No. 16-1540 (16A1191)

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAI'I, *et al.*,

Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN OPPOSITION TO PETITIONERS' STAY APPLICATION

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MOTION FOR LEAVE TO FILE

The States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia move this Court for leave to file the enclosed brief as amicus curiae in opposition to defendants' stay application,[1] without 10 days' advance notice to the parties of amici's intent to file as ordinarily required by Supreme Court Rule 37.2(a). In light of the extremely expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice. All parties have consented in writing to the filing of the brief without such notice.

On June 26, 2017, this Court granted certiorari in this case and another case addressing the legality of certain provisions of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017), and partly granted the federal government's request for a stay of the nationwide preliminary injunctions entered in these cases. The Court left in place that part of the injunctions that restrained enforcement of the Order's temporary ban on the entry to the United States of nationals from six majority Muslim countries, or any refugees, where the foreign national seeking admission has a "bona fide relationship with a person

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[1] The defendants in this action are: Donald J. Trump, as President of the United States; the United States Department of Homeland Security; John F. Kelly, as Secretary of Homeland Security; the United States Department of State; Rex Tillerson, as the Secretary of State; and the United States. This motion refers to them collectively as "defendants" or "the federal government."

or entity in the United States." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017). The Court explained that such a relationship can be either "a close familial relationship" with "a person" in the United States, or a "formal, documented" relationship with an entity or organization that was "formed in the ordinary course." *Id.*

Thereafter, the federal government issued guidance narrowly defining the qualifying family relationships. Plaintiffs then challenged that guidance, moving the district court for—among other things—enforcement of the remaining portion of its preliminary injunction, pending this Court's review of the merits in October 2017. On July 13, 2017, the district court held that the federal government's restrictive definition conflicted with this Court's decision of June 26 and partly granted plaintiffs' motion. Defendants now move in this Court for clarification of this Court's June 26 ruling and a stay of the district court's July 13 order pending judicial review.

As set forth in the enclosed brief, the undersigned amici States and our residents will suffer irreparable harms if the July 13 order enforcing the injunction is stayed. The interest of the amici States arises from the fact that many provisions of the Executive Order have threatened and already caused substantial harm to our States, hospitals, universities, businesses, communities, and residents as litigation over the Order's legality continues. While this Court's June 26 decision to leave important aspects of the injunction in place provides critical protection to the state interests endangered by the Order, the amici States have a strong continuing interest in ensuring that this

protection is not diminished by the federal government's restrictive interpretation of the June 26 ruling, which is inconsistent with the ruling's meaning and purpose.

Consequently, the amici States have a distinct perspective on the harms threatened by a stay of the July 13 injunction, and the justifications for preserving the status quo while any judicial review of that order proceeds, that may be of considerable assistance to the Court. We have asserted and documented these harms in briefs in this Court opposing a stay of the initial preliminary injunction,[2] as well as in numerous other cases challenging this Executive Order[3] and its predecessor.[4] Pursuant to Supreme Court Rule 37.1, the undersigned amici States therefore seek to file this brief in order to demonstrate that granting a stay of the July 13 injunction as requested by defendants will result in irreparable harm to our States and residents.

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[2] Va. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos. 16A1190, 16A1191 (Sup. Ct. June 21, 2017).

[3] *See* Second Am. Compl., *Washington v. Trump*, No. 17-cv-00141-JLR (W.D. Wash. Mar. 16, 2017) (challenge by Washington, California, Oregon, New York, Maryland, and Massachusetts, stayed pending appeal in *Hawaii v. Trump*), ECF No. 152; Ill. Amicus Br. (16 States and D.C.), *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Va. & Md. Amicus Br. (16 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153.

[4] *See Washington v. Trump*, 17-cv-00141, 2017 WL 462040, at *2-*3 (W.D. Wash. Feb. 3, 2017) (enjoining travel and refugee bans), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); Mass. & N.Y. Amicus Br. (15 States and D.C.), *Washington v. Trump*, No. 17-141 (9th Cir. 2017), ECF No. 58-2; *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *11 (E.D. Va. Feb. 13, 2017) (enjoining travel ban as applied to Virginia).

CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief in opposition to defendants' stay application.

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INTRODUCTION AND INTERESTS OF THE AMICI STATES

On June 26, 2017, this Court granted certiorari in this case and a companion case addressing the legality of certain provisions of Executive Order No. 13,780, which imposed a 90-day ban on the entry to the United States of nationals from six overwhelmingly Muslim countries, suspended the U.S. Refugee Admissions Program, and lowered the Program's refugee cap.[1] *Trump v. Int'l Refugee Assistance Project (IRAP),* 137 S. Ct. 2080 (2017). The Court partly stayed the district court's injunction against those provisions but expressly left the injunction in place with respect to foreign nationals who have a "bona fide relationship with a person or entity in the United States." *Id.* at 2088. The Court explained that such a relationship can be either "a close familial relationship" with "a person" in the United States, or a "formal, documented" relationship with an entity or organization that was "formed in the ordinary course." *Id.*

Notwithstanding that ruling, defendants[2] have issued guidance stating that the federal government intends to enforce the enjoined provisions of the Executive Order against certain close family members of persons in the United States—including grandparents, grandchildren, aunts, uncles, nieces, nephews,

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[1] Executive Order No. 13,780, §§ 2(c), 6(a)-(b) (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017).

[2] The defendants in this action are: Donald J. Trump, as President of the United States; the United States Department of Homeland Security; John F. Kelly, as Secretary of Homeland Security; the United States Department of State; Rex Tillerson, as the Secretary of State; and the United States. This brief refers to them collectively as "defendants" or "the federal government."

and cousins (D. Ct. ECF No. 294-1, at 4 ¶ 11). That exclusion conflicts with the language and rationale of this Court's order preserving the injunction with respect to foreign nationals who have a "bona fide relationship with a person or entity in the United States," as well as the meaning and purpose of the underlying injunction as modified by this Court's partial stay.

Plaintiffs the State of Hawaii and Ismail Elshikh challenged the federal government's guidance. The district court denied plaintiffs' motion to clarify the scope of the remaining injunction,[3] but on July 13, 2017, partly granted plaintiffs' subsequent motion to interpret and enforce the injunction (D. Ct. ECF No. 345, attached as Addendum ("Add.") to Defendants' Motion for Clarification and a Stay of Modified Injunction ("Mot.")). With respect to the standard for determining close familial relationships, the district court held that the federal government's narrow definition conflicts with this Court's June 26 decision, and that plaintiffs' requested injunctive relief was "necessary to preserve the status quo" pending this Court's hearing of the case in October 2017 (Add. 14-15). Defendants filed a notice of appeal in the Ninth Circuit Court of Appeals (D. Ct. ECF No. 346, docketed as 9th Cir. No. 17-16426, July 14, 2017). Defendants also now move this Court for "clarification of [its] June 26, 2017 stay ruling" and a stay of the injunction set forth in the district court's order of July 13 (i) pending this Court's determination of the motion for clarification, or alternatively (ii) pending disposition of any

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[3] D. Ct. ECF No. 322, at *Hawaii v. Trump*, No. 17-cv-50, 2017 WL 2882696 (D. Haw. July 6, 2017), *appeal dismissed*, *Hawaii v. Trump*, No. 17-16366 (9th Cir. July 7, 2017), ECF No. 3.

appeal in the court of appeals, if this Court directs defendants to pursue that review in the first instance.

Amici States New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia submit this brief as amici curiae in opposition to defendants' stay application.[4] This brief supplements plaintiffs' brief by providing the perspective and experience of 15 additional sovereign States and the District of Columbia, all of which have an urgent interest in the outcome of the stay application and preservation of the status quo under the circumstances, given the irreparable harms that will result to the amici States and our residents if a stay of the July 13 injunction is granted.

Like plaintiffs here, the amici States have brought suits challenging the Executive Order and its predecessor on the grounds that certain provisions of those Orders violate the Establishment Clause of the United States Constitution and various other constitutional and statutory provisions.[5] We have also

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[4] The parties have consented to the filing of this brief. Because this Court's expedited briefing schedule did not permit earlier notice, the parties were notified on July 15, 2017. As this date was less than ten days before filing, amici States are concurrently filing a motion requesting leave to file this brief.

[5] Cases challenging this Executive Order: *See* Second Am. Compl., *Washington v. Trump*, No. 17-cv-141 (W.D. Wash. Mar. 16, 2017) (challenge by Washington, California, Oregon, New York, Maryland, and Massachusetts, stayed pending appeal in *Hawaii v. Trump*), ECF No. 152.

Cases challenging predecessor Order: *See Washington v. Trump*, No. 17-cv-141, 2017 WL 462040, at *2-*3 (W.D. Wash.

previously filed briefs amicus curiae in this case, including briefs supporting the entry of a preliminary injunction against the Executive Order, and briefs opposing any stay of such a preliminary injunction.[6] In particular, following this Court's June 26 decision, the amici States filed briefs supporting plaintiffs' motion to interpret and enforce the injunction[7]—which is the subject of defendants' present application for relief.

Amici have a strong interest in plaintiffs' challenge to this Executive Order because many of its provisions have threatened—indeed, have already caused—substantial harm to our residents, communities, hospitals, universities, and businesses while courts continue to adjudicate the Order's lawfulness. The nationwide preliminary injunction initially entered by the district court in this case, along with the nationwide injunction entered in *Trump v. IRAP*, substantially mitigated the harm threatened by the Order. And this Court's decision to leave important aspects of those injunctions in place continues to provide critical protection to the state interests

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Feb. 3, 2017) (enjoining travel and refugee bans), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); Mass. & N.Y. Amicus Br. (15 States and D.C.), *Washington v. Trump*, No. 17-141 (9th Cir. 2017), ECF No. 58-2; *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *11 (E.D. Va. Feb. 13, 2017) (enjoining travel ban as applied to Virginia).

[6] Va. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos. 16A1190, 16A1191 (Sup. Ct. June 21, 2017); N.Y. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos. 16A1190, 16A1191 (Sup. Ct. June 21, 2017); Ill. Amicus Br. (16 States and D.C.), *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Va. & Md. Amicus Br. (16 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153.

[7] D. Ct. ECF Nos. 331, 333.

endangered by the Order. Accordingly, the amici States have a strong interest in ensuring that the protection provided by the remaining portions of the injunction is not diminished by an interpretation that is inconsistent with the meaning and purpose of this Court's directives.

The amici States are particularly concerned that the federal government has construed this Court's phrase "bona fide relationship with a person or entity in the United States" in a manner so narrow that it will not adequately protect the ability of state universities, hospitals, and businesses to recruit and retain students and staff from the affected countries, or otherwise protect the rights of persons in the United States. When foreign nationals decide whether to accept offers of employment or offers of admission to an educational institution in the United States, they take into account whether their close family members will be able to visit them. And during the time that such persons are actually working or studying in the United States, their fundamental familial relationships are profoundly burdened if close family members are prevented from visiting them. The artificially narrow line drawn by the federal government will thus likely impair the ability of institutions in the amici States to recruit and retain individuals from the affected countries who do not wish to endure the hardship of enforced separation from family members with whom they have bona fide "close familial relationship[s]."[8] *Trump v. IRAP*, 137 S. Ct. at 2088.

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[8] Amici States also share the concerns raised by plaintiffs about other aspects of the federal government's guidance, *see* Brief for Hawai'i at 10-15, D. Ct. ECF No. 328-1. And amici States

Nothing in the text or rationale of the Court's order supports the federal government's decision to exclude grandparents, grandchildren, aunts, uncles, nieces, nephews, and cousins (including first cousins), from the list of "close familial relationship[s]" that qualify for the protection of the unstayed portion of the preliminary injunction as a "bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S. Ct. at 2088. Defendants are simply mistaken in suggesting that the district court, by protecting those relationships, has "eliminate[d]" the distinction between "family member" and "close family member" (Mot. at 4, 15, 25-26). The district court was acutely aware that this Court's order required drawing a line between "close familial relationship[s]" and other family relationships (*see, e.g.*, Add. 11-12). Defendants perhaps assume that the district court used the term "cousin" to encompass a wide range of family relationships, but that is not a sensible interpretation of the district court's order. The common and primary definition of "cousin" is "a child of one's uncle or aunt,"[9] and that is the definition that most reasonably fits the purpose of the district court's order, namely, to identify the close familial relationships contemplated by this Court's June 26 decision.

