EXHIBIT A

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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 ENFORCE OR, IN THE ALTERNATIVE, TO MODIFY PRELIMINARY INJUNCTION

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INTRODUCTION

Amici are respondents in *Trump v. International Refugee Assistance Project* ("*IRAP*") and provide legal and resettlement services to refugees and other foreign nationals here and abroad. *Amici* write to highlight ways in which the government is violating this Court's preliminary injunction, as partially stayed by the Supreme Court, with respect to refugees and the persons and entities in the United States with whom they have bona fide relationships.

First, the government has adopted an exceedingly narrow and unjustified interpretation of the relationships with U.S. entities that shield foreign nationals from Executive Order 13780.[1] Perhaps most alarmingly, the government has taken the position that refugee clients of resettlement agencies like HIAS are *not* protected by the preliminary injunction—a decision that affects refugees who would otherwise be allowed to enter the United States in the coming weeks and months. The government has also refused to acknowledge that the injunction continues to cover clients of legal aid organizations like IRAP. The government does not, and indeed, cannot dispute that the relationships that HIAS and IRAP have with their clients are "formal, documented, and formed in the ordinary course, rather than for the purpose of

[1] *Amici* also agree with the Hawai'i plaintiffs that the government has adopted an improperly narrow interpretation of which individuals have "bona fide relationship[s] with . . . person[s]" in the United States. *See* Dkt. No. 328-1, Mem. in Supp. of Pls.' Mot. to Enforce Or, In the Alternative, Modify Prelim. Inj. at 8-10.

evading [Executive Order 13780]," or that IRAP and HIAS "can legitimately claim concrete hardship" if their clients are excluded. *Trump v. IRAP*, Nos. 16-1436 and 16-1540, 528 U.S. __, slip op. at 12-13 (June 26, 2017) (per curiam). Instead, the government seeks to add criteria, which appear nowhere in the Supreme Court's order, to restrict this Court's protection of individuals with bona fide relationships to U.S. entities. Such restrictions, if left in place, will impose additional delay and hardship on refugees and the U.S. entities that proudly call them clients.

Second, the government has refused to recognize that particular categories of refugees necessarily have the requisite relationship to a U.S. entity or close family member, and instead insists on making case-by-case determinations where none are needed. The practical effect of this decision—which affects refugees who accessed the U.S. Refugee Admissions Program ("USRAP") through specific programs designed to *expedite* their resettlement to the United States—is to lengthen what is already a years-long process. This will result in refugees being further delayed in their escape from dangerous situations, and could turn into effective denial for many.

The government has grossly misconstrued the Supreme Court's partial stay and is inflicting substantial harm on persons and entities in the United States. *Amici* respectfully urge this Court to grant Plaintiffs' motion to enforce or to modify its preliminary injunction to ensure that the government is not permitted to apply the Executive Order to individuals in the following categories:

1. Refugees with formal "assurances" from resettlement agencies like HIAS.

2. Clients of IRAP and similar U.S. legal services organizations.

3. Individuals who have accessed USRAP through a program or mechanism that by definition requires the requisite relationship, including but not limited to the Iraqi Direct Access Program for U.S.-Affiliated Iraqis; the Central American Minors program; and the Lautenberg program.

BACKGROUND

A. Prior Proceedings

Section 6(a) of Executive Order 13780[2] (hereinafter, "the EO") directed a 120-day suspension of refugee travel into the United States and of "decisions on applications for refugee status." Section 6(b) lowered the number of refugee admissions for fiscal year 2017 from 110,000 to 50,000, and suspended entry of refugees above that number.[3]

The day before the EO's effective date, this Court enjoined all of Sections 2 and 6, which injunction the Ninth Circuit subsequently affirmed as to Sections 2(c), 6(a) and 6(b). *Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017). On June 26, 2017, the Supreme Court granted *certiorari* in this case; consolidated it with its companion case from the Fourth Circuit, in which *Amici* are plaintiffs; and partially stayed the

[2] *See* Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017); *see also* Presidential Mem., *Effective Date in Exec. Order 13780*, 82 Fed. Reg. 27,965 (June 14, 2017).

[3] Refugees from Iran, Libya, Somalia, Sudan, Syria and Yemen are also subject to Section 2(c)'s 90-day ban on the entry of nationals from those countries.

injunctions in both cases. *See IRAP*, slip op. at 9. While the Court held that the injunctions appropriately "covered not just respondents, but parties similarly situated to them," *id.* at 10, 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 [the EO]." *Id.* at 12.

B. The Government's Implementation of the Stay

Despite numerous attempts by the *IRAP* plaintiffs to contact the government regarding its plans for implementing the Supreme Court's partial stay, the government has said little about how it is enforcing the EO as to refugees, and its publicly available guidance has been subject to frequent unexplained revisions. The government's *current* position vis-à-vis refugees appears to be as follows.

