No. 16-1540

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.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE THE INTERNATIONAL REFUGEE ASSISTANCE PROJECT AND HIAS, INC., IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO PETITIONER'S APPLICATION FOR A STAY OF THE NINTH CIRCUIT'S MANDATE

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September 12, 2017

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, *amici* refer the Court to the disclosures made in their prior *amicus* brief in this case.

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND TO FILE IN IN 8 ½ x 11 INCH FORMAT

The International Refugee Assistance Project and HIAS, Inc. move this Court for leave to file the enclosed brief as *amici curiae* in support of respondents without the ten days' advance notice to the parties that is ordinarily required by Supreme Court Rule 37.2(a). In light of the extremely expedited nature of the government's Application for a Stay of the Mandate, it was not feasible to give ten days' notice. All parties have consented in writing to the filing of this brief without such notice. *Amici* also respectfully request leave to file the attached brief in 8 ½ x 11 inch format, in light of the short period for response to the government's application and the added time that production of booklets would require.

Amici are U.S.-based non-profit entities that provide resettlement and legal services to refugees and other foreign nationals. Both are plaintiffs-respondents in *Trump v. International Refugee Assistance Project*, No. 16-1436 (Stay Application No. 16A1190), and previously filed an *amicus* brief in this case. As set forth in the accompanying brief, *amici* seek to explain both the nature of their relationships with assured refugees, whom the government has sought to exclude, and the types of harm they would suffer were this Court to grant the government's Application for a Stay of the Mandate.

For the foregoing reasons, pursuant to this Court's Rules 21.2(b) and 37.1, *amici* respectfully request that the Court grant this motion for leave to file the accompanying *amicus* brief.

Respectfully Submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici are U.S.-based non-profit organizations that provide a variety of services to refugees and other foreign nationals seeking to resettle in the United States. Both are plaintiffs-respondents in *Trump v. International Refugee Assistance Project*, No. 16-1436 (Stay Application No. 16A1190), and previously submitted an *amicus* brief in this case.

HIAS, founded as the Hebrew Immigrant Aid Society, is a non-profit organization whose mission is to rescue people whose lives are in danger and help them resettle in the United States. HIAS is the global refugee organization of the organized American Jewish community. Its clients include refugees and their families, both in the United States and abroad. It is one of nine non-profit organizations in the United States that serve as resettlement agencies in the U.S. Refugee Admissions Program ("USRAP"). HIAS has been providing resettlement services to refugees since 1881.

The International Refugee Assistance Project ("IRAP") is a non-profit organization that provides direct legal services to refugees and others seeking to escape violence and persecution, as well as to their U.S.-based family members. Its staff and pro bono volunteers represent and work directly with individuals abroad throughout their application, travel, and resettlement processes.

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[1] *Amici* have moved this Court for leave to file this *amicus* brief in support of respondents without ten days' advance notice to the parties, as is ordinarily required by Supreme Court Rule 37.2(a). No party has authored this brief in whole or in part, and no one other than *amici*, their members, and their counsel have paid for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In its June 26 decision denying in part and granting in part the government's request for a stay of the district court's injunction, this Court distinguished between those noncitizens who have a "bona fide relationship" with a U.S. person or entity, and those who do not. It did so based on a balancing of the equities, finding that where such a relationship exists, the harm to U.S. persons and entities warrants the injunction's protection. With respect to entities, the Court stated that to be "bona fide," the relationship need only be "formal, documented, and formed in the ordinary course" of business. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) ("*IRAP*"). As one example, it cited the fleeting and diffuse relationship between a visiting lecturer and an audience.

In implementing the Court's stay order, however, the government decided that the far more significant and extended relationship formed between a U.S.-based resettlement agency and a refugee for whom it has provided a formal assurance of resettlement assistance is insufficient.

As the district court correctly held, and the court of appeals affirmed, that rule was contrary to the text and reasoning of this Court's order. *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 2989048, at *7 (D. Haw. July 13, 2017) ("An assurance from a United States refugee resettlement agency, in fact, meets each of the Supreme Court's touchstones: it is formal, it is a documented contract, it is binding, it triggers responsibilities and obligations, including compensation, it is issued specific to an individual refugee only when that refugee has been approved

for entry by the Department of Homeland Security, and it is issued in the ordinary course, and historically has been for decades."); App. Add. 10, 35. The government's application of the Executive Order to refugees with formal assurances from U.S. resettlement agencies is wrong and will impose concrete injuries on *amici* and other U.S.-based organizations. A stay of the mandate is not warranted.

