No. 16-1540 (17A275)

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.

REPLY IN SUPPORT OF APPLICATION FOR A STAY OF THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AFFIRMING THE MODIFIED PRELIMINARY INJUNCTION

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

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Respondents offer no valid justification for permitting the modified injunction the court of appeals affirmed to nullify this Court's prior stay rulings while this Court decides the merits of the underlying injunction. Respondents' procedural objections to a stay are insubstantial. And their attempt to square the Ninth Circuit's decision with this Court's prior stay rulings does not make any sense. There are no new facts to adjudicate -- only the same legal question of the correct interpretation of this Court's decisions. Nothing relevant has changed since this Court entered

its earlier stays, and its intervention is again warranted to prevent those rulings from being frustrated.

1. Respondents incorrectly assert (17A275 Resp. to Appl. for Stay (Opp.) 8-10) that this Court's intervention is procedurally improper. As the government explained, the Court undoubtedly has authority to prevent the lower courts' decisions from eviscerating this Court's own prior stay rulings while this Court decides the underlying merits. See 17A275 Gov't Stay Appl. 17-18; see also 28 U.S.C. 1651(a). In any event, respondents do not dispute that the Court may grant certiorari to review the Ninth Circuit's latest decision and may grant a stay while it considers that petition and reviews that decision. Opp. 10-12. Whatever avenue this Court deems most appropriate, it has the authority to intervene to prevent frustration of its rulings here.

Respondents' suggestion (Opp. 1) that the Court should not exercise that authority "for the third time" in this case disregards the fact that the Court twice granted the government's prior stay requests in substantial part. The Court's intervention is needed again only because the lower courts failed to heed those rulings. Respondents' contention that the Court should deny a stay this time because the refugee provisions of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), will expire soon has things backwards. A stay is urgently needed precisely so that the status quo under this Court's July 19, 2017, stay ruling

will continue and those provisions can operate as intended while they are in effect.

2. This Court's July 19, 2017, stay ruling by itself establishes that the government is likely to succeed on the merits and will suffer irreparable harm without a stay. 17A275 Gov't Stay Appl. 17-18; see 16-1540 Order (July 19, 2017). Respondents are left to argue (Opp. 14-16) only that the Court's July 19 ruling did not definitively resolve the merits of whether a refugee resettlement-assurance agreement constitutes a qualifying "bona fide relationship" between a refugee and a U.S. person or entity within the meaning of this Court's June 26 stay ruling. Trump v. International Refugee Assistance Project, 137 S. Ct. 2080, 2089 (2017) (per curiam) (IRAP). That argument misses the point. Respondents do not and cannot dispute that the Court's July 19 ruling necessarily found a likelihood that the government will succeed on the merits. That is all the Court must find with respect to the merits to grant a stay now.

Respondents contend that the correct interpretation of this Court's June 26 ruling is "factbound" (Opp. 2, 8, 11, 12) and that the relevant facts have developed further since July 19 (Opp. 16-17). Respondents are wrong on both counts. The critical question is the meaning of a decision of this Court: whether a contract between the federal government and a refugee-resettlement agency, to which a refugee is not a party, gives the refugee a "bona fide relationship with a person or entity in the United

States." IRAP, 137 S. Ct. at 2089. The facts about assurance agreements and refugee-resettlement agencies' activities are for present purposes undisputed. As respondents themselves underscore (Opp. 22), the question is the "meaning of the term 'relationship'" in this Court's June 26 decision -- a legal question that this Court, not the lower courts, is best positioned to decide.

Nor have any "subsequent developments" (Opp. 16) changed the landscape since this Court issued its July 19 stay ruling. Respondents do not contend that the operation or terms of assurance agreements have been altered or that their fundamental nature as an agreement between the government and resettlement agencies has changed. Respondents merely argue (Opp. 16-17) that the purported harms to refugee-resettlement agencies from the exclusion of refugees whose only alleged connection to this country is the assurance agreement have now materialized. The question, however, is not what injuries resettlement agencies purport to suffer, but whether they have a "relationship with" the refugee independent of the admission process. IRAP, 137 S. Ct. at 2089. They do not.

3. On that critical question, respondents' submission adds nothing to the analysis and merely echoes the lower courts' errors. Like the court of appeals, respondents fail to show how an agreement between the federal government and a resettlement agency constitutes the kind of relationship this Court contemplated in its June 26 stay ruling. See Opp. 17-24. Respondents' analogy (Opp. 22) to a hypothetical U.S. couple who intend to adopt a child

from overseas and who work through an adoption agency illustrates what is lacking for refugee-resettlement agencies. An adoption agency that stands in the couple's shoes and acts as their agent may form a relationship with the child on the couple's behalf. By contrast, the federal government does not act as the agent of a refugee-resettlement agency. 17A275 Gov't Stay Appl. 27-28. Nor is the resettlement agency an agent of the refugee.

Like the Ninth Circuit, respondents also offer no plausible explanation for why the Court would issue a stay allowing Section 6(a)'s refugee suspension and Section 6(b)'s refugee cap to "take effect," IRAP, 137 S. Ct. at 2089, if the Court intended those provisions to be practically inoperative and exclude no refugees. See Opp. 24-27. Respondents echo (Opp. 25) the court of appeals' conclusion that deeming an assurance agreement sufficient gives this Court's partial stay meaning because it allows the government to refrain from adjudicating applications of refugees who would not enter the United States in any event. That illogical reading of this Court's stay ruling is wrong, 17A275 Gov't Stay Appl. 30-31, and gains nothing from repetition.

Respondents also briefly contest (Opp. 26) whether the approximately 24,000 refugees who have assurances exceed the number who would likely enter while Section 6(a) and (b) are in effect. But whereas the government submitted evidence to establish that fact below, D. Ct. Doc. 301-1, at 5 (July 3, 2017) (Bartlett Decl. ¶ 17), which neither lower court questioned, respondents

offered nothing. Even now all respondents offer is speculation and inferences based on the original Fiscal Year 2017 refugee cap and data from the prior year regarding refugee admissions. Opp. 26. The Court should not permit its own rulings to be rendered meaningless based on respondents' conjecture.

CONCLUSION

The Court should stay the court of appeals' mandate affirming the district court's modified injunction with respect to refugees covered by an assurance, pending this Court's disposition of the underlying merits of the original preliminary injunction barring enforcement of Section 6(a) and (b) of the Order. In the alternative, the Court should construe the application as a petition for a writ of certiorari and stay the mandate pending its disposition of the petition. The Court then could either hold the petition pending the decision on the underlying merits, grant the petition and summarily reverse, or grant review and consolidate with its consideration of the underlying merits.

Respectfully submitted.

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