly warranted because

Plaintiffs could have avoided all of this by seeking relief directly from the Supreme Court in the first instance.

II. The Government's Definition of "Close Family" Is Consistent with the INA and the Supreme Court's Decision.

For relationships with individuals, "a *close* familial relationship is required" to fall outside the scope of the Supreme Court's stay. *Id.* at *7 (emphasis added). The parties disagree on the contours of that "relationship."

The Government's definition draws from the INA itself, which provides the definitions of familial relationships that are relevant here. *See* Gov. Mem. at 7-13. This authority includes 8 U.S.C. §§ 1151(b)(2)(A)(i) (defining "immediate relatives" as "the children, spouses, and parents" of U.S. citizens); 1101(b)(1)-(2) (including step-relationships in definitions of "child" and "parent"); 1153(a) (privileging sons and daughters (age 21 or older) of U.S. citizens; siblings of U.S. citizens; and spouses, unmarried children under the age of 21, and unmarried sons and daughters (age 21 or older) of lawful permanent residents in allotting numerically-limited visas); and 1101(a)(15)(K) and 1184(d) (recognizing and giving special accommodation to fiancés).[2] Rather than focusing on this directly relevant

[2] Plaintiffs previously argued that some of this authority is inapposite to the extent it involves the allocation of a numerically-limited number of visas. *See* Pls.' Reply at 6, ECF No. 303. Regardless of the number of visas to be issued, all of these provisions draw lines in the context of determining which familial relationships are close enough to petition for a visa under the INA. That is exactly the type of line-drawing that the Supreme Court's opinion requires.

statutory scheme, Plaintiffs draw strained analogies from cases involving local housing ordinances and prisoner civil rights. *See* Pls.' Mem. at 8. Even these non-immigration cases, however, undermine Plaintiffs' position. *See United States v. Felipe*, No. 94 Cr. 395, 1997 WL 278111, at *1 (S.D.N.Y. May 22, 1997) (noting concession that "a sister-in-law and a niece" did not "fit the normal definition of 'close family member'").

To the extent Plaintiffs address the INA at all, they rely on a handful of INA provisions or regulations that are not relevant or that otherwise reflect narrow exceptions to the general rules. For example, Plaintiffs claim that a provision in the Family Sponsor Immigration Act of 2002 defines an alien's sister-in-law, brother-in-law, grandparents, and grandchildren as "close family." Pls.' Mem. at 9 (quoting Pub. L. No. 107-150, § 2(a) (codified at 8 U.S.C. § 1183a(f)(5))). That provision, however, does not directly address who may petition for a visa, but instead who may serve as a financial sponsor for certain aliens. *See* 8 U.S.C. § 1183a.

And even in that context, the provision reflects the distinctions between close and extended family that the Government draws here. 8 U.S.C. § 1183a(f)(1)(D) and (f)(4) require that the financial sponsor be the relative who is petitioning under § 1154 to classify the alien as a family-sponsored or employment-based immigrant (or a relative with a significant ownership interest in the entity filing an employment-based petition). *See id.* § 1153(a)-(b). Only spouses, parents, sons, daughters, and

siblings may file family-sponsored petitions, and the eligible "relatives" in the employment-based context are limited to the same family members. *See id.* § 1154(a); 8 C.F.R. § 213a.1 (defining relative to include spouse, parents, children, and siblings); *see also* Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35,732; 35,733 (June 21, 2006) (defining "'relative,' for purposes of the affidavit of support requirement, to include only those family members who can file alien relative visa petitions"). Only when a petitioner has died and the petition either converts to a widow(er) petition or the Secretary of the Department of Homeland Security ("DHS") reinstates the petition on humanitarian grounds can one of the extended family members that Plaintiffs cite serve as a financial sponsor under this provision. *See* Pls.' Mem. at 9; 8 U.S.C. § 1183a(f)(5)(B)(i), (ii). And even then, siblings-in-law and grandparents only serve as financial sponsors; they cannot petition for a visa applicant. *Cf. Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2213 (2014) ("grandchildren, nieces, or nephews of citizens [are] relationships [that] d[o] not independently entitle [those family members] to visas").[3]

Each of Plaintiffs' other authorities represent a narrow exception to the INA's general rules on which the Government has relied. For example, Plaintiffs cite a