First, HIAS' refugee clients, and the clients of other U.S.-based resettlement agencies, are *not* protected by this Court's preliminary injunction. *See* U.S. Dep't of State, *Information Regarding the U.S. Refugee Admissions Program* (June 30, 2017), https://www.state.gov/j/prm/releases/factsheets/2017/272316.htm; *see also* Dkt. 301 at 13-20.

Second, IRAP's refugee and other clients, and clients of other similar U.S.-based legal aid entities, must prove on a case-by-case basis that they have a bona fide relationship with their own lawyers. Dkt. 301 at 20-21. The government has refused to explain what information must be provided or why an attorney-client relationship with a U.S. entity, particularly those formed before the partial stay was issued, does *not* entitle the clients to the protections of the preliminary injunction.

Third, while the government acknowledges that refugees who accessed the USRAP via certain programs remain protected by this Court's preliminary injunction as a categorical matter, without the need for any further case-by-case showing, it fails to apply that same criteria and logic to exempt the Direct Access Program for U.S.-Affiliated Iraqis; the Lautenberg program; and the Central American Minors ("CAM") program, which are discussed in more detail below.

C. HIAS and IRAP

Amici are U.S.-based non-profit organizations providing a variety of services to refugees and other foreign nationals seeking to resettle in the United States. Both are plaintiffs-respondents in *IRAP*. HIAS is the world's oldest refugee resettlement agency, and has been resettling refugees since 1881. Hetfield Decl. ¶ 2, attached as Ex. A. It is one of nine agencies in the United States providing resettlement services to refugees admitted through USRAP, including refugees resettled through the CAM and Lauternberg programs. *Id.* ¶¶ 16, 30; Supp. Hetfield Decl. ¶¶ 6-7, attached as

Exhibit B. IRAP provides direct legal services to refugees and others seeking to escape violence and persecution, including refugees in USRAP through the Direct Access Program for U.S.-Affiliated Iraqis. Heller Decl. ¶¶ 2, 17-21, attached as Ex. C. IRAP staff and pro bono volunteers represent and work directly with individuals abroad throughout their application, travel, and resettlement processes. *Id.* ¶¶ 4, 31-36.

ARGUMENT

The government seeks to exclude thousands of refugees who are clearly protected by this Court's preliminary injunction. Its position on refugees, like its cramped and indefensible interpretation of "close relatives," cannot be squared with the Supreme Court's opinion in this case. Because the government has failed to heed the Supreme Court's instructions, *Amici* respectfully ask this Court to enforce the proper scope of its preliminary injunction, as partially stayed, to prohibit the government from applying the enjoined provisions to refugees that have the requisite relationships with U.S. individuals and entities.

I. THE INJUNCTION PROTECTS REFUGEES WITH BONA FIDE RELATIONSHIPS TO U.S.-BASED REFUGEE ASSISTANCE ENTITIES LIKE HIAS & IRAP

The government has said that it intends to exclude HIAS's clients, and it apparently intends to exclude at least some of IRAP's. But the exclusion of clients of entities like IRAP and HIAS ignores the Supreme Court's clear instructions. The

Court expressly "le[ft] the injunctions entered by the lower courts in place *with respect to respondents and those similarly situated*." *IRAP*, slip op. at 9 (emphasis added). Both IRAP and HIAS are respondents before the Supreme Court, and both "can legitimately claim concrete hardship if [their clients] are excluded." *Id.* at 13. The enjoined provisions should not apply to their clients or clients of similarly situated entities, because those relationships are "formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the EO]." *Id.* at 12.

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," which the Supreme Court stated was sufficient. *Id*. 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 many of 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—after evaluating the refugee's case and circumstances, and its own capacity and resources—provides a formal "assurance" to the federal government that it can and will provide for the refugee's entire resettlement process. *Id.* ¶ 16. After providing assurances, HIAS and its affiliates identify and rent 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. The government cannot plausibly claim that this extensive, intimate, and formally documented contact does not constitute a "bona fide relationship" or that this relationship was formed to "evad[e]" the EO, *IRAP*, slip op. at 12, because these assurances were given, and the relationships were formed, before the Supreme Court issued the partial stay. Supp. Hetfield Decl. ¶ 4. The Court should therefore prohibit the government from barring refugees who have documented relationships with HIAS and the other eight resettlement agencies operating in the United States.[4]

IRAP's client relationships are similarly extensive, formal, and documented. IRAP spends multiple weeks, sometimes months, interviewing prospective clients. Heller Decl. ¶ 32-33. After executing a formal written representation agreement, *id.* ¶ 33, IRAP and its affiliated attorneys help their clients navigate USRAP, often over

