Nos. 20-16557, 20-16580

In the United States Court of Appeals for the Ninth Circuit

IMMIGRANT LEGAL RESOURCE CENTER and
FREEDOM FOR IMMIGRANTS,
Petitioners-Appellees,

vs.

CITY OF MCFARLAND and CITY OF MCFARLAND
PLANNING COMMISSION,
Respondents-Appellants,

THE GEO GROUP, INC.,
Real-Party-in-Interest-Appellant.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE EASTERN
DISTRICT OF CALIFORNIA, NO. 1:20-CV-00966-TLN-AC
HON. TROY L. NUNLEY, DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: September 11, 2020

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Immigration Law Reform Institute ("IRLI") files this brief with the written consent of the parties.[1] IRLI is a nonprofit 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 to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in many important immigration cases. For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's affiliate, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has direct interests in the issues here.

STATEMENT OF THE CASE

Two immigration interest groups (hereinafter, "Plaintiffs") filed a petition for a writ of mandate in state court to direct the City of McFarland to comply with the notice requirements of CAL. CIV. CODE § 1670.9 (hereinafter, "SB29") regarding the issuance of a conditional use permit for alien-detention facilities in McFarland. The private operator of those facilities, The GEO Group, Inc. ("GEO" and together with

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity — other than *amicus*, its members, and its counsel — contributed monetarily to this brief's preparation or submission.

McFarland, "Appellants"), is the real party in interest. GEO removed the case to federal court under 28 U.S.C. § 1442(a)(1), based on SB29's discrimination against federal facilities under the intergovernmental-immunity doctrine. Plaintiffs did not move to remand within 30 days of the removal but did move for a temporary restraining order and preliminary injunction. The district court granted both motions, and both GEO and McFarland appealed. A motions panel stayed the injunction pending appeal.

STANDARD OF REVIEW

To warrant interim relief such as a preliminary injunction, plaintiffs must establish that they likely will succeed on the merits and likely will suffer irreparable harm without interim relief, that the balance of equities between their harm in the absence of interim relief and the defendants' harm from interim relief favors the movants, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.,* 555 U.S. 7, 20 (2008).

SUMMARY OF ARGUMENT

Notwithstanding the parties' dispute about Article III standing, removal was proper because GEO's intergovernmental-immunity defense "arises under" federal law and the parties' dispute over the venue provides an Article III case or controversy for that issue (Section I.A.1). Regardless of whether Plaintiffs have Article III standing for the injunction (Section I.A.2), they clearly lack prudential

standing under the *jus tertii* (third-party standing) doctrine and the zone-of-interests test (section I.A.3). Plaintiffs are unlikely to succeed on the merits because SB29 violates the Supremacy Clause and the intergovernmental-immunity doctrine (Section I.B). Similarly, the self-inflicted nature of Plaintiffs' harm — nominal increases in the cost of voluntary outreach — would not qualify as irreparable harm, even assuming *arguendo* that it qualifies as Article III injury (Section II.A), making the balance of the equities tip sharply to Appellants (Section II.B). Finally, the public interest tracks both the merits and Appellants' interests in protecting the public (Section II.C).

ARGUMENT

I. PLAINTIFFS ARE NOT LIKELY TO PREVAIL.

The first — and most important — *Winter* factor is the likelihood of movants' prevailing. *Winter,* 555 U.S. at 20. Plaintiffs are unlikely to prevail for two reasons. First, Plaintiffs cannot prevail because the statute on which they rely for their right to enjoin the McFarland facilities — SB29 — discriminates against the federal government and its contractors and, so, is preempted under the intergovernmental-immunity doctrine. McFarland's compliance with SB29, assuming it is relevant, provides a secondary reason that Plaintiffs cannot prevail.

A. The Article III issues support Appellants.

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). Appellate courts must determine not only their own appellate jurisdiction, but also the lower courts' jurisdiction, *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 95 (1998), even if the parties concede jurisdiction: "Although the parties did not raise the issue in their briefs on the merits, we must first consider whether we have jurisdiction to decide this case." *Demore v. Kim*, 538 U.S. 510, 516 (2003) (interior quotation marks omitted); *cf. Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991) (jurisdictional arguments are an exception to rule that courts ordinarily do not consider issues raised only by an *amicus*). Jurisdiction aids Appellants in several interrelated respects.

The federal judicial power extends, *inter alia*, to "Cases … arising under [the] Constitution [and] the Laws of the United States." U.S. CONST. art. III, § 2. Under Article III, a "bedrock requirement" is that federal courts are limited to hearing cases and controversies. U.S. CONST. art. III, § 2; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 471 (1982). At its constitutional minimum, standing presents the tripartite test of whether the party invoking a court's jurisdiction raises a sufficient "injury in fact" under Article III 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 Supreme Court has adopted prudential limits on standing that bar judicial review even when the plaintiff meets Article III's minimum criteria. *See*, *e.g.*, *Valley Forge,* 454 U.S. at 475 (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).

1. The district court and this Court have Article III jurisdiction to determine the appropriateness of removal jurisdiction.

While the parties dispute whether Plaintiffs have "standing" for the relief that Plaintiffs seek, there is no question that the district court has Article III jurisdiction to determine the appropriateness of removal for GEO's intergovernmental-immunity defense. Quite simply, whether or not Plaintiffs have Article III standing to challenge McFarland's land-use permitting, the parties have an Article III dispute over removal itself: "The 'adverseness' necessary to resolving the *removal* question is supplied not by petitioners' claims for the monkeys' protection but rather by petitioners' desire to prosecute their claims in state court." *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 78 (1991) (emphasis in original), *abrogated in part on other grounds*, Federal Courts Improvement Act of 1996, PUB. L. NO. 104-

317, 110 Stat. 3847, 3850.[2] Plaintiffs wanted a state forum, and Appellants want a federal forum. GEO's intergovernmental-immunity defense is a sufficient case or controversy for federal courts.

Significantly, the intergovernmental-immunity defense "arises under" federal law within the meaning of Article III. *See* U.S. CONST. art. III, § 2 (quoted *supra*). Equally significant is the difference between removal generally and federal-officer removal. General civil removals require that the action lie within the federal court's "original jurisdiction." *See* 28 U.S.C. § 1441(a). The term "original jurisdiction" is a *statutory* term of art that refers to the various forms of statutory subject-matter jurisdiction that Congress has conferred on the federal courts. *See*, *e.g.*, *Gibson v. Chrysler Corp.*, 261 F.3d 927, 935-36 (9th Cir. 2001); *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 34 (2002). That term of art incorporates the "well-pleaded complaint" rule, which is a *statutory* — not constitutional — interpretation. *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (discussing "our longstanding interpretation of the current statutory scheme" for the "the question for removal jurisdiction [under] the "'well-pleaded complaint' rule").

By contrast, federal-officer removal does not incorporate the well-pleaded

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[2] *See Neb. ex rel. Dep't of Soc. Servs. v. Bentson*, 146 F.3d 676, 678 (9th Cir. 1998) (discussing 1996 amendment to 28 U.S.C. § 1442).

complaint rule. *Compare* 28 U.S.C. § 1441(a) *with id.* § 1442(a)(1). As the Supreme Court has explained, the difference (namely, the omission of "original jurisdiction" from § 1442) is intentional:

> Section 1442(a), in our view, is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III "arising under" jurisdiction. Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes. *The removal statute itself merely serves to overcome the "well-pleaded complaint" rule which would otherwise preclude removal even if a federal defense were alleged*.

Mesa v. California, 489 U.S. 121, 136 (1989) (emphasis added). If GEO prevails on its federal defense under the intergovernmental-immunity doctrine, the balance of Plaintiffs' case — over which supplemental jurisdiction would exist, 28 U.S.C. § 1367(a) — would become futile and could be dismissed, even if Article III jurisdiction were lacking for the state-law claim. *Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991). Although this Court has subsequently questioned the *Bell* futility doctrine, *see Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1197 (9th Cir. 2016), the doctrine remains available here in any event.

Even if futility under *Bell* were in question for a *general removal case*, futility would be valid here because the intergovernmental-immunity defense and its related merits issues of preemption are "logically antecedent to [jurisdictional] concerns and

… pertain to statutory standing, which may properly be treated before [jurisdiction]." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830-31 (1999). With removals, as with any civil litigation, a court can dismiss on any permissible threshold ground rather remanding for lack of standing. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) ("in cases removed from state court to federal court, as in cases originating in federal court, there is no unyielding jurisdictional hierarchy"). In questioning the *Bell* futility doctrine, *Polo* neither considered the no-unyielding-hierarchy rationale of *Ruhrgas* nor involved a situation where the merits basis for futility was antecedent to an issue properly before the federal court. Under these circumstances, dismissal would be appropriate because the Court will have decided that SB29 is void and unenforceable as part of finding removal jurisdiction.

2. Plaintiffs may lack an injury in fact.

The parties dispute Plaintiffs' standing under the diverted-resources rationale of *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), but that might not be the only potential basis for standing.

In an appropriate case, *amicus* IRLI would encourage this Court to review the overuse of *Havens*: "The 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); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216,

1225-26 (9th Cir. 2012) (Ikuta, J., dissenting). For garden-variety claims of diverted-resource standing, the plaintiff's advocacy expenditures should not satisfy Article III's causation requirement because a "self-inflicted injury" cannot manufacture an Article III case or controversy. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Here, the addition of the McFarland facilities may impose marginally greater costs on Plaintiffs to spread their operations a little wider to cover the new facilities. If so, that might provide the mere "trifle" needed for constitutional standing. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973), If so, the alleged notice violations of SB29 could provide procedural standing.[3] *Defenders of Wildlife*, 504 U.S. at 573 n.8; *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Even if Plaintiffs' moving papers do not support that basis for standing *for the injunction*, the potential for standing along these lines would exist for purposes of the district court's threshold Article III jurisdiction.[4]

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[3] In arguing for standing based on Plaintiffs' *allegations* of procedural error, *amicus* IRLI in no way suggests that those allegations are true because courts analyze subject-matter jurisdiction from the plaintiff's merits views. *Southern Cal. Edison Co. v. F.E.R.C.*, 502 F.3d 176, 180 (D.C. Cir. 2007); *Tyler v. Cuomo*, 236 F.3d 1124, 1133 (9th Cir. 2000); *McConnell v. FEC,* 540 U.S. 93, 227 (2003).

[4] Even for standing, a court need not consider an argument that the actual party before it fails to raise: "Because Appellants failed to raise the informational standing

(Footnote cont'd on next page)

Indeed, challenging Plaintiffs' Article III standing could be a poisoned chalice for Appellants. WILLIAM SHAKESPEARE, MACBETH, act 1, sc. 7. The "prize" for winning that jurisdictional argument could be remand to state court: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 42 U.S.C. § 1447(c). Aside from the issue of the *Bell* futility doctrine, *see* Section I.A.1, *supra*, "the Supreme Court expressly left open the question whether a plaintiff must have Article III standing with respect to state law claims within the federal court's supplemental jurisdiction to permit removal under 28 U.S.C. § 1442(a)." *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1002 n.4 (9th Cir. 2001). In any event, the Article III question presented in this interlocutory appeal — Plaintiffs' standing for the injunction — is a different question than the threshold Article III question presented for removal.[5]

3. Plaintiffs lack prudential standing.

The foregoing discussion of Article III does not resolve the issue of Plaintiffs' standing because there are also *prudential* limits on standing, such as the zone-of-

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argument advanced by [*amicus curiae*], we decline to reach it." *Physicians Comm. for Responsible Med. v. EPA*, 292 F.App'x 543, 545 n.1 (9th Cir. 2008).

[5] Specifically, even if Article III jurisdiction exists for the removed state-law claim, it may be that Plaintiffs did not meet their burden of showing standing for the injunction. A party with standing for an injunction clearly has threshold standing, but a party without standing for an injunction may nonetheless have threshold standing.

interests test and *jus tertii* (or third-party standing) doctrine. Given that Plaintiffs seek to support the rights of absent third parties and relief not contemplated by SB29, these additional prudential limits are relevant.

Under *jus tertii*, a plaintiff must meet a three-part test to assert the rights of absent third parties: the plaintiff must have its own Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004). Under that test, Plaintiffs cannot challenge the lack of notice to third parties — such as third parties who are Spanish speakers or who lost internet connections during a hearing — and they cannot assert the interests of alien detainees.

An *"existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here.*"* *Kowalski*, 543 U.S. at 131 (emphasis in original). 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). Since *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support *jus tertii* standing.

Jus tertii standing is even less appropriate here; far from the parties' having

the required "identity of interests,"[6] the putative third-party plaintiff's interests are *adverse* or even *potentially adverse* to the third-party rights holder's interests. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (rejecting *jus tertii* standing where interests "are not parallel and, indeed, are potentially in conflict"). Plaintiffs seek to close facilities that will enable alien detainees to practice social distancing during the COVID-19 pandemic. The detainees may not wish to risk their health in the hopes of winning release for overcrowding. In such cases, courts should avoid "the adjudication of rights which [the rights holders] not before the Court may not wish to assert." *Newdow*, 542 U.S. at 15 n.7. Under *Newdow*, Plaintiffs have no right to risk detainees' lives to press Plaintiffs' political agenda.

Once this Court resolves the nature of the costs that Plaintiffs allegedly must bear under Appellants' actions, the Court will need to assess whether that interest falls within the zone of interests that SB29 protects. Significantly, this issue did not arise in *Havens* because the *Havens* statute eliminated prudential standing. *Havens*,

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[6] *See*, *e.g.*, *Lepelletier v. FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999) ("there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests"); *Pa. Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 288 (3d Cir. 2002) (asking whether "the third party … shares an identity of interests with the plaintiff"); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 810 (11th Cir. 1993) ("relationship between the party asserting the right and the third party has been characterized by a strong identity of interests").

455 U.S. at 372 (Fair Housing Act extends "standing under § 812 … to the full limits of Art. III" and "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section"). By collapsing the standing inquiry to the question of whether the alleged injuries met the Article III minimum, *id.*, the Court in *Havens* held that the plaintiff did not need to satisfy a prudential test such as the zone-of-interests test. When a plaintiff — whether individual or organizational — sues under a statute that *does not eliminate prudential standing*, that plaintiff cannot bypass the zone-of-interest test or other prudential limits on standing. *See*, *e.g.*, *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 939 (D.C. Cir. 1986) (applying zone-of-interest test under *Havens*) (R.B. Ginsburg, J.). Here, Plaintiffs' interests far exceed those that SB29 reasonably protects.

4. For purposes of removal jurisdiction, the difference between Article III standing and prudential standing is significant.

If this Court elects to parse Plaintiffs' standing and finds it insufficient, *amicus* IRLI respectfully submits that the Court should distinguish between core Article III standing — which is jurisdictional and can be raised at any time — and prudential standing such as third-party standing or the zone-of-interests test, which is non-jurisdictional and waivable. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899-900 (9th Cir. 2000). While the lack of constitutional standing could provide a basis for remand, 28 U.S.C. § 1447(c), the lack of

prudential standing is now waived. *See id.* (requiring plaintiff to raise non-jurisdictional bases for remand within 30 days of removal).

B. Plaintiffs' merits claims are unlikely to prevail.

More than 100 years ago, the Supreme Court prefigured — and rejected — state legislation like SB29 in another case from California:

> The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. *No state government can exclude it from the exercise of any authority conferred upon it by the Constitution; obstruct its authorized officers against its will; or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it*.

In re Neagle, 135 U.S. 1, 61-62 (1890) (interior quotation marks omitted, emphasis added); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2236-37 (2003) (discussing *Neagle*). With that brief addition, *amicus* IRLI supports

Appellants' thorough discussion of intergovernmental immunity, *see* GEO Br. at 34-48, and the federal *amicus* brief on the same issue. *See* Fed'l *Amicus* Br. at 12-25.

II. THE OTHER *WINTER* FACTORS SUPPORT APPELLANTS.

Given Plaintiffs' unlikelihood of prevailing on the merits, this Court could vacate the injunction without considering the other three *Winter* factors. In any event, each additional *Winter* factor supports *vacatur*.

A. Plaintiffs cannot establish irreparable harm.

The second *Winter* factor concerns the irreparable harm that a plaintiff would suffer, absent interim relied. *Winter,* 555 U.S. at 20. Even injuries that can qualify as cognizable under 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). Here, Plaintiffs may not even have standing for the relief that they seek. *See* Section I.A, *supra*. But even assuming *arguendo* that Plaintiffs could satisfy Article III, they still could not show irreparable harm.

Again, assuming *arguendo* that Plaintiffs' alleged injuries could qualify as an "injury in fact" under Article III, the self-inflicted nature of the harm disqualifies the harm as irreparable: "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). Plaintiffs' minor — if any — harm here is simply not irreparable.

B. The balance of equities favors Appellants.

The third *Winter* factor is the balance of equities. *Winter,* 555 U.S. at 20. The injunction would cause significant harm not only to GEO but also to the McFarland community, detained aliens, and the federal government. *See* GEO Br. at 61-64. This *Winter* factor tips strongly in Appellants' favor for two reasons. First, their advantage on the merits tips the equities in their favor. *See* Section I.B, *supra*. Second, Plaintiffs' minor and tenuous interest — if even cognizable, *see* Section I.A, *supra* — undercuts Plaintiffs' ability to assert a countervailing form of irreparable harm. *See* Section II.A, *supra*, For all these overlapping reasons, the balance of the equities tips decidedly in Appellants' favor.

C. The public interest favors Appellants.

The last *Winter* factor — the public interest, *Winter,* 555 U.S. at 20 — also favors Appellants. 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. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law"). 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). In that regard, the district court should not have issued its injunction until resolving the merits of GEO's immunity defense and weighing the public-interest factors.

CONCLUSION

For the foregoing reasons and those argued by Appellants and the federal *amicus* brief, this Court should vacate the injunction.

Dated: September 11, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and 29(a)(5) because:

This brief contains 4,031 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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Dated: September 11, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2020, I electronically submitted the foregoing *amicus curiae* brief to the Clerk via the Court's CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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