No. 19A230

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, *ET. AL.*,
Applicants,

v.

EAST BAY SANCTUARY COVENANT, *ET AL.*,
Respondents.

On Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit and Pending Further Proceedings in this Court

To the Honorable Elena Kagan,
Associate Justice of the United States and
Circuit Justice for the Ninth Circuit

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF, MOTION FOR LEAVE TO FILE BRIEF IN COMPLIANCE WITH RULE 33.2, *AMICUS CURIAE* BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPLICANTS

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TABLE OF CONTENTS

Table of Authorities iii
Motion for Leave to File *Amicus* Brief 1
Motion for Leave to File under Rule 33.2 4
Amicus Curiae Brief in Support of Applicants 6
Introduction 6
Standard of Review 7
Summary of Argument 7
Argument 9
I. The grant of a writ of *certiorari* is likely. 9
II. The Government is likely to prevail 9
A. The courts below lacked jurisdiction. 9
1. Plaintiffs' interests are insufficiently related to an "injury in fact" to satisfy Article III jurisdiction. 10
2. Plaintiffs' interests fall outside the relevant zones of interests. 13
3. Plaintiffs do not have standing under *Havens*. 14
4. Plaintiffs lack third-party standing for future clients. 16
5. Sovereign immunity bars Plaintiffs' challenge. 17
a. Plaintiffs cannot sue under the APA. 18
b. Plaintiffs cannot bring a non-APA and pre-APA suit in equity. 19
B. The Government is likely to prevail on the merits. 20
1. The IFR's promulgation did not violate the APA's procedural requirements. 21
2. The IFR complies with the INA substantively. 21
a. A categorical bar to granting asylum is not inconsistent with a mandatory right to apply for asylum. 21
b. Plaintiffs' argument that §1158's 1996 amendment precludes any new regulatory bars to asylum amounts to the flawed argument thatthe Executive's pre-existing discretion with respect to asylum has been repealed by implication. 22
3. Plaintiffs' theory would undermine the essential flexibility that the APA and the INA provide to address emergencies and foreign-affairs functions. 25
III. The other stay criteria tip in the Government's favor. 27

A. The Government's harm is weighty and irreparable. 27
B. Because Plaintiffs' alleged harms are trivial to non-existent, the balance of the equities favors the Government. 28
C. The public interest favors a stay. 30
Conclusion 30

TABLE OF AUTHORITIES

CASES

Action Alliance of Senior Citizens v. Heckler,
789 F.2d 931 (D.C. Cir. 1986) 16

Air Courier Conference v. Am. Postal Workers Union,
498 U.S. 517 (1991) 13

Alabama Power Co. v. Ickes,
302 U.S. 464 (1938) 20

Allen v. Wright,
468 U.S. 737 (1984) 10

Altria Group, Inc. v. Good,
555 U.S. 70 (2008) 24

Am. Immigration Lawyers Ass'n v. Reno,
199 F.3d 1352 (D.C. Cir. 2000) 17

Animal Legal Def. Fund v. USDA,
632 F. App'x 905 (9th Cir. 2015) 14

Arizona v. United States,
567 U.S. 387 (2012) 21, 26

Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,
397 U.S. 150 (1970) 18

Bender v. Williamsport Area Sch. Dist.,
475 U.S. 534 (1986) 9

Burford v. Sun Oil Co.,
319 U.S. 315 (1943) 30

Chevron U.S.A., Inc. v. NRDC,
467 U.S. 837 (1984) 25

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 14

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 11

Davis v. Mineta,
302 F.3d 1104 (10th Cir. 2002) 29

Dep't of Army v. Blue Fox, Inc.,
525 U.S. 255 (1999) 17

Diamond v. Charles,
476 U.S. 54 (1986) 12, 28

Ecosystem Inv., Partners v. Crosby Dredging, L.L.C.,
729 F.App'x 287 (5th Cir. 2018) 16

Edwards v. Hope Med. Group for Women,
512 U.S. 1301 (1994) 7

Elrod v. Burns,
427 U.S. 347 (1976) 28

Ex parte Young,
209 U.S. 123 (1908) 19

Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC,
666 F.3d 1216 (9th Cir. 2012) 14

FDIC v. Meyer,
510 U.S. 471 (1994) 17

Flast v. Cohen,
392 U.S. 83 (1968) 12

Fourco Glass Co. v. Transmirra Products Corp.,
353 U.S. 222 (1957) 24

Gladstone, Realtors v. Bellwood,
441 U.S. 91 (1979) 15

Graddick v. Newman,
453 U.S. 928 (1981) 28

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 8, 14-16

Heckler v. Lopez,
464 U.S. 879 (1983) 29

Hernandez v. Sessions,
872 F.3d 976 (9th Cir. 2017) 28

Hollingsworth v. Perry,
558 U.S. 183 (2010) 7, 20

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 10

Kleindienst v. Mandel,
408 U.S. 753 (1972) 27

Kokkonen v. Guardian Life Ins. Co. of Am.,
511 U.S. 375 (1994) 9-10

Kowalski v. Tesmer,
543 U.S. 125 (2004) 17

Lane v. Pena,
518 U.S. 187 (1996) 17-18

Lewis v. Casey,
518 U.S. 343 (1996) 11

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 12

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 11

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990) 13-14

Mathews v. Diaz,
426 U.S. 67 (1976) 27

McConnell v. FEC,
540 U.S. 93 (2003) 12-13

Miller v. Albright,
523 U.S. 420 (1998) 17

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010) 29

Mountain States Legal Found. v. Glickman,
92 F.3d 1228 (D.C. Cir. 1996) 16

Muskrat v. United States,
219 U.S. 346 (1911) 10

Nader v. Saxbe,
497 F.2d 676 (D.C. Cir. 1974) 12

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
551 U.S. 644 (2007) 23-24

Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co., 290 F.3d 578 (3d Cir. 2002) 29

