No. 24A931

In the Supreme Court of the United States

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; PAMELA BONDI, ATTORNEY GENERAL OF THE UNITED STATES, IN HER OFFICIAL CAPACITY; KRISTI NOEM, SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY, IN HER OFFICIAL CAPACITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; MADISON SHEAHAN, ACTING DIRECTOR AND SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HER OFFICIAL CAPACITY; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MARCO RUBIO, SECRETARY OF STATE, IN HIS OFFICIAL CAPACITY; AND THE UNITED STATES DEPARTMENT OF STATE.,
Applicants,

v.

J.G.G.; G.F.F.; J.G.O; W.G.H.; AND J.A.V.,
Respondents.

On Application to Vacate the Orders Issued by the United States District Court for the District of Columbia and Request for an Immediate Administrative Stay

AMICUS CURIAE BRIEF OF APA WATCH IN SUPPORT OF APPLICANTS IN SUPPORT OF VACATUR, ADMINISTRATIVE STAY, AND _CERTIORARI_ BEFORE JUDGMENT

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW, Suite 700
Washington, DC 20036
(202) 899-2987
ljoseph@larryjoseph.com
Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF OF APA WATCH

Pursuant to this Court's Rule 37.4,[1] *amicus curiae* APA Watch respectfully submits that (a) the Circuit Justice should refer this matter to the full Court, (b) pending further order of the Court, the full Court should summarily stay any interim relief that affects the public fisc without security under FED. R. CIV. P. 65(c) adequate to pay any damage from interim relief later held improper, and (c) the Court should construe the application as a petition for a writ of *certiorari* before judgment on the question of whether interim relief may issue without adequate security under Rule 65(c). Viewing this matter by itself, expeditious review and relief are necessary both to prevent the district court's overreach in this case and to protect whatever legitimate rights respondents have. Viewed in the context of the widespread similar overreach by other district courts against the new presidential Administration, this Court's expeditious review and relief is urgently needed to reestablish the need for the security required by Rule 65(c), sovereign immunity, and 5 U.S.C. § 705 when a court purports to enjoin the federal government without a final judgment.

INTEREST OF *AMICUS CURIAE*

Amicus curiae APA Watch is a nonprofit association dedicated to ensuring that federal and state agencies and courts comply with the rulemaking, decisionmaking, information-dissemination, and information-quality requirements under the federal Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), related state laws, the

[1] Per Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel contributed monetarily to preparing or submitting the brief.

federal Constitution, and state constitutions. *Amicus* filed a similar brief with respect to similarly improper interim relief in No. 24A904 and intends to continue to do so with respect to other improper interim relief issued by district courts.

STATEMENT OF THE CASE

Amicus APA Watch adopts the facts as stated by the federal applicants (collectively, the "Government"). *See* Appl. at 1-16. Respondents are five alleged members of the Tren de Aragua ("TdA") organization (collectively, "Plaintiffs") who sued the Government under the APA to avert deportation pursuant to a presidential proclamation under the Alien Enemies Act, 50 U.S.C. § 21. *See Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua*, 90 Fed. Reg. 13,033 (Mar. 20, 2025). Without addressing the security required by Rule 65(c) and sovereign immunity, the district judge ordered the Government to turn planes around and to incur detention costs here, beyond the detention that the Government had arranged abroad. Nothing in the record establishes that the responsible parties are adequately capitalized to repay the detention costs that the district court's improper interim relief would impose on the Government during a full-fledged, multi-year lawsuit. Under 5 U.S.C. § 705, therefore, any interim relief should be made contingent upon security that is adequate to reimburse unnecessary detention costs.

ARGUMENT

I. THE COURT SHOULD CONSTRUE THE APPLICATION AS A PETITION FOR A WRIT OF *CERTIORARI* BEFORE JUDGMENT, BUT—EVEN WITHOUT THAT RELIEF—THE COURT IS LIKELY TO GRANT A WRIT OF *CERTIORARI*.

To resolve a mature split in Circuit authority, *see* Section I.C, *infra*, the Court

should construe the application as a petition for a writ of *certiorari* before judgment on the question whether injunctive relief's can take effect without security pursuant to Rule 65(c), as well as to consider several important federal questions related to that overarching question. *See* Sections I.A-I.B, I.D, *infra*.

