

ACLU of Hawai'i Foundation

Mateo Caballero 10081
P.O. Box 3410
Honolulu, Hawai'i 96801
Tel: (808) 522-5908
Fax: (808) 522-5909
mcaballero@acluhawaii.org

Attorneys for *Amici Curiae*

(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

**BRIEF OF INTERNATIONAL
REFUGEE ASSISTANCE
PROJECT AND HIAS AS *AMICI
CURIAE* IN SUPPORT OF
PLAINTIFFS' MOTION TO
CLARIFY SCOPE OF
PRELIMINARY INJUNCTION**

ADDITIONAL COUNSEL

National Immigration Law Center

Karen C. Tumlin†
Nicholas Espíritu†
Melissa S. Keaney†
Esther Sung†
3435 Wilshire Boulevard, Suite 1600
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org
espiritu@nilc.org
keaney@nilc.org
sung@nilc.org

National Immigration Law Center

Justin B. Cox
1989 College Ave. NE
Atlanta, GA 30317
Tel: (678) 404-9119
Fax: (213) 639-3911
cox@nilc.org

† *pro hac vice* forthcoming

Attorneys for *Amici Curiae*

**American Civil Liberties Union
Foundation**

Omar C. Jadwat†
Lee Gelernt†
Spencer E. Amdur†
David Hausman†
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org
lgelernt@aclu.org
samdur@aclu.org
dhausman@aclu.org

**American Civil Liberties Union
Foundation**

Cody H. Wofsy†
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwofsy@aclu.org

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	2
A. <i>Prior Proceedings</i>	2
B. <i>The Government Plans to Apply the Ban to Refugees with Bona Fide Connections to U.S. Entities</i>	3
C. <i>HIAS and IRAP</i>	4
ARGUMENT	5
A. <i>The Injunction Protects Refugees Who Have Bona Fide Relationships to U.S.-Based Refugee Assistance Entities</i>	5
B. <i>The Injunction Categorically Protects Numerous Categories of Refugees</i> ..	8
C. <i>The Government May Not Suspend Any Component of the U.S. Refugee Admissions Program</i>	11
CONCLUSION	11

INTRODUCTION

The government has grossly misconstrued the Supreme Court’s decision in this case as it applies to refugees. The amici—International Refugee Assistance Project (“IRAP”) and HIAS—are respondents in *IRAP v. Trump* who provide legal and resettlement services to refugees. They respectfully ask this Court to clarify that, under the Supreme Court’s order, the injunction of Sections 6(a) and 6(b) of Executive Order 13780 continues to protect their clients, along with clients of similarly situated organizations. By claiming the right to exclude such refugees, the government is threatening to violate the Supreme Court’s clear instructions by excluding thousands of refugees with bona fide connections to U.S. entities. The amici also ask this Court to clarify that certain categories of refugees are categorically exempt from the ban, and that the injunction prevents the government from shutting down any component of the U.S. Refugee Admissions Program (“USRAP”).¹

¹ Amici agree with Hawaii that the government has adopted an improperly narrow interpretation of which individuals have “bona fide relationship[s] with . . . person[s]” in the United States, and that the process set forth in the reported State Department guidance improperly applies a presumption against the applicant. *See* Mem. in Support of Emergency Motion to Clarify, *Hawaii v. Trump*, No. 17-50, at 7-11 (D. Haw. June 29, 2017). *See* Mem. in Support of Emergency Motion to Clarify, *Hawaii v. Trump*, No. 17-50, at 7-11 (D. Haw. June 29, 2017).

BACKGROUND

A. Prior Proceedings

Executive Order 13780, which President Trump issued on March 6, 2017, imposed two restrictions on refugee admissions. Section 6(a) suspended travel and application processing under the U.S. Refugee Assistance Program (“USRAP”) for 120 days. Section 6(b) lowered the annual refugee cap for fiscal year 2017 from 110,000 to 50,000, and suspended entry of any refugees beyond that number.

The day before its effective date, this Court enjoined all of Section 6. *See Hawaii v. Trump*, ___ F. Supp. 3d ___, 2017 WL 1011673, at *17 (D. Haw. Mar. 15, 2017) (temporary restraining order); *Hawaii v. Trump*, ___ F. Supp. 3d ___, 2017 WL 1167383, at *8-9 (D. Haw. Mar. 29, 2017) (preliminary injunction). On appeal, the Ninth Circuit upheld the injunction as it applied to the ban in Section 6(a) and the lowered cap in Section 6(b). *Hawaii v. Trump*, ___ F.3d ___, 2017 WL 2529640, at *17-18, *21-23 (9th Cir. June 12, 2017).

