No. 19-16487

In the United States Court of Appeals for the Ninth Circuit

EAST BAY SANCTUARY COVENANT, *ET AL.*,
Plaintiffs-Appellees,

vs.

WILLIAM P. BARR, ATTORNEY GENERAL, *ET AL.*,
Defendants-Appellants.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, NO. 3:19-cv-04073-JST
HON. JON S. TIGAR, DISTRICT JUDGE

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

Christopher J. Hajec
Director of Litigation
Immigration Reform Law Institute
25 Massachusetts Ave, NW, Ste 335
Washington, DC 20001
Tel: 202-232-5590
Fax: 202-464-3590
Email: chajec@irli.org

Lawrence J. Joseph
Cal. Bar #154908
1250 Connecticut Av NW, Ste 700-1A
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

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 5, 2019

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. Bar #154908
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Immigration Law Reform Institute ("IRLI") filed this brief with the written consent of all parties.[1] IRLI is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and legal permanent residents, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in important immigration cases, including *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), and *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017). For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's parent organization, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has a direct interest in the issues here.

STATEMENT OF THE CASE

Three immigrant-rights advocacy groups (collectively, "Plaintiffs") have sued various federal Executive offices and officers (collectively, the "Government") to challenge the promulgation and enforcement of an interim final rule, Asylum

[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* and its counsel — contributed monetarily to this brief's preparation or submission.

Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (2019) (hereinafter, the "IFR"), which concerns aliens seeking asylum in the United States after transiting through a third country without seeking asylum there. Plaintiffs challenge not only the substantive merits under the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"), but also the IFR's promulgation without notice-and-comment rulemaking under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"). The District Court granted Plaintiffs' motion for a preliminary injunction, and the Government appeals.

Plaintiffs move for a preliminary injunction, which requires meeting the four-factor test of *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008):

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Id. Since Plaintiffs meet none of these factors, the Court should vacate the District Court's preliminary injunction.

SUMMARY OF ARGUMENT

Before reaching the merits of a dispute, federal appellate courts first must evaluate the lower court's jurisdiction over the plaintiff's claims. Here, Plaintiffs lack a legally protected right under Article III and their claimed injuries would fall

outside the zone of interests for the relevant statutes even if Plaintiffs satisfied Article III (Sections I.A-B). Moreover, the INA differs from the statute at issue in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in a way that precludes reliance on Plaintiffs' diverted-resources injury (Section I.C), and Plaintiffs cannot assert the rights – if any – of third-party asylum seekers that Plaintiffs hope to represent in the future (Section I,D). Finally, Plaintiffs lack not only a cause of action under the Administrative Procedure Act ("APA") and the APA's waiver of sovereign immunity (Section I.E.1), but also a claim for non-APA equity review (Section I.E.2).

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

that both the APA and the INA provide for emergencies (Section II.C).

While the foregoing jurisdictional and merits issues suggest that Plaintiffs cannot prevail, the other *Winter* factors also support the Government. Plaintiffs' harms are trivial and, indeed, arguably not cognizable, and thus do not constitute the irreparable harm needed to warrant interim relief (Section III.A).The balance of the equities favors that Government both because injunctions in favor of plaintiffs who lack standing inflict a separation-of-powers injury on the Executive Branch and because the injunction negatively impacts the Executive Branch's ability to conduct foreign affairs and protect national security and public safety (Section III.B). Finally, the public interest favors vacating the preliminary injunction, both because the public interest merges with the merits (which favor the Government) and because — in public-injury cases such as this — a private plaintiff cannot obtain an injunction against the government as easily as it could against a private plaintiff in like circumstances (Section III.C).

ARGUMENT

I. THE DISTRICT COURT 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 I.A-E, *infra*. Accordingly, as an alternative to vacating the injunction, this Court should fulfill its "special obligation to" determine jurisdiction, *id.*, find a lack of jurisdiction, and remand with instructions to dismiss the case.

