No. 18A615

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET. AL.*,
Applicants,

v.

EAST BAY SANCTUARY COVENANT, *ET AL.*,
Respondents.

On Application for a Stay Pending Appeal to the U.S. Court of Appeals for the Ninth Circuit and Pending Further Proceedings in this Court

To the Honorable Elena Kagan,
Associate Justice of the United States and
Circuit Justice for the Ninth Circuit

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF, MOTION FOR LEAVE TO FILE BRIEF IN COMPLIANCE WITH RULE 33.2, *AMICUS CURIAE* BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPLICANTS

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Movant Immigration Reform Law Institute ("IRLI") respectfully requests leave to file the accompanying brief as *amicus curiae* in support of the application to stay the interim relief entered by the district court this matter.* The federal applicants and the private respondents consented to this motion for leave to file, the latter premising their consent on IRLI's providing email service of the motion and accompanying brief by 4:00 p.m. on Friday, December 14, 2018.

IDENTITY AND INTERESTS OF MOVANT

IRLI is a nonprofit 501(c)(3) public-interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on

* Consistent with FED. R. APP. P. 29(a)(4)(E) and this Court's Rule 37.6, counsel for movant and *amicus curiae* authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the movant/*amicus* and its counsel, make a monetary contribution to preparation or submission of the motions and brief.

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 curiae* briefs in many important immigration cases. For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's affiliate, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has direct interests in the issues here.

REASONS TO GRANT LEAVE TO FILE

By analogy to this Court's Rule 37.2(b), movant respectfully seeks leave to file the accompanying *amici curiae* brief in support of the stay applicants. Because this motion is filed contemporaneously with the respondents' deadline to file an opposition, this filing should not disturb the accelerated briefing schedule ordered in this matter.

Movant IRLI respectfully submits that its proffered *amicus* brief brings several relevant matters to the Court's attention, beyond the issues in the application:

- First, the IRLI brief discusses the All Writs Act, 28 U.S.C. §1651(a), which aids this Court's jurisdiction to issue a stay now to preserve judicial review later. *See* IRLI Br. at 11-12.
- Second, on the issue of standing, the IRLI brief rebuts the analysis by plaintiffs and the courts below of standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), *see* IRLI Br. at 12-15, the failure of plaintiffs' claimed injuries to meet the zone of interests test, *see id.* at 15, the failure of the plaintiffs' claimed interests to align with the plaintiffs' claimed injury in fact, *see id.* at

15-16, and the plaintiffs' failure to meet the test for third-party standing. *See Id.* at 16-17.

- Third, the IRLI brief addresses the absence of either a cause of action or a waiver of sovereign immunity under the Administrative Procedure Act, given the availability of special statutory review under the substantive immigration laws. *See* IRLI Br. at 18-19.
- Fourth, the IRLI brief analyzes the plaintiffs' unlikelihood of prevailing on the procedural merits, given that the promulgation of a final rule will moot the purely procedural defects alleged against the interim final rule, and given that 8 U.S.C. 8 U.S.C. §1158(c)(2)(B) allows terminating any grants of asylum already in place, based on the President's proclamation and a future final rule. *See* IRLI Br. at 19-22.

These issues are all relevant to deciding the stay application, and movant IRLI respectfully submits that filing the brief will aid the Court.

Dated: December 14, 2018

Respectfully submitted,

/s/ Lawrence J. Joseph

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MOTION FOR LEAVE TO FILE UNDER RULE 33.2

Immigration Reform Law Institute ("IRLI") respectfully submits that the Court's rules require those moving or applying to a single Justice to file in 8½-by 11-inch format pursuant to Rule 22.2, as IRLI has done here. If Rule 21.2(b)'s requirements for motions to the Court for leave to file an *amicus* brief applied here, however, IRLI would need to file 40 copies in booklet format, even though the Circuit Justice may not refer this matter to the full Court. Due to the expedited briefing schedule, the expense and especially the delay of booklet-format printing, and the rules' ambiguity on the appropriate procedure, IRLI has elected to file pursuant to Rule 22.2. To address the possibility that the Circuit Justice may refer this matter to the full Court, however, movant files an original plus ten copies, rather than Rule 22.2's required original plus two copies.

