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TRAVEL BAN PARTIES REBUT TRUMP ADMINISTRATION'S INTERPRETATION OF U.S. SUPREME COURT RULING

HONOLULU – Today Hawaii filed a reply memo supporting its June 29th request to federal district court Judge Derrick K. Watson to clarify the scope of the travel and refugee ban injunction in *Hawaii v. Trump,* in light of last Monday's ruling by the United States Supreme Court. Hawaii's latest filing is a reply to the opposition memorandum filed by the Trump Administration on July 3rd.

In the Trump Administration's opposition, it argued that "close familial relationships" should only be those specifically described in certain portions of the Immigration and Nationality Act (INA). The U.S. Supreme Court, however, already decided that this is not the case. For example, one of the relationships the Supreme Court said was "clearly" close family – Dr. Elshikh's mother-in-law (and those "similarly situated") – is not found in any provision of the immigration laws the Trump Administration cites. Yet the Supreme Court still included them as a "close familial relationship" for the purposes of the injunction obtained by Hawaii. Additionally, other immigration laws include the very same close family members the Trump Administration wants to exclude.

Attorney General Doug Chin said, "In its 6-3 order, the U.S. Supreme Court used a balancing test that says the travel and refugee bans should not be applied when doing so would inflict a concrete hardship on someone in the United States. The Trump Administration's guidelines may inflict a concrete hardship by excluding grandparents, uncles, nieces, cousins, and more. This is why we have asked the federal court to clarify the scope of its injunction."

Hawaii's reply memorandum states in part:

> For five days and counting, the Government has been directing U.S. consulates and refugee processing organizations to deny entry to foreign nationals whose grandparents, aunts, nephews, and other close relatives are waiting for them in this country. At the same time, the Government has barred the doors to numerous refugees with a connection to the United

> States, even where a resettlement agency has a relationship with a particular refugee that involves the investment of copious resources for pre-arrival planning. These actions plainly “burden * * * American part[ies] by reason of [their] relationship with [a] foreign national,” and so are unlawful.
>
> The Government could have avoided this result. It could have engaged with Plaintiffs in a dialogue that would have brought to light these harms, as well as the multiple additional errors the Government has already corrected. But the Government refused. Indeed, even on the day of the rollout, the Government spent precious hours conducting a conference call not with Plaintiffs, but with reporters. It then issued flawed guidance regarding fiancé admissions that a brief discussion with Plaintiffs would have easily avoided.
>
> In short, the Government elected to implement the stay in a manner that jeopardizes the rights of countless Americans and keeps the Government on the deeply flawed trajectory it has pursued since the release of the first Executive Order.

Hawaii filed its reply memorandum today, one day early, because the people that the Trump Administration has excluded from the definition of “close family members” might already be denied entry into the country.

A copy of the reply memorandum is attached.

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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

REPLY IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION TO CLARIFY SCOPE OF PRELIMINARY INJUNCTION

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INTRODUCTION

The Government fundamentally misconstrues the Supreme Court's partial stay. The Court did not concoct an abstract "bona fide relationship" standard that the Government can tailor to its liking by borrowing limits from the immigration laws, Opp. at 8, imposing restrictions found in its own Executive Order, Opp. at 13, or announcing ad hoc exceptions at will, Opp. at 15. Rather, the Court "balance[d] the equities" and determined that they favor a stay only when "[d]enying entry to * * * a foreign national does not burden any American party by reason of that party's relationship with the foreign national." *Trump* v. *Int'l Refugee Assistance Project* ("*IRAP*"), Nos. 16-1436 & 16-1540, slip op. at 11 (U.S. June 26, 2017) (per curiam). For that reason, the Government may not apply the bans to exclude any foreign national that has a "credible claim of a bona fide relationship" with an individual or entity in the United States, such that the exclusion will inflict "concrete hardship" on the American party. *Id.* at 12-13.