Pennsylvania v. New Jersey,
426 U.S. 660 (1976) 15

People for the Ethical Treatment of Animals v. U.S. Dept. of Agriculture,
797 F.3d 1087 (D.C. Cir. 2015) 14

Sea-Land Serv., Inc. v. Alaska R.R.,
659 F.2d 243 (D.C. Cir. 1982) 18

Second City Music, Inc. v. City of Chicago,
333 F.3d 846 (7th Cir. 2003) 29

Secretary of State of Md. v. Joseph H. Munson Co.,
467 U.S. 947 (1984) 11

Sierra Club v. Morton,
405 U.S. 727 (1972) 11, 15

Steel Co. v. Citizens for a Better Env't.,
523 U.S. 83 (1998) 10

Trump v. Hawaii,
138 S.Ct. 2392 (2018) 21-22, 26

United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 26

United States v. Lee,
106 U.S. 196 (1882) 19

United States v. Sherwood,
312 U.S. 584 (1941) 17

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 11

Vt. Agency of Nat. Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 12-13, 16

Wadley S. R. Co. v. Georgia,
235 U.S. 651 (1915) 18-20

Warth v. Seldin,
422 U.S. 490 (1975) 15

Washington v. Reno,
35 F.3d 1093 (6th Cir. 1994) 30

Yakus v. United States,
321 U.S. 414 (1944) 30

Youngberg v. Romeo,
457 U.S. 307 (1982) 19

STATUTES

U.S. CONST. art. III 7, 10-13, 15, 17, 19-20, 28-29

U.S. CONST. art. III, §2 10

Administrative Procedure Act,
5 U.S.C. §§551-706 ..... 7-8, 18-19, 21, 25-26

5 U.S.C. §553(a)(1) 21, 26

5 U.S.C. §553(b)(B) 21, 25

5 U.S.C. §553(d)(3) 21, 25

5 U.S.C. §701(a)(1) 18-19
5 U.S.C. §702 18-19
5 U.S.C. §703 18-19
5 U.S.C. §704 18-19
Congressional Review Act,
5 U.S.C. §§801-808 24
Immigration and Naturalization Act,
8 U.S.C. §§1101-1537 ..... 7-8, 15-16, 19, 21-22, 25-27
8 U.S.C. §1158 ..... 8, 21-23
8 U.S.C. §1158(a)(1) 21-22
8 U.S.C. §1158(c)(2)(A) 23
8 U.S.C. §1158(c)(2)(A)(ii) 22
8 U.S.C. §1158(c)(2)(B) 21-23
8 U.S.C. §1158(c)(2)(C) 23
8 U.S.C. §1252(a)(5) 19
8 U.S.C. §1252(b)(9) 19
8 U.S.C. §1252(e)(3) 19
All Writs Act,
28 U.S.C. §1651(a) 7
PUB. L. NO. 94-574, §1,
90 Stat. 2721 (1976) 18
Refugee Act of 1980,
PUB. L. NO. 96-212, §201(b), 94 Stat. 102, 105 23
Illegal Immigration Reform and Immigrant Responsibility Act,
PUB. L. NO. 104-208, Div. C, 110 Stat. 3009-546 (1996) 22-23
PUB. L. NO. 104-208, Div. C, §604,
110 Stat. 3009, 3009-690 to 3009-694 (1996) 23
8 U.S.C. §1158(a) (1994) 23

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Movant Immigration Reform Law Institute respectfully requests leave to file the accompanying brief as *amicus curiae* in support of the application to stay the injunctive relief entered by the District Court in this matter.* The federal parties all consented to this motion for leave to file in writing.

IDENTITY AND INTERESTS OF MOVANT

Movant Immigration Law Reform Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and legal permanent residents, and to assisting courts in

* Consistent with FED. R. APP. P. 29(a)(4)(E) and this Court's Rule 37.6, counsel for movant and *amicus curiae* authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the movant/*amicus* and its counsel, make a monetary contribution to preparation or submission of the motions and brief.

understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in important immigration cases, including *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), and *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017). For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's parent organization, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has a direct interest in the issues here.

REASONS TO GRANT LEAVE TO FILE

By analogy to this Court's Rule 37.2(b), movant respectfully seeks leave to file the accompanying *amici curiae* brief in support of the stay applicants. Because this motion is filed before the respondents' deadline to file an opposition, this filing should not disturb the accelerated briefing schedule ordered in this matter.

Movant respectfully submits that its proffered *amicus* brief brings several relevant matters to the Court's attention, beyond the issues in the application:

- First, on the issue of standing, the *amicus* brief demonstrates that plaintiffs fail to meet the requirement for a legally protected interest with respect to an injury in fact. *See Amicus* Br. at 10-13.
- Second, on the issue of standing, the *amicus* brief rebuts Plaintiffs' and the lower courts' reliance on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *See Amicus* Br. at 14-16.
- Third, the *amicus* brief demonstrates that Plaintiffs lack third-party standing to assert the rights of future clients. *See Amicus* Br. at 16-17.

- Fourth, the *amicus* brief addresses the absence of either a cause of action in equity or a waiver of sovereign immunity under the Administrative Procedure Act. *See Amicus* Br. at 17-20.
- Fifth, on the merits, the *amicus* brief demonstrates that Plaintiffs' arguments that statutory bars to asylum in certain discrete contexts should preempt the adoption of regulatory bars in other contexts amounts to the flawed argument that the Executive's prior authority to adopt such regulatory bars has been repealed by implication. *See Amicus* Br. at 22-24.