Nothing would demonstrate the *likelihood* of this Court's granting a writ of *certiorari* more conclusively than this Court's *granting* a writ of *certiorari*. This Court has authority to construe stay applications as petitions for a writ of *certiorari*, *see*, *e.g.*, *United States v. Texas*, 143 S.Ct. 51 (2022), and to decide such cases summarily, *Wisconsin Legis. v. Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022), or on expedited briefing. *Nken v. Mukasey*, 555 U.S. 1042 (2008); *cf. TikTok Inc. v. Garland*, 145 S.Ct. 57, 62 n.1 (2025) (*per curiam*). Even without conclusively demonstrating the likelihood of granting *certiorari*, there is a reasonable possibility that this Court would grant the Government's eventual petition for a writ of *certiorari* in this matter.

In addition to the important issues that the Government raises, *amicus* notes that the Circuits are deeply split on whether Rule 65(c) constitutes a mandatory condition precedent to interim relief, *see* Section I.C, *infra*, and that the issues presented here are vital to democratic governance. *See* Sections I.A-I.B, *infra*. Significantly, even if some of Plaintiffs' claims or some of the district court's actions become moot, the situation presented here—namely, improper interim relief against the Government—is capable of repetition while evading review. As such, the issues presented here on what Rule 65(c) requires will not become moot. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 396-98 & n.2 (1981). Accordingly, the jurisdiction that

this Court now has will not dissipate as this matter progresses in district court. Given the jurisdictional issues involved, appellate courts have discretion over what issues to consider on appeal, *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), even if raised only by an *amicus*. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991).

A. The lower courts' imposing unnecessary detention costs on the Government warrants this Court's exercise of its supervisory power over lower courts.

By leaving in place the district court's overreach—which could cost over $100 million over the full life of a federal lawsuit—the D.C. Circuit abdicated its supervisory role over its district court, thereby necessitating this Court's supervisory control of lower federal courts. *See* S.Ct. Rule 10(a). As explained in Sections II.A.2-II.A.3, *infra*, the district court has neither constitutional nor statutory subject-matter jurisdiction over Plaintiffs' claims. Indeed, if viewed as an APA rule, rather than an APA order, the Government's action here would be outside the APA. *See* 5 U.S.C. § 553(a)(1) (exempting "military or foreign affairs function[s] of the United States" from APA rulemaking requirements).

B. The district court's government-by-litigation approach threaten democratic self-rule.

The district court's action here is a particularly egregious example of a trend that this Court should reject, lest something "not normal" and unhealthy become the new normal by displacing the political branches with government by litigation:

> This is not normal. Universal injunctions have little basis in traditional equitable practice.

Dep't of Homeland Security v. New York, 140 S.Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay) (citing Samuel L. Bray, *Multiple Chancellors:*

Reforming the National Injunction, 131 HARV. L. REV. 417, 425-27 (2017)). This Court should review the issue not only based on the sheer scope of the district court's "departure" from the "accepted and usual course of judicial proceedings," S.Ct. Rule 10(a), but also based on these issues' fundamental importance to democratic norms. *See* S.Ct. Rule 10(c).

Hamilton's "least dangerous" branch should not become the "most dangerous one." *Compare* THE FEDERALIST NO. 78 at 522 (Hamilton) (Jacob E. Cooke, ed.) *with Missouri v. Jenkins*, 515 U.S. 70, 132 (1995) (judges become "dangerous" when they "presume to have the institutional ability to set effective educational, budgetary, or administrative policy") (O'Connor, J., concurring). Allowing the sweeping interim relief here would undermine this Nation's system of government under which the political branches resolve political issues. *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 311-12 (2014). "'The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government.'" *Alden v. Maine*, 527 U.S. 706, 750 (1999) (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). As *Read* explained, waivers of immunity must be limited to the terms of the waiver to avoid the "crippling interferences" of government-by-lawsuit:

> The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures.

Read, 322 U.S. 53-54. To its credit, the United States—through Congress—has waived sovereign immunity for many suits against the Government, but the judiciary

lacks jurisdiction to extend those waivers beyond their express terms: "It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place." *Alden*, 527 U.S. at 751 (cleaned up). Article III and sovereign immunity compel this Court to confine Plaintiffs to the statutory procedure that Congress enacted to resolve Plaintiffs' claims.

