No. 19A960

In the Supreme Court of the United States

CHAD WOLF, ACTING SECRETARY OF HOMELAND SECURITY, *ET. AL.*,
Applicants,

v.

INNOVATION LAW LAB, *ET AL.*,
Respondents.

On Application for a Stay of the Injunction Issued by the United States District Court for the Northern District of California and for an Administrative Stay

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

CHRISTOPHER J. HAJEC
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW, Suite 700-1A
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Movant and Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

No. 19A960

In the Supreme Court of the United States

CHAD WOLF, ACTING SECRETARY OF HOMELAND SECURITY, *ET. AL.*,
Applicants,

v.

INNOVATION LAW LAB, *ET AL.*,
Respondents.

On Application for a Stay of the Injunction Issued by the United States District Court for the Northern District of California and for an Administrative Stay

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 and modified by the Court of Appeals in this matter.* Movant's counsel contacted the parties' counsel of record, who each indicated that their clients take no position on IRLI's motion for leave to file.

IDENTITY AND INTERESTS OF MOVANT

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal

* 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.

immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases, including an *amicus* brief in the district court proceedings in this litigation. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

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 core Article III requirements for causation, redressability, and a legally protected interest. *See Amicus* Br. at 11-14.
- 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 14-18.
- Third, the *amicus* brief demonstrates that Plaintiffs lack third-party standing to assert the rights of future clients. *See Amicus* Br. at 18.
- 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 20-23.

- Fifth, on the merits regarding the statutory provisions for returns to contiguous countries pending removal, the *amicus* brief analyzes additional aspects of the statute that support the Government's position. *See Amicus* Br. at 23-26.
- Sixth, on the merits regarding refoulment, the *amicus* brief highlights that the statutory non-refoulment provisions — by their terms — are not enforceable and do not reach returns pending removal. *See Amicus* Br. at 26-28.
- Seventh, on the balance of the equities, the *amicus* brief evaluates the parties' respective claims of irreparable harm, with an emphasis on the plaintiffs' lack of cognizable injuries. *See Amicus* Br. at 34-36.

These issues are all relevant to deciding the stay application, and the jurisdictional issues that predominate in IRLI's *amicus* brief concern matters that this Court has an obligation to consider *sua sponte*. For these reasons, movant IRLI respectfully submits that the filing of the brief might aid the Court.

Dated: March 9, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590
chajec@irli.org

Lawrence J. Joseph
Counsel of Record
1250 Connecticut Av NW Suite 700-1A
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
lj@larryjoseph.com

Counsel for Movant Immigration Reform Law Institute

No. 19A960

In the Supreme Court of the United States

CHAD WOLF, ACTING SECRETARY OF HOMELAND SECURITY, *ET. AL.*,
Applicants,

v.

INNOVATION LAW LAB, *ET AL.*,
Respondents.

On Application for a Stay of the Injunction Issued by the United States District Court for the Northern District of California and for an Administrative Stay

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: March 9, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
Counsel of Record
1250 Connecticut Av NW Suite 700-1A
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
lj@larryjoseph.com

Counsel for Movant Immigration Reform Law Institute

Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590
chajec@irli.org

No. 19A960

In the Supreme Court of the United States

CHAD WOLF, ACTING SECRETARY OF HOMELAND SECURITY, *ET. AL.*,
Applicants,

v.

INNOVATION LAW LAB, *ET AL.*,
Respondents.