These issues are all relevant to deciding the stay application, and movant IRLI respectfully submits that filing the brief will aid the Court.

Dated: September 3, 2019

Respectfully submitted,

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MOTION FOR LEAVE TO FILE UNDER RULE 33.2

Movant Immigration Reform Law Institute ("IRLI") respectfully submits that the Court's rules require those moving or applying to a single Justice to file in 8½-by 11-inch format pursuant to Rule 22.2, as IRLI does here. If Rule 21.2(b)'s requirements for motions to the Court for leave to file an *amicus* brief applied here, however, IRLI would need to file 40 copies in booklet format, even though the Circuit Justice may not refer this matter to the full Court. Due to the expedited briefing schedule, the expense and especially the delay of booklet-format printing, and the rules' ambiguity on the appropriate procedure, IRLI has elected to file pursuant to Rule 22.2. To address the possibility that the Circuit Justice may refer this matter to the full Court, however, movant files an original plus ten copies, rather than Rule 22.2's required original plus two copies.

Should the Clerk's Office, the Circuit Justice, or the Court so require, IRLI commits to re-filing expeditiously in booklet format. *See* S.Ct. Rule 21.2(c) (Court may

direct the re-filing of documents in booklet-format). Movant respectfully requests leave to file the accompanying brief as *amicus curiae* — at least initially — in 8½-by 11-inch format pursuant to Rules 22 and 33.2, rather than booklet format pursuant to Rule 21.2(b) and 33.1.

For the foregoing reasons, the motion for leave to file in 8½-by 11-inch format should be granted.

Dated: September 3, 2019

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AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANTS

Amicus Curiae Immigration Reform Law Institute ("IRLI" or "*Amicus*") respectfully submits that the Circuit Justice — or the full Court, if this matter is referred to the full Court — should stay the injunctive relief entered in the District Court in this action until the federal applicants timely file and this Court duly resolves a petition for a writ of *certiorari.* Alternatively, because jurisdiction is lacking here, the Court could notice that defect and remand with instructions to dismiss. IRLI's interests are set out in the accompanying motion for leave to file.

INTRODUCTION

Three immigrant-rights advocacy groups (collectively, "Plaintiffs") have sued various federal Executive offices and officers (collectively, the "Government") to challenge the promulgation and enforcement of an interim final rule, Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (2019) (hereinafter, the "IFR"), which concerns aliens seeking asylum in the United States after transiting

through a third country without seeking asylum there. Plaintiffs challenge not only the substantive merits under the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"), but also the IFR's promulgation without notice-and-comment rulemaking under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA").

STANDARD OF REVIEW

A stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* Where the All Writs Act, 28 U.S.C. §1651(a) is implicated, the Court also considers the necessity or appropriateness of interim relief *now* to aid the Court's *future* jurisdiction. *See Edwards v. Hope Med. Group for Women,* 512 U.S. 1301 (1994) (requiring "reasonable probability that *certiorari* will be granted," a "significant possibility" of reversal, and a "likelihood of irreparable harm") (Scalia, J., in chambers).

SUMMARY OF ARGUMENT

Before reaching the merits of a dispute, federal appellate courts first must evaluate the jurisdiction of the courts below over Plaintiffs' claims. Plaintiffs lack a legally protected right under Article III and their claimed injuries would fall outside the zone of interests for the relevant statutes even if Plaintiffs satisfied Article III

(Sections II.A.1-II.A.2). Moreover, the INA differs from the statute at issue in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in a way that precludes reliance on Plaintiffs' diverted-resources injury (Section II.A.3), and Plaintiffs cannot assert the rights – if any – of third-party asylum seekers that Plaintiffs hope to represent in the future (Section II.A.4). Finally, Plaintiffs lack both a cause of action under the Administrative Procedure Act ("APA") and the APA's waiver of sovereign immunity (Section II.A.5.a), and cannot state a claim for non-APA equity review (Section II.A.5.b).

On the merits, the Government's actions easily fit within the APA's emergency and foreign-policy exceptions for proceeding without notice-and-comment rulemaking (Section II.B.1). Substantively, Plaintiffs' suggestion that 8 U.S.C. §1158's mandate that all aliens may *apply* for asylum precludes the Executive's adopting bars to *granting* asylum, as §1158 itself does for various classes of aliens, is transparently incorrect (Section II.B.2.a); Plaintiffs' argument that express statutory bars to granting asylum in certain contexts field preempts the Executive from adopting regulatory bars in other contexts amounts to the flawed argument that the Executive's broad authority to adopt those bars before the 1996 amendments has been repealed by implication (Section II.B.2.b). Finally, this Court should reject Plaintiffs' approach because it would deny the Executive the flexibility that both the APA and the INA provide for emergencies (Section II.B.3).

While the foregoing jurisdictional and merits issues suggest that the Government is likely to prevail, the other stay factors also support the Government.

Injunctions in favor of plaintiffs who lack standing inflict a separation-of-powers injury on the Executive Branch that constitutes irreparable harm, in addition to the injunction's negative impact on the Executive Branch's ability to conduct foreign affairs and protect national security and public safety (Section III.A). By contrast, Plaintiffs' countervailing injuries are trivial and, indeed, arguably not cognizable (Section III.B). Finally, the public interest favors a stay, both because the public interest merges with the merits (which favor the Government) and because — in public-injury cases such as this — a private plaintiff cannot obtain an injunction against the government as easily as it could against a private plaintiff in like circumstances (Section III.C).