C. There is a mature Circuit split on whether Rule 65(c)'s provisions are mandatory.

The Circuits are split on whether Rule 65(c)'s provisions are mandatory.[2] Several Circuit deem Rule 65(c) mandatory, *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988); *Continuum Co. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989); *Habitat Educ. Ctr. v. United States Forest Serv.*, 607 F.3d 453, 460 (7th Cir. 2010), while others do not. *See*, *e.g.*, *Moltan Co. v. Eagle-Picher Indus.*, 55 F.3d 1171, 1176 (6th Cir. 1995); *Doctor's Assocs. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996); *California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) ("court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review"); *cf. Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999) (although security is waivable, court must expressly address the issue of security and cannot "disregard the bond requirement

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[2] In *dicta*, this Court has suggested that damages are unavailable outside an injunction bond: "A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757, 770 n.14 (1983) (citing *Russell v. Farley*, 105 U.S. 433, 437 (1882)).

altogether"); *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987). In the District of Columbia Circuit, precedent recognizes a court's discretion to forgo security for injunctive relief where "the restraint will do the defendant no material damage," "there has been no proof of likelihood of harm," or the moving party's "considerable assets" enable it to respond in damages if defendant does suffer damages by reason of a wrongful injunction." *Fed'l Prescription Serv. v. Am. Pharm. Ass'n*, 636 F.2d 755, 759 (D.C. Cir. 1980). This mature Circuit split provides another rationale for the Court to hear this case. *See* S.Ct. Rule 10(c).

Further, contrary to the *dicta* in *W.R. Grace* that suggests limiting defendants to the amount of an injunction bond *see* note 2, *supra*, this Court previously found that equity jurisdiction includes the "discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted." *Pub. Serv. Comm'n v. Brashear Freight Lines, Inc.*, 312 U.S. 621, 629 (1941). That authority traces back to the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78, and on to then-contemporaneous English chancery practice. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). The Court should resolve this important ambiguity in federal law as a subsidiary question fairly included in the overall question under 5 U.S.C. § 705 of an appropriate security for interim relief. *See* S.Ct. Rule 10(c). If—contrary to the *dicta* in *W.R. Grace*, *see* note 2, *supra*—Plaintiffs can be held liable for the costs imposed by improper interim relief, Plaintiffs might prefer to know that.

D. The funds at issue are significant.

As with other instances of federal district courts' usurping executive functions

via security-free interim relief, the volume of federal funding that the district court seeks to control—by compelling detention in the United States over deportation—is another rationale for the Court to hear this case. *See* S.Ct. Rule 10(c).

According to data published by the Federal Bureau of Prisons, the annual cost of incarceration was over $44,000 annually for fiscal 2023. *Annual Determination of Average Cost of Incarceration Fee (COIF)*, 89 Fed. Reg. 97,072 (Dec. 6, 2024). According to the presidential proclamation, there are potentially thousands of TdA members in the United States. Applying that cost of incarceration to 1,000 detained members for 2-year litigation puts the cost of interim relief at almost $100 million. As Section II.A.1.c, *infra*, explains, the APA authorizes this Court to set an injunction bond on appeal that Plaintiffs must post before any interim relief takes effect.

E. Respondents' cognizable rights compel expeditious review.

Finally, although Plaintiffs may lack any rights whatsoever if their habeas claims lack merit, it is also possible that some of them may have valid habeas claims (*e.g.*, an individual Plaintiff may be lawfully present or may not be a TdA member).

To the extent that any Plaintiff has such a legitimate habeas claim, the Court should expeditiously resolve whatever issues the Court intends to resolve and remand the case to the U.S. District Court for the Southern District of Texas for Plaintiffs to replead the case:

> Whenever a civil action is filed in a [federal] court … or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court … in which the action or appeal could have been brought at the time it was filed or

> noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631; *see*, *e.g.*, *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 144-48 (D.C. Cir. 2014) (transferring petition for review to district court where court of appeals lacked jurisdiction).

Further, Plaintiffs' counsel may be using Plaintiffs as political pawns against the Government (*i.e.*, to "resist" the results of the 2024 election). If Plaintiffs signed on for being used as pawns in a meritless suit in a friendly forum that clearly lacks jurisdiction, that perhaps could be permissible. *But see* Fed. R. Civ. P. 11(b)(1)-(2); FED. R. APP. P. 46(c); S.CT. RULE 8(2); D.C. RULES OF PROF'L CONDUCT 3.1, 3.3(a)(1). In the end, Plaintiffs may not want to risk responsibility for the cost of their detention here if the district court's interim relief is later held improper. *See* Section I.C, *supra* (notwithstanding *dicta* in *W.R. Grace*, cost of improper interim relief may be recoverable). In any event, Plaintiffs' counsel began this representation, and no court has released them. While at least some of Plaintiffs' counsel (*e.g.*, the American Civil Liberties Union Foundation) undoubtedly have access to local Texas counsel, the Southern District of Texas does not require membership in the State Bar of Texas as a condition for admission. *See* S.D. TEX. RULE LR83.1(A). Accordingly, transfer to the district court with jurisdiction over habeas claims would not prejudice Plaintiffs.