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[3] Plaintiffs also note that a juvenile alien may be released from custody to an aunt, uncle, or grandparent. *See* Pls.' Mem. at 9-10. While that may be true in certain circumstances, that says nothing about how immigration law treats which familial relationships may petition for visas for certain family members.

human-trafficking regulation that allows grandchildren, nieces, and nephews to be eligible for T visas (for victims of human trafficking), but only if DHS determines that they face "a present danger of retaliation as a result of the principal's escape from the severe form of trafficking in persons or cooperation with law enforcement." Pls.' Mem. at 10; 8 U.S.C. § 1101(a)(15)(T)(ii)(III); 8 C.F.R. § 214.11(a)(3).

Plaintiffs also cite DHS regulations that allow an individual to "apply for asylum if a 'grandparent, grandchild, aunt, uncle, niece, or nephew' resides in the United States," Pls.' Mem at 10 (quoting 69 Fed. Reg. 69,480, 69,488 (Nov. 29, 2004)), but those provisions were compelled by a negotiated agreement with Canada that included broader familial definitions than typically available under the INA. *See* 69 Fed. Reg. at 69,480 (discussing "Safe Third Countries Agreement").

Plaintiffs similarly can find no support in 8 U.S.C. § 1433(a). That provision allows an application on behalf of a grandchild, *see* Pls.' Mem. at 10, but only under very limited circumstances, including the death of a U.S. citizen parent.

The USA PATRIOT Act's provisions, *see* Pls.' Mem. at 10, similarly are applicable only if the grandchild is an orphan and "both . . . parents died as a direct result of . . . [the 9/11 attacks]," and at least one of the parents was, on September 10, 2001, a U.S. Citizen or Lawful Permanent Resident. Pub. L. No. 107-56, § 421(b)(3), 115 Stat. 272.

Rather than all these narrow and contingent *exceptions* that Plaintiffs invoke, the Government appropriately relied on the *typical* definition of close familial relationships. Applying that typical definition is especially appropriate here: The Supreme Court's use of the phrase "close familial relationship" is nearly identical to language in the waiver provisions of Section 3(c)(iv) of the Executive Order, providing further support for the Government's definition. And even if there were any ambiguity in the Supreme Court's stay, the Government's reasonable construction—based on the typical rules reflected in the immigration statute that it administers—should receive deference.

Plaintiffs further argue that, because the Supreme Court included Dr. Elshikh's mother-in-law within the scope of its stay, it also must have intended that grandparents, aunts, cousins, and the like should be included. *See* Pls.' Mem. at 8. Plaintiffs do not point to any support in the Supreme Court's opinion for that position, and there is none. As the Government previously noted, the Supreme Court merely examined "[t]he facts of the[] cases" presented to it in deciding that Dr. Elshikh's mother-in-law would be subject to the Court's stay, *Trump*, 2017 WL 2722580, at *7, and the Government is treating all parents-in-law (and children-in-law) as being within the definition of "close famil[y]." *See* Gov. Mem. at 11-12 & n.2. In seeking to apply a broader definition, Plaintiffs ignore the Government's argument that, as was factually the case with Dr. Elshikh's mother-in-law, parents-

in-law of persons in the United States will often also be parents of persons in the United States. *See* Elshikh Decl. ¶¶ 1, 4, ECF No. 66-1. This places the parent-in-law relationship in a fundamentally different position from the other relatives that Plaintiffs seek to have included, including siblings-in-law. *See* Gov. Mem. at 12 n.2.

III. An Assurance From A Refugee Resettlement Agency Does Not, By Itself, Create a Bona Fide Relationship.

As the Government has previously argued, an assurance from a resettlement agency, *by itself*, does not create a "bona fide relationship" between a refugee and "a[n] . . . entity in the United States." *Trump*, 2017 WL 2722580, at *7; *see* Gov. Mem. at 14-20. Plaintiffs nonetheless contend that the terms of assurances establish a qualifying relationship because they require resettlement agencies to prepare in advance for a refugee's arrival pursuant to the assurance. *See* Pls.' Mem. at 11-12.