ARGUMENT

I. THE GRANT OF A WRIT OF *CERTIORARI* IS LIKELY.

There is a reasonable possibility that this Court will grant the Government's eventual petition for a writ of *certiorari* in this matter. See Appl. at 19-21.

II. THE GOVERNMENT IS LIKELY TO PREVAIL

The Government is likely to prevail on the merits not only because it is correct on the substantive merits, but also because Plaintiffs have neither standing nor a cause of action for judicial review of governmental action.

A. The courts below lacked jurisdiction.

Federal courts are courts of limited jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.

375, 377 (1994). The parties cannot confer jurisdiction by consent or waiver, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982), and federal courts instead have the obligation to assure themselves of jurisdiction before reaching the merits. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). As explained below, Plaintiffs lack not only standing, but also a waiver of the Government's sovereign immunity. *See* Sections II.A.1-II.A.5, *infra.* Accordingly, as an alternative to the stay that the Government requests, this Court should fulfill its "special obligation to" determine jurisdiction, *id.*, find a lack of jurisdiction, and remand with instructions to dismiss the case.

1. Plaintiffs' interests are insufficiently related to an "injury in fact" to satisfy Article III jurisdiction.

Under Article III, federal courts cannot issue advisory opinions, *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911), but must instead focus on the cases or controversies presented by affected parties before the court. U.S. CONST. art. III, §2. "All of the doctrines that cluster about Article III — not only standing but mootness, ripeness, political question, and the like — relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen v. Wright,* 468 U.S. 737, 750 (1984) (interior quotation marks omitted). Under these limits, a federal court lacks the power to interject itself into public-policy disputes when the plaintiff lacks standing.

At its constitutional minimum, standing presents the tripartite test of whether the party invoking a court's Article III jurisdiction raises an "injury in fact" that

(a) constitutes "an invasion of a legally protected interest," (b) is caused by the challenged action, and (c) is redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62 (1992) (interior quotation marks omitted). In addition, the judiciary has adopted prudential limits on standing that bar review even when the plaintiff meets Article III's minimum criteria. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 475 (1982) (zone-of-interests test); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 955 (1984) (litigants must raise their own rights). Moreover, plaintiffs must establish standing separately for each form of relief they request. *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996) ("standing is not dispensed in gross"); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Plaintiffs here lack both constitutional and prudential standing.

A plaintiff can, of course, premise its standing on non-economic injuries, *Valley Forge Christian Coll.*, 454 U.S. at 486, including a "change in the aesthetics and ecology of [an] area," *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). But the threshold requirement for "the irreducible constitutional minimum of standing" is that a plaintiff suffered an "injury in fact" through "an invasion of a *legally protected interest* which is … concrete and particularized" to that plaintiff. *Defenders of Wildlife*, 504 U.S. at 560 (emphasis added). To be sure, the requirement for particularized injury typically poses the biggest problem for plaintiffs — for example, both *Valley Forge Christian College* and *Morton*, *supra*, turned on the lack of a particularized injury — but the requirement for a legally protected interest is even

more basic.

As this Court recently explained in rejecting standing for *qui tam* relators based on their financial stake in a False Claims Act penalty, not all *interests* are *legally protected* interests:

> There is no doubt, of course, that as to this portion of the recovery — the bounty he will receive if the suit is successful — a *qui tam* relator has a concrete private interest in the outcome of the suit. But the same might be said of someone who has placed a wager upon the outcome. *An interest unrelated to injury in fact is insufficient to give a plaintiff standing*. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion[.]

Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 772-73 (2000) (emphasis added, interior quotation marks, citations, and alterations omitted); *accord McConnell v. FEC*, 540 U.S. 93, 226-27 (2003). Thus, even harm to a pecuniary interest does not *necessarily* qualify as an injury in fact. Rather, "Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue." *Diamond v. Charles*, 476 U.S. 54, 70 (1986).[1] The statutes here

[1] After rejecting standing based on an interest in a *qui tam* bounty, *Stevens* held that *qui tam* relators have standing on an assignee theory (*i.e.*, the government has an Article III case or controversy and assigns a portion of it to the *qui tam* relator). *Stevens*, 529 U.S. at 771-73. Outside of taxpayer-standing cases that implicate the Establishment Clause, the nexus test of *Flast v. Cohen*, 392 U.S. 83 (1968), typically arises in cases challenging a failure to prosecute. *See*, *e.g.*, *Nader v. Saxbe*, 497 F.2d 676, 680-82 (D.C. Cir. 1974); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617-18 (1973) ("in the unique context of a challenge to a criminal statute, appellant has failed to allege a sufficient nexus between her injury and the government action which she attacks"). Even without the *Flast* nexus test, Article III nonetheless requires that the claimed interest qualify as a "legally protected right." *Stevens*, 529 U.S. at 772-73.

have no nexus to Plaintiffs' alleged financial injuries (*i.e.*, the resources that they voluntarily have diverted – or will divert – to counteract the new rules). For this reason, Plaintiffs have not suffered an injury in fact under the statutes at issue here.[2]

2. Plaintiffs' interests fall outside the relevant zones of interests.

Assuming *arguendo* that Plaintiffs had constitutional standing based on their injuries, *but see* Section II.A.1, *supra*, Plaintiffs would remain subject to the zone-of-interests test, which defeats their claims for standing to sue under the statutes that they invoke. Quite simply, nothing in those statutes supports an intent to protect private pecuniary interests in future fundraising or budget allocations.

To satisfy the zone-of-interests test, a "plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523-24 (1991) (interior quotation marks omitted, emphasis in original). Not every frustrated interest meets the test:

> [F]or example, the failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and

[2] Although analogous to the prudential zone-of-interests test, *Stevens* and *McConnell* make clear that the need for a *legally protected interest* is an element of the threshold inquiry under Article III of the Constitution, not a merely prudential inquiry that a party could waive.

> not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990). *Amicus* respectfully submits that Plaintiffs' pecuniary interests here no more relevant than court reporters' fees are from a statute requiring hearings on the record. Not every adverse effect on a private interest falls within the zone of interests that Congress sought to protect in a tangentially related statute.

3. Plaintiffs do not have standing under *Havens*.

Plaintiffs base their standing on their voluntarily diverted resources and the IFR's impact on their fundraising. Because the diverted-resource injuries are self-inflicted and outside the relevant statutory zone of interests, *Amicus* respectfully submits that such injuries do not suffice to support standing.

This type of diverted-resource standing derives from *Havens*. As Judge Millett of the U.S. Court of Appeals for the District of Columbia Circuit has explained, "[t]he problem is not *Havens*[; the] problem is what our precedent has done with *Havens*." *People for the Ethical Treatment of Animals v. U.S. Dept. of Agriculture*, 797 F.3d 1087, 1100-01 (D.C. Cir. 2015) (Millett, J., *dubitante*); *accord Animal Legal Def. Fund v. USDA*, 632 F. App'x 905, 909 (9th Cir. 2015) (Chhabria, J., concurring); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1225-26 (9th Cir. 2012) (Ikuta, J., dissenting). Under the unique statutory and factual situation in *Havens*, a housing-rights organization's diverted resources provided it standing, but in most other settings such diverted resources are mere self-inflicted injuries. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417-18 (2013) (self-censorship due to fear of

surveillance insufficient for standing); *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976) (financial losses state parties could have avoided insufficient for standing). Indeed, if mere spending could manufacture standing, any private advocacy group could establish standing against any government action merely by spending money to oppose it. But that clearly is not the law. *Morton,* 405 U.S. at 739 (mere advocacy by an organization does not confer standing to defend "abstract social interests"). To confine federal courts to their constitutional authority, this Court should review and revoke the diverted-resources rationale for Article III standing.

Relying on *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 102-09 (1979), *Havens* held that the Fair Housing Act at issue there extends "standing under §812 … to the full limits of Art. III," so that "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section," 455 U.S. at 372, thereby collapsing the standing inquiry into the question of whether the alleged injuries met the Article III minimum of injury in fact. *Id.* The typical organizational plaintiff and typical statute lack several critical criteria from *Havens*.

First, the *Havens* organization had a statutory right (backed by a statutory cause of action) to truthful information that the defendants denied to it. Because "Congress may create a statutory right[,] … the alleged deprivation of [such rights] can confer standing." *Warth v. Seldin,* 422 U.S. 490, 514 (1975). Under a typical statute, by contrast, a typical organizational plaintiff has no claim to any rights related to its own voluntarily diverted resources. So too under the INA.

Second, and related to the first issue, the injury that an organizational plaintiff

claims must align with the other components of its standing, *Stevens*, 529 U.S. at 772; *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C. Cir. 1996); *Ecosystem Inv., Partners v. Crosby Dredging, L.L.C.*, 729 F.App'x 287, 299 (5th Cir. 2018) (collecting cases), including the allegedly cognizable right. In *Havens,* the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information given in violation of the statute). By contrast, under the INA (or any typical statute), there will be no rights even *remotely* related to a third-party organization's discretionary spending.

Third, the *Havens* statute eliminated prudential standing, so the zone-of-interests test did not apply. When a plaintiff — whether individual or organizational — sues under a statute that *does not eliminate prudential standing*, that plaintiff cannot bypass the zone-of-interests test or other prudential limits on standing.[3] Typically, it would be fanciful to suggest that a statute has private, third-party spending in its zone of interests.

4. Plaintiffs lack third-party standing for future clients.

The institutional Plaintiffs lack third-party standing to assert the rights of absent asylum seekers whom the institutional Plaintiffs hope to meet someday and represent. While some relationships might support third-party standing, the same is simply not true of all hypothetical relationships, including those between the

[3] For example, applying *Havens* to diverted resources in *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 939 (D.C. Cir. 1986) (R.B. Ginsburg, J.), then-Judge Ginsburg correctly recognized the need to ask whether those diverted resources fell within the zone of interests of the Age Discrimination Act. 789 F.2d at 939.

institutional Plaintiffs and any asylum seekers whom the institutional Plaintiffs might meet in the *future*: an *"existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here.*"* *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004) (emphasis in original). Future asylum-seeking aliens do not have regular, ongoing relationships with the institutional Plaintiffs analogous to *existing* attorney-client relationships.

Before *Kowalski* was decided in 2004, "the general state of third party standing law" was "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "in need of what may charitably be called clarification." *Miller v. Albright*, 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). After *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support third-party standing. Thus, the institutional Plaintiffs lack third-party standing to assert the rights of those who might be their clients in the future.

5. Sovereign immunity bars Plaintiffs' challenge.

Not only is there no Article III jurisdiction over these actions, but they also fall outside the scope of the APA's waiver of sovereign immunity, and thus are subject to an independent jurisdictional bar. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature"). "The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). The scope of such waivers, moreover, is strictly construed in favor of the sovereign. *Lane*

v. Pena, 518 U.S. 187, 192 (1996). Here, Plaintiffs lack a waiver of sovereign immunity for an APA action.

a. Plaintiffs cannot sue under the APA.

Subject to certain limitations, the APA provides a cause of action for judicial review to those "aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. §702, a formulation that implicates the same zone-of-interests test used for prudential standing. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970). In the 1976 APA amendments to 5 U.S.C. §702,[4] Congress "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (quoting S. REP. NO. 996, 94th Cong., 2d Sess. 8 (1976); H.R. REP. NO. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.). But that waiver has several restrictions that preclude review *in these actions*. Specifically, the APA excludes review for "statutes [that] preclude judicial review" and those that provide "special statutory review." 5 U.S.C. §§701(a)(1), 703. In addition, the waiver of immunity extends only to actions made reviewable by statute and final actions for which there is no other adequate remedy in court. 5 U.S.C. §704. APA review is barred here on several bases:

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4 PUB. L. NO. 94-574, § 1, 90 Stat. 2721 (1976).

- Plaintiffs do not meet the zone-of-interests test, see Section II.A.2, supra, and so are not aggrieved within the meaning of the APA. *See* 5 U.S.C. §702.
- The INA provides special – and exclusive – statutory review for both expedited removal, 8 U.S.C. §1252(e)(3) (exclusive review for individuals in expedited removal), and administrative removal proceedings followed by petitions for review for other removal proceedings, 8 U.S.C. §1252(a)(5), §1252(b)(9), and this special review displaces APA review, 5 U.S.C. §§701(a)(1), 703.
- Similarly, both because this action is either precluded outright or channeled to special INA review and because — for most individual asylum seekers — the new rule does not represent final agency action, these actions fall outside the APA's waiver of sovereign immunity. *See* 5 U.S.C. §704.

Collectively, these limits on APA review preclude, narrow, or channel all the review that Plaintiffs seek and deny district courts the authority to issue *any* relief here.

b. Plaintiffs cannot bring a non-APA and pre-APA suit in equity.

In order to sue in equity, Plaintiffs need more than Article III standing and an injury within the relevant zone of interests. Instead, an equity plaintiff or petitioner must invoke a statutory or constitutional *right* for equity to enforce, such as life, liberty, or property under the Due Process Clause or equal protection under the Equal Protection Clause or its federal equivalent in the Fifth Amendment. *See*, *e.g.*, *United States v. Lee*, 106 U.S. 196, 220-21 (1882) (property); *Ex parte Young*, 209 U.S. 123, 149 (1908) (property); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (liberty); *cf. Wadley S. R. Co. v. Georgia*, 235 U.S. 651, 661 (1915) ("any party affected by

[government] action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution"). Plaintiffs' claimed injuries here fall short of what equity requires, even assuming *arguendo* that those claimed injuries could satisfy Article III. Put another way, equity review requires "direct injury," which means "a wrong which directly results in the violation of a legal right." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). Without that elevated level of direct injury, there is no review:

> It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.

Id. (alterations, citations, and interior quotation marks omitted). Plaintiffs have not even claimed that any of their *rights* have been violated by the IFR, and thus they lack an action in equity.

B. The Government is likely to prevail on the merits.

In order to warrant a stay, there must be a "fair prospect" of the Government's prevailing. *Hollingsworth*, 558 U.S. at 190. As explained in the prior subsection, the Government is likely to prevail because federal courts lack jurisdiction over Plaintiffs' claims. *See* Section II.A, *supra*. As explained in this subsection, the Government likely would prevail on the merits, assuming *arguendo* that federal jurisdiction existed.

1. The IFR's promulgation did not violate the APA's procedural requirements.

The Government issued its interim final rule to address not only a public-safety and humanitarian emergency, but also issues of national security and foreign relations. 84 Fed. Reg. at 33,840-42. These grave and weighty concerns easily meet the APA's exceptions for notice-and-comment rulemaking and for suspending the 30-day grace period for a rule's taking effect. 5 U.S.C. §553(a)(1), (b)(B), (d)(3). This Court has found it imperative that the United States speak with one national voice — not 50 states' voices or 94 district courts' voices — on issues, such as immigration, that touch foreign relations. *Arizona v. United States*, 567 U.S. 387, 395 (2012). Given the APA's foreign-affairs exception, 5 U.S.C. §553(a)(1), the 94 federal district courts do not have authority, *vis-à-vis* APA procedural issues, to interfere in these aspects of sovereignty, which the Constitution commits to the political branches. *Trump v. Hawaii*, 138 S.Ct. 2392, 2419 (2018). The APA poses no procedural barrier to the IFR.

2. The IFR complies with the INA substantively.

The IFR's substantive validity hinges on whether the Government's proposed additional criteria for denying asylum qualify as "consistent with this section." 8 U.S.C. §1158(c)(2)(B). This Court should reject Plaintiffs' alleged inconsistencies with §1158 as unfounded under both §1158's plain language and its history.

a. A categorical bar to granting asylum is not inconsistent with a mandatory right to apply for asylum.

A categorical prohibition on the *granting* of asylum is fully consistent with the mandatory right to *apply* for asylum. *Compare* 8 U.S.C. §1158(a)(1) (right to *apply*

for asylum) *with id.* §1158(c)(2)(A)-(C) (exceptions to subsection (b)(1)'s permissive *grant* of asylum). For example, an alien "who arrives in the United States … whether or not at a designated port of arrival" has an unfettered right to *apply* for asylum, 8 U.S.C. §1158(a)(1), but immigration officials lack the authority to *grant* that application if the alien in question has been convicted of certain crimes. *Id.* §1158(c)(2)(A)(ii). The INA does not create a right to obtain the discretionary grant of asylum merely by giving aliens the right to *apply* for asylum. This Court recognized that the INA makes a similar distinction between obtaining a visa to enter the United States and being deemed admissible to enter the United States. *Hawaii*, 138 S.Ct. at 2414 ("plaintiffs' interpretation … ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA"). Neither the INA nor the Constitution prohibits allowing applications that are doomed to fail.

b. Plaintiffs' argument that §1158's 1996 amendment precludes any new regulatory bars to asylum amounts to the flawed argument that the Executive's pre-existing discretion with respect to asylum has been repealed by implication.

