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State v. Trump: Trump Fails in the 'Art of the Deal' Securing a Victory for Travel Ban 2.0

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CASE SUMMARY

STATE V. TRUMP: TRUMP FAILS IN THE 'ART OF THE DEAL'[1] SECURING A VICTORY FOR TRAVEL BAN 2.0

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INTRODUCTION

The Ninth Circuit affirmed the District Court of Hawaii's modification of the preliminary injunction against sections 2 and 6 of President Trump's Executive Order 13780, in accordance with the Supreme Court's decision in *Trump v. International Refugee Assistance Project.*[2]

I. FACTUAL AND PROCEDURAL HISTORY

On March 6, 2017, President Trump announced Executive Order 13780, "Protecting the Nation From Foreign Terrorist Entry Into the United States."[3] Section 2 of the Order halts the entry of individuals from the countries of Iran, Libya, Somalia, Sudan, Syria and Yemen into the United States for ninety days.[4] Section 6 halts for 120-days the entry of refugees into the United States and decisions on refugee applicants.[5]

On March 15, 2017, the District Court of Hawaii issued a temporary restraining order ("TRO") suspending sections 2 and 6 of the Executive

[1] DONALD TRUMP WITH TONY SCHWARTZ, TRUMP: THE ART OF THE DEAL (2015).

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[2] State v. Trump, 871 F.3d 646, 649 (9th Cir. 2017).

[3] *Id.* at 649-650.

[4] Exec. Order No. 13780, 3 C.F.R. § 2 (2017).

[5] Exec. Order No. 13780, 3 C.F.R. § 6(a) (2017).

Order, finding that the plaintiffs had successfully shown a likelihood of success on the merits of their underlying Establishment Clause claim.[6]

On March 29, 2017, the district court issued a preliminary restraining order from the existing TRO enjoining the same sections of the Executive Order from enforcement.[7] On June 12, 2017, the Ninth Circuit affirmed in part the preliminary injunction on statutory grounds rather than the underlying constitutional question.[8] The case was remanded back to the District of Hawaii.[9]

The Government filed petitions for certiorari and applications to stay the preliminary injunctions.[10] On June 26, 2017, the Supreme Court granted certiorari and stayed the preliminary injunction in part, but only to the extent that "the injunctions prevent enforcement of [section] 2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States."[11] The Court defined bona fide relationships in terms of "close familial relationships."[12]

On June 29, 2017, the Government commenced enforcement of the portions of the Executive Order not enjoined by the preliminary injunction.[13] That same day, the plaintiffs filed an emergency motion seeking guidance from the district court as to the scope of the preliminary injunction, however the court denied the motion and referred the plaintiffs back to the Supreme Court.[14]

On July 7, 2017, the plaintiffs appealed the district court ruling and again, the district court denied the motion.[15] The plaintiffs then filed a new motion, most notably seeking to modify the preliminary injunction on the basis that "(1) the Government's definition of 'close familial relationship' was artificially narrow and (2) refugees with a formal assurance from a refugee settlement agency have a 'bona fide relationship' with a U.S. entity."[16]

On July 13, 2017, the district court granted the motion to enforce or modify the preliminary injunction holding that the Government's defini-

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[6] *Trump*, 871 F.3d at 650.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 651.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 652.

[14] *Id.*

[15] *Id.*

[16] *Id.* The plaintiffs made additional contentions to the district court regarding clients of legal services organizations and refugees in other programs, but for the purposes of this case summary they have been omitted to focus on the court's analysis of "close familial relationships" and refugees with formal assurances.

tion of "close familial relationships" was too narrow because it was limited to "parents, parents-in-law, spouses, fiancés, children, adult sons and daughters, sons- and daughters-in-law, siblings (half and whole relationships), and step relationships."[17] The district court expanded the definition to include grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of individuals in the United States.[18] The district court also found that refugees with formal assurance from resettlement agencies had bona fide relationships with a United States entity.[19]

On July 14, 2017, the Government filed an appeal to the district court's order and a motion for a stay pending the appeal.[20] Additionally, the Government filed a motion for clarification to the Supreme Court asking for further guidance regarding its stay issued on June 26, 2017 and requested a temporary administrative stay for the district court's injunction.[21] The Supreme Court denied the motion for clarification, but issued a stay for the portion of the injunction "with respect to refugees covered by a formal assurance."[22]

On July 21, 2017, both parties filed a joint motion to expedite the Government's appeal, which the Ninth Circuit granted.[23]