That straightforward principle resolves this motion. For five days and counting, the Government has been directing U.S. consulates and refugee processing organizations to deny entry to foreign nationals whose grandparents, aunts, nephews, and other close relatives are waiting for them in this country. At the same time, the Government has barred the doors to numerous refugees with a connection to the United States, even where a resettlement agency has a

relationship with a particular refugee that involves the investment of copious resources for pre-arrival planning. These actions plainly "burden * * * American part[ies] by reason of [their] relationship with [a] foreign national," and so are unlawful.

The Government could have avoided this result. It could have engaged with Plaintiffs in a dialogue that would have brought to light these harms, as well as the multiple additional errors the Government has already corrected. But the Government refused. Indeed, even on the day of the rollout, the Government spent precious hours conducting a conference call not with Plaintiffs, but with reporters. See Katyal Decl. Ex. D. It then issued flawed guidance regarding fiancé admissions that a brief discussion with Plaintiffs would have easily avoided.

In short, the Government elected to implement the stay in a manner that jeopardizes the rights of countless Americans and keeps the Government on the deeply flawed trajectory it has pursued since the release of the first Executive Order. The Court should correct the Government's path, holding the Government to the clear terms of the Supreme Court's order.[1]

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[1] The Court should not accede to the Government's request to stay its clarifying order while the Government seeks appellate review: Americans are *already* being harmed by the exclusion of individuals with whom they have a bona fide relationship. The Supreme Court *already* held that this harm outweighs the national security interest the Government claims. There is no justification for a stay. Plaintiffs agree, however, that any disputes that remain after this Court's order should be dealt with through expedited appellate review.

ARGUMENT

A. The Court Should Clarify That Its Injunction Protects Grandparents, Grandchildren, Brothers-in-Law, Sisters-in-Law, Aunts, Uncles, Nieces, Nephews, And Cousins.

The Government has acknowledged its error in excluding fiancés from its definition of "close familial relationship." Opp. at 2, 7. Yet it still adheres to the preposterous contention that grandchildren, siblings-in-law, and other fundamental relations are not "close famil[y]," and that excluding them somehow imposes "*no*[] burden" on persons in the United States. Slip Op. at 11-12. That argument is as wrong as it sounds, and nothing in the Supreme Court's opinion supports it.

The Government starts off by attempting to rewrite the Court's opinion. It speculates that when the Supreme Court used the phrase "close familial relationship," it "ha[d] * * * in mind" the types of family relationships delineated in certain provisions of the INA. Opp. at 2. But as the Government ultimately must acknowledge, one of the two relationships the Supreme Court said was "clearly" close family—Dr. Elshikh's mother-in-law—is not found in any provision of the immigration laws the Government cites. *Id.* at 11. Rather than accepting this fact as fatal to its argument, the Government soldiers on, speculating that when the Court said "mother-in-law," it really meant "mother," because it was *sub silentio* relying on the fact that Dr. Elshikh's wife is a U.S. citizen. *Id.* That is utter nonsense. The Court never so much as hinted that it was concerned with the

burden on Dr. Elshikh's wife; it said that the injunction was justified because of "the concrete burdens that would fall on * * * *Dr. Elshikh*"; that the Order may not be enforced against "parties similarly situated to * * * *Dr. Elshikh*"; and that "*Dr. Elshikh's mother-in-law*[] clearly has [a qualifying] relationship." Slip Op. at 10-12 (emphases added). Furthermore, if it were even remotely plausible to posit that the Court had any of Dr. Elshikh's other family in mind, it would be his children, because the record documents the harm inflicted by their separation from their *grandmother*. Elshikh Decl. ¶ 3, ECF. No. 66-1.

The Government's position also finds scant footing in the logic of the Court's opinion. The Court made clear that the balance of the equities supports this Court's injunction whenever excluding an alien would inflict "concrete hardship" on a U.S. person. Slip Op. at 11. On multiple occasions the Supreme Court has recognized that an individual suffers a concrete and constitutionally cognizable injury if the Government interferes with his relationship with his "uncles, aunts, cousins, and especially grandparents," all of whom it has called "close relatives." *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 503 (1977); *see also, e.g.*, *Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003) (noting constitutional "right to maintain certain familial relationships, including * * * association between grandchildren and grandparents"). The Government offers no reason why

it is sensible to interpret the Court's language by looking to particular provisions of the INA rather than the Court's own prior statements.[2]

In any event, the Government's attempt to rely on the immigration laws is self-defeating. In the Family Sponsor Immigration Act of 2002, Congress amended the immigration laws to provide that an alien's "close family" could sponsor her for admission, and included in that term an alien's "sister-in-law, brother-in-law, grandparent, or grandchild."[3] The immigration laws similarly state that a juvenile alien may be released from immigration detention to the custody of her "aunt, uncle, [or] grandparent"—a list the Supreme Court has said consists of "*close blood relatives*, whose protective relationship with children our society has also traditionally respected." *Reno* v. *Flores*, 507 U.S. 292, 297, 310 (1993) (emphasis added) (quoting 8 C.F.R. § 242.24 (1992), *recodified at* 8 C.F.R. § 236.3(b)(1)(iii)). Other immigration provisions enable an individual to seek admission on behalf of "[g]randchild(ren)" and "[n]iece[s] or nephew[s]"[4]; to apply for asylum if a "grandparent, grandchild, aunt, uncle, niece, or nephew" resides in

[2] The Government relies on the maxim "equity follows the law." Opp. at 10. But that principle means only that courts cannot use their equitable powers to "violat[e]" express statutory commands. *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012). It does not instruct courts to borrow statutory provisions and repurpose them in wholly inapposite contexts.

[3] Pub. L. No. 107-150, § 2(a) (codified at 8 U.S.C. § 1183a(f)(5)); *see* H.R. Rep. 107-207, at 2 (2001) (provision permits "close family member[s]" to be sponsors).

[4] 81 Fed. Reg. 92,266, 92,280 (Dec. 19, 2016) (describing 8 U.S.C. § 1101(a)(15)(T)(ii)(III)).

the United States[5]; to apply for naturalization on behalf of a grandchild[6]; or to qualify as a special immigrant if he is the "grandparent" of a U.S. person.[7]

The Government ignores all of these provisions, going so far as to claim that "the INA does not grant *any* immigration benefits" for grandparents, nieces, and so on. Opp. at 10. Not only is that demonstrably false, but the Government cherry-picked a list of immigration provisions that grant some of the most restricted benefits in the immigration laws: Most notably, Sections 1152(b) and 1153(a) perform the "unavoidably zero-sum" task of "allocating a limited number of [immigrant] visas." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2213 (2014) (plurality opinion).[8] The Court's injunction, however, simply authorizes aliens to be *considered* for a visa or refugee status on the same terms as anyone else. Slip Op. at 11-12. It would be nonsensical to borrow the most limiting possible definition of family to determine who qualifies for that baseline right. *Id.* at 11.

Finally, grasping at any reed it can find, the Government points to the Order's own waiver provisions. Opp. at 12-13. But those provisions are triply

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[5] 69 Fed. Reg. 69,480, 69,488 (Nov. 29, 2004) (codified at 8 C.F.R. § 208.30(e)(6)(iii)(B)).
[6] 8 U.S.C. § 1433(a).
[7] USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 421(b)(3).
[8] Similarly, Section 1182(a)(3)(D)(iv) establishes a limited exception to the admissibility bar for members of totalitarian parties, 8 U.S.C. § 1182(a)(3)(D)(iv), and other provisions cited by the Government concern who may qualify for the "exceptional" relief of cancellation of removal. *Moreno-Morante* v. *Gonzales*, 490 F.3d 1172, 1174 (9th Cir. 2007); *see INS* v. *Hector*, 479 U.S. 85 (1986) (same).

irrelevant. First, the Court said that "[t]he facts of these cases," not the terms of the very Order it left enjoined, "illustrate the sort of relationship that qualifies." Slip Op. at 12. Second, more than half of the examples the Court gave—Dr. Elshikh's mother-in-law, the newly-admitted University students, the refugees Hawaii seeks to resettle, and the invited lecturer—do not fall within any of the waiver provisions. Order § 3(c). And, third, the waiver provisions themselves offer only a very short illustrative list of close family members—"e.g., a spouse, child, or parent," *id.* § 3(c)(iv)—that is grossly under-inclusive even by the Government's standard, excluding even fiancés, siblings, and parents-in-law. They therefore shed no light whatsoever on the existing extent of the injunction.

B. This Court Should Clarify That Refugees With Formal Assurances And Other Bona Fide Relationships With United States Entities Remain Covered By The Injunction.

1. The Injunction Covers Refugees With A Formal Assurance From A U.S. Resettlement Agency.

The Supreme Court's guidance with respect to refugee admissions is straightforward: The injunction continues to apply where a U.S. entity "has a bona fide relationship with a particular" refugee such that the entity "can legitimately claim concrete hardship if that person is excluded." Slip Op. at 13. As the Supreme Court recently explained "when we have used the adjective 'concrete' we

have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Spokeo Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016).

The Government's own submissions easily establish both that there is a bona fide relationship between a refugee and the resettlement agency that provides the refugee's formal assurance, and that—as a result of this relationship—the agency will suffer real harm if the refugee is excluded. Attachment B to the Government's Declaration explains that, when a resettlement agency submits an "assurance," it makes a "written commitment * * * to provide, or ensure the provision of" basic services to the "refugee[] named on the assurance form." Bartlett Decl., Att. 2, ECF No. 301-1, at Page ID # 5694. The same document demonstrates that the resettlement agency must invest extensively in its relationship with the named refugee well before she arrives.

Notably, the document specifies that the agency must provide "[p]re-arrival services" for the refugee, including "[a]ssum[ing] responsibility for sponsorship, * * * plan[ning] for the provision" of "health services," *id.* at Page ID # 5702, and making arrangements for children who must be placed in foster care, *id.* at Page ID # 5715. The resettlement agency must also take all steps necessary to ensure that, as soon as the refugee gets off the plane, she is "transported to furnished living quarters," receives "ready-to-eat food and seasonal clothing," and has her "basic needs" met for at least thirty days. *Id.* at Page ID ## 5704-5708. And that is only

the beginning of the countless tasks, large and small, that the entity must prepare to undertake as soon as it submits the formal assurance. *See* HIAS & IRAP Amicus Br. at 6-7; Hetfield Decl. (detailing the investment by resettlement agencies).

When a refugee's travel is blocked, however, all of this planning and preparation is wasted. The resettlement agency is unable to meet the refugee, resettle her in the United States, or offer the myriad other services which it has invested substantial resources to provide. That is a "concrete hardship" far more severe than the one an entity might experience if an arranged "lecturer" is forbidden admission. Slip Op. at 12; *cf. Vill. of Arlington Heights* v. *Metro Hous. Dev. Corp.*, 429 U.S. 252, 253, 262-63 (1977) (organization experiences concrete "economic injury" as a result of expenditures on planning and review).

The Government sweeps aside this tremendous burden on the ground that a resettlement agency's efforts are simply "resettlement services for which the Government has contracted with [the entity] to provide." Opp. at 20. That is both misleading and irrelevant. As the Government requires resettlement agencies to inform newly arrived refugees, "[t]he local resettlement agency *is not a government agency*." Bartlett Decl., Att. 2, at Page ID # 5709 (emphasis added). It is a non-governmental organization that—in most circumstances—has been undertaking these refugee services for decades, even before the Government became involved. Moreover, these agencies receive only "*partial* funding" from

the Government "for resettlement services." Bartlett Decl.¶ 20 (emphasis added). They are required to provide the Government with a detailed break-down of the *private* resources they have devoted and are prepared to devote to refugee work, *see, e.g.*, Katyal Supp. Decl. Ex. F (Decl. of L. Bartlett, *Texas Health and Human Services Comm'n* v. *United States*, No. 3:15-cv-3851 (N.D. Tex. Jan. 5, 2016)) at pp. 80, 83, 86. And even if the agencies did not invest their own resources on behalf of each refugee, even the loss of proposed federal funding constitutes a "concrete injury." *Clinton* v. *City of New York*, 534 U.S. 417, 430-431 (1998).