Plaintiffs argue that §1158's express statutory bars to asylum (*e.g.*, an alien's being "firmly resettled in another country prior to arriving in the United States") preclude the Government's adopting additional regulatory bars because the regulatory bars would not qualify as "consistent with this section." *See* 8 U.S.C. §1158(c)(2)(B). Nothing in the 1996 enactment[5] of the relevant provisions of §1158

[5] The contested provisions of current §1158 were enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act, PUB. L. NO. 104-208, Div. C,

announced that Congress intended to repeal the Executive's pre-existing discretion with respect to *denying* asylum. *See* Refugee Act of 1980, PUB. L. NO. 96-212, §201(b), 94 Stat. 102, 105. Specifically, the relevant pre-1996 part of §1158 provided as follows:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

Id. (former §1158(a)); 8 U.S.C. §1158(a) (1994). While it would plainly be inconsistent with §1158 to *contradict* the categorical bars that Congress enacted, *supplementing* those categorical bars by regulation is not linguistically inconsistent with §1158. Given that the Executive had broad discretion to deny asylum to any category of aliens before 1996, reading the 1996 amendment to implicitly narrow the discretion in areas where the 1996 amendments were silent amounts to a repeal by implication, which this Court should reject.

Repeals by implication are disfavored, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007) ("*NAHB*"), and require "clear and manifest" intent of a congressional intent to repeal the prior authority:

> While a later enacted statute … can sometimes operate to amend or even repeal an earlier statutory provision …, repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest.

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110 Stat. 3009-546 (1996). *See* PUB. L. NO. 104-208, Div. C, §604, 110 Stat. 3009, 3009-690 to 3009-694 (1996).

Id. (interior quotation marks and alterations omitted).[6] In the related context of federal preemption, the same clear-and-manifest standard is presumptively not met if the statute is linguistically open to a non-preemptive reading: "When the text of [a statute] is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors'" unsettling the canon. *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). Here, too, this Court should reject Plaintiffs' attempt to graft onto a congressional bar to some asylees a congressional intent to preclude the Executive's authority — in the discretion that Congress delegated to the Executive — to adopt regulatory bars when the Executive finds them appropriate. Indeed, viewing Plaintiffs' field-preemption argument under §1158's express provisions, *see* Appl. at 27-28, through the lens of repeals by implication exposes the fallacy of Plaintiffs' argument, given that preemption and repeals by implication use the same high bar of requiring clear and manifest congressional intent.

If Congress disagrees with the Executive's actions, Congress can amend the statute or even reject the regulation. *See* 5 U.S.C. §§801-808 (Congressional Review Act). Federal courts should not attempt to displace the political branches in setting immigration policy.

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[6] Although *NAHB* involved one statute impliedly repealing another statute, the same principle applies to instances where one version of a statute amends the prior version of the same statute: "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 227 (1957).

3. Plaintiffs' theory would undermine the essential flexibility that the APA and the INA provide to address emergencies and foreign-affairs functions.

It suffices to deny a preliminary injunction that Plaintiffs' APA and INA claims lack merit. *See* Sections II.B.1-II.B.2, *supra*. *Amicus* IRLI respectfully submits that this Court should also consider the "flip-side" of how *granting* a preliminary injunction would injure the very flexibility that the APA and the INA provide the Government.

Before addressing the legal issues of APA and INA flexibility, *amicus* IRLI respectfully submits that the Government has correctly recognized a real emergency. Aliens are crossing the southern border at unprecedented levels, far exceeding the ability of the immigration system to process them in an orderly manner. Most asylum claims are deemed to lack merit, and many valid claims could continue under the IFR. *See* 84 Fed. Reg. at 33,839. In addition to the public-safety and humanitarian concerns about harm to both federal enforcement officers and the illegal border crossers themselves, removing the magnetic pull of near-automatic parole into the United States while awaiting the orderly processing of baseless asylum claims injures *bona fide* asylum seekers, whose claims are slowed by the mass of baseless claims. *See id.*

The APA provides all federal agencies broad discretion to set policy in the interstitial areas that their enabling statutes do not address specifically. *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 844 (1984). Furthermore, in the specific context of emergencies, the APA goes further in loosening the otherwise-applicable requirements for notice-and-comment rulemaking. 5 U.S.C. §553(b)(B), 553(d)(3).

Finally, "to the extent that there is involved … a … foreign affairs function of the United States," the APA provides still more flexibility by outright exempting federal agencies from those rulemaking requirements. *Id.* §553(a)(1). This Court should not ignore the flexibility that the APA gives the Government to address the humanitarian and public-safety emergencies here or to interfere with the Government's negotiations with Mexico over illegal aliens crossing through Mexico to the United States.

In addition to the general flexibility that the APA provides, the INA provides even more flexibility to the political branches to address immigration:

> Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. … It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a *field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program*.

United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543-44 (1950) (internal quotation marks omitted, emphasis added); *Arizona*, 567 U.S. at 396 ("principal feature of the removal system is the broad discretion exercised by immigration officials"); *Hawaii*, 138 S.Ct. at 2420 (even under the Constitution, courts should avoid "inhibit[ing] the flexibility of the President to respond to changing world conditions") (interior quotation marks omitted). Significantly, we deal here not with a constitutional limit but with perceived statutory limits.

Finally, the "exclusion of aliens is a fundamental act of sovereignty by the political branches." *Hawaii*, 138 S.Ct. at 2407 (interior quotation marks omitted).