The relationship between a resettlement agency and a refugee to whom it formally assures resettlement assistance is extensive, intimate, and formally documented. Formal assurances trigger extensive client-specific efforts by resettlement agencies and their community partners. They are issued at the conclusion of a long and arduous refugee admission process involving multiple layers of security checks and a medical screening.

Banning refugees who have these relationships with U.S. resettlement agencies will cause concrete harm to those and other U.S. entities. The resettlement agencies are not mere government contractors, but values-driven, and largely faith-based, organizations whose reason for being is providing these services. They are independent entities with long-standing missions to serve refugees that pre-date (often by decades) the government's involvement in refugee resettlement. Suspending the entry of refugees whose resettlement has been assured by entities like HIAS would inflict serious economic and non-economic harm on the entities' operations and missions, harm that will compound over time as refugees' various security checks and clearances begin to expire.

The stakes also could not be higher for the resettlement agencies' assured clients. "Refugees' lives remain in vulnerable limbo during the pendency of the Supreme Court's stay. Refugees have only a narrow window of time to complete their travel, as certain security and medical checks expire and must then be re-initiated. Even short delays may prolong a refugee's admittance." App. Add. 35. Their lives hang in the balance. And the stakes are also high for the U.S. individuals, including landlords, prospective foster parents, and other volunteers, who have prepared for and invested in their arrival.

At the same time, recognizing assurances as giving rise to a "bona fide relationship" does not render the Court's stay order meaningless, as the government suggests. The Court's stay order did not mandate that a certain number of refugees be banned; instead it struck an equitable balance, barring applications of the ban that burden U.S. persons and entities, and letting it go into effect for those without bona fide relationships.

That is precisely what will happen under the district court's modified injunction. Unless they have some other connection to the United States, the government will continue to apply Section 6 during its effective period to more than 175,000 refugees who have not received formal assurances from a U.S. entity and who lack other relationships with U.S. persons, suspending their applications and preventing any of them from coming to the United States during the ban. Many of these individuals would have come to the United States during the ban period but will be excluded because of this Court's stay. That is the equitable balance this

Court struck, and it is not in any sense a "nullity." App. 28. And the government's insistence that the stay is only meaningful if it further lowers the number of refugee admissions for the remainder of the fiscal year ignores that the government has already achieved, by its own actions, a drastic lowering in refugee admissions for this fiscal year.

Thus, if the Ninth Circuit's ruling is allowed to go into effect, the Executive Order will have real consequences for many noncitizens abroad, but the injunction will continue to provide vital protection for those with a relationship to a U.S. entity that is "formal, documented, and formed in the ordinary course." *IRAP*, 137 S. Ct. at 2088. That is fully consistent with this Court's stay opinion.

BACKGROUND

The "individualized screening process" that a refugee must endure to apply for and receive resettlement in the United States is long and arduous, typically lasting between eighteen and twenty-four months. App. Add. 24; *see* D. Ct. Doc. 297-3 (Declaration of Mark Hetfield ¶¶ 6-21); D. Ct. Doc. 336-3 (Supplemental Declaration of Mark Hetfield ¶¶ 11-16); D. Ct. Doc. 301-1 (Declaration of Lawrence E. Bartlett ¶¶ 7-16). Formal assurance, which the courts below held constitutes a bona fide relationship, is one of the last steps, occurring after refugees have been vetted and before they travel to the United States.

The extensive pre-assurance screening process generally starts with the refugee registering with the United Nations High Commissioner for Refugees ("UNHCR") in the country to which he or she has fled. D. Ct. Doc. 301-1 (Bartlett

Decl. ¶ 8). If the UNHCR determines after an interview and review of documents that the applicant meets the United States' criteria for resettlement consideration and presents no disqualifying information, the UNHCR refers the case to a U.S. embassy. *Id.* ¶¶ 8-9. The embassy then transfers the case to one of nine Resettlement Support Centers across the world for further processing. *Id.* ¶ 9. These Centers process refugee applications, prepare case files, and initiate security checks. *Id.* ¶ 10. Once the case files are prepared, the applicant interviews with the U.S. Citizenship and Immigration Services to establish eligibility for refugee status and resettlement in the United States. *Id.* ¶ 12.