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agree with plaintiffs that there is no basis for this Court to stay the district court's measured approach to the refugee aspects of the injunction. These issues are addressed in detail by plaintiffs and other amici.

[9] *See Oxford Dictionaries*, s.v. cousin (internet); *Merriam-Webster Dictionary*, s.v. cousin (internet). The terms "uncle" and "aunt" are commonly defined to mean a parent's sibling or the spouse of such a sibling. *See Oxford Dictionaries*, s.v. uncle; *Merriam-Webster Dictionary*, s.v. uncle; *Oxford Dictionaries*, s.v. aunt; *Merriam-Webster Dictionary*, s.v. aunt.

Giving effect to the federal government's arbitrarily narrow list of close familial relationships that qualify for the protection of the preliminary injunction will result in the improper exclusion of numerous foreign nationals who have the requisite bona fide connection to a person in the United States, despite this Court's unequivocal holding that the protections for such persons remain in full force.

ARGUMENT

In considering an application for a stay pending judicial review, the Court considers whether (1) the stay applicant has "made a strong showing" of the likelihood of success on the merits; (2) the applicant "will be irreparably harmed absent a stay;" (3) a stay "will substantially injure the other parties interested in the proceeding"; and, finally, (4) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The likelihood of success on the merits is one of the "most critical" factors, *id.*, and the remaining factors require the Court to "balance the equities" when it explores the relative harms as well as the public interest, *Trump v. IRAP*, 137 S. Ct. at 2087 (quoting *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers)). Importantly, a stay "is not a matter of right" and the "party requesting the stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken*, 556 U.S. at 433-34. Defendants have made no such showing here. Thus, a stay is not warranted, as explained below.

I. The Federal Government Has Not Met Its Burden of Establishing a Strong Likelihood of Success on the Merits.

In partially granting plaintiffs' motion to interpret and enforce the portion of the preliminary injunction left in place by this Court's June 26 decision, the district court held that the federal government was interpreting the Court's "close familial relationship" standard in an unduly restrictive manner (Add. 11-15). The federal government has stated that it intends to recognize as bona fide "close familial relationship[s]" protected by the injunction only a specified list of family relationships that do not include grandparents, grandchildren, aunts, uncles, nieces, nephews, and cousins (including first cousins). But nothing in the language or rationale of this Court's prior order supports such a restrictive definition of "close familial relationship." Indeed, the federal government's narrow interpretation improperly excludes persons who fall squarely within the meaning and purpose of the injunction as described by this Court.

First, as the district court correctly observed (Add. 12), the federal government's interpretation is not supported by the "careful language" used by this Court in its June 26 decision. This Court, while staying the underlying injunction in part, broadly held that §§ 2(c), 6(a), and 6(b) of the Executive Order "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S. Ct. at 2088. The Court made clear that the exclusionary provisions of these sections can be enforced only against those "who have no connection" or "no tie" to the United States. *Id.*

With respect to foreign nationals claiming a bona fide relationship with *a person* in the United States, this Court held that "a close familial relationship is required," but did not expressly limit what constitutes such a relationship or enumerate an exhaustive list of relationship categories, *id.*, as the district court recognized (Add. 12). Instead, this Court provided two examples of the "sort of relationship" that continues to be protected under the injunction—being a wife or a mother-in-law of a person in the United States. 137 S. Ct. at 2088. The Court's recognition that a person's relationship to his or her mother-in-law "clearly" presents a close enough relationship to qualify for protection, *id.*, implies that the Court viewed the injunction as encompassing a broader category of close familial relationships than those found within a traditional nuclear family.

Indeed, this Court has long recognized in various contexts that relatives other than nuclear family members may constitute close family relations for various purposes, and that this country's "deeply rooted" history and tradition "support[] a larger conception of the family." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502-05 (1977). In *Moore*, for example, the Court invalidated an ordinance prohibiting a grandmother from living with her grandchild, noting that the "tradition of uncles, aunts, cousins, and especially grandparents sharing a household with parents and children" has "venerable" roots. *Id.*; *see also Troxel v. Granville*, 530 U.S. 57, 64 (2000) (recognizing in grandparent visitation case the "changing realities of the American family" where "grandparents and other relatives undertake duties of a parental nature in many households"). And in *Reno v. Flores*, the Court held that the Immigration and

Naturalization Service had rationally decided to treat aunts, uncles, and grandparents as "close blood relatives" who were presumptively appropriate custodians for detained alien juveniles, recognizing that "society has . . . traditionally respected" those relatives' "protective relationship with children." 507 U.S. 292, 297, 310 (1993).