On Application for a Stay of the Injunction Issued by the United States District Court for the Northern District of California and for an Administrative Stay

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 and modified in the Court of Appeals 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

Several aliens seeking admission into the United States (the "Alien Plaintiffs") and entities concerned about immigration issues (the "Institutional Plaintiffs") have sued various federal Executive officers (collectively, the "Government") to challenge a series of immigration policies. These policies — collected at pages 139-56 of the

Government's appendix of record excepts in the Court of Appeals — were announced by the Secretary of the Department of Homeland Security ("DHS") in a memorandum issued on January 25, 2019, entitled Policy Guidance of the Implementation of Migrant Protection Protocols (collectively, the "MPP"). The MPP 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 Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA"), but also the MPP's promulgation without notice-and-comment rulemaking under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"). The District Court issued a preliminary injunction, finding Plaintiffs likely to prevail on the INA merits and, without fully explaining a basis, also that Plaintiffs had "shown a likelihood of success on the refoulement issue, whether that is best characterized as a claim under their second, third, or fourth claims for relief, or some combination thereof." Appl. App. at 128a.[1] The Court of Appeals did not address procedural issues under the APA and affirmed only on the substantive INA merits and refoulment.

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

[1] Plaintiffs' second claim for relief raises an APA notice-and-comment challenge, their third claim for relief raises an APA arbitrary-and-capricious challenge, and their fourth claim for relief invokes the 1951 Convention Relating to the Status of Refugees and the implementing regulations. *See id.* 126a-128a.

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.*

SUMMARY OF ARGUMENT

Before reaching the merits of a dispute, federal appellate courts first must evaluate the jurisdiction of the courts below. Plaintiffs' ultimate harm — remaining is Mexico — is neither caused by the MPP nor redressable by vacating the MPP because the INA gives the Government independent *statutory* authority to return aliens to Mexico (Section II.A.1.a). Further, because the INA sets forth the process that is due for recent entrants, Alien Plaintiffs and Institutional Plaintiffs' clients lack a cognizable right to remain in this country (Section II.A.1.b). The INA, moreover, differs from the statute at issue in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in a way that precludes reliance on Institutional Plaintiffs' diverted-resources injury (Sections II.A.1.c-II.A.1.d). Also, Institutional Plaintiffs cannot assert the rights — if any — of third-party asylum seekers that Plaintiffs hope to represent in the future (Section II.A.1.e). Further, Institutional Plaintiffs' injuries lie outside the INA's zone of interests (Section II.A.1.f). Plaintiffs also lack both a cause of action under the APA and the APA's waiver of sovereign immunity (Section II.A.2.a), and cannot state a claim for pre-APA equity review (Section II.A.2.b).

On the INA merits, the Government has discretion to place aliens eligible for expedited removal under 8 U.S.C. § 1225(b)(1) into normal removal proceedings, to

which the return-pending-removal provisions of 8 U.S.C. § 1225(b)(2)(C) apply (Section II.B.1); the INA's non-refoulment provisions are expressly not enforceable, 8 U.S.C. § 1231(h), and — in any event — apply only to removal, not to return pending removal (Section II.B.2). The APA's narrow requirement for reasoned decisionmaking does not give a reviewing court power to set agency policy on the court's terms (Section II.B.3), and the APA's notice-and-comment requirements do not apply to exercises of discretion or general enforcement policies that merely implement statutory criteria (Section II.B.4).

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 not cognizable (Section III.B). Finally, the public interest merges with the merits (which favor the Government) and — in public-injury cases such as this — does not allow private plaintiffs to obtain injunctions against the government as easily as they could against private defendants in like circumstances. Because both the public interest and the balance of equities favor the Government, a stay of the preliminary injunction is appropriate (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 20-22.

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.2, *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 lack standing for the relief they seek.

The District Court confined its standing analysis to Institutional Plaintiffs, finding they had standing on the diverted-resource-rationale of *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1240 (9th Cir. 2018). *See* Appl. App. at 115a-116a.