II. THE GOVERNMENT IS LIKELY TO PREVAIL

On the underlying litigation, the Government is likely to prevail not only because it is correct on the substantive merits, but also because (a) the district court

lacks jurisdiction for Plaintiffs' claims, (b) Plaintiffs have sued the wrong parties; and (c) Plaintiffs lack a cause of action in *this* district court to review the challenged governmental actions. With respect to the threshold issue of security under Rule 65(c), the Government is likely to prevail because this Court has never held that the Government must face litigation imposing on the public fisc without recourse against interim relief subsequently held improper. *See* Sections I.C, *supra*, II.B, *infra*.

A. This Court has jurisdiction to review both the district court's substantive actions and the district court's 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 must assure themselves of jurisdiction before reaching the merits. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). Moreover, parties must establish jurisdiction 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).

Before reaching the question of the Government's likelihood of prevailing on the merits, therefore, this Court—or the Circuit Justice—first must establish federal jurisdiction, both for this Court's review and for the rulings of the courts below.

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that

> of the lower courts in a cause under review, even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Id. (cleaned up). As the following subsections explain, this Court has jurisdiction for the Government's requested relief, *see* Section II.A.1, *infra*, but the district court lacks jurisdiction for the relief Plaintiffs seek. *See* Sections II.A.2-II.A.4, *infra*.

1. This Court has jurisdiction to issue injunctive and declaratory relief *vis-à-vis* the district court's actions.

Although Plaintiffs may dispute the *de novo* issue of appellate jurisdiction on appeal, the D.C. Circuit found the issues presented here sufficient to invoke appellate jurisdiction. *See* Appl. 3 (citing Appl. 8a (Henderson, J., concurring), 76a (Walker, J., dissenting)). Even assuming *arguendo* that appellate review does not lie directly pursuant to 28 U.S.C. § 1292(a)(1), however, the Government has three distinct bases for appellate jurisdiction and authority.

a. The All Writs Act gives this Court jurisdiction *now* to preserve its *future* jurisdiction over the Government's eventual petition for a writ of *certiorari*.

First, the All Writs Act, 28 U.S.C. § 1651(a), provides a supplemental alternate form of jurisdiction to stay the district court's action, if only to preserve the full range of the controversy *now* for this Court's consideration upon the Government's *future* appeal to this Court:

> The All Writs Act empowers the federal courts to issue all writs necessary or appropriate in aid of their respective

> jurisdictions and agreeable to the usages and principles of law. The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court, and *extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected*.

FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966) (cleaned up, emphasis added). Although resort to the All Writs Act is an extraordinary remedy—as indeed is any stay or injunction—the writ "has traditionally been used in the federal courts … to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States*, 389 U.S. 90, 95 (1967) (cleaned up). While "only exceptional circumstances … will justify the invocation of this extraordinary remedy," those circumstances certainly include a "judicial usurpation of power," as happened here. *Id.* (cleaned up); *accord Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004). Here, if the interim relief is left in place without first complying with Rule 65(c), the Government would suffer the irreparable harm of being unable to recoup its damages when the interim relief is ultimately invalidated.

b. Even without mandamus *relief*, mandamus *jurisdiction* makes declaratory relief available.

Second, regardless of whether the underlying orders support an interlocutory appeal under 28 U.S.C. § 1292(a)(1), appellate jurisdiction extends to potential mandamus relief. *See AIDS Vaccine Advoc. Coal. v. United States Dep't of State*, 2025 U.S. App. LEXIS 4611, at *2-4 (D.C. Cir. Feb. 26, 2025) (Nos. 25-5046, 25-5047). Even without *mandamus relief*, that is jurisdiction enough for an appellate court to issue *declaratory relief*.

Although the Declaratory Judgment Act does not *extend* federal courts' jurisdiction, *California v. Texas*, 593 U.S. 659, 672 (2021), a court *otherwise with jurisdiction* "may grant declaratory relief even though it chooses not to issue an injunction or mandamus." *Powell v. McCormack*, 395 U.S. 486, 499 (1969); *Steffel v. Thompson*, 415 U.S. 452, 457 n.7 (1974). This Court thus has jurisdiction to issue declaratory relief on the mandatory nature of Rule 65(c). Indeed, if the Court does not wish to do so via full merits briefing, the Court—or the Circuit Justice—could do so via a summary order. *Wisconsin Legis.*, 595 U.S. at 401. Given the torrent of litigation—and the accompanying nationwide interim relief without security under Rule 65(c)—against the Government, *amicus* respectfully submits that the Circuit Justice should refer the matter to the full Court, making the resulting order a decision of the full Court. *See Graddick v. Newman,* 453 U.S. 928, 929 (1981) (Powell, J., for the Court[3]). If the Court provides only case-specific or Circuit-specific relief, the result might not apply to the torrent of improper interim relief issuing from district courts in other circuits.

c. The APA's provisions for interim relief allow this Court to preserve the Government's rights.