The government filed a petition for certiorari and an application for a stay pending appeal before the Supreme Court. On June 26, 2017, the Supreme Court granted certiorari in this case and consolidated it with its companion case in the Fourth Circuit, in which amici are plaintiffs. *See Trump v. Int’l Refugee Assistance Project (“IRAP”)*, 582 U.S. ___, slip op. at 9 (2017). The Court also partially stayed the injunctions in this case and *IRAP*. It held that the injunctions

appropriately “covered not just respondents, but parties similarly situated to them.” *Id.* at 10. But it stayed the injunctions to the extent they applied to “foreign nationals abroad who have no connection to the United States at all.” *Id.* at 11. The government therefore may not apply Sections 2(c), 6(a), or 6(b) against “foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.” *Id.* at 12, 13. For entities, the relationship must be “formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2.” *Id.* at 12.

B. The Government Plans to Apply the Ban to Refugees with Bona Fide Connections to U.S. Entities

Like the *Hawaii* plaintiffs, the *IRAP* plaintiffs contacted the government numerous times seeking an explanation for how the government would implement the Supreme Court’s partial stay. The government failed to provide any information throughout the days leading up to the June 29 effective date.

Finally, hours before it planned to begin implementing the bans, the government posted a “Q&A” document on DHS’s website that revealed an exceedingly narrow interpretation of the Supreme Court’s ruling. The Q&A stated that clients of resettlement agencies and legal services providers lack a bona fide relationship with a U.S. entity. *See* Dep’t of Homeland Security, FAQs on EO

13780, June 29, 2017 (“Q31”).² Hours later, however, and after implementation of the bans had begun, the Q&A was amended to remove that statement. The next day, the State Department issued guidance confirming that it plans to ban refugees despite a documented relationship with a U.S. resettlement agency.³

C. HIAS and IRAP

Amici are U.S.-based entities that provide a variety of services to refugees seeking to resettle in the United States. Both are plaintiffs in *IRAP* and respondents in the consolidated case before the Supreme Court. HIAS is the world’s oldest refugee resettlement agency. Hetfield Decl. ¶ 2. It is one of nine agencies in the United States that contract with the federal government to assist refugees throughout the resettlement process. *Id.* ¶ 16. IRAP provides direct legal services to refugees and others seeking to escape violence and persecution. Heller Decl. ¶ 2. Its staff and pro bono volunteers work directly with individuals abroad throughout their application, travel, and resettlement processes. *Id.* ¶ 4.

² Available at https://www.aclu.org/files/6.29-faq-homeland-security/2017.06.29v1_Frequently_Asked_Questions_Protecting_the_Nation_from_Foreign_Terrorist_Entry.pdf

³ See Dep’t of State, *Information Regarding the U.S. Refugee Admissions Program*, June 30, 2017, available at <https://www.state.gov/j/prm/releases/factsheets/2017/272316.htm>.

ARGUMENT

Without any explanation, the government seeks to exclude thousands of refugees who are clearly protected by this Court’s preliminary injunction. The Supreme Court held that the government may not exclude foreign nationals who can credibly claim a relationship to a U.S. person or entity. And yet the government plans to exclude clients of HIAS, IRAP, and similar U.S. entities, with whom the entities have worked closely for years. Because the government has failed to heed the Supreme Court’s instructions, the amici respectfully ask this Court to clarify the scope of its injunction of Sections 6(a) and 6(b). Amici also seek clarification that the government cannot shut down any component of USRAP or apply the refugee ban to the programs that are categorically protected by the injunction.

A. The Injunction Protects Refugees Who Have Bona Fide Relationships to U.S.-Based Refugee Assistance Entities

The government’s plan to exclude the clients of entities like IRAP and HIAS ignores the Supreme Court’s clear instructions. The Court expressly “[e]ft] the injunctions entered by the lower courts in place *with respect to respondents and those similarly situated.*” Slip Op. at 9 (emphasis added). Both IRAP and HIAS are respondents before the Supreme Court, and both of them “can legitimately claim concrete hardship if [their clients] are excluded.” *Id.* at 13. The government cannot apply Sections 6(a) or 6(b) to their clients or clients of similarly situated

entities, because those relationships are “formal, documented, and formed in the ordinary course.” Slip Op. at 12. Indeed, by explaining that such relationships would *not* suffice if they were formed “simply to avoid [the ban],” the Court made clear that a documented relationship *would* suffice if the relationship is “formed in the ordinary course, rather than for the purpose of evading EO-2.” *Id.*

Moreover, both HIAS and IRAP form relationships with their clients that are at least as close as that between “a lecturer” and “an American audience.” Slip op. at 12. Their client relationships illustrate the type of contact that is sufficient to trigger the injunction’s protection. *See id.* (“The facts of these cases illustrate the sort of relationship that qualifies.”).