Plaintiffs fail to come to grips with the fact that their position would eviscerate the Supreme Court's order as to refugees. As the Government previously noted, 23,958 refugees have been assured as of June 30, which is more than the number that would likely be scheduled to enter the United States in the next 120 days. *See* Gov. Mem. at 17-18; Bartlett Decl. ¶ 17, ECF No. 301-1. Plaintiffs previously responded that this cohort is a "fraction" of the 200,000 individuals seeking refugee status. Pls.' Reply at 12. But the total number of individuals seeking refugee status is irrelevant, as the Executive Order suspends entry of refugees for only the next 120 days. Virtually all of the refugees likely to enter in the next 120 days already have

an assurance from a resettlement agency. If an assurance is all that is necessary to create a qualifying bona fide relationship, the Supreme Court's order allowing suspension to "take effect" for certain refugees, *Trump*, 2017 WL 2722580, at *7, would be rendered meaningless.

Moreover, Plaintiffs miss the critical point that the various steps that a resettlement agency may take before a refugee arrives are all pursuant to (and required by) a contract the resettlement agency enters into with the Government. *See* Pls.' Mem. at 12; Gov. Mem. at 14-15; Bartlett Decl. ¶ 15 & Att. 2. That a resettlement agency owes contractual obligations to the Government does not establish a qualifying relationship with refugees. Plaintiffs also do not dispute that resettlement agencies typically have no direct contact with refugees before their arrival in the United States. *See* Gov. Mem. at 15; Bartlett Decl. ¶ 21.

Plaintiffs alternatively contend that resettlement agencies are harmed because they have devoted private resources to refugee work and may lose federal funding. *See* Pls.' Mem. at 12. Even assuming this to be true, any such harm flows not from an independent, pre-existing relationship with the refugee, but from the agencies' contracts with the Government.[4]

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[4] Plaintiffs previously argued that the Government's guidance indicates that visa applicants who have a relationship with the U.S. Government itself have a bona fide relationship as a result. *See* Pls.' Reply at 10. Plaintiffs have misread that guidance. https://travel.state.gov/content/visas/en/immigrate/iraqi-afghan-translator.html. The SI and SQ visas that Plaintiffs reference are for Iraqi and Afghani nationals who

Plaintiffs dismiss the fact that resettlement agencies do not typically interact with refugees prior to arrival by noting that lecturers can be invited through agents. Pls.' Mem. at 13. The analogy is inapt. Agents inviting lecturers do so on behalf of the private organization that hired them. Resettlement agencies, in contrast, provide services to refugees on the Government's behalf. Moreover, the Supreme Court relied upon the First Amendment in noting that excluding lecturers could affect the rights of U.S.-based people or entities. *See Trump*, 2017 WL 2722580, at *5 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 763-65 (1972)). Plaintiffs alternatively note that a "refugee and a son-in-law" may have never met, *see* Pls.' Mem. at 13, but that speculative scenario is irrelevant because it is nevertheless a close familial relationship. In addition to the Supreme Court's adoption of different relationship standards for individuals and entities, *see Trump*, 2017 WL 2722580, at *6-7, there is an obvious difference between an *actual family member* whom one has not yet met and a *potential third-party* with whom there has not been any direct contact.

Finally, Plaintiffs assert that, if Hawaii has a bona fide relationship with refugees that are to be resettled in the State, then resettlement agencies that have

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worked with the U.S. Government in those locations, and thus do not even fall within the scope of Section 2(c) of the Executive Order (which applies neither to Iraq nor Afghanistan). Moreover, the Q&A cited by Plaintiffs, Opp. Ex. A, ECF No. 301-2, at 2, specifically notes that applicants for other special immigrant visas of the type that Plaintiffs discuss "may be subject to the E.O." unless they satisfy the relationship standards adopted in the Supreme Court's stay.

provided an assurance must have the necessary relationship because their connection to an assured refugee is less removed than the State's. *See* Pls.' Mem. at 13. This argument, however, assumes that a State can establish the requisite relationship with a refugee merely because the refugee will be resettled within its borders. The Supreme Court made no such determination: Unlike its discussion of Section 2(c), its discussion of Section 6 conspicuously did *not* find that Hawaii or Dr. Elshikh had the requisite relationship with any refugee. *See Trump*, 2017 WL 2722580, at *7. As with a mere agency assurance, such a conclusion would render the Supreme Court's stay meaningless, as all refugees will be resettled within some State.