Third, the APA provides this Court—and all federal courts—the authority to preserve the parties' rights while an APA case progresses:

> On such conditions as may be required and *to the extent necessary to prevent irreparable injury*, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to

[3] Although *Graddick* began as an application to a circuit justice, the Chief Justice referred the application to the full Court. *Id.*

> a reviewing court, may issue *all necessary and appropriate process* to postpone the effective date of an agency action or *to preserve status or rights pending conclusion of the review proceedings*.

5 U.S.C. § 705 (emphasis added). Here, in addition to whatever rights Plaintiffs may have, the Government has the right to avoid irreparable harm in the form of almost $100 million in damages from improper interim relief. *Cf.* Sections III.A-III.B, *infra* (balancing equities between Government and Plaintiffs). To the extent that the Government has an interest to protect here, this Court and the lower federal courts have authority to protect that interest under Rule 65(c) and 5 U.S.C. § 705. Here, the Government's "rights" pending this interlocutory proceeding include being made whole if the district court's injunctive relief later proves improper.[4] The Court should condition any injunctive relief's taking effect on Plaintiffs' providing adequate security pursuant to 5 U.S.C. § 705 and Rule 65(c).

For several reasons, setting an appropriate amount for security under Rule 65(c) would be a fact-intensive inquiry, could change over time, and would depend on how quickly a final judgment replaced the interim relief. Unless this Court commits to resolving these issues expeditiously (*e.g.*, because the district court plainly lacked

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[4] *See* H. REP. NO. 79-1980 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess., at 277-78 (1946) ("APA LEG. HIST.") ("the court should take into account that persons other than parties may be adversely affected, by such postponement and in such cases the *party seeking postponement may be required to furnish security* to protect such other persons from loss resulting from postponement") (emphasis added); *accord* S. REP. NO. 79-752 (1945), *reprinted in* APA LEG. HIST., at 213 ("authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy").

jurisdiction), an adequate security could range from a few hundred thousand dollars (*e.g.*, if the Court vacates the provisional class) to $100 million (*e.g.*, for multi-year detention of 1,000 class members). Because Plaintiffs' desire for interim relief may wane if interim relief requires providing a significant security, it may suffice to stay the district court's interim relief pending the Court's resolution of the district court's jurisdiction.

If the Court requires determining the federal funds at stake, the Court could remand the question to the federal agencies involved or appoint a special master. *See*, *e.g.*, *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984); *Harrison v. PPG Indus.*, 446 U.S. 578, 594 (1980). If the Court leaves the district court's ruling in place, this Court should require a significant security—based on the cost of detention for the anticipated number of TdA members for the duration of the litigation—before any interim relief takes effect.

2. This action cannot redress Plaintiffs' injuries.

Jurisdictionally, plaintiffs are masters of their complaints, *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987), and Plaintiffs have elected to proceed under the APA without naming the immediate custodian responsible for their detention (*i.e.*, the only person with jurisdiction to redress their injury under the habeas suit that Congress has provided as their exclusive remedy). Significantly, plaintiffs bear the burden of proving standing: "We presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (cleaned up). Presumably, if Plaintiffs had a viable habeas claim, they would have brought that claim, but Plaintiffs have elected not to do so, thereby failing

to meet their burden to establish standing for their claims.

Under Article III, federal courts cannot issue advisory opinions, *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911), so federal courts 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) (cleaned up). Under these limits, federal courts lack the power to resolve important public-policy disputes for plaintiffs who lack standing.

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. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62 (1992). An "injury in fact" means (a) "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical;" (b) caused by the challenged action, and (c) likely to be redressed by the court's relief. *Id.* (cleaned up). By failing to sue their immediate custodian in habeas, *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("proper respondent to a habeas petition is the person who has custody over the petitioner") (cleaned up), Plaintiffs fail to raise an Article III case or controversy. *See id.* 442 (28 U.S.C. § 2241(a) limits district courts to granting habeas relief "within their respective jurisdictions"). As this Court explained, Congress added the limit for precisely the situation presented here:

> Congress added the limiting clause … to the habeas statute in 1867 to avert the inconvenient and potentially embarrassing possibility that every judge anywhere could issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat. Accordingly, with respect to habeas petitions designed to relieve an individual from oppressive confinement, the traditional rule has always been that the Great Writ is issuable only in the district of confinement.