In any event, the Supreme Court in no way suggested that only purely private relationships qualify as "bona fide." The injunction applies to any foreign national whose relationship with a U.S. entity is "formal, documented, and formed in the ordinary course rather than for the purpose of evading EO-2." Slip Op. at 12. There is no exception for "relationships facilitated by the Government." Indeed, the Government's own guidance specifies that those who qualify for visas because of their relationship with the U.S. Government *itself* are covered by the injunction. *See* Opp. Ex. A, at 2 (explaining that any visa category but B, C-1, C-3, D, or I "inherent[ly]" requires "a bona fide relationship"); goo.gl/whF5jZ (explaining that SI and SQ visas are granted to employees of the U.S. Armed Forces or a U.S. Mission). It is baffling why relationships *with* the Government would qualify but relationships *facilitated* by the Government would not.

The fact that a local resettlement agency may not have personally interacted with a refugee is equally irrelevant. The same is true of the relationship between a U.S. entity and an invited lecturer. *See* Slip Op. at 12. Entities often arrange lecturers through the speaker's organization or agent, but the Supreme Court made clear that a relationship exists all the same. Likewise, there is no requirement that a refugee have any direct contact with—or even have met—his "close familial relations" in the United States. The Supreme Court obviously did not view personal interaction as a necessary characteristic of a qualifying relationship.

Moreover, the Ninth Circuit held that Hawaii's harm from the refugee ban flows from the fact that the ban prevents the State from "assisting with refugee resettlement." *Hawaii* v. *Trump*, slip op. at 24 (9th Cir. June 12, 2017). The Government urged the Supreme Court to reject that holding and to stay any application of the injunction to refugees on the ground that the State had "no cognizable sovereign interest in * * * the entry of refugees." Katyal Supp. Decl. Ex. G at 11, 30; *id.* Ex. H at 11, 31. The Supreme Court did not grant that request, instead holding that the "facts of these cases" illustrate the kind of relationships that remain covered by the injunction. Thus, at a minimum, the injunction covers refugees with a relationship to an American entity similar to the one between Hawaii and the refugees it intends to resettle—a relationship that is if anything *more* removed than a resettlement agency's. *See* Bartlett Decl. ¶ 23, ECF No.

301-1 (explaining that "state and local governments" work with resettlement agencies to "meet the needs of forthcoming refugees"); Katyal Supp. Decl. Ex. F. at pp. 10-16 (summarizing state interactions with resettlement agencies).

Finally, the Government asserts that recognizing that a formal assurance embodies a bona fide relationship would "eviscerate the Supreme Court's stay ruling" because *every* refugee must ultimately have a formal assurance. Opp. at 17. That is incorrect. The Government estimates that only 24,000 of the approximately 200,000 individuals seeking refugee status currently have a formal assurance. Opp. at 18; *see generally* www.state.gov/j/prm/ra. That makes sense because the submission of a formal assurance is one of the last steps in the refugee process, occurring only after the refugee has passed through multiple stages of comprehensive vetting. Bartlett Decl. ¶¶ 5, 7-16, ECF No. 301-1. Section 6(a), however, suspends "decisions on applications for refugee status" for 120 days for those unaffected by the injunction. Thus, recognizing the relationship between refugees and agencies that have provided their formal assurances affects only a fraction of the refugees in the U.S. Refugee Admissions Program.

In any event, a stay is not a statute for which a court is obligated to ensure that each word has a substantial real-world effect. *Cf. Nevada* v. *Hicks*, 533 U.S. 353, 372 (2001) ("this is an opinion, bear in mind, not a statute"). The Court made it crystal clear that Sections 6(a) and 6(b) "*may not be enforced* against an

individual seeking admission as a refugee who can credibly claim a bona fide relationship," regardless of how many of them there may be. Slip Op. at 13.