The Court of Appeals also found that Institutional Plaintiffs had diverted-resource standing under *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765-67 (9th Cir. 2018), id. 26a-27a, and summarily found that Alien Plaintiffs, "all of whom have been returned to Mexico under the MPP, obviously have Article III standing." *Id.* at 26a. In fact, however, the Article III premise is dubious for two primary reasons. First, this Court has stayed — without stating its rationale — the *East Bay Sanctuary Covenant* injunctions on which the lower courts relied to shore up Institutional Plaintiffs' standing, *Barr v. E. Bay Sanctuary Covenant*, 140 S.Ct. 3 (2019), which leaves Institutional Plaintiffs here open to the same deficiencies that undermine the *East Bay Sanctuary Covenant* injunctions. Second, the Court of Appeals unexplained "holding" that Alien Plaintiffs "obviously have Article III standing" is by no means obvious.

a. Plaintiffs' alleged injuries lack both causation and redressability.

The tripartite test for standing under the Constitution is whether the party invoking a court's jurisdiction alleges a sufficient "injury in fact" under Article III, *viz.*, (a) a legally cognizable injury that is (b) caused by the challenged action and (c) redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). While IRLI doubts that Plaintiffs have suffered legally cognizable injuries, *see* Section II.A.1.b, *infra*, it would be enough to warrant dismissal if Plaintiffs failed to prove causation or redressability. Plaintiffs fail on both counts.

With respect to causation, some of the DHS conduct that the Ninth Circuit found actionable *violates* the MPP. *Compare* Appl. at 30-31 *with* Appl. App. at 59a-

60a. If — for example — an immigration officer's ignoring an alien's stated fears of return to Mexico violates the MPP,[2] those officers' actions cannot form the basis for enjoining or vacating the MPP: the MPP obviously cannot have *caused* the alleged action. First, 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). If DHS officers are violating the MPP, that might form the basis for relief in an appropriate forum, but it has nothing to do with the MPP itself. Second, even without the MPP, DHS could return Alien Plaintiffs or Institutional Plaintiffs' current or future clients to Mexico under the INA itself, without the MPP's administrative gloss. *See* 8 U.S.C. § 1225(b)(2)(C) (authorizing return of aliens to Mexico or Canada pending removal proceedings). For both reasons, the MPP has not *caused* injury within the meaning of Article III.

Likewise, with respect to redressability, vacating the MPP would not terminate the Government's ability to send Alien Plaintiffs or Institutional Plaintiffs' current or future clients to Mexico under the INA itself, without any administrative overlay. *See id*. If vacating the MPP would not help, Plaintiffs lack a redressable injury, even on the assumption that they have an otherwise cognizable injury at all.

---

[2] As a class, asylum seekers at the southern border often make false or non-credible claims to justify asylum, *compare* Pls.' Memo. at 19 (25% of claims have merit) (ECF #20-1) *with* Gov't Memo. at 20 (17% of claims have merit) (EFCF #42). But even assuming *arguendo* the veracity of Plaintiffs' anonymous declarations, the two declarations do not support causation for the reasons set out in the text.

b. Alien Plaintiffs lack a legally protected right to the relief they seek.

This Court has made it clear that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Excluding an alien seeking admission is an act of sovereignty. *Id.* Accordingly, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (interior quotation marks omitted). Here, the INA (that is, "the procedure authorized by Congress") provides for the very injury that Alien Plaintiffs seek to avoid.

An Article III "injury in fact" requires "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). 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 pecuniary losses do

not necessarily qualify as an injury in fact.

Additionally, "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).[3] The INA has no nexus to Plaintiffs' alleged injuries because the INA itself expressly *allows* the Government to return aliens to Mexico. *See* 8 U.S.C. § 1225(b)(2)(C). Further, the INA non-refoulment provision expressly creates no enforceable rights. 8 U.S.C. § 1231(h). Accordingly, Plaintiffs lack a legally protected interest to enforce against the MPP.[4]

c. Institutional Plaintiffs cannot premise standing on diverted resources.

Institutional Plaintiffs base their standing on their voluntarily diverted resources and the MPP'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.

---

[3] 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.

[4] 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.

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 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. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (mere advocacy by an organization does not confer standing to defend "abstract social interests").

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 — much less *aligned with* — a third-party organization's discretionary spending.