If the refugee is eligible, the case proceeds through multiple layers of security and medical screening, most of which apply separately to every member of the family in the refugee application, including children. *Id.* ¶¶ 12-13; D. Ct. Doc. 336-3 (Hetfield Supp. Decl. ¶¶ 11-16) (detailing the various steps including an Inter-Agency Check involving numerous U.S. intelligence agencies). As the court of appeals observed: "The sum total of these hurdles means that refugees with formal assurances have been reviewed by: UNHCR, the National Counterterrorism Center, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Defense, the Department of State, and others in the U.S. intelligence community." App. Add. 25 n.11.

Only after all this is complete does a refugee obtain a "sponsorship assurance" from one of nine private non-profit organizations in the United States known as "resettlement agencies." D. Ct. Doc. 301-1 (Bartlett Decl. ¶ 14); D. Ct.

Doc. 297-3 (Hetfield Decl. ¶ 16). *Amicus* HIAS is one of these nine resettlement agencies. On a weekly basis, the resettlement agencies review the case files of specific refugees who are seeking sponsorship assurance to evaluate the fit between the needs of each refugee and the resources of the local communities where the agencies' affiliates are based. App. Add. 26; D. Ct. Doc. 301-1 (Bartlett Decl. ¶ 18); D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 16); U.S. Dep't of State, *The Reception and Placement Program*.[2] If, after evaluating the refugee's needs and the capacity of its own network of affiliates, a resettlement agency decides that one of its affiliates can sponsor the refugee, it provides a written "assurance." *Id.*; D. Ct. Doc. 301-1 (Bartlett Decl. Ex. 3 (attaching sample form of an assurance)). An assurance is a formal, documented commitment by the resettlement agency and its affiliate (together, "resettlement entities") to arrange for the reception of the refugee and provide individualized, specialized assistance before and after his or her arrival in the United States. D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 16-17).

Once a resettlement agency provides an assurance, information about the agency is communicated to the refugee, *see* U.S. Dep't of State, *The Reception and Placement Program*, *supra*, and the resettlement entities begin the process of preparing for the refugee's arrival, D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 17). Once they receive an assurance, after selling possessions and terminating any leases and employment, refugees typically travel to the United States within two to six weeks. *Id.* at 18; *see* App. Add. 26 n.13.

[2] *Available at* https://www.state.gov/j/prm/ra/receptionplacement/index.htm.

During that period, resettlement agencies complete an intensive process to welcome the refugee to the United States. *See* App. Add. 28 (noting agencies' "substantial investment in preparing for resettlement"). In advance of the refugee's arrival, they undertake substantial preparations to assure that there will be adequate living arrangements and assistance for a smooth transition. D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 20). The resettlement entities ensure that an arriving refugee is greeted at the airport, transported to already-furnished living quarters, provided with food and clothing, and connected to necessary medical care. *Id.* ¶¶ 19-21; D. Ct. Doc. 301-1 (Bartlett Decl. Ex. 2 (outlining entities' obligations for pre-arrival and post-arrival services)). Resettlement entities also provide case management services, which may include an initial safety orientation, facilitating school enrollment, and assisting with employment and public benefits. D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 20). Preparation for a refugee's arrival thus involves a substantial investment of time and resources by a resettlement agency. App. Add. 28.

ARGUMENT

I. THE COURTS BELOW CORRECTLY CONCLUDED THAT RESETTLEMENT AGENCIES HAVE BONA FIDE RELATIONSHIPS WITH REFUGEES FOR WHOM THEY HAVE PROVIDED A FORMAL ASSURANCE OF SPONSORSHIP.

1. The courts below correctly concluded that, under this Court's order, the government cannot apply the Executive Order to bar entry of refugees who have received a formal assurance of sponsorship from a U.S. resettlement agency, because those refugees have a "bona fide relationship with a[n] . . . entity in the

United States." *IRAP*, 137 S. Ct. at 2088. A resettlement agency's assurance of a particular refugee is, without doubt, "formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Executive Order]." *Id.*; *see* D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 17) (describing the formation and documentation of the refugee-resettlement agency relationship). And resettlement entities suffer very real harm from the order. *See infra*. Thus, their relationship with assured refugees qualifies under the clear terms of this Court's order.

Indeed, this Court explained that the injunctions in this case and *IRAP* applied to both "respondents" and "parties similarly situated to them—that is, people or entities in the United States who have relationships with foreign nationals abroad." *IRAP*, 137 S. Ct. at 2087; *see also id.* at 2088 ("[T]he facts of *these cases* illustrate the sort of relationship that qualifies.") (emphasis added). *Amicus* HIAS is a respondent in *IRAP* and has relationships with refugees abroad for whom it has provided assurances. *See, e.g.*, Doc. No. 93, First Amended Complaint, *IRAP v. Trump*, No. 17-cv-361 (D. Md. filed Mar. 10, 2017), ¶¶ 161-166 (discussing HIAS's assured clients).

2. The touchstone of this Court's equitable analysis was whether a U.S. individual or entity could "legitimately claim concrete hardship" if a noncitizen were to be excluded. *IRAP*, 137 S. Ct. at 2089. It found such hardship to exist whenever a noncitizen has a credible claim of a "bona fide relationship" with a U.S. person or entity. *Id.* The government is simply wrong when it asserts, without citing any factual support, that "the exclusion of an assured refugee [cannot] plausibly be

thought to 'burden' a resettlement agency . . . ." App. 24. In fact, the record demonstrates that resettlement agencies like HIAS experience concrete harm whenever the government excludes refugees for whom the agency has provided formal assurances and invested resources preparing for resettlement.

First, resettlement entities face potentially devastating economic harm. For each refugee they do not resettle, they lose the $950 that they are allocated to provide services for that particular person. D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 22); *see also* Ct. App. Doc. 10-2 (Declaration of Lavinia Limon in support of Emergency Motion to Intervene ¶¶ 34-35) (describing layoffs at USCRI resulting from the freeze to USRAP); App. Add. 29-30 (noting "concrete hardship through the loss of federal funds withheld") (citing *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 730 (S.D. Ind. 2016) (holding that a resettlement non-profit's loss of federal funding is an injury for Article III purposes), *aff'd,* 838 F.3d 902 (7th Cir. 2016) (Posner, J.)). Moreover, "[i]f a refugee does not arrive in the United States, or is delayed in arriving, the agency will lose the money and resources it has already expended in preparing for arrival, including securing rental housing, buying furniture, and arranging for basic necessities." App. Add. 28 (citing *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 262-63 (1977) (recognizing economic injury based on resources already invested in a project)); *see* D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 17-22). To give one specific example, HIAS had partnered with a synagogue and a church who raised funds to rent and furnish an apartment for a Syrian refugee family that it had assured—only to find out that the

family may not arrive because of the government's interpretation of this Court's Order. D. Ct. Doc. 336-3 (Hetfield Supp. Decl. ¶ 9).

Resettlement entities face equally significant non-economic hardships when formally assured refugees are denied entry. As the court of appeals recognized, "[a]ssisting refugees and providing humanitarian aid are central to the core belief systems of resettlement entities and their employees. Efforts to work on behalf of marginalized and vulnerable populations are undercut when the Government bars from entry formally assured refugees." App. Add. 30 (citing *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 (D.C. Cir. 1987)). That mission is often rooted in the religious beliefs of an entity, its employees, and its affiliates. *See, e.g.*, D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 4) (explaining that HIAS's resettlement work is "an expression of[] the organization's sincere Jewish beliefs," and that failing to carry out that work "violates HIAS's deeply held religious convictions").[3]

Moreover, the commitments that resettlement entities and their partners make to the refugees they assure are individualized and meaningful. In order to effectively resettle an assured refugee, entities must develop an understanding of the particular person or family they are assuring and mobilize a community to receive them. For example, resettlement organizations recruit U.S. foster parents

[3] *See also, e.g.*, United States Conference of Catholic Bishops, Migration & Refugee Services, http://www.usccb.org/about/migration-and-refugee-services/ ("Grounded by our belief in Jesus Christ and Catholic teaching, Migration and Refugee Services (MRS) fulfills the commitment of the U.S. Catholic bishops to protect the life and dignity of the human person. We serve and advocate for refugees, asylees, migrants, unaccompanied children, and victims of human trafficking."); Episcopal Migration Ministries, Our Mission, https://episcopalmigrationministries.org/our-mission/ ("Episcopal Migration Ministries (EMM) lives the call of welcome by supporting refugees, immigrants, and the communities that embrace them as they walk together in The Episcopal Church's movement to create loving, liberating, and life-giving relationships rooted in compassion.").

for minors living abroad without parental support, provide training for those families, and facilitate delivery of a picture and letter of welcome from the family to the refugee child waiting to travel to the United States. *See* Andrea Gillespie, *Left Behind: Refugee Ban Abandons Vulnerable Orphans*, Human Rights First, Aug. 2, 2017.[4] The government's refusal to recognize assurances as bona fide relationships not only leaves these children in danger for no conceivable reason, but also harms the U.S. families who are waiting to welcome a new family member. *See, e.g.,* Ellen Knickmeyer, *Trump's Travel Ban Keeps Orphan Kids from U.S. Foster Families*, Associated Press, July 30, 2017.[5]

And the many community members and volunteers who support newly arrived refugees—from storing donated furniture to showing families how to use an American vacuum cleaner—are similarly on a "roller coaster." Dara Lind, *The Americans Waiting to Welcome Refugees Who May Never Come*, Vox, Aug. 1, 2017.[6] These volunteers—including, for example, landlords who have made affordable housing available and who now must decide whether to let properties remain vacant while they find out whether refugees will be allowed to travel—are directly harmed by the ban. *Id.*

The equitable balance with regard to these relationships thus easily measures up to the examples this Court cited as meriting protection—such as those between a university and an admitted student, between a company and a hired

[4] *Available at* http://www.humanrightsfirst.org/blog/left-behind-refugee-ban-abandons-vulnerable-orphans.
[5] *Available at* https://apnews.com/64b2fbf5026d4d1abf6b4eefbc6ec78a.
[6] *Available at* https://www.vox.com/policy-and-politics/2017/8/1/16036526/refugees-ban-trump-volunteer.

employee, or between an *audience* and a lecturer. *IRAP*, 137 S. Ct. at 2088; *see* App. Add. 30-31 (citing *Exodus Refugee Immigration, Inc.*, 165 F. Supp. 3d at 732 (recognizing close relationship between resettlement non-profit and refugees that it had agreed to resettle)).

3. The government does not dispute that refugee assurances are "formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Executive Order]." *IRAP*, 137 S. Ct. at 2088. Nor does it dispute that, when the government bans assured refugees, resettlement entities lose economic resources, waste the significant investments they have made preparing to help refugees adjust to life in the United States, and suffer non-economic harms to their mission and community relationships.

Instead, the government contends that its own part in the refugee resettlement process means that resettlement entities have *no* relationship with the refugees they select and commit to shepherd through the resettlement process. App. 26 (asserting that the "fundamental point" is "an assurance agreement does not create any relationship whatsoever with the refugee") (emphasis omitted). That contention deeply misunderstands the entities' role in the resettlement process.

A resettlement agency assesses a particular refugee's needs and its own capacity; commits to resettling that particular refugee; begins a host of preparations for the refugee's arrival; and, upon arrival, welcomes that particular person to the country and facilitates his or her resettlement. The resettlement agency chooses to form a relationship with a particular person, makes commitments, and invests

resources preparing for the person's arrival—a level of investment at least as significant as an employment or educational relationship, and substantially more so than the fleeting connection a lecturer has with any given member of an audience wishing to hear his views. Indeed, if the diffuse and contingent connection between a lecturer and his future audience, whoever that may be, qualifies as a "relationship," there can be no doubt as to the concrete, individualized, and extensive relationship with a resettlement agency.