[4] The government argues that recognizing resettlement agencies' relationships with their formally assured clients "would largely eviscerate the Supreme Court's stay ruling with respect to the Executive Order's refugee provisions." Dkt. 301 at 17. Yet, as the government itself acknowledges, fewer than 24,000 refugees have been formally assured, *id.* at 18, out of the more than 200,000 individuals in USRAP. *Amici* further agree with the *Hawai'i* plaintiffs' arguments against the government's unsupported attempt to carve relationships initiated by the federal government out of the Supreme Court's order. Dkt. 328-1 at 12-13. Notably, HIAS has been resettling refugees in the United States since *long* before the federal government established any system to do so. Hetfield Decl. ¶ 2.

the course of multiple years. *Id.* ¶ 33. IRAP and its network of attorneys investigate clients' claims, draft legal submissions, prepare clients for interviews, and often provide non-legal forms of practical assistance, such as assisting with medical and 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 (IRAP itself and affiliated attorneys) and individuals (their attorneys). The Court should hold that the government cannot apply the EO to any clients of IRAP or any other U.S.-based provider of legal services to refugees and other foreign nationals.

The Supreme Court made clear why these relationships remain protected. Entities with bona fide relationships to refugees can "legitimately claim concrete hardship if th[ose] person[s] [are] excluded." *IRAP*, slip op. at 13. As HIAS and IRAP have explained, their resources would be diverted, their prior efforts would be wasted, and their staffs and budgets would be stretched thin were their clients banned from entering the United States.[5] *See* Hetfield Decl. ¶ 22; Supp. Hetfield Decl. 7-9; Heller Decl. ¶¶ 37-38. The same is true for other entities that assist refugees in the resettlement process, who also continue to be protected.

The Supreme Court further emphasized that its examples of bona fide relationships were meant only to *illustrate*, not exhaust, the kinds of relationships

[5] The direct injuries the EO inflicts on IRAP and HIAS are one of their bases for standing to challenge the EO.

that the injunction continues to cover. *IRAP*, 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.* The Court should therefore enforce the injunction against application of the EO to clients of organizations like IRAP and to refugees who have been assured by HIAS and other refugee resettlement organizations.

II. THE INJUNCTION PROTECTS ADDITIONAL 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.[6] After *Amici* pointed out in briefing that same is true of many USRAP programs, the government issued similar guidance for some refugees.[7] That guidance, however, fails to include three categories of refugees who

[6] *See* Dep't of State, *Executive Order on Visas*, June 29, 2017, *available at* https://travel.state.gov/content/travel/en/news/important-announcement.html.

[7] Dep't of Homeland Sec., *Frequently Asked Questions on Protecting the Nation from Terrorist Entry into the United States* (June 29, 2017) at Q36, https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states ("[C]ertain categories of refugee cases require relationships with close family members in the United States, specifically 'Priority 3' cases, Form I-730 (following-to-join) cases and Iraqi and Syrian Priority 2 cases where access is based on an approved Form I-130 (family based petition).").

necessarily have a bona fide relationship with a U.S. entity, individual, or both. The Court should therefore enforce the injunction against application of the EO on a case-by-case basis to these categorically exempt refugee programs.

First, the Direct Access Program for U.S.-Affiliated Iraqis permits certain Iraqi nationals to apply to USRAP for eventual resettlement to the United States. Applicants must demonstrate that they are at risk of persecution because of their contributions to the United States' mission in Iraq after March 20, 2003 as employees of 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] By definition, these Iraqis worked for Americans and American entities who were in Iraq either to carry out or to report on the United States' military, diplomatic, and humanitarian mission there. Doing so put these Iraqis in the same dangerous conditions faced by American service members, who depended on their Iraqi allies in myriad ways.[9] Iraqis who apply to USRAP through this program must prove not only their affiliation with U.S. entities and individuals, but also that they are at risk of persecution *because of* those relationships. *See supra* note 11. As the name itself

[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* Decl. of General John R. Allen, attached as Ex. D; Decl. of "Sam," attached as Ex. E; Decl. of Allen Vaught, attached as Ex. F.

denotes, all applicants in the program are, as a categorical matter, "U.S.-Affiliated," and so the government's case-by-case approach to the program is unjustified.

Similarly unjustified is the government's refusal to categorically exempt from the EO individuals in USRAP by virtue of the Lautenberg Amendment, which permits certain nationals of the former Soviet Union with "close family in the United States" to apply for refugee status.[10] The government has not explained (or even acknowledged) its decision to require refugees in this category to provide case-by-case proof of the requisite tie to the United States. *Amici* note, however, that grandparents and grandchildren are considered "close family" for purposes of the Lautenberg Amendment. *See* Supp. Hetfield Decl. ¶ 6. Thus, the government's refusal to categorically exempt the Lautenberg program may reflect its indefensible position that grandparents are not close relatives—even as the government's *own rules* in the program undermine its arguments for excluding grandparents.