Third, 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. The *Havens* statute thus eliminated prudential standing. 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.[5] Typically, it would be fanciful to suggest that a statute

[5] 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

has private, third-party spending in its zone of interests. Certainly, that is the case for the INA.[6]

d. Institutional Plaintiffs' lost funding from California does not provide standing.

In *East Bay Sanctuary Covenant*, the Ninth Circuit also considered it relevant that the institutional plaintiffs there received funding from the State of California that depended in part on the volume of refugees processed, which provided institutional plaintiffs standing to challenge any threat to their funding stream. *East Bay Sanctuary Covenant*, 909 F.3d at 1243. But such a loss of funding is analogous to the loss of a wager, and cannot establish standing to sue the federal government over federal immigration policy:

> 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.

Stevens, 529 U.S. at 772 (interior quotation marks, alterations, and citations omitted). Just like the bounty or hypothetical wager in *Stevens*, an interest in third-

---

resources fell within the zone of interests of the Age Discrimination Act. 789 F.2d at 939.

[6] *East Bay Sanctuary Covenant* found the entities' diverted-funding injuries within the INA's and 8 U.S.C. § 1158's zone of interests because various INA provisions recognize the right to counsel, including *pro bono* counsel. 909 F.3d at 1244-45. But the challenged agency action here does not impose any burden on the right of counsel, and Institutional Plaintiffs' diverted-resource injuries do not relate in any legal way to aliens' right to counsel.

party funding here is insufficiently related to Institutional Plaintiffs' asserted injury from the Government's actions. California cannot create standing against the federal government merely by subsidy.[7]

e. Institutional Plaintiffs lack third-party standing for future clients.

Institutional Plaintiffs lack third-party standing to assert the rights of absent asylum seekers whom 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 Institutional Plaintiffs and any asylum seekers whom 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 Institutional Plaintiffs analogous to *existing* attorney-client relationships.

---

[7] To be sure, *Stevens* found standing for *qui tam* relators, albeit not based on the bounty *per se*; instead, *Stevens* found the United States to have assigned a portion of *its* Article III claim to the private *qui tam* relator and premised the relator's standing on that assignment of rights. *See Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 285 (2008) (discussing assignee standing under *Stevens*). California has done nothing of the kind here, but even if California wanted to do so, California lacks an Article III claim against the federal government to assign here. *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). Consequently, California's payments to Institutional Plaintiffs are no more consequential here than the hypothetical wager in *Stevens*.

f. Institutional Plaintiffs' interests fall outside the relevant zones of interests.

Assuming *arguendo* that Institutional Plaintiffs had constitutional standing based on their injuries, *but see* Sections II.A.1.a, II.A.1.c-II.A.1.e, *supra*, they 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 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 are no more relevant than court reporters' fees are to 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.

2. Sovereign immunity bars Plaintiffs' challenge.

In addition to lacking standing for this litigation, Plaintiffs 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. Similarly, Plaintiffs lack the type of enforceable right needed to bring a pre-APA suit in equity.

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,[8] 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.*

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

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 this action*. 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. When a statute provides special statutory review, APA review is unavailable. *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984). In addition, 5 U.S.C. § 701(a)(2) exempts "agency action … committed to agency discretion by law" from APA review. This exception is available when a reviewing court has "no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971). With that background, APA review is barred here on several bases:

- Plaintiffs do not meet the zone-of-interests test, *see* Section II.A.1.f, *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.
- As relevant here, the Government's discretion on the type removal proceeding in which to place Plaintiffs is committed to agency discretion, 5 U.S.C.

§ 701(a)(2), and the Government's decision to issue a general statement of policy on discretionary returns pending removal is exempt from APA notice-and-comment rulemaking as a "general statement[ ] of policy." 5 U.S.C. § 553(b)(A).

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 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). As explained throughout this brief, Plaintiffs cannot claim a violation of any rights under the INA, *see* Section II.A.1.b, *supra*; Sections II.B.1-II.B.2, *infra*, and they thus 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 MPP is consistent with the INA.