Id. (cleaned up); *id.* at 443 ("jurisdiction lies in only one district: the district of confinement"). Plaintiffs have sued in the wrong court—and under the wrong statute—so the district court lacks jurisdiction to redress their injury.

3. Habeas is the exclusive remedy for challenging action under the Alien Enemies Act.

As the Government explains, Appl. 18-20, the statutory habeas procedures provide an exclusive remedy for challenging action under the Alien Enemies Act. *Ludecke v. Watkins*, 335 U.S. 160, 164-66 (1948). Either because Plaintiffs invoked the wrong federal processes, *id.*; Section II.A.4, *infra* (discussing APA's inapplicability), or because Plaintiffs are outside Article III altogether, *see* Section II.A.2, *supra*, the district court lacks subject-matter jurisdiction for Plaintiffs' claims.

Indeed, for claims otherwise within federal-question jurisdiction, this Court's controlling decisions can render claims too insubstantial for federal review if they are "so attenuated and unsubstantial as to be absolutely devoid of merit," "wholly insubstantial," "obviously frivolous," "plainly unsubstantial," or "no longer open to discussion." *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974). Given the clear holdings in *Padilla* and *Ludecke* to channel review exclusively to habeas review in the judicial district of confinement, Plaintiffs' APA claims are not viable federal claims.

4. Sovereign immunity bars Plaintiffs' claims.

If "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, … the suit is one against the sovereign." *Land v. Dollar*, 330 U.S. 731, 738 (1947). The interim relief here imposes costs of up to $100 million on the Government, *see* Section I.D, *supra*, and interferes with the administration of national security issues. Therefore, in addition to the lack of Article III jurisdiction, Plaintiffs' claims also fall outside the scope of the APA's waiver of sovereign immunity[5] and thus are subject to an independent jurisdictional bar: "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); *cf. Alabama v. North Carolina*, 560 U.S. 330, 341 (2010) ("the primeval sovereign right is immunity from levies against the government fisc"). 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' claims fall outside the APA and its waiver of sovereign immunity.

Specifically, the APA provides judicial review to those "aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, which comes with a presumption of reviewability. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984). But the "presumption favoring judicial review of administrative action is just that—a presumption." *Id.* First, the APA itself comes with express exceptions, including

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[5] The waiver of sovereign immunity was added to 5 U.S.C. § 702 in 1976. PUB. L. NO. 94-574, § 1, 90 Stat. 2721 (1976).

that APA review does not extend to "statutes [that] preclude judicial review" or action "committed to agency discretion by law" and statutes with "special statutory review." 5 U.S.C. §§ 701(a)(1)-(2), 703. Second, the "congressional intent necessary to overcome the presumption [of reviewability] may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it." *Block*, 467 U.S. at 349 (citing *Ludecke*).

This Court has already determined that APA review does not apply to the Alien Enemies Act:

> As Congress explicitly recognized in the recent Administrative Procedure Act, some statutes "preclude judicial review." Barring questions of interpretation and constitutionality, the Alien Enemy Act of 1798 is such a statute. Its terms, purpose, and construction leave no doubt. … That such was the scope of the Act is established by controlling contemporaneous construction. … The very nature of the President's power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion. This view was expressed by Mr. Justice Iredell shortly after the Act was passed, and every judge before whom the question has since come has held that the statute barred judicial review. We would so read the Act if it came before us without the impressive gloss of history.

Ludecke, 335 U.S. at 163-65 (cleaned up); *id.* at 164 ("act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons … appears to me to be as unlimited as the legislature could make it") (quoting decisions by Chief Justice Marshall). As explained, habeas review is the exclusive remedy here. *See* Section II.A.3, *supra*. The APA does not provide review unless the "special statutory review" outlined in Section II.A.3, *supra*, is either absent or inadequate. *See* 5 U.S.C. § 703. Plaintiffs have not made that showing, assuming

arguendo that Plaintiffs had standing.

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

To warrant a stay, there must be a "fair prospect" of the Government's prevailing. As explained in the prior subsection, the Government is likely to prevail in the underlying litigation because the district court lacks jurisdiction over Plaintiffs' claims. *See* Section II.A, *supra*. As explained in this subsection, the Government likely will prevail on the merits of *when* interim relief can apply, assuming *arguendo* that federal jurisdiction existed. Significantly, the inquiry about when interim relief takes effect is independent of the underlying merits of the parties' substantive disputes.