The federal government, however, has sought to narrowly define "close family" as only "a parent (including parent-in-law), spouse, child, adult son or daughter, son-in-law, daughter-in-law, sibling, whether whole or half," including "step relationships." (D. Ct. ECF No. 294-1, at 4, ¶ 11.) That definition expressly excludes "grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law." (*Id.*; *see also* D. Ct. ECF No. 294-2; D. Ct. ECF No. 264-3, at 2-3.)

Contrary to defendants' assertion (Mot. at 26-27), nothing in this Court's June 26 order links the scope of the remaining injunction to the scope of the Executive Order's waiver provision for foreign nationals who wish to visit or reside with a "close family member," which the Executive Order defines as either "a spouse, child, or parent." Order § 3(c)(iv). Indeed, the Court expressly stated that plaintiff Dr. Elshikh's relationship with his mother-in-law qualified her for protection under the remaining injunction, 137 S. Ct. at 2088, although a mother-in-law is not defined as a "close family member" under the Order's waiver provisions. Order § 3(c)(iv). To be sure, Dr. Elshikh's mother-in-law is also the mother of his wife (*see* Mot. at 34-36), but the Court did not rely on that fact in its July 26 decision. *See Trump v. IRAP*, 137 S. Ct. at 2088.

The federal government's cramped view of what counts as a "close familial relationship" is also contradicted by both common experience and decades of social science research. In particular, the relationship between grandparents and grandchildren is widely recognized as close to—and sometimes a substitute for—the relationship between parents and children.[10] Other excluded family relationships, including those with uncles and aunts—and likewise with cousins who are the children of those uncles and aunts—can also be close and significant.[11] Since at

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[10] Indeed, grandparents are frequently responsible for caring for and nurturing their grandchildren. *See, e.g.*, Teresa Wiltz, *Why More Grandparents Are Raising Children* (The Pew Charitable Trusts Nov. 2, 2016) (internet) (stating that in 2015, approximately 2.9 million children in this country were living with grandparents who were responsible for their care and discussing reasons for this increase); Cheryl Smithgall, et al., *Caring for their Children's Children* 1, 4 (Chapin Hall Ctr. for Children, Univ. of Chicago 2006) (internet) (in 2000-2001 there were over 100,000 households in Illinois in which a grandparent had primary caregiving responsibility for grandchildren living in the home); Xiaolin Xie & Yan Xia, *Grandparenting in Chinese Immigrant Families*, 47 Marriage & Family Rev. 383 (2011) (internet) (studying cultural trend in Chinese immigrant families of bringing grandparents to United States, often on temporary visas only, to be primary care givers for grandchildren while parents worked outside the home). (For authorities available on the internet, full URLs are listed in the table of authorities.)

[11] *See, e.g.,* Native American Training Inst., *Kinship Relationships and Expectations* (internet) (describing relationship between an aunt and niece as akin to that of a mother and child; relationship between an uncle and nephew as "similar to the relationship between a young boy and his father"; and that a brother-in-law may appropriately "help a brother raise male children"); Margaret Slade, *Relationships: The Role of Uncles and Aunts*, N.Y. Times, Apr. 9, 1984 (internet) ("Among some ethnic

least the early 1970s, social scientists have rejected the notion that the nuclear family is a historical or universal norm, recognizing that these and other close family relationships often provide critical caregiving and resources, particularly for families in economic and social distress.[12] As this Court has noted, "[e]specially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." *Moore,* 431 U.S. at 505; *see also id.* at 506-13 (Brennan, J., concurring) (observing that early American immigrants relied on extended family for "social