Because "decisions in these matters may implicate our relations with foreign powers" and implicate "changing political and economic circumstances," these "decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). Thus, the Government's flexibility here — while clearly present in the INA itself — also arises from the nature of sovereignty and the separation of powers: "In accord with ancient principles of the international law of nation-states, … the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers — a power to be exercised exclusively by the political branches of government.'" *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (citations, internal alterations, and quotation marks omitted). Federal courts should not attempt to set federal immigration policy.

III. THE OTHER STAY CRITERIA TIP IN THE GOVERNMENT'S FAVOR.

Although the likelihood of this Court's granting a writ of *certiorari* and ruling for the Government on the merits would alone justify granting a stay, IRLI addresses the balance of the equities. The Government has significant public-health and public-safety concerns at stake as well as the need to present a unified national position in negotiations with foreign countries over those underlying health and safety issues. In addition, the public interest favors a stay. Against those considerations, Plaintiffs' proffered interests are trivial and likely not even cognizable. In short, the balances of equities tip decidedly in the Government's favor.

A. The Government's harm is weighty and irreparable.

For stays, the question of irreparable injury requires a two-part "showing of a

threat of irreparable injury to interests that [the applicant] properly represents." *Graddick v. Newman,* 453 U.S. 928, 933 (1981) (Powell, J., for the Court[7]). "The first, embraced by the concept of 'standing,' looks to the status of the party to redress the injury of which he complains." *Id.* "The second aspect of the inquiry involves the nature and severity of the actual or threatened harm alleged by the applicant." *Id.* The Government meet both tests.

As for standing, the Government clearly has standing to defend its laws and regulatory actions. *Diamond,* 476 U.S. at 62-63. When it comes to irreparable harm, the Government's application explains the serious and irreparable harms that delaying this emergency action would cause. *See* Appl. at 29-30. Additionally, the District Court's enjoining the federal sovereign without Article III jurisdiction violates the separation of powers, which inflicts a separation-of-powers injury on the Executive Branch. "[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hernandez v. Sessions*, 872 F.3d 976, 994-95 (9th Cir. 2017) (interior quotation marks omitted).[8] The Government will suffer irreparable injury unless this Court stays the injunction.

B. Because Plaintiffs' alleged harms are trivial to non-existent, the balance of the equities favors the Government.

With respect to Plaintiffs' claims of irreparable harm, a stay would not

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[7] Although *Graddick* began as an application to a circuit justice, the Chief Justice referred the application to the full Court. *Graddick,* 453 U.S. at 929.

[8] The Ninth Circuit's *Hernandez* line of cases derives from *Elrod v. Burns*, 427 U.S. 347, 373 (1976), but arguably removes *Elrod* from its First Amendment mooring. That line of cases nonetheless remains Circuit precedent.

prejudice Plaintiffs' legally protected interests at all. With the help of immigrant advocacy groups, economic migrants (that is, those seeking to immigrate to the United States because the standard of living is higher here than in their home countries) have abused the asylum process by making false claims of persecution or other baseless asylum claims in order to gain entry into this country, only to disappear into the country without appearing at future hearings.

As explained in Sections II.A.1-II.A.5, *supra*, Plaintiffs lack standing and a waiver of sovereign immunity. That absence of jurisdiction "negates giving controlling consideration to the irreparable harm" they claim. *Heckler v. Lopez*, 464 U.S. 879, 886 (1983) (Brennan, J., dissenting from the denial of motion to vacate the Circuit Justice's stay). But even injuries that satisfy Article III can nonetheless fail to qualify under the higher bar for irreparable harm. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010). This is especially true for self-inflicted injuries such as diverted resources: "self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003); *accord Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) ("injury … may be discounted by the fact that [a party] brought that injury upon itself"); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002). Similarly, this Court should discount the allegedly irreparable harm from the IFR when any affected individuals aligned with Plaintiffs have an adequate remedy in their removal proceedings. *See* Section II.A.5.a, *supra*. Finally, because these aliens did not apply for asylum in the countries through which they transited

to get here, this Court can draw an inference that their allegedly irreparable harm is not as significant as they claim.

C. The public interest favors a stay.

The last stay criterion is the public interest. Where the parties dispute the lawfulness of government programs, this last criterion collapses into the merits. *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). If the Court agrees with the Government on the merits, the public interest will tilt decidedly in favor of the Government: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of … governments in carrying out their domestic policy." *Burford v. Sun Oil Co.,* 319 U.S. 315, 318 (1943). In public-injury cases, equitable relief that affects competing public interests "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff" because courts also consider adverse effects on the public interest. *Yakus v. United States*, 321 U.S. 414, 440 (1944). The public interest lies in ameliorating the humanitarian and security crises at the border.

CONCLUSION

This Court should stay the District Court's interim relief, pending the timely filing and resolution of a petition for a writ of *certiorari*. Alternatively, the Court should remand with instructions to dismiss this action.

Dated: September 3, 2019

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing motion for leave to file, motion for leave to file in compliance with Rule 33.2, and the accompanying *amicus* brief are proportionately spaced, have a typeface of Century Schoolbook, 12 points, and contain 3, 2, and 25 pages (and 540, 237, and 6,691 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: September 3, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 3rd day of September 2019, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by Federal Express, postage pre-paid, with a PDF courtesy copy served via electronic mail on the following counsel:

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The undersigned further certifies that, on this 3rd day of September 2019, an original and ten true and correct copies of the foregoing document were served on the Court by hand delivery.

Executed September 3, 2019, at Washington, DC,

/s/ Lawrence J. Joseph

Lawrence J. Joseph