Rule 65(c) is mandatory as to the need to address security for the injunctive relief and as to the injunctive relief's remaining ineffective until that condition is met:

> The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

FED. R. CIV. P. 65(c). By excluding the United States expressly, Rule 65(c) makes clear that a "public interest" exemption does not exist. *See Setser v. United States*, 566 U.S. 231, 238-39 (2012) (discussing principle of *expressio unius est exclusio alterius*). Because the district court did not consider security under Rule 65(c), the district court's injunctive relief remains ineffective. *See* Section I.C, *supra* (collecting cases on Circuit split). Even Circuits that allow forgoing security nonetheless require courts to *consider* the issue. Michael T. Morley, *Erroneous Injunctions*, 71 EMORY L.J. 1137,

1167 & n.206 (2022). Where a lower court fails to exercise discretion given it, an appellate court may exercise that discretion in the first instance, especially here where 5 U.S.C. § 705 vests appellate courts with that same authority and discretion. Indeed, even if the lower courts had exercised their authority under 5 U.S.C. § 705 and Rule 65(c) to set an injunction bond, this Court's *independent* authority under 5 U.S.C. § 705 would provide this Court the independent discretion and authority both to review and to revise that bond.

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, *amicus* addresses the balance of the equities. The Government has significant separation-of-powers, national-security, and financial concerns at stake, and the public interest favors a stay; against those considerations, Plaintiffs' *legal* interests are trivial and likely not even cognizable.[6] In short, the balance of the 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

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[6] *Amicus* does not suggest that Plaintiffs' potential habeas claims are trivial. It is possible that their counsel misled them into withholding viable habeas claims so that they could press the frivolous class-wide APA claims in a friendlier forum. If any Plaintiff is indeed innocent, release from custody would be an interest of the highest importance. For that reason, Congress and this Court have provided an exclusive process (habeas) for courts to consider such issues. *See* Section II.A.3, *supra*. The issue for judicial consideration here, however, is whether Plaintiffs brought claims over which the district court had jurisdiction and—even with jurisdiction—for which the district court could impose interim injunctive relief without adequate security.

threat of irreparable injury to interests that [the applicant] properly represents." *Graddick,* 453 U.S. at 933. "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 actions. *Diamond v. Charles*, 476 U.S. 54, 62-63 (1986). For irreparable harm, the Government will suffer two distinct irreparable injuries.

First, although mere monetary loss is not irreparable if the injured party can recoup it later, there are two obstacles here: (a) the *dicta* in *W.R. Grace*, *see* note 2, *supra*, suggests that damages are unavailable beyond Rule 65(c)'s security; and (b) Plaintiffs' insolvency *vis-à-vis* potentially $100 million in damages. Monetary injury is reparable unless the responsible party "would become insolvent or otherwise judgment-proof prior to the conclusion of litigation." *Carabillo v. ULLICO Inc. Pension Plan & Trust*, 355 F. Supp. 2d 49, 55 (D.D.C. 2004); *accord Wisconsin Gas Co. v. Fed'l Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Brown v. Pearson*, 241 A.3d 265, 274 n.36 (D.C. 2020) (a party's inability to satisfy a future money judgment constitutes irreparable harm). The Government's monetary injury is irreparable without adequate security under Rule 65(c).

Second, the district court's enjoining the Government without jurisdiction violates the separation of powers, which injures the Executive Branch. *Axon Enter. v. FTC*, 598 U.S. 175, 191 (2023) ("subjection to an illegitimate proceeding" can

constitute irreparable harm). If allowed to stand in the short run, the district court's unauthorized interference with the Executive Branch will either stymie the proper workings of the political branches or spawn satellite litigation over sanctions and contempt. This Court should supervise the lower federal courts with declaratory and injunctive relief to protect the Executive Branch from the irreparable injury it will suffer without an immediate stay and security before any interim relief takes effect.

B. Plaintiffs do not plead a *cognizable* harm.

With respect to Plaintiffs' countervailing claims of irreparable harm, a stay would not seriously prejudice Plaintiffs' *cognizable* interests. Because Plaintiffs lack the Article III minima of standing, *see* Section II.A.2, *supra*, Plaintiffs have not shown that they can make the *higher* showing required for irreparable harm. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010) (injuries that qualify as sufficiently immediate for Article III standing can nonetheless fail to qualify under the higher bar for irreparable harm). Moreover, lack of jurisdiction "negates giving controlling consideration to the irreparable harm." *Heckler v. Lopez*, 464 U.S. 879, 886 (1983) (Brennan, J., dissenting from the denial of motion to vacate the Circuit Justice's stay). Finally, no litigant—and especially no litigant imposing on the public fisc—has a cognizable interest in interim relief that takes effect before the requirements of Rule 65(c) are met. In sum, Plaintiffs have no countervailing *cognizable* harms to balance against the Government's irreparable harm.