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groups, aunts and uncles serve as a network that can absorb children from another household when needed, as in a divorce or after a parent's death"); Alexander Pashos, *Asymmetric Caregiving by Grandparents, Aunts, and Uncles and the Theories of Kin Selection and Paternity Certainty: How Does Evolution Explain Human Behavior Toward Close Relatives?*, 51 Cross-Cultural Res. 263, 272 (2017) (in addition to discussing grandparent, aunt, and uncle caregiving patterns, noting one study finding kinship caregiving and "closeness toward first cousins"); *id.* at 272-275 (also discussing recent studies finding "more cultural variety in kin caregiving patterns than often previously assumed"); *see also* Chapin Hall, Univ. of Chi., *What Are Important Differences Among Kinship Foster Families* (2016) (internet) (noting in recent study of Illinois kinship foster families that over 43% of those families "were almost exclusively headed" by relatives such as aunts, uncles, and cousins).

[12] Pashos, *Asymmetric Caregiving*, *supra*, 51 Cross-Cultural Res. at 264-278; Naomi Gerstel, *Rethinking Families and Community: The Color, Class, and Centrality of Extended Kin Ties*, 26 Sociological F. 1, 2-10, 17 (2011); *see also* Carol Stack, *All Our Kin: Strategies for Survival in a Black Community* (1974) (foundational work illustrating the significance of extended family networks on the social and economic survival of disadvantaged Black American families).

services and economic and emotional support in times of hardship" and that this remains a "means of survival" for the poor and underprivileged). There is thus simply no justifiable basis for categorically excluding these significant and often essential relationships from the class of close family relationships that qualify for protection under the modified injunction.

Defendants are wrong in suggesting (Mot. at 27-31) that the scope of the remaining injunction should be dictated by the categories of relationship that are eligible for family-based long-term immigrant visas under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq. As the district court correctly observed (Add. 13), other INA provisions treat relatives such as grandparents, nieces and nephews, and siblings-in-law as close family members (Mot. at 31-33).[13] Moreover, the definitions applicable to family-based immigrant visas in 8 U.S.C. §§ 1101(b)(1)-(2), 1151(a)(1) & (b)(2), 1153(a) serve a different and distinguishable purpose from the preliminary injunction at issue here. The definitions in these provisions reflect a Congressional policy determination about how far to extend the opportunity

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[13] *See, e.g.*, 8 U.S.C. §1183a(f)(5) (sisters-in-law, brothers-in-law, grandparents, and grandchildren may serve as financial sponsors for certain aliens when petitioning family member dies); *id.* § 1101(a)(15)(T)(ii)(III) and 8 C.F.R. § 214.11(a)(3) (grandchildren, nieces, and nephews of a person may be eligible for special visas for victims of human trafficking if they face danger of retaliation based on that person's escape from trafficking or cooperation with law enforcement); 8 U.S.C. § 1433(a) (permitting application for naturalization on behalf of a grandchild under limited circumstances, such as death of an American citizen parent).

for permanent immigration with a path to American citizenship. In contrast, the injunction at issue here provides interim protection to applicants for shorter-term non-immigrant visas on the understanding that persons in the United States should not be prevented from seeing close family members while courts adjudicate the legality of the disputed provisions of the Executive Order. The error in the federal government's approach is evident in the fact that, although the INA's definition of "family" excludes mothers-in-law, *see, e.g.*, *id.* §§ 1151(b)(2)(A), 1153(a), this Court expressly held that this relationship is within the ambit of the injunction's protections. *Trump v. IRAP*, 137 S. Ct. at 2088.

Second, the federal government's interpretation of the injunction is inconsistent with the rationale this Court gave for distinguishing between foreign nationals who have a bona fide "connection" or "tie" to someone in the United States and those who lack such a relationship. As the Court reasoned, denying entry to a foreign national with no close ties to the United States "does not burden any American party by reason of that party's relationship with the foreign national," whereas the exclusion of a close family member of a person in the United States results in an "obvious hardship" to that person.[14] *Trump v. IRAP*, 137 S. Ct.

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[14] This Court's use of the term "*a person* . . . in the United States," 137 S. Ct. at 2088 (emphasis added), to serve as the reference point for evaluating the relevant hardship further demonstrates that the Court did not intend the scope of the injunction at issue here to be governed by the sections of the INA, which authorize only citizens and legal permanent residents—and not all persons in the United States—to sponsor family members for permanent immigration. *See* 8 U.S.C. §§ 1151(a)-(b), 1153(a).

at 2088. The Court applied the same analysis to the suspension of refugee admissions under §§ 6(a) and (b) of the Executive Order, and emphasized that it was "not disturb[ing] the injunction" where "[a]n American individual . . . that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded." *Id*. at 2089. The district court here correctly recognized (Add. 12) that these essential underlying considerations should serve to guide its evaluation of the issue.