Plaintiffs and the Ninth Circuit majority argue that the MPP cannot apply to Alien Plaintiffs because those Plaintiffs are eligible for expedited removal under 8 U.S.C. § 1225(b)(1), and the Government's authority to send aliens back to Mexico under 8 U.S.C. § 1225(b)(2)(C) does not apply to "an alien … to whom [§ 1225(b)(1)] applies." *See* 8 U.S.C. § 1225(b)(2)(B)(ii). The Ninth Circuit held the MPP inconsistent

with § 1225(b) for three reasons: (1) the purported holding in *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), that § 1225(b)(1) and § 1225(b)(2) refer to distinct categories of aliens, (2) a rejection of the Government's argument that the INA vests the Government with discretion to process § 1225(b)(1) aliens under § 1225(b)(2) based on the two uses of the verb "apply" in 8 U.S.C. § 1225(b)(2)(B)(ii); and (3) the court's reasoning that § 1225(b)(1) aliens are less culpable as a class than § 1225(b)(2) aliens (*e.g.*, "spies, terrorists, alien smugglers, and drug traffickers"). Appl. App. 43a-45a. Only the second argument requires an extended response: can the Government use § 1225(b)(2) to process a § 1225(b)(1)-eligible alien?[9]

With respect to that second argument, the answer is "yes." As the Government explains, it has prosecutorial discretion under § 1225(b)(1) *not* to apply expedited

---

[9] The first argument is simply false: *Jennings* used the language that the panel quotes, but did not *hold* anything remotely relevant to the issue that the panel seeks to prove: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Serv., Inc.,* 543 U.S. 157, 170 (2004) (interior quotation marks omitted). The third argument about spies, terrorists, and criminals is preposterous. Both categories — § 1225(b)(1) and § 1225(b)(2) — no doubt include spies, terrorists, and criminals. Indeed, presenting false documents to DHS under § 1225(b)(1) would be a crime itself. The point is that § 1225(b)(2) is the "catchall" category while § 1225(b)(1) includes only those with false or no documents. *Jennings*, 138 S.Ct. at 837. Nothing in the legislative record — and nothing in the panel majority's citation-free discussion of the legislative history — demonstrates congressional intent to confine § 1225(b)(2)(C) to "undesirable § (b)(2) applicants like Sanchez-Avila" and not to purportedly "bona fide asylum seekers" like Plaintiffs. *Compare* 8 U.S.C. § 1225(b)(2)(C) *with* Appl. App. 47a (citing *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444 (BIA 1996)). To the contrary, the Government invoked its plenary authority — applicable to *all aliens* — to support the pre-1996 policy that Congress ratified in enacting § 1225(b)(2)(C). *See Sanchez-Avila*, 21 I. & N. Dec. at 450. The third argument is makeweight if the Government loses the second argument, but it is simply wrong if the Government *wins* the second argument.

removal to a given alien, thus taking that alien out of the class of aliens to whom § 1225(b)(1) is applied. Appl. at 22-27. While *amicus* IRLI accepts the Government's distinction, the dispute is also easily resolved by focusing on the verbs that Congress used in § 1225(b)(2). The panel majority saw "a fatal syntactical problem" for the Government in § 1225(b)(2)(B)(ii)'s two uses of the verb "apply," Appl. App. 44a, but missed a far-worse problem for Plaintiffs in § 1225(b)(2)(C)'s alternate use of the verb "describe."