C. The public interest favors a stay.

The last stay criterion is the public interest. Where the parties dispute the lawfulness of government actions, the public interest collapses into the merits. *ACLU*

v. Ashcroft, 322 F.3d 240, 247 (3d Cir. 2003) ("the public interest [is] not served by the enforcement of an unconstitutional law") (cleaned up); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). The public interest favors preventing district courts that lack jurisdiction usurping the elected branches' governmental authority.

If the Court agrees with the Government and *amicus* that Plaintiffs lack jurisdiction and that interim relief against the public fisc cannot commence without security under Rule 65(c), the public interest tilts sharply in the Government's favor:

> It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of … governments in carrying out their domestic policy.

Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943). In public-injury cases, equitable relief that affects competing public interests "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff" because courts also consider adverse effects on the public interest. *Yakus v. United States*, 321 U.S. 414, 440 (1944). Moreover, especially on issues of national security, the greater public interest lies in having the elected branches set government policy, without government by litigation. *See* Section I.B, *supra*. For all these reasons, this Court—or the Circuit Justice—should stay the district court's interim relief until the Government has adequate security against the otherwise irreparable monetary harm that the interim relief would impose.

CONCLUSION

This Court should (a) construe the application as a petition for a writ of

certiorari before judgment on the question whether Rule 65(c), 5 U.S.C. § 705, and sovereign immunity require adequate security before encumbering the public fisc with interim relief, including all subsidiary questions fairly included within the context of a governmental defendant's damages from interim relief improperly granted, (b) stay the district court's interim relief pending either the Court's resolving that question or Plaintiffs' providing adequate security pursuant to 5 U.S.C. § 705 and Rule 65(c), and (c) expedite consideration of this matter, including a review of the district court's jurisdiction over this matter. If the district court lacked jurisdiction, the Court should further consider whether to remand this case to the U.S. District Court for the Southern District of Texas pursuant to 28 U.S.C. §§ 1631, 2106.

Dated: March 31, 2025

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
Counsel of Record
1250 Connecticut Av NW Suite 700
Washington, DC 20036
Telephone: (202) 899-2987
Facsimile: (202) 318-2254
ljoseph@larryjoseph.com

Counsel for Amicus Curiae

CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22, 33, and 37.4, I certify that the foregoing *amicus* brief is proportionately spaced, has a typeface of Century Schoolbook, 12 points, and contain 25 pages (and 7,027 words), excluding this Certificate as to Form, the Table of Contents, and the Certificate of Service.

Dated: March 31, 2025

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
1250 Connecticut Av NW Suite 700
Washington, DC 20036
Telephone: (202) 899-2987
Facsimile: (202) 318-2254
ljoseph@larryjoseph.com

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

The undersigned certifies that, on March 31, 2025, 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 Priority U.S. Mail, postage pre-paid, with a PDF courtesy copy served via electronic mail on the following counsel:

Bradley Girard
Sarah Rich
Pooja Boisture
Democracy Forward Found.
P.O. Box 34553
Washington, DC 20043
202-448-9090
bgirard@democracyforward.org
srich@democracyforward.org
pboisture@democracyforward.org

Lee Gelernt
Omar Jadwat
Hina Shamsi
Am. Civil Liberties Union Found.
125 Broad Street 18th Floor
New York, NY 10004-2400
212-549-2607
lgelernt@aclu.org
ojadwat@aclu.org
hshamsi@aclu.org

Cody Wofsy
Am. Civil Liberties Union Found.
425 California Street, 7th Floor
San Francisco, CA 94104
415-343-0785
cwofsy@aclu.org

Michael L. Waldman
Kramer Levin Naftalis & Frankel LLP
2000 K Street, NW 4th Floor
Washington, DC 20006
202-775-4500
mwaldman@robbinsrussell.com

Scott M. Michelman
Arthur B. Spitzer
Am. Civil Liberties Union Found.
915 15th Street, NW
Washington, DC 20005
202-457-0800
smichrelman@acludc.org
aspitzer@acludc.org

Sarah M. Harris
Acting Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
202-514-2217
supremectbriefs@usdoj.gov

The undersigned certifies that, on March 31, 2025, an original and two true and correct copies of the foregoing document were sent to the Court via next-day courier.

/s/ Lawrence J. Joseph
Lawrence J. Joseph