II. Ninth Circuit Analysis

The court's analysis began with the Government's argument that the district court "significantly expand[ed] the preliminary injunction beyond the limits of the stay."[24] In particular, the Government contended that the district court committed error when they amended the preliminary injunction to prevent enforcement against: (1) certain family members, such as grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, nieces, nephews, and cousins, and (2) refugees who received assurance from a U.S.-established resettlement agency.[25]

A. "Close Familial Relationship" v. Certain Family Members

In its June 26, 2017 stay of the preliminary injunction, the Supreme Court defined a bona fide relationship between individuals as a "close

[17] *Id.* at 653.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 653.
[21] *Id.* at 653-654.
[22] *Id.* at 654.
[23] *Id.*
[24] *Id.*
[25] *Id.*

familial relationship," and for entities, "the relationship must be formal, documented and formed in the ordinary course, rather than for the purpose of evading [the Executive Order]."[26] The Supreme Court further defined the meaning of "close" familial relationship in terms of a "foreign national who wishes to enter the United States to live with or visit a family member . . ." and pointed to the relationship between the plaintiff and his mother-in-law as an example.[27] The Supreme Court sought to balance the equities between foreign nationals with no connections to the United States and those possessing bona fide relationships with individuals in the United States where a hardship would be created if those persons were denied entry.[28]

The Government claimed that it correctly interpreted the stay to include only the following relationships: parents, parents-in-law, spouses, fiancés, children, adult sons or daughters, sons- and daughters-in-law, siblings, and step-relationships based on the Court's definition of "close familial relationships" in its stay order.[29] The Government also maintained that it chose these particular relationships because of provisions in the Immigration and Nationality Act ("INA") and the Supreme Court's use of the Executive Order's case-by-case waivers.[30]

First, the Ninth Circuit reasoned that the Government did not correctly interpret the Supreme Court's reference to "close familial relationships" because they did not show how certain family members, such as grandparents, grandchildren, brothers- and sisters-in-law, aunts, uncles, nieces, nephews, and cousins, could have "no connection" to or "lack any bona fide relationship" with individuals in the United States.[31] The court also reasoned that the Government did not clarify how the Executive Order would not burden other certain family members (grandparents, grandchildren, brothers- and sisters-in-law) with "concrete hardships."[32]

Second, the Ninth Circuit criticized the Government's use of the INA.[33] The Government claimed that it based its list of familial relationships on section 201 and section 203 of the INA.[34] Section 201 defines "immediate relatives" as "the children," the "spouses, and parents of a citizen of the United States."[35] Section 203 contains provisions for immi-

[26] *Id.* at 651-52.
[27] *Id.*
[28] *Id.* at 651.
[29] *Id.* at 655.
[30] *Id.* at 655-56.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 656-57.
[34] *Id.* at 656.
[35] *Id.*

grant visas in which certain individuals are prioritized: sons, daughters and siblings of U.S. Citizens and spouses and unmarried sons and daughters of permanent resident aliens.[36] In response, the court looked to the Supreme Court's focus on hardships placed on individuals in the United States who had "bona fide relationships" with those foreign nationals denied entry rather than specific INA definitions of family.[37] Additionally, the court commented on the Government's unexplained "cherry-pick[ing]" of INA definitions of "close familial relationships," since other provisions in the Act provide for broader definitions that include close family as sisters- and brothers-in-law, grandparents, and grandchildren.[38]

Third, the Ninth Circuit disagreed with the Government's contention that the Supreme Court's positive use of the Executive Order's waiver provision supported their argument.[39] In deciding to grant the stay, the Court directed its attention to the case-by-case waivers designated in the Executive Order in its balancing of equities.[40] One particular waiver covers foreign nationals seeking "to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa [where] the denial of entry during the suspension period would cause undue hardship."[41] Although that particular waiver specified some close family members, the Court reasoned that that list was not exhaustive and the very existence of a waiver in the Executive Order meant that there was a distinction between foreign nationals with connections to the United States and those without.[42]

The Ninth Circuit affirmed the district court's modification of the preliminary injunction to include grandparents, grandchildren, brothers- and sisters-in-law, aunts, nieces, nephews, and cousins.[43]

B. Refugees Who Have Received Formal Assurances from a U.S.-Established Resettlement Agency

Next, the Government argued that the district court erred when it modified the injunction to prevent its enforcement against refugees with

[36] *Id.* at 655.
[37] *Id.* at 656.
[38] *Id.* at 657.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id*. at 649.