The government nonetheless argues that the entity-refugee relationship is insufficient because the assurance itself is technically an agreement between the entities and the federal government. App. 23. But the role of the government in this process does not diminish the commitment that the *entities* make to the refugees themselves, the steps that the entities take in anticipation of refugees' arrival once the assurance is issued, or—key to this Court's analysis—the hardship the entities experience if the refugees they have assured do not arrive. Besides, it is not the assurance per se that is protected from the Executive Order, but the entity's *relationship* to the refugee that necessarily results from it.

The government also repeatedly stresses that resettlement agencies "typically" are not in direct contact with assured refugees before arrival. App. 2, 10, 15, 18, 24, 26, 27. This is a red herring. The question under this Court's order is not whether a U.S. person or entity has "contact" with a noncitizen subject to the ban; it is whether a relationship exists such that the noncitizen's exclusion would

impose "concrete burdens." *IRAP*, 137 S. Ct. at 2087. As explained above, just such a relationship exists.

Resettlement entities may not always interact directly with refugees prior to their arrival, but they do expend significant resources and marshal a host of individualized services for each refugee prior to arrival, based on personal information they receive about each refugee they agree to resettle. App. Add. 31-32. Refugees similarly receive information about the non-profit that has agreed to sponsor them. *See* Dep't of State, *The Reception and Placement Program*, *supra.* This level of interaction is not meaningfully different from that involved in other protected bona fide relationships—for example, a college's decision to admit a perspective student based solely on written application materials.[7] The government conceded below that indirect relationships, through intermediaries, do in fact "count." App. Add. 31 n.15.

Indeed, nearly all the entity relationships recognized by this Court's opinion share a similar structure to the assurance relationship. Just as the resettlement entity provides an assurance partly in anticipation of future resettlement activities, an employer makes a job offer in anticipation of the future work relationship, often based solely on the assurances of a third-party recruiter; a university admits a student in anticipation of the future study relationship; and *whoever* invites a

[7] Nor is it relevant that the communication is typically handled through a third party prior to the refugee's arrival. For example, speaking invitations for lecturers are often handled through third-party speaker bureaus*, see, e.g.*, American Program Bureau: Speaking to the World, https://www.apbspeakers.com, and individuals applying to college may do so through a third-party application processor, *see* The Common Application, Inc., *Fact Sheet* (2016) (describing third-party entity through which students can apply to college), http://www.commonapp.org/about-us/fact-sheets. *See* App. Add. 32-33.

lecturer does so in anticipation of the future relationship the lecturer will have with his or her as-yet unformed audience. The government's rule thus breaks faith with this Court's explanation of which entity relationships qualify.

The government resists this conclusion by asserting that, in addition to the criteria established by this Court, individuals must also demonstrate a "freestanding connection" to a U.S. entity, "separate and apart from the refugee-admissions process." App. 24. But that requirement is nowhere to be found in the Court's opinion or its reasoning. The government's role in facilitating a relationship does not render the relationship any less bona fide: Whether the government is involved has nothing to do with whether a relationship is "formed in the ordinary course, rather than for the purpose of evading EO–2." *IRAP*, 137 S. Ct. at 2088; *see also* App. Add. 14 n.5. Nor does it reduce the harm that U.S. entities or individuals would face if the relationship were severed by the entry ban. Under the government's theory, if a federal agency helped facilitate an invited lecture or an employment relationship, those relationships would suddenly fall outside the protection of the injunction, no matter the harm to the U.S. audience or employer.

Moreover, the additional criteria that the government would read into this Court's opinion ignore what USRAP is. The Refugee Act of 1980 set out the government's role in this process, which relied on and incorporated the longstanding private refugee resettlement work of organizations like HIAS and USCRI. D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 2) (stating that HIAS has been providing refugee resettlement services since 1881); Ct. App. Doc. 10-2 (Limon Decl. ¶ 4) (USCRI

founded in 1911). The government cannot be the sole source of—and give the sole meaning to—relationships that were being formed for a hundred years before the Refugee Act. Through USRAP, Congress sought to recognize and support those relationships, *see, e.g.*, H.R. Rep. No. 608, 96th Cong., 1st Sess. 6 (1979) ("Refugee resettlement in this country has traditionally been carried out by private voluntary resettlement agencies . . . . The Congress recognizes that these agencies are vital to successful refugee resettlement."), not diminish them as the government tries to do here. *Contra* App. 22-23 (portraying resettlement agencies as government contractors).