HIAS forms relationships with its clients long before they reach the United States. Hetfield Decl. ¶ 7-9. Its staff “develop strong bonds” with refugee clients as they provide a host of legal and mental health services. *Id.* ¶ 10. Once a refugee is assigned to HIAS for resettlement, HIAS provides a formal “assurance” to the federal government that it will provide for the refugee’s entire resettlement process. *Id.* ¶ 16. After providing assurances, HIAS and its affiliates identify and rents housing, provide transportation from the airport, arrange for basic necessities like rent, food, utilities, and medical care, facilitate enrollment in school and public benefits programs, and provide ongoing case management services. *Id.* ¶ 17-21. It is preposterous for the government to claim that this extensive, intimate, and

formally documented contact does not constitute a “bona fide relationship.” *IRAP*, slip op. at 12. The Court should clarify that refugees who have documented relationships with HIAS and the other eight resettlement agencies are protected by the injunction.

IRAP’s client relationships are similarly extensive, formal, and documented. It spends multiple weeks, or even months, interviewing prospective clients. Heller Decl. ¶ 32-33. After executing a formal written agreement, *id.* ¶ 33, IRAP and affiliated attorneys help their clients navigate the resettlement process often over the course of multiple years. *Id.* ¶ 33. IRAP and its network of attorneys investigate clients’ claims, draft legal submissions, prepare clients for interviews, help navigate the USRAP, and often provide non-legal forms of practical assistance, such as assisting with medical needs, mental health needs, housing, and safe passage out of immediate danger. *Id.* ¶ 33-36. IRAP’s clients therefore have a clear relationship with a U.S. entity. The Court should clarify that the government cannot apply Section 6(a)’s ban or Section 6(b)’s cap to any clients of IRAP or any other U.S.-based provider of legal services to refugees.

The Supreme Court made clear why these relationships remain protected. Because HIAS, IRAP, and similar entities have “bona fide relationship[s] with [] particular person[s]” entering as refugees, they can “legitimately claim concrete hardship if th[ose] person[s] [are] excluded.” *IRAP*, slip op. at 13. As they have

explained in the attached declarations, their resources would be diverted, their prior efforts would be wasted, and their staffs and budgets would be stretched thin were their clients of many years to be banned from entering the United States through the USRAP. *See* Hetfield Decl. ¶ 22; Heller Decl. ¶ 37-38. The same is true for other entities that assist refugees in the resettlement process, who also continue to be protected. As the Supreme Court made clear, its examples of bona fide relationships were meant only to *illustrate*, not exhaust, the kinds of relationships that the injunction continues to cover. Slip op. at 12 (“The facts of these cases illustrate the *sort* of relationship that qualifies.”) (emphasis added). Notably, these relationships in no way resemble the one example the Supreme Court gave of a relationship that would *not* be bona fide: a non-profit that “contact[s] foreign nationals” and adds them to client lists “simply to avoid” the Executive Order. *Id.*

B. The Injunction Categorically Protects Numerous Categories of Refugees

In its guidance regarding visa applications, the government properly recognized that many categories of visas are categorically exempt under the Supreme Court’s decision. *See* Dep’t of State, *Executive Order on Visas*, June 29, 2017.⁴ The exact same thing is true of many USRAP programs, yet the government has failed to issue corresponding categorical exemptions.

⁴ Available at <https://travel.state.gov/content/travel/en/news/important-announcement.html>.