Should the Clerk's Office, the Circuit Justice, or the Court so require, IRLI commits to re-filing expeditiously in booklet format. *See* S.Ct. Rule 21.2(c) (Court may

direct the re-filing of documents in booklet-format). Movant IRLI respectfully requests leave to file the accompanying brief as *amicus curiae* — at least initially — in 8½-by 11-inch format pursuant to Rules 22 and 33.2, rather than booklet format pursuant to Rule 21.2(b) and 33.1.

For the foregoing reasons, the motion for leave to file in 8½-by 11-inch format should be granted.

Dated: December 14, 2018

Respectfully submitted,

/s/ Lawrence J. Joseph

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AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANTS

Amicus Curiae Immigration Reform Law Institute ("IRLI") respectfully submits that the Circuit Justice — or the full Court, if this matter is referred to the full Court — should stay the interim relief entered in the district court in this action until the federal applicants timely file and this Court duly resolves a petition for a writ of *certiorari*. *Amicus* IRLI's interests are set out in the accompanying motion for leave to file.

INTRODUCTION

Executive-branch offices and officials (collectively, the "Government") have applied to stay the district court's temporary restraining order — which the Ninth Circuit construed as a preliminary injunction — against the implementation of a regulation on asylum under the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"). The respondents — plaintiffs below — are nongovernmental organizations (collectively, "NGOs") that assist aliens who apply for asylum.

The challenged rule implements the Attorney General's authority to "establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under [§1158(b)(1)]." 8 U.S.C. §1158(b)(2)(C); *see Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (2018). The Government promulgated its rule on November 9, 2018, as an interim final rule, invoking two good-cause exceptions under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"): (1) the exception from notice-and-comment procedures when prior notice and comment are "impracticable, unnecessary, or contrary to the public interest," *id.* §553(b)(B), and (2) the exception from the requirement for a 30-day grace period before a rule's taking effect for "good cause found." *Id.* §553(d)(3). The Government also invoked the APA's foreign-affairs exception, which applies "to the extent that there is involved … a … foreign affairs function of the United States." *Id.* §553(a)(1). At the same time, the Federal Register notice also requested comments and evinces plans to promulgate a final rule, with a comment deadline of January 8, 2019. *See* 83 Fed. Reg. at 55,934. The interim final rule bars from eligibility for asylum all aliens who enter the country in contravention of a presidential proclamation suspending entry across the southern border. *Id.*

Later on November 9, 2018, the President issued a proclamation pursuant to 8 U.S.C. §1182(f) suspending just such entry, except at ports of entry. Neither the interim final rule nor the proclamation affects the eligibility of aliens for either withholding of removal under 8 U.S.C. §1231(b)(3) or protection under regulations

implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 8 C.F.R. §§1208.16-1208.18 ("CAT"). *See Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57,661, 57,663 (2018); 83 Fed. Reg. at 55,934. The proclamation does not apply to unaccompanied minors. 83 Fed. Reg. at 57,663.

STANDARD OF REVIEW

A stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* Where the All Writs Act, 28 U.S.C. §1651(a) is implicated, the Court also considers the necessity or appropriateness of interim relief *now* to aid the Court's *future* jurisdiction. *See Edwards v. Hope Med. Group for Women,* 512 U.S. 1301 (1994) (requiring "reasonable probability that *certiorari* will be granted," a "significant possibility" of reversal, and a "likelihood of irreparable harm") (Scalia, J., in chambers).

SUMMARY OF ARGUMENT

Article III requires this Court to evaluate not only its own jurisdiction to hear the stay application, but also the jurisdiction of the courts below over the NGO's claims. The All Writs Act provides this Court jurisdiction to aid its future appellate

jurisdiction (Section II.A.1), but the NