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**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

East Bay Sanctuary Covenant; Al Otro Lado; Innovation Law Lab; and Central American Resource Center in Los Angeles,

Plaintiff,

v.

Donald J. Trump, President of the United States, in his official capacity; Matthew G. Whitaker, Acting Attorney General, in his official capacity; U.S. Dep't of Justice; James McHenry, Director of the Executive Office for Immigration Review, in his official capacity; the Executive Office for Immigration Review; Kirstjen M. Nielsen, Secretary of Homeland Security, in her official capacity; U.S. Dep't of Homeland Security; Lee Francis Cissna, Director of the U.S. Citizenship & Immigration Services, in his official capacity; U.S. Citizenship & Immigration Services; Kevin K. McAleenan, Commissioner of U.S. Customs & Border Protection, in his official capacity; U.S. Customs & Border Protection; Ronald D. Vitiello, Acting Director of Immigration & Customs Enforcement, in his official capacity; Immigration & Customs Enforcement,

Defendants.

Case No. 3:18-cv-6810-JST

**AMICUS CURIAE BRIEF OF
IMMIGRATION REFORM LAW
INSTITUTE IN SUPPORT OF
FEDERAL DEFENDANTS IN
OPPOSITION TO INTERIM RELIEF**

Date: November 19, 2018

Time: 9:30 a.m.

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17 *Sierra Club v. Morton,*
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18 *Warth v. Seldin,*
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20 *Yee v. Escondido,*
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STATUTES

21

22 U.S. CONST. art. III 2-3

23 Administrative Procedure Act,
5 U.S.C. §§551-7061

24 Immigration and Naturalization Act,
8 U.S.C. §§1101-15371

25 Fair Housing Act,
PUB. L. No. 90-284, Title VIII, 82 Stat. 83 (1968)3

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MEMORANDUM OF POINTS AND AUTHORITIES

1
2 Several groups concerned about immigration issues (collectively, “Plaintiffs”) have sued
3 various federal officials and offices (collectively, the “Government”) to enjoin the Government’s
4 actions regarding immigration matters under the Immigration and Naturalization Act, 8 U.S.C.
5 §§1101-1537 (“INA”) and Administrative Procedure Act, 5 U.S.C. §§551-706 (“APA”).

STATEMENT OF ISSUES

6
7 In addition to the issues raised by the parties, this Court should consider whether groups
8 such as Plaintiffs can premise their standing on diverted resources under *Havens Realty Corp. v.*
9 *Coleman*, 455 U. S. 363, 373 (1982), and its progeny when the statute that the groups seek to
10 enforce either does not remove prudential concerns from the standing analysis (as the *Havens*
11 *Realty* statute did) or does not include such groups’ expenditures within the zone of interests that
12 the statute protects.
13

IDENTITY AND INTEREST OF AMICUS CURIAE

14
15 *Amicus curiae* Immigration Law Reform Institute (“IRLI”) is a nonprofit 501(c)(3)
16 public-interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating
17 immigration-related cases on behalf of, and in the interests of, United States citizens and legal
18 permanent residents and to assisting courts in understanding and accurately applying federal
19 immigration law. IRLI has litigated or filed *amicus* briefs in many important immigration cases.
20 For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted
21 by IRLI staff from IRLI’s affiliate, the Federation for American Immigration Reform, because
22 the Board considers IRLI an expert in immigration law. For these reasons, IRLI has direct
23 interests in the issues here.
24

STATEMENT OF FACTS

25
26 In the interest of brevity, IRLI adopts the facts as stated by the Government. Gov’t Memo.

1 at 1-7.

2 **ARGUMENT**

3 **I. PLAINTIFFS LACK STANDING.**

4 Before a federal court can even consider the underlying merits, plaintiffs must establish
5 their standing to obtain a preliminary injunction. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103
6 (1983). As the Government argues, Plaintiffs lack constitutional and prudential standing. Gov’t
7 Memo. at 7-9 (Article III standing), 9-11 (zone of interests).