Finally, the Central American Minors ("CAM") program should also be categorically exempt from the EO. This program allows children *with a parent in the United States* to petition for refugee status.[11] DNA testing is required to verify

[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.

[11] *See generally* Dep't of State, *Central American Minors (CAM) Program*, *available at* https://www.state.gov/j/prm/ra/cam/index.htm.

the family relationship. And the application must be initiated in the United States through one of the nine U.S.-based refugee resettlement agencies (of which HIAS is one), which shepherds the applicants through the entire process. The CAM program is therefore doubly exempt, by virtue of the categorical ties to an individual (a parent) and an entity (a resettlement agency) in the United States.[12]

III. CATEGORICAL RULES ARE NECESSARY TO MAKE THE INJUNCTION MEANINGFUL AND TO PREVENT A BUREAUCRATIC FREEZE ON REFUGEE ADMISSIONS

The government, enjoined from implementing the total ban on refugee admissions intended by the EO, threatens to achieve much of the same through the slow death of procedural delays. Case-by-case determinations of whether a particular refugee has "a credible claim of a bona fide relationship" with a U.S. entity or person, *IRAP*, slip op. at 12, should be strictly limited to situations in which such

[12] In keeping with the overall family reunification purpose of the program, a CAM application may also seek admission of the child's primary caregiver, provided that the caregiver is *also* related to the child or parent. *See Central American Minors (CAM) Program*, *supra* note 13. The government recently directed that CAM cases involving a caregiver should be examined case-by-case, while cases without a caregiver are categorically exempt. Supp. Hetfield Decl. at Ex. A. Because the child must be related to *both* the U.S.-based parent *and* the caregiver, though, the refusal to exempt the entire CAM program again reflects the government's unjustifiably cramped definition of "close family member." *See* Dkt. 301 at 19 n.6 (asserting that caregivers "do[] not necessarily have a sufficiently close relationship to a U.S.-based parent to qualify as a 'close family member'"). Its decision to fall back yet again on its unjustified exclusion of grandparents and other close family relationships offers no reason to reject a categorical exemption of the CAM program.

analysis is actually necessary to determine whether a relationship exists.

Refugee processing and resettlement is a long and tortuous process, requiring coordination across multiple governmental, intergovernmental, and non-governmental organizations. Within the U.S. government, a variety of agencies conduct different security checks for every refugee. *See* Supp. Hetfield Decl. ¶¶ 12-15.[13] Some of these clearances are only valid for a set period, usually months, and must be repeated if they expire. Supp. Hetfield Decl. ¶¶ 11-17. But because each security check can take months or even years to complete, the expiration of one can have a cascade effect, as other clearances expire while the first is being redone. *Id.* ¶¶ 10, 18-19. Accordingly, even relatively short-term delays in processing or disruptions of USRAP reverberate for far longer.[14]

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[13] *See generally* USCIS, *Refugee Processing & Security Screening*, https://www.uscis.gov/refugeescreening#RefugeeProcessing.

[14] A powerful example of this reality is readily available. The day President Trump was inaugurated, the United States was on pace to hit the existing admissions cap of 110,000 refugees for this fiscal year. *See* Phillip Connor & Jens Manuel Krogstad, *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. A few months later—before the Supreme Court issued its partial stay—that expected total had fallen to slightly more than 70,000. *See* Gardiner Harris, *U.S. Quietly Lifts Limit on Number of Refugees Allowed In*, N.Y. Times (May 26, 2017), http://nyti.ms/2tzUcmL. In between, USRAP was suspended for eight days (before that provision of the first EO was enjoined nationwide) and the lowered admissions cap was in effect for fewer than seven weeks (before that part of the first EO was superseded by the same provision in the second EO, which this Court enjoined before it went into effect). Those eight days and seven weeks prevented tens of thousands of refugees from entering the United States.

Further, the looming end to the government's fiscal year on September 30 means that any delay could effectively bar refugees from the United States forever. The annual level of refugee admissions is reset annually by the President, before the beginning of the next fiscal year, and after appropriate consultation with Congress. *See generally* 8 U.S.C. § 1157. Depending on where President Trump sets that level, refugees who are not resettled this fiscal year—even those protected by the injunction—may be left in limbo indefinitely.

Amici accordingly urge the Court to articulate categorical rules to ensure that refugees who the Supreme Court held are still protected by this Court's injunction are not delayed or wrongly excluded from the United States while the ban is partially implemented. Specifically, the Court should enforce the injunction as to *all* refugees who have assurances; are clients of IRAP or similar organizations; or are in the categories noted above.

CONCLUSION

Amici respectfully request that the Court grant Plaintiffs' Motion.

DATED: Los Angeles, California, July 11, 2017.

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