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

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

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

A plaintiff can, of course, premise its standing on non-economic injuries, *Valley Forge Christian Coll.*, 454 U.S. at 486, including a "change in the aesthetics and ecology of [an] area," *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). But the threshold requirement for "the irreducible constitutional minimum of standing" is that a plaintiff suffered an "injury in fact" through "an invasion of a *legally protected interest* which is … concrete and particularized" to that plaintiff. *Defenders of*

Wildlife, 504 U.S. at 560 (emphasis added). To be sure, the requirement for particularized injury typically poses the biggest problem for plaintiffs — for example, both *Valley Forge Christian College* and *Morton*, *supra*, turned on the lack of a particularized injury — but the requirement for a legally protected interest is even more basic.

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

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

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

regulation at issue." *Diamond v. Charles*, 476 U.S. 54, 70 (1986).[2] The statute here has no nexus to Plaintiffs' alleged financial injuries (*i.e.*, the resources that they voluntarily have diverted – or will divert – to counteract the new rule). For this reason, Plaintiffs have not suffered an injury in fact under the statutes at issue here.[3]

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

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

To satisfy the zone-of-interests test, a "plaintiff must establish that the injury

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[2] 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.

[3] 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.

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 no more relevant than court reporters' fees are from a statute requiring hearings on the record. Not every adverse effect on a private interest falls within the zone of interests that Congress sought to protect in a tangentially related statute.

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

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

This type of diverted-resource standing derives from *Havens*. As Judge Millett of the U.S. Court of Appeals for the District of Columbia Circuit has explained, "[t]he problem is not *Havens*[; the] problem is what our precedent has done with *Havens*." *People for the Ethical Treatment of Animals v. U.S. Dept. of Agriculture*, 797 F.3d 1087, 1100-01 (D.C. Cir. 2015) (Millett, J., *dubitante*); *accord Animal Legal Def. Fund v. USDA*, 632 F. App'x 905, 909 (9th Cir. 2015) (Chhabria, J., concurring); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1225-26 (9th Cir. 2012) (Ikuta, J., dissenting). Under the unique statutory and factual situation in *Havens*, a housing-rights organization's diverted resources provided it standing, but in most other settings such diverted resources are mere self-inflicted injuries. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417-18 (2013) (self-censorship due to fear of surveillance insufficient for standing); *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976) (financial losses state parties could have avoided insufficient for standing). Indeed, if mere spending could manufacture standing, any private advocacy group could establish standing against any government action merely by spending money to oppose it. But that clearly is not the law. *Morton,* 405 U.S. at 739 (mere advocacy by an organization does not confer standing to defend "abstract social interests"). To confine federal courts to their constitutional authority, this Court should review and revoke the diverted-resources rationale for standing.

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

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

Second, and related to the first issue, the injury that an organizational plaintiff claims must align with the other components of its standing, *Stevens*, 529 U.S. at 772; *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C. Cir. 1996); *Ecosystem Inv., Partners v. Crosby Dredging, L.L.C.*, 729 F.App'x 287, 299 (5th Cir. 2018) (collecting cases), including the allegedly cognizable right. In *Havens,* the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information given in violation of the

statute). By contrast, under the INA (or any typical statute), there will be no rights even *remotely* related to a third-party organization's discretionary spending.

Third, the *Havens* statute eliminated prudential standing, so the zone-of-interests test did not apply. When a plaintiff — whether individual or organizational — sues under a statute that *does not eliminate prudential standing*, that plaintiff cannot bypass the zone-of-interests test or other prudential limits on standing.[4] Typically, it would be fanciful to suggest that a statute has private, third-party spending in its zone of interests.

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

The institutional Plaintiffs lack third-party standing to assert the rights of absent asylum seekers whom the institutional Plaintiffs hope to meet someday and represent. While some relationships might support third-party standing, the same is simply not true of all hypothetical relationships, including those between the institutional Plaintiffs and any asylum seekers whom the institutional Plaintiffs might meet in the *future*: an "*existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here." *Kowalski v.*

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

Tesmer, 543 U.S. 125, 131 (2004) (emphasis in original). Future asylum-seeking aliens do not have regular, ongoing relationships with the institutional Plaintiffs analogous to *existing* attorney-client relationships.

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

E. Plaintiffs lack a waiver of sovereign immunity and a cause of action for judicial review.

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

260 (1999). The scope of such waivers, moreover, is strictly construed in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Here, Plaintiffs lack both a waiver of sovereign immunity and a cause of action under the APA.

1. 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,[5] Congress "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (quoting S. REP. NO. 996, 94th Cong., 2d Sess. 8 (1976); H.R. REP. NO. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.). But that waiver has several restrictions that preclude review *in these actions*. Specifically, the APA excludes review for "statutes [that] preclude judicial review" and those that provide "special statutory review." 5 U.S.C. §§701(a)(1), 703. In addition, the waiver of immunity extends only to actions made reviewable by statute

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

and final actions for which there is no other adequate remedy in court. 5 U.S.C. §704. APA review is barred here on several bases:

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

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

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

In order to sue in equity, Plaintiffs need more than Article III standing and an injury within the relevant zone of interests. Instead, an equity plaintiff or petitioner must invoke a statutory or constitutional *right* for equity to enforce, such as life,

liberty, or property under the Due Process Clause or equal protection under the Equal Protection Clause or its federal equivalent in the Fifth Amendment. *See*, *e.g.*, *United States v. Lee*, 106 U.S. 196, 220-21 (1882) (property); *Ex parte Young*, 209 U.S. 123, 149 (1908) (property); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (liberty); *cf. Wadley S. R. Co. v. Georgia*, 235 U.S. 651, 661 (1915) ("any party affected by [government] action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution"). Plaintiffs' claimed injuries here fall short of what equity requires, even assuming *arguendo* that those claimed injuries could satisfy Article III. Put another way, equity review requires "direct injury," which means "a wrong which directly results in the violation of a legal right." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). Without that elevated level of direct injury, there is no review:

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

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

II. THE GOVERNMENT IS LIKELY TO PREVAIL ON THE MERITS.

As explained in the prior subsection, the Government is likely to prevail because federal courts lack jurisdiction over Plaintiffs' claims. *See* I, *supra*. As explained in this subsection, the Government likely would prevail on the merits, assuming *arguendo* that federal jurisdiction existed.

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

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

B. The IFR complies with the INA substantively.

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

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

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

to fail.

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

Plaintiffs argue that §1158's express statutory bars to asylum (*e.g.*, an alien's being "firmly resettled in another country prior to arriving in the United States") preclude the Government's adopting additional regulatory bars because the regulatory bars would not qualify as "consistent with this section." *See* 8 U.S.C. §1158(c)(2)(B). Nothing in the 1996 enactment[6] of the relevant provisions of §1158 announced that Congress intended to repeal the Executive's pre-existing discretion with respect to *denying* asylum. *See* Refugee Act of 1980, PUB. L. NO. 96-212, §201(b), 94 Stat. 102, 105. Specifically, the relevant pre-1996 part of §1158 provided as follows:

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

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[6] The contested provisions of current §1158 were enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act, PUB. L. NO. 104-208, Div. C, 110 Stat. 3009-546 (1996). *See* PUB. L. NO. 104-208, Div. C, §604, 110 Stat. 3009, 3009-690 to 3009-694 (1996).

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

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

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

Id. (interior quotation marks and alterations omitted).[7] In the related context of federal preemption, the same clear-and-manifest standard is presumptively not met if the statute is linguistically open to a non-preemptive reading: "When the text of [a

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

statute] is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors'" unsettling the canon. *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). Here, too, this Court should reject Plaintiffs' attempt to graft onto a congressional bar to some asylees a congressional intent to preclude the Executive's authority — in the discretion that Congress delegated to the Executive — to adopt regulatory bars when the Executive finds them appropriate. Indeed, viewing Plaintiffs' field-preemption argument under §1158's express provisions, *see* Gov't Br. at 28-29, through the lens of repeals by implication exposes the fallacy of Plaintiffs' argument, given that preemption and repeals by implication use the same high bar of requiring clear and manifest congressional intent.

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

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

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

injunction would injure the very flexibility that the APA and the INA provide the Government.