8 Plaintiffs premise their organizational standing on the theory that the Government’s
9 actions will cause Plaintiffs to expend additional resources to combat the Government’s rule.
10 Compl. ¶¶ 78-99. Because such diverted-resource injuries are entirely self-inflicted and outside
11 the INA’s zone of interests, *amicus* IRLI respectfully submits that such injuries do not suffice.
12

13 This type of diverted-resources standing derives from *Havens Realty*; as Judge Millett of
14 the U.S. Court of Appeals and Judge Chhabria of this Court have explained, “[t]he problem is
15 not *Havens*[; the] problem is what our precedent has done with *Havens*.” *People for the Ethical*
16 *Treatment of Animals v. U.S. Dept. of Agriculture*, 797 F.3d 1087, 1100-01 (D.C. Cir. 2015)
17 (Millett, J., dissenting); *accord Animal Legal Def. Fund v. USDA*, 632 F. App’x 905, 909 (9th
18 Cir. 2015) (Chhabria, J., concurring³). Under the unique statutory and factual situation in *Havens*
19 *Realty*, a housing-rights organization’s diverted resources provided it standing, but in most other
20 settings such diverted resources are mere self-inflicted injuries. *Clapper v. Amnesty Int’l USA*,
21 133 S.Ct. 1138, 1152-53 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976).
22 Moreover, if mere spending could manufacture standing, any private advocacy group could
23 establish standing against any government action. But that clearly is not the law. *Sierra Club v.*
24

25 _____
26 ³ Judge Chhabria was sitting on the Ninth Circuit panel by designation.

1 *Morton*, 405 U.S. 727, 739 (1972) (organizations lack standing to defend “abstract social
2 interests”). To avoid overstepping its constitutional authority, this Court should not count the
3 diverted-resources rationale for Article III standing.

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

11
12 First, the *Havens Realty* organization had a statutory right (backed by a statutory cause
13 of action) to truthful information that the defendants denied to it. Because “Congress may create
14 a statutory right[.]

15 ... the alleged deprivation of [such rights] can confer standing.” *Warth v. Seldin*, 422
16 U.S. 490, 514 (1975). Under a typical statute, a typical organizational plaintiff has no claim to
17 any rights related to its own voluntarily diverted resources.

18
19 Second, and related to the first issue, the injury that an organizational plaintiff claims
20 must align with the other components of its standing, *Mountain States Legal Found. v. Glickman*,
21 92 F.3d 1228, 1232 (D.C. Cir. 1996), including the allegedly cognizable right. In *Havens Realty*,
22 the statutorily protected right to truthful housing information aligned with the alleged injury
23 (costs to counteract false information, in violation of the statute). By contrast, under INA (or any
24 typical statute), there will be no rights even *remotely* related to a third-party organization’s
25 discretionary spending.
26

1 Third, and most critically, the *Havens Realty* statute eliminated prudential standing, so
2 the zone-of-interest test did not apply. When a plaintiff— whether individual or
3 organizational — sues under a statute that *does not eliminate prudential standing*, that plaintiff
4 cannot bypass the zone-of-interest test or other prudential limits on standing.⁴ Typically, it would
5 be fanciful to suggest that a statute has private, third-party spending in its zone of interests.
6 Certainly that is the case for the INA.

7 **II. THE GOVERNMENT DID NOT WAIVE ANY OF THE ARGUMENTS RAISED**
8 **IN THIS BRIEF.**

9 Although the zone-of-interests test is a prudential doctrine that a defendant can waive by
10 failing to raise it, *City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009), the
11 Government’s memorandum of law not only argues that Plaintiffs fall outside the INA’s zone of
12 interests but also distinguishes *Havens Realty*. Accordingly, the Government has not waived any
13 of the arguments that IRLI makes because IRLI’s brief supports *issues* that the Government
14 already has raised. As such, the Government could raise these arguments on appeal, *Yee v.*
15 *Escondido*, 503 U.S. 519, 534-35 (1992), so it would be passing strange if this Court cannot
16 consider them here.
17

18 **CONCLUSION**

19 This Court should deny the request for interim relief because Plaintiffs lack standing.
20
21
22

23 _____
24 ⁴ For example, applying *Havens* to diverted resources in *Action Alliance of Senior Citizens*
25 *v. Heckler*, 789 F.2d 931, 939 (D.C. Cir. 1986) (R.B. Ginsburg, J.), then-Judge Ginsburg correctly
26 recognized the need to ask whether those diverted resources fell within the zone of interests of the
Age Discrimination Act. 789 F.2d at 939. There was no such inquiry here or in most diverted-
resource decisions.

1 Dated: November 16, 2018

Respectfully submitted,

2 /s/ Lawrence J. Joseph

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