As indicated, the Government's authority to return an alien to Mexico resides in § 1225(b)(2)(C), and it applies to "an alien *described* in subparagraph [§ 1225(b)(2)(A)]." 8 U.S.C. § 1225(b)(2)(C) (emphasis added). In turn, § 1225(b)(2)(A) *describes* the following type of alien: "an alien seeking admission [who] is not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A). The actionable part of § 1225(b)(2)(A) provides that "the alien shall be detained for a proceeding under [§ 1229a]," *id.*, qualified as being "[s]ubject to subparagraphs [§ 1225(b)(2)(B)] and [§ 1225(b)(2)(C)]." *Id.* But the qualifier modifies the aliens "detained for a proceeding under [§ 1229a]," *id.*, not the "alien[s] *described* in subparagraph [§ 1225(b)(2)(A)]." 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Significantly, Congress choose two different verbs — "applies" and "apply" in § 1225(b)(2)(B) and "described" in § 1225(b)(2)(C) — and these words have different meanings. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[w]e refrain from concluding here that the differing language in the two subsections has the same meaning in each"); *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("different words appearing in the same statute are

presumed to have different meanings"). Congress purposely choose *not to say* "an alien to whom subparagraph (A) *applies*," which potentially could have incorporated the exceptions in § 1225(b)(2)(B). Nothing in the way that Congress framed § 1225(b)(2)(A) suggests that the two caveats — § 1225(b)(2)(B) and § 1225(b)(2)(C) — could not work independently, such that § 1225(b)(2)(B)'s exceptions do not limit the independent authority provided in § 1225(b)(2)(C) for the type of alien *described* in § 1225(b)(2)(A). While an alien subject to expedited removal under § 1225(b)(1) is not detained for removal proceedings under § 1225(b)(2), *see* 8 U.S.C. § 1225(b)(2)(B)(ii), that does not limit the application of § 1225(b)(2)(C) to any alien subject to removal under § 1225(b)(2). Alien Plaintiffs remain that type of alien — namely, ones "not clearly and beyond a doubt entitled to be admitted" — whether they are processed in expedited or normal removal proceedings.

2. The MPP is consistent with the non-refoulment obligations.

Plaintiffs' non-refoulment arguments under international law also must fail. Insofar as the United States's partial ratification of 1951 Refugee Convention through its 1967 Protocol is not self-executing, Appl. at 27; *Immigration & Naturalization Serv. v. Stevic*, 467 U.S. 407, 428 n.22 (1984), Plaintiffs must rely on the INA for enforceable rights. *Medellin v. Texas*, 552 U.S. 491, 505 (2008). As the Government explains, the INA non-refoulment provision applies only to *removal*, not to mere *return* pending removal proceedings under § 1225(b)(2)(C). *See* Appl. at 28; 8 U.S.C. § 1231(b)(3)(A) ("the Attorney General may not *remove* an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that

country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion") (emphasis added). The panel majority's contrary holding lacks merit.

At the outset, by its express terms, § 1231 itself is unenforceable against the Government: "Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. § 1231(h). If Plaintiffs could surmount that obstacle, the Government is certainly correct that § 1231(b) does not protect *return* pending removal.

As the panel majority acknowledged, the 1996 INA amendments replaced various forms of exclusion with removal. Appl. App. 49a ("'removal' became the new all-purpose word"). Although the panel majority would include "return" with prior INA words like "exclusion" and "deportation," *id.*, that is inaccurate. The 1996 INA amendments *added* "return" in § 1225(b)(2)(C) and struck it from the non-refoulment provision simultaneously with replacing other instances throughout the INA. *Compare id. with* PUB. L. NO. 104-208, Div. C, § 302(a), 110 Stat. 3009, 3009-579 to 3009-584 (1996) (codified at 8 U.S.C. § 1225) *and id.* § 305(a)(3), 110 Stat. at 3009-598 to 3009-606 (codified at 8 U.S.C. § 1231). As indicated, the use of different words in the same statute implies different meanings. *Russello*, 464 U.S. at 23. While it is true that the INA's pre-1996 non-refoulment provision included returns, today they do not. *Compare* 8 U.S.C. § 1253(h) (1994) ("Attorney General shall not deport *or return* any alien … to a country if the Attorney General determines that such alien's

life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion") (emphasis added) *with* 8 U.S.C. § 1231(b)(3)(A) (quoted *supra*). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987) (citation omitted). Plaintiffs' non-refoulment argument cannot prevail.

3. The MPP satisfies the APA's requirement for reasoned decisionmaking.

In the District Court, Plaintiffs argued that the MPP does not qualify as reasoned decisionmaking under the APA arbitrary-and-capricious standard on the ground that it is not rationally related to its proffered justifications and instead relies of false premises. Pls.' Memo. at 16-19 (ECF #20-1).

This APA mode of judicial review is quite narrow:

> The scope of review under the arbitrary and capricious standard is narrow. A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives.

FERC v. Elec. Power Supply Ass'n, 136 S.Ct. 760, 782 (2016) (internal quotations, alterations, and citations omitted). An agency action meets this narrow review if "the agency … examined the relevant considerations and articulated a satisfactory explanation for its action." *Id.*

Here, the MPP will not only aid legitimate asylum seekers in the long run but also address the crisis at the southern border. Even Plaintiffs admit that considerably fewer than half of asylum seekers have valid claims. *Compare* Pls.' Memo. at 19 (25%)

(ECF #20-1) *with* Gov't Memo. at 20 (17%) (EFCF #42). Too many would-be asylum seekers crowd the border — creating delays for *bona fide* asylum seekers — in the hope that they will be paroled into the interior, then skip an immigration hearing. The MPP seeks to end that sort of opportunistic "gaming" of the asylum system, a result that ultimately will improve the asylum process for *bona fide* asylum seekers. While this might not be the choice that Plaintiffs or even this Court would make, that is not the test.

4. The MPP satisfied the APA's procedural requirements.

The APA exempts general statements of policy and interpretive rules from notice-and-comment rulemaking. 5 U.S.C. § 553(b)(A). Although Plaintiffs suggested otherwise below, Pls.' Memo. at 15 (ECF #20-1), the question of whether a rule is "legislative" (*i.e.*, of the type that requires notice-and-comment rulemaking) does not depend on the number of interested parties. Plaintiffs also argue that the MPP amends existing legislative rules on non-refoulement, an assertion that has the same flaw as Plaintiffs' refoulement claims themselves. *See* Section II.B.2, *supra*.[10] But even if the APA's notice-and-comment provisions applied *generally* to an agency action like the MPP, the MPP still would nonetheless qualify for several specific APA exemptions. Because the MPP addresses not only a public-safety and humanitarian

[10] Plaintiffs argued in the District Court that the Government previously had published plans to undergo notice-and-comment in this area, Pls.' Memo. at 14 (ECF #20-1), but that is irrelevant because the Government permissibly decided to proceed via a guidance document instead of a rulemaking. Plaintiffs cannot estop the Government to carry out its prior plans. *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 419-20 (1990) ("equitable estoppel will not lie against the Government").

emergency, but also issues of national security and foreign relations, it easily meets 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 MPP.

5. This type of litigation undermines the essential flexibility that the APA and the INA provide to address emergencies and foreign-affairs functions.

Although a stay would be justified solely because Plaintiffs' APA and INA claims lack merit, *see* Sections II.B.1-II.B.4, *supra*, *amicus* IRLI respectfully submits that this Court should also consider the "flip-side." *Denying* a stay and allowing the preliminary injunction to stand would impair the 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 that the MPP addresses. Prior to the MPP, aliens were 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 MPP. *See* Appl. at 12. In addition to the public-safety and humanitarian concerns about harm to both federal enforcement officers and aliens, 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* 84 Fed. Reg. 33,829, 33,839 (2019).

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). As the District of Columbia Circuit has recognized, agency guidance benefits the regulated community by providing notice of how the agency interprets a statute that the agency is free to enforce *without prior notice*:

> Where a statute or legislative rule has created a legal basis for enforcement, an agency can simply let its interpretation evolve ad hoc in the process of enforcement or other applications (e.g., grants). The protection that Congress sought to secure by requiring notice and comment for legislative rules is not advanced by reading the exemption for "interpretive rule" so narrowly as to drive agencies into pure ad hocery — an ad hocery, moreover, that affords less notice, or less convenient notice, to affected parties.

Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1111-12 (D.C. Cir. 1993). 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); Decl. of Ambassador Christopher Landau, at 1 (¶ 3) ("panel's decision, unless stayed, will have an immediate and severely prejudicial impact on the bilateral relationship between the United States and Mexico"). This Court should not decrease 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 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[11]). "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 2-3; 84 Fed. Reg. at 33,831. Additionally, a district court's enjoining the federal sovereign without Article III jurisdiction violates the separation of powers, inflicting 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).[12] The Government will suffer irreparable injury unless this Court stays the injunction.

B. Plaintiffs' alleged harms are not cognizable.

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

---

[11] 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.

[12] 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. *See* Sections II.A.1.a-II.A.1.b, *supra*. Indeed, Plaintiffs lack both standing and a waiver of sovereign immunity, each of which is an independent perquisite to a lawsuit against the Government. *See* Section II.A, *supra*. 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). Moreover, a lack of standing necessarily implies a lack of irreparable harm, the test for which sets a higher bar for injury than Article III. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010). And even if Plaintiffs had standing, irreparable harm would require more than Article III standing, which Plaintiffs have not shown.

The lack of irreparable harm is especially true for self-inflicted injuries such as Institutional Plaintiffs' 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, with respect to Alien Plaintiffs, this Court can draw an inference that their failure to apply for asylum in the countries through which they transited to get here that their allegedly irreparable harm is not as significant as they claim. Instead, 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. Federal courts have no legitimate basis from which to restrict the Executive's efforts to put an end to the endless cycle of meritless economic migrants' successfully gaming the system and thereby attracting still more economic migrants to attempt the same.

C. The balance of equities and the public interest favor the Government.

In assessing whether to stay a preliminary injunction, this Court considers the balance of the equities and the public interest. *Trump v. Int'l Refugee Assistance Project*, 137 S.Ct. 2080, 2087 (2017). The Government defends and asserts the public interest here, *see* Section III.A, *supra*, and the balance of equities tips in the Government's favor for two reasons. First, the Government's advantage on the substantive merits — *see* Section II.B, *supra* — tips the equities in the Government's favor. Second, Plaintiffs' tenuous interest — if even cognizable, *see* Sections II.A.1.a (all Plaintiffs), II.A.1.b (Alien Plaintiffs), II.A.1.c-II.A.1.e (Institutional Plaintiffs), *supra* — undercuts Plaintiffs' ability to assert a countervailing form of irreparable harm. *See* Section III.B, *supra*. Consequently, the balance of equities tips decidedly in the Government's favor.

Where the parties dispute the lawfulness of government programs, this public interest can collapse into the merits. *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). But even a plaintiff likely to prevail on the merits is not automatically

entitled to an injunction against the Government. *Winter v. NRDC, Inc.*, 555 U.S. 7, 32-33 (2008); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state 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). Federal courts should not attempt to set immigration policy for the Nation.

CONCLUSION

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

Dated: March 9, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
Counsel of Record
1250 Connecticut Av NW Suite 700-1A
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
lj@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590
chajec@irli.org

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 32 pages (and 583, 236, and 8,773 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: March 9, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
Counsel of Record
1250 Connecticut Av NW Suite 700-1A
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
lj@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 9th day of March 2020, 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:

Hon. Noel J. Francisco
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Email: SupremeCtBriefs@USDOJ.gov

Judy Rabinovitz
Michael Tan
Omar Jadwat
Lee Gelernt
ACLU Foundation
Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004
Email: JRabinovitz@aclu.org

The undersigned further certifies that, on this 9th day of March 2020, an original and ten true and correct copies of the foregoing document were served on the Court by hand delivery.

Executed March 9, 2020, at Washington, DC,

Lawrence J. Joseph

_____

Lawrence J. Joseph