2. The Court Should Clarify That The Government's Positions On Refugee Travel And Attorney-Client Relationships Are Unlawful.

The Government's opposition brief and guidance that it has released since Plaintiffs' motion raise several additional troubling issues.[9]

First, the Government asserts that it "has yet to determine" whether aliens who have already booked travel may enter the United States after July 6. Opp. at 18-19. That cannot be. Refugees who have booked travel to the United States by necessity not only have a relationship with a U.S. resettlement agency, but also have a place to live and services lined up for them when they enter the country. They therefore *a fortiori* have the requisite bona fide relationship under the Court's order. *See supra* Section B.1.

Second, in guidance sent on July 3, the Government stated that it was temporarily halting the process through which refugees obtain the advanced booking notifications necessary for travel, even with respect to refugees "with * * * the required bona fide relationship to a person or entity" in the United States. Katyal Supp. Decl. Ex. I ¶ 11. But the Supreme Court could not have been clearer that the Order's refugee provisions "*may not be enforced* against an individual

[9] Plaintiffs have attached a revised Proposed Order to this brief in light of the Government's new representations and the alterations to its guidance since Plaintiffs filed.

seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States." Slip Op. at 13 (emphasis added). Any programmatic delay in permitting them to enter is plainly unlawful.

Third, while the Government appears to accept that some client relationships with a legal services organization qualify under the terms of the Court's order, it nonetheless refuses to say whether all relationships qualify. *See* Opp. at 20-21. The fact that an alien has a "formal, documented" relationship with a legal services organization that is "formed in the ordinary course," however, is *ipso facto* sufficient under the Court's order. Slip Op. at 12; *see* HIAS & IRAP Amicus Br. at 5-6. There is no reason for the Government's equivocation.

The Government wrongly attempts to dodge each of these issues by asserting that the disputes are unripe. Opp. at 18-19. But parties may seek clarification of an injunction whenever there is a "question about [its] terms." *Connecticut Gen. Life Ins. Co.* v. *New Images of Beverly Hills*, 321 F.3d 878, 883 (9th Cir. 2003). It is especially appropriate for courts to provide clarification where one party "proposes to engage" in action that may be unlawful. *Matter of Hendrix*, 986 F.2d 195, 200 (7th Cir. 1993). Here, the Government has said it is actively considering violating the injunction as early as *Friday* of this week. Waiting any longer to clarify the unlawfulness of that conduct would result in contempt by the Government and impair the public interest.

That is all the more true because the Government has offered (at 22-25) a decidedly confused account of how it intends to ensure that qualified applicants are not affected by the bans. Refugee and visa processes are already notoriously slow and backlogged; applicants wait for months or years for individual interviews. The Government cannot be permitted to drag this process out even further by refusing admission when it is "unclear" whether a particular applicant is exempt from the ban, *see* Opp. at 24, while discouraging the courts from giving the guidance that will produce clarity. Nor can the Government be permitted to employ a cumbersome individualized process for applicants that should be categorically exempt from the bans.[10] The time wasted in that process may, for example, unfairly preclude refugees from entering the country before October 1, when President Trump is authorized to set a new refugee cap.

CONCLUSION

The Court should grant Plaintiffs' motion to clarify the scope of the injunction.

[10] While the Government has properly recognized that certain categories of foreign nationals seeking entry are categorically exempt from the bans, *see* Opp. at 18-19, it still refuses to acknowledge that three categories of refugee applicants are similarly categorically exempt: "U.S.-affiliated Iraqis" at risk of persecution because of their contributions to the United States' combat mission in Iraq; and participants in the Lautenberg Program and the Central American Minors Program, each of which requires participants to have close family ties with the United States, a relationship with a "designated resettlement agency," or both. *See* HIAS & IRAP Amicus Br. at 10; https://www.uscis.gov/CAM.

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Respectfully submitted,

/s/ Neal K. Katyal

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