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

The APA provides all federal agencies broad discretion to set policy in the interstitial areas that their enabling statutes do not address specifically. *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 844 (1984). Furthermore, in the specific context of emergencies, the APA goes further in loosening the otherwise-applicable requirements for notice-and-comment rulemaking. 5 U.S.C. §553(b)(B), 553(d)(3). Finally, "to the extent that there is involved … a … foreign affairs function of the United States," the APA provides still more flexibility by outright exempting federal

agencies from those rulemaking requirements. *Id.* §553(a)(1). This Court should not ignore the flexibility that the APA gives the Government to address the humanitarian and public-safety emergencies here or to interfere with the Government's negotiations with Mexico over illegal aliens crossing through Mexico to the United States.

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

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

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

Finally, the "exclusion of aliens is a fundamental act of sovereignty by the

political branches." *Hawaii*, 138 S.Ct. at 2407 (interior quotation marks omitted). Because "decisions in these matters may implicate our relations with foreign powers" and implicate "changing political and economic circumstances," these "decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). Thus, the Government's flexibility here — while clearly present in the INA itself — also arises from the nature of sovereignty and the separation of powers: "In accord with ancient principles of the international law of nation-states, … the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers — a power to be exercised exclusively by the political branches of government.'" *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (citations, internal alterations, and quotation marks omitted). Federal courts should not attempt to set federal immigration policy.

III. THE OTHER *WINTER* FACTORS FAVOR THE GOVERNMENT.

Although the unlikelihood that Plaintiffs will prevail is enough to deny interim relief, the other three *Winter* factors also counsel against interim relief.

A. Plaintiffs will not suffer irreparable harm.

Immigrant advocacy groups and 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. Injuries that qualify as sufficiently immediate 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). This is especially true for self-inflicted injuries like 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); *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). So even assuming that Plaintiffs' diverted resources could constitute an Article III injury for standing, *but see* Section I.C, *supra*, Plaintiffs nonetheless would lack the irreparable harm needed for a preliminary injunction.

Similarly, this Court should discount the allegedly irreparable harm from this action when affected aliens have an adequate remedy in their removal proceedings. *See* Section I.E.1, *supra*. Finally, because affected aliens did not apply for asylum in the countries through which they transited to get here, this Court can draw an inference that their allegedly irreparable harm is not as significant as they claim.

B. The balance of equities favors the Government.

The balance of equities tips in the Government's favor for several reasons. First, the injunction impairs the Government's ability to address the emergency at the southern border and to conduct foreign negotiations. Second, the Government's advantage on jurisdiction and the substantive merits tips the equities in its favor. *See* Sections I-II, *supra*. Third, a district court's issuing an injunction without Article III jurisdiction violates the separation of powers, which inflicts a constitutional injury on the Executive Branch: "the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hernandez v. Sessions*, 872 F.3d 976, 994-95 (9th Cir. 2017) (interior quotation marks omitted). Fourth, Plaintiffs' interest — if even cognizable and within this Court's jurisdiction, *see* Sections I.A-D, *supra* — undercuts their ability to assert a countervailing form of irreparable harm. *See* Section III.A, *supra*. Consequently, the balance of equities tips decidedly in the Government's favor. Moreover, as the Government explains, the crush of economic migrants asserting insincere claims of persecution in their asylum claims drown immigrants with bona fide asylum claims in delay caused by the economic migrants.

C. The public interest favors the Government.

The last *Winter* factor is the public interest. Where the parties dispute the lawfulness of government programs, this last factor collapses into the merits. *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). If the Court agrees with

the Government on the merits, the public interest will tilt decidedly toward the Government: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of 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 asylum policy for the Nation.

CONCLUSION

For the foregoing reasons and those argued by the Government, this Court should vacate the injunction.

Dated: September 5, 2019

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. Bar #154908
Law Office of Lawrence J. Joseph
1250 Connecticut Av NW, Ste 700-1A
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

Christopher J. Hajec
Director of Litigation
Immigration Reform Law Institute
25 Massachusetts Ave, NW, Ste 335
Washington, DC 20001
Tel: 202-232-5590
Fax: 202-464-3590
Email: chajec@irli.org

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, appellants state that they know of no related case pending in this Court.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies compliance of the accompanying brief with the following requirements of the FEDERAL RULES OF APPELLATE PROCEDURE and the Local Rules of this Court. This brief contains 6,011 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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

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Dated: September 5, 2019

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. Bar #154908
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2019, 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.

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. Bar #154908
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com