Finally, in arguing that the district court's interpretation of the reach of "close familial relationship[s]" is too sweeping and includes "virtually all family members" (Mot. at 3-4, 14-15, 26), defendants fundamentally misunderstand the relationships covered by the injunction. For example, defendants presume (Mot. at 15) that the terms "uncle" and "cousin" reflect "distant" family relationships. But as explained above (at 9-13), this Court has long respected and confirmed the status of uncles, aunts, and cousins as close blood relatives, and such relationships have also been widely recognized as close and significant in the social science literature generally.

Indeed, when parents die or are unavailable to care for a child, aunts and uncles may often become the primary caregivers for their nieces or nephews, who are then like one of the aunt's or uncle's own children. In support of their motion below, plaintiffs provided a compelling illustration of exactly this circumstance: after both biological parents of John, a young Congolese man, died of cholera when he was one month old, he went to live with his paternal uncle, who raised him as a son alongside the uncle's ten biological

children. John's uncle never legally adopted John, however, because that practice was not part of their culture and there was no need to do so; the uncle already considered John a son and John's cousins considered him a brother. After fleeing for their lives as refugees in 2009, the family was finally resettled in the United States on July 4th of this year—but without John, who was forced to stay behind (presumably under application of the federal government's guidance to him), and who is now separated from the only "parents" and "siblings" he has ever known—a frightening and emotionally devastating experience for both John and his United States–based family. (D. Ct. ECF Nos. 343-2, 343-3).

The federal government's guidance completely fails to account for the experiences of families such as John's, as does the federal government's unsupported suggestion (Mot. at 15) that being an uncle or first cousin is such a distant relationship that it does not constitute a close familial relationship. As explained above (at 6), while the term cousin can sometimes embrace distant relationships, it is entirely implausible to believe that the district court used the term that way, both because the common and primary definition of "cousin" is "a child of one's uncle or aunt,"[15] and because the district court understood that this Court's opinion required drawing a line between "close" familial relationships and other familial relationships.

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[15] *See Oxford Dictionaries*, s.v. cousin (internet); *Merriam-Webster Dictionary*, s.v. cousin (internet). The terms "uncle" and "aunt" are commonly defined to mean a parent's sibling or the spouse of such a sibling. *See Oxford Dictionaries*, s.v. uncle; *Merriam-Webster Dictionary*, s.v. uncle; *Oxford Dictionaries*, s.v. aunt; *Merriam-Webster Dictionary*, s.v. aunt.

For all these reasons, defendants have not shown a likelihood of success on the merits of the position advanced in their motion to this Court. When evaluating the propriety of a stay, this Court has been clear that the stay applicant's likelihood of success must be "strong," and "more than a mere possibility of relief is required." *Nken*, 556 U.S. at 434 (quotation marks omitted). Here, defendants have failed to make this required threshold showing, and thus a stay is not warranted for that reason alone.

II. The Balance of the Equities Strongly Favors Denial of a Stay.

Balancing the equities implicated by a stay application requires the Court to determine whether the harm to other interested parties or the public outweighs the injury asserted by the applicant. *Trump v. IRAP*, 137 S. Ct. at 2087 (quoting *Barnes*, 501 U.S. at 1305). In conducting that analysis here, the Court should weigh heavily the irreparable harm that will be inflicted on the amici States and our residents if the federal government is permitted to define "close familial relationship[s]," 137 S. Ct. at 2088, in a way that categorically excludes close but non-nuclear family members from the protection of the remaining portion of the preliminary injunction.

For the reasons described in Point I, the federal government's narrow interpretation of this Court's June 26 decision will prevent many persons in the United States from receiving visits from family members with whom they have close and bona fide relationships. An ailing grandmother could not receive end-of-life care from her foreign granddaughter. A niece whose foreign aunt was like a mother to her could not bring that aunt to witness and celebrate her

wedding. And an orphaned child would not be permitted to receive a visit from the uncle who took care of her financial and emotional needs after her father's untimely death.