A number of USRAP programs are only available to refugees who have a verified close relationship to a person or entity in the United States. *IRAP*, slip op. at 12. In each of these programs, the State Department must determine that the relationship is bona fide before the refugee can even *apply*. This Court should therefore clarify that refugees in the following programs are categorically protected from the ban:

- Priority 3 Family Reunification. Refugees who enter through the Priority 3 process *must* be parents, minor unmarried children, and spouses of individuals who were recently admitted into the United States as refugees or asylees. They must file an Affidavit of Relationship and undergo DNA testing to verify the familial relationship.⁵
- I-730 Beneficiaries. The I-730 process is only available to spouses and minor unmarried children of refugees in the United States. *See* DHS Form I-730.⁶
- Syrian Direct Access Program. This program covers Syrian nationals with an approved I-130 petition, which is limited to spouses, children, parents, and siblings of individuals in the United States.⁷

⁵ Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2017*, at 12-13, *available at* <https://www.state.gov/documents/organization/262168.pdf>.

⁶ *Available at* <https://www.uscis.gov/i-730>.

- Iraqi Direct Access Program. This program covers two groups of Iraqis: I-130 petitioners who are necessarily close relatives of U.S. citizens or legal permanent residents (like the Syrian program), and “U.S.-affiliated Iraqis” who are at risk of persecution based on their employment with the U.S. government, a U.S.-based media organization, or a U.S. government-funded entity “closely associated with the U.S. mission in Iraq.”⁸
- Central American Minors Program. This program allows children from El Salvador, Guatemala, and Honduras to petition for refugee status if they have a parent who is lawfully present in the United States. This program also requires DNA testing to verify the family relationship.⁹
- Lautenberg Program. This program covers certain religious minorities from Eurasia and the Baltics who have “close family in the United States.”¹⁰

⁷ See Dep’t of State, *U.S. Refugee Resettlement Processing for Iraqi and Syrian Beneficiaries of an Approved I-130 Petition*, Mar. 11, 2016, available at <https://www.state.gov/j/prm/releases/factsheets/2016/254649.htm>.

⁸ See generally U.S. Dep’t of State, Bureau of Population, Refugees, & Migration, *Fact Sheet: U.S. Refugee Admissions Program (USRAP) Direct Access Program for U.S.-Affiliated Iraqis* (Mar. 11, 2016), <https://www.state.gov/j/prm/releases/factsheets/2016/254650.htm>.

⁹ See Dep’t of State, *Central American Minors (CAM) Program*, available at <https://www.state.gov/j/prm/ra/cam/index.htm>.

¹⁰ See Dep’t of State, *Proposed Refugee Admissions for Fiscal Year 2017*, Sept. 15, 2016, available at <https://www.state.gov/j/prm/releases/docsforcongress/261956.htm>.

C. The Government May Not Suspend Any Component of the U.S. Refugee Admissions Program

Since the Supreme Court’s ruling on June 26, the government has suggested that it plans to suspend certain components of the refugee pipeline in July, including travel bookings. *See* Hetfield Decl. ¶ 25; Heller Decl. ¶ 26; Dep’t of State, *Background Briefing on the Implementation of Executive Order 13780*, June 29, 2017. But because the government has refused to provide official information on this topic, there has been no confirmation as to whether these reports are true.

It would plainly violate this Court’s injunction for the government to shut down interviews or travel under the USRAP based on the Section 6(a) ban or the Section 6(b) cap, because refugees “who can credibly claim a bona fide relationship with a person or entity in the United States” cannot be subject to either provision. *See IRAP*, slip op. at 13. Accordingly, the Court should clarify that all components of the USRAP must remain in operation.

CONCLUSION

The Court should grant Hawaii’s motion to clarify.

DATED: Honolulu, Hawai'i, June 30, 2017.

/s/ Mateo Caballero
Mateo Caballero 10081
ACLU of Hawai'i Foundation
P.O. Box 3410
Honolulu, Hawai'i 96801
Tel: (808) 522-5908
Fax: (808) 522-5909
mcaballero@acluhawaii.org

National Immigration Law Center

Karen C. Tumlin†
Nicholas Espiritu†
Melissa S. Keaney†
Esther Sung†
3435 Wilshire Boulevard, Suite 1600
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org
espiritu@nilc.org
keaney@nilc.org
sung@nilc.org

National Immigration Law Center

Justin B. Cox
1989 College Ave. NE
Atlanta, GA 30317
Tel: (678) 404-9119
Fax: (213) 639-3911
cox@nilc.org

† *pro hac vice* forthcoming

Attorneys for *Amici Curiae*

**American Civil Liberties Union
Foundation**

Omar C. Jadwat†
Lee Gelernt†
Spencer E. Amdur†
David Hausman†
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org
lgelernt@aclu.org
samdur@aclu.org
dhausman@aclu.org

**American Civil Liberties Union
Foundation**

Cody H. Wofsy†
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwofsy@aclu.org