II. THE DECISIONS BELOW AVOID SEVERE, UNNECESSARY, AND IRREPARABLE HARM TO FULLY VETTED REFUGEES.

The decisions below are not only correct, but avoid potentially catastrophic results for the refugees themselves. As the court of appeals recognized in directing the prompt issuance of the mandate: "Refugees' lives remain in vulnerable limbo during the pendency of the Supreme Court's stay. Refugees have only a narrow window of time to complete their travel, as certain security and medical checks expire and must then be re-initiated. Even short delays may prolong a refugee's admittance." App. Add. 35.

The court's concerns were amply founded. Refugees at this stage of the process have a set window to complete their travel—if they miss this window, the security and medical checks that they passed will begin to expire. D. Ct. Doc. 336-3 (Hetfield Supp. Decl. ¶¶ 12-16). Once a check expires, it must be re-initiated. *Id.* ¶ 17. But because each security check can take months or even years to complete,

the expiration of even one can have a cascading effect, as other clearances expire while the first is being re-processed. *Id.* ¶ 19. As a result, even relatively short-term delays in the resettlement process reverberate for far longer.

These delays cruelly and unnecessarily harm people who have survived violence and persecution, passed months of rigorous screening and vetting, and seek the safety that this country can offer. Refugees awaiting travel include an Iraqi interpreter who helped the U.S. government rebuild Falluja and survived two assassination attempts and three years of separation from his family, D. Ct. Doc. 336-6; a gay Iraqi engineer whose father repeatedly tortured him, whose refugee application was granted months ago, and who has been waiting in Turkey for a travel date; and dozens of vulnerable children already assigned to foster families in the United States whom the ban prevents from traveling. Knickmeyer, *supra*.

These harms to refugees abroad, which follow from even a short period of suspension, directly harm refugee agencies on U.S. soil. The suspension undermines resettlement agencies' core religious and humanitarian missions and imposes significant financial harms as well. *See supra*; *contra* App. 18-19 (suggesting that "brief delay" will not injure respondents). And in any event, the government has offered no representation that the delay will be brief—in fact, the Order provides for a possible indefinite ban, Order § 2(e).

The potentially devastating effect of even a short travel delay further underscores that the equitable balance strongly favors exempting fully-vetted, formally assured refugees from the ban. The government warns of "uncertainty and

confusion," App. 32, which rings hollow after the many abrupt changes and reversals the government has itself imposed both as to the bans themselves and the implementation of this Court's stay. In any event, such considerations pale in comparison to the real human costs. A decision not to protect relationships formed by assurances of sponsorship by U.S. resettlement entities would jeopardize the lives of the approximately 24,000 refugees who have already completed a stringent vetting process. D. Ct. Doc. 301-1 (Bartlett Decl. ¶ 17). And introducing any further delay into the process will likely result in at least one clearance expiring for each refugee. D. Ct. Doc. 336-3 (Hetfield Suppl. Decl. ¶ 18). A stay or reversal of the district court's order could therefore result in not only a temporary delay for many of these refugees, but an effective lifetime ban.

III. THE DECISIONS BELOW STILL ALLOW THE GOVERNMENT TO APPLY THE BAN TO REFUGEES WITHOUT BONA FIDE RELATIONSHIPS TO INDIVIDUALS OR ENTITIES IN THE UNITED STATES.

The government's concern that the district court's order "eviscerates this Court's partial stay," App. 18, is misplaced. This Court's ruling allowed the Executive Order to be implemented as to refugees whose exclusion would not harm any U.S. entities or persons, and the district court's ruling does the same. As the court of appeals recognized, "[m]ore than 175,000 refugees currently lack formal assurances," App. Add. 33, so absent a separate connection to the U.S. over 85 percent of refugees currently in USRAP would remain banned if the Ninth Circuit's ruling were allowed to go into effect.

The government nevertheless complains that the number of people who already have assurances may exceed the number of people whom it can schedule for travel before the end of the fiscal year on September 30, and that therefore the district court injunction does not as a practical matter allow it to apply the Executive Order to bar any refugees from entering the country. App. 28-29. This argument is fundamentally mistaken.