Under this Court's cases, such deprivations are a constitutionally-cognizable hardship to the affected United States–based persons. *See Moore*, 431 U.S. at 502 (tradition of sharing household with extended family "deserving of constitutional recognition"); *see also Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (noting in prisoners' visitation case "a right to maintain certain familial relationships, including . . . association between grandchildren and grandparents"). Moreover, the exclusions at issue hinder the amici States' ability to protect their residents' fundamental familial relationships to the extent allowed under other federal laws.[16] *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607-08 (1982) (discussing a State's interests in ensuring that its residents are "not excluded from benefits that are to flow from participation in the federal system" and in "securing observance of the terms under which it participates in" that system); *see*

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[16] The federal government is mistaken in contending (Mot. at 33-34) that the Executive Order's case-by-case waiver provisions avert any such harm because a foreign national who "has a particularly close relationship with a more distant relative" may still qualify for entry. The Executive Order never describes the process of applying for a waiver, specifies a time frame for receiving a waiver, or sets any concrete guidelines for issuance of a waiver beyond providing a list of circumstances in which waivers "could be appropriate." Order § 3(c). And there is no guarantee that a waiver will be issued for any particular foreign national who seeks to visit a close family member in the United States, because the ultimate decision on whether to grant a waiver lies solely within a consular official's discretion. *See id.*

also Gerstel, *Rethinking Families*, *supra*, 26 Sociological F. at 4-5 ("Th[e] focus on . . . the nuclear family contains strong racial and ethnic—as well as class—biases".)

The federal government's impermissible exclusions will also result in continuing concrete and irreparable harms to amici States' economic and proprietary interests. The specter of unlawful exclusions creates barriers to attracting and retaining foreign students and employees at our universities, hospitals, and businesses. Many such persons may be unwilling to accept offers to work and study in our States in light of the federal government's stated intention to ban visits from their grandparents, grandchildren, or other close relatives. *Cf.* Gerstel, *Rethinking Families*, *supra*, 26 Sociological F. at 7-9 (discussing significance of extended family networks particularly for those in medical profession who often work long hours and have limited ability to control schedules). And the amici States will lose significant sources of taxes and other revenues that would otherwise be collected from the foreign visitors whom the Executive Order improperly excludes. These are some of the same interests that the district court's preliminary injunction was originally designed to protect, and some of the same harms this Court carefully sought to avoid when leaving certain portions of the preliminary injunction in place. *See* Va. Amicus Br. (16 States and D.C.) at 4-14, *Trump v. IRAP*, Nos. 16A1190, 16A1191 (Sup. Ct. June 21, 2017); Ill. Amicus Br. (16 States and D.C.) at 5-20, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125.

On the other hand, defendants have not demonstrated that a stay pending this Court's review of the district court's July 13 order (or, alternatively,

pending review of the July 13 order by the Ninth Circuit) is necessary to prevent any irreparable harm to their interests. Defendants' generalized claim of harm to the federal government's interest in maintaining national security (Mot. at 37-38) is abstract and conclusory—unlike the concrete, immediate harms to the amici States and their residents outlined above. Nor are the harms of the amici States and their residents outweighed by the federal government's desire to avoid the administrative inconvenience of "alter[ing] its implementation of the Order in substantial respects" and communicating such changes to an extensive worldwide network of agencies (Mot. at 38). Indeed, defendants' assertions of harm are substantially undermined by their acknowledgement that the travel ban in § 2(c) will expire less than 90 days from now (Mot. at 8 [noting presidential memorandum clarifying effective date of all previously enjoined provisions of the Order]) and defendants' similar concession (Mot. at 24-25) that the refugee restrictions in § 6(a) and (b) of the Order will also shortly expire.

In sum, the balance of the equities here tips decidedly in favor of denying the federal government's request for a stay. While defendants have identified no appreciable harm that the district court's July 13 order will cause to the federal government's interests during the brief period for which the Order will be effective, a stay of the July 13 order would allow irreparable harm to be imposed on the amici States and our residents. The status quo should be preserved while this litigation continues.

CONCLUSION

The application to stay the injunction as modified should be denied.

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