IV. Plaintiffs' Other Challenges Regarding Refugees Are Not Ripe and Mischaracterize the Government's Guidance.

Plaintiffs also seek to have this Court "enforce" its preliminary injunction as to other refugee-related issues, but these issues are not ripe and there is no credible allegation that the Government is violating the Supreme Court's stay. Plaintiffs would have this Court modify its injunction by adding requirements that, at best, appear nowhere in the Supreme Court's opinion or, at worst, contradict that opinion. This Court should reject that invitation.

Plaintiffs assert that the Government is violating the injunction because it "'has yet to determine' whether [refugees] who have already booked travel may enter the United States after July 6." Pls.' Mem. at 13-14 (quoting Gov. Mem. at 18-19). The Government has now provided guidance on this issue: All refugees

with travel bookings through July 12 may travel as planned, and any refugee with travel bookings after July 12 may travel pursuant to those bookings if they have a credible claim to a bona fide relationship with a person or entity in the United States. Supp. Hetfield Decl. Ex. A ¶ 1, ECF No. 336-3. Moreover, Plaintiffs' bootstrap argument that refugees with travel bookings have a qualifying relationship due to the assurance-related services they will receive—such as a place to live and other arrangements—fails for the same reasons that their assurance argument fails.[5]

Finally, Plaintiffs seek to have this Court "enforce" its injunction by requiring the Government to automatically treat all client relationships with legal services organizations as protected by the injunction. *See* Pls.' Mem. at 14-15. But as the Government has explained, those relationships may vary from organization to organization and refugee to refugee. *See* Gov. Mem. at 21. Nothing in the Supreme Court's stay required the Government to treat all such relationships alike or to categorically assume that all such relationships automatically meet the Court's standard (regardless of the nature of the relationship or the amount of contact between the organization and refugee); to the contrary, the Court specifically noted, for example, that a relationship created for the purpose of "evading EO-2" would

[5] Plaintiffs also quarrel over State Department guidance temporarily pausing travel bookings, *see* Pls.' Mem. at 14, but updated guidance reflects that the Department "will issue guidance the week of July 10 on when new ABNs may be scheduled for new cases with bona fide relationships." Supp. Hetfield Decl. Ex. A ¶ 14.

not qualify and cited the situation of an organization improperly contacting "foreign nationals from the designated countries, add[ing] them to client lists, and then secur[ing] their entry by claiming injury from their exclusion." *Trump*, 2017 WL 2722580, at *7. This requires a case-by-case analysis. Plaintiffs' blanket approach, in contrast, would have the Court effectively (and improperly) broaden the scope of relief beyond what the Supreme Court permitted.[6]

CONCLUSION

The Court should deny Plaintiffs' motion. Should this Court grant any relief to Plaintiffs, the Government requests that the Court grant an interim stay of that relief as described above.

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[6] Plaintiffs also claim that "three categories of refugee applicants" are exempt from the Executive Order: "'U.S.-affiliated Iraqis' at risk of persecution" and participants in the Lautenberg Program and the Central American Minors Program. Pls.' Mem. at 15 n.6. But while some applicants through the identified programs would have qualifying bona fide relationships, others would not. For the Central American Minors Program, some caregivers may not have a sufficiently close relationship to a U.S.-based parent to qualify as a "close family member." *See* Gov. Mem. at 19 n.6. Likewise, the Lautenberg Program, which was established in §§ 599D and 599E of the Foreign Operations, Export Financing, and Related Appropriations Act, Fiscal Year 1990, Pub. L. No. 101-167, 103 Stat. 1195 (1989), includes grandparents and grandchildren in the family relationship criteria for applicants. And the Iraqi Direct Access Program includes certain nonqualifying relationships with the U.S. Government itself, as well as past (not current) relationships. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Title XII, Subtitle C, § 1243(a)(1)-(4), 122 Stat. 3. In any event, the mere fact that the Government has not categorically exempted these programs does not mean that the Government is not complying with the injunction or that qualifying participants in these programs would be subject to the Executive Order.

Dated: July 11, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, on July 11, 2017, by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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