First, it mistakes this Court's equitable balance for a numerical one. The Court did not predict or provide that any number or percentage of refugees would be protected by the injunction as the case proceeds with the stay in place. Instead, it focused on *who* should be protected. Where a refugee's connection to an entity is formal, documented, and formed in the ordinary course, the government's desire to

apply the ban is "outweigh[ed]" by the harm that the U.S. entity would suffer if its client is excluded. *IRAP*, 137 S. Ct. at 2087.

Second, the government's argument is framed as though Section 6 of the Order acts only upon the *entry* of refugees. But that is simply not so. The Order suspends for 120 days not just travel, but also "decisions on applications for refugee status," Order § 6(a), and the district court's ruling regarding assurances does *nothing* to disturb the application of Section 6 to such decisions prior to the (very late) assurance stage. *See* App. Add. 33-34. The government's assertion that the decisions below render the stay a "dead letter," App. 22, is thus plainly incorrect. The Executive Order still freezes a significant portion of the refugee program to the detriment of hundreds of thousands of people who are fleeing persecution and seeking refuge in this country.

Third, the fact is the stay—as correctly interpreted by the lower courts—*will* impact who is and is not admitted to the country during the 120-day ban period. In *amici*'s experience, many refugees are able to travel to the U.S. within four months of receiving assurances, and ahead of others who received assurances earlier. That is so because, for a variety of reasons, some applications move faster than others. In the absence of this Court's stay, many individuals who did not have assurances on June 26 (when the stay issued) would thus have been able to enter the country by October 24 (when the refugee ban expires). But because the stay has frozen their applications, those individuals will not be allowed in during the ban period. Thus even if the total number of admissions during the ban period is the same with or

without the stay, *which* refugees are admitted is affected by this Court's stay—and that is an all-too-real impact for those whose applications have been frozen. It is thus simply wrong for the government to suggest the district court's order rendered this Court's stay a "nullity." App. 28.

Fourth, through its control over the adjudication process and travel bookings, the government has *already* reduced the number of refugees who have been able to enter the United States by tens of thousands. On January 20, 2017, the United States was on pace to hit the existing admissions cap of 110,000 refugees for this fiscal year—meaning approximately 9,000 refugees would be admitted every month.[8] Since then, however, the pace of booking refugees for travel has slowed considerably, to under 2,000 admissions per month. Karoun Demirjian et al., *"Refugee Processing Has Ground to a Halt": A Group of Senators Wants to Know Why*, Wash. Post, May 4, 2017.[9] As a result, even if all currently assured refugees are admitted this fiscal year, the government will still have admitted *forty thousand fewer refugees* than could have been admitted absent the bans. *Id.* ("[R]esettlement officials say that at the current pace, there is no way the country could take in more than about 65,000 refugees."). In light of its own success at excluding refugees despite the injunction, and its own efforts to create a backlog of assured refugees,

[8] Phillip Connor et al., *U.S. on Track to Reach Obama Administration's Goal of Resettling 110,000 Refugees This Year*, Pew Research Center (Jan. 20, 2017), http://pewrsr.ch/2jwYQvg.

[9] *Available at* https://www.washingtonpost.com/powerpost/refugee-processing-has-ground-to-a-halt-a-group-of-senators-want-to-know-why/2017/05/04/d49aee2a-30d6-11e7-9534-00e4656c22aa_story.html?utm_term=.a3d911535e3a.

the government cannot be heard to complain that it has been unfairly precluded from preventing the resettlement of even more refugees.

This Court should thus decline to stay the mandate. Permitting the Ninth Circuit's judgment to take effect would simply allow refugees who have already obtained assurances of sponsorship from U.S. resettlement entities and passed the rigorous vetting process to be welcomed into the country during this fiscal year, thus sparing the resettlement entities substantial, and concrete, hardships.

CONCLUSION

For the foregoing reasons, *amici* ask that the Court deny the government's Application for a Stay of the Mandate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Omar C. Jadwat, a member of the Supreme Court Bar, hereby certify that three copies of the foregoing Brief of the International Refugee Assistance Project and HIAS, Inc. was served via electronic mail and Federal Express on September 12, 2017 on:

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