formal assurances.[44] In its June 26, 2017 stay order, the Supreme Court held that if a refugee has a bona fide relationship with the United States that is "formal, documented, and formed in the ordinary course rather than to evade the Executive Order," he or she is covered by the preliminary injunction.[45] In contrast, the U.S Department of State declared that "[t]he fact that a resettlement agency in the United States has provided a formal assurance for a refugee seeking admission . . . is not sufficient in and of itself to establish a qualifying relationship for that refugee with an entity in the United States."[46] The Government argued that a formal assurance was not a relationship between the refugee and the resettlement organization, but rather a relationship between the resettlement organization and the Department of State.[47]

In response, the Ninth Circuit referred back to the Supreme Court's definition of a bona fide relationship with a U.S. entity holding that refugees with formal assurances are excluded from the ban.[48] The Ninth Circuit reasoned that formal assurances are given to refugees after they go through a lengthy process consisting of an application and security and medical screenings across multiple agencies.[49] Only once a refugee has completed this process do they receive "sponsorship assurance" from a resettlement agency.[50] Thus, the assurance and the underlying relationship formed is "formal, documented, and formed in the ordinary course rather than to evade the Executive Order."[51] Additionally, the Ninth Circuit considered the fact that resettlement agencies would be subject to "concrete hardships" in the form of a loss of invested resources and financial support of the refugee, as well as an inability to fulfill their agency missions, which are sometimes spiritual or religious, if the refugee was denied entry.[52]

Thus, the Ninth Circuit affirmed the district court's modification of the preliminary injunction to include refugees with formal assurances.

III. IMPLICATIONS OF THE DECISION

Following its decision to affirm the district court's modification of the preliminary injunction, the Ninth Circuit's immediate concern was

[44] *Id*. at 659.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 559.
[49] *Id.* at 660.
[50] *Id.*
[51] *Id.* at 559.
[52] *Id.* at 661-62.

with the status of refugees in "vulnerable limbo" and the short time they have before portions of their application for admittance into the United States expire, particularly their security and medical checks.[53] With this in mind, the court shortened the time for the mandate to issue from 52-days to five days.[54]

On September 24, 2017, Proclamation 9645 was announced, barring entry of foreign nationals from Chad, Iran, Libya, Syria, Yemen, Somalia, Venezuela, and North Korea.[55] The U.S. District Courts of Hawaii and Maryland issued injunctions against the ban of nationals from all aforementioned countries, except Venezuela and North Korea.[56]

Some lawyers have argued against national injunctions because of their greater implications.[57] In particular, national injunctions were used during the Obama and Bush administrations to block the enforcement of certain executive orders, statutes, and regulations.[58] Thus, concerns arise from the use of forum shopping to find the most sympathetic court that will issue the injunction.[59] An example of this is the use of the Ninth Circuit's liberal reputation to block Trump's Executive Order.[60] Other implications include the lack of "percolation" among lower courts before the Supreme Court hears the issue, whereby several courts and circuits decide on the case before it reaches the Supreme Court, and the federal courts' lack of judicial authority, which does not allow for the resolution of all issues for the parties.[61] Instead this authority is laid out in the U.S. Constitution as being delegated to the Supreme Court and the lower courts, who hold judicial power and the ability to "decide particular cases for particular parties."[62]

Despite the existing injunctions against the President's most recent Proclamation, the country continues to struggle with how to deal with

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[53] *Id.* at 664.

[54] *Id.*

[55] Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24. 2017).

[56] NAFSA: Association of International Educators, *Executive Order Entry Ban Litigation Updates* (Oct. 23, 2017), http://www.nafsa.org/Professional_Resources/Browse_by_Interest/International_Students_and_Scholars/Executive_Order_Entry_Ban_Litigation_Updates/.

[57] Samuel Bray, *The Case Against National Injunctions, No Matter Who Is President*, LAWFARE (Feb. 4, 2017, 4:00pm), https://www.lawfareblog.com/case-against-national-injunctions-no-matter-who-president.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

terrorism, foreign nationals, and refugees. It is likely that the Government will appeal the existing injunctions[63] and the saga will continue.

[63] NAFSA: Association of International Educators, *Executive Order Entry Ban Litigation Updates* (Oct. 23, 2017), http://www.nafsa.org/Professional_Resources/Browse_by_Interest/International_Students_and_Scholars/Executive_Order_Entry_Ban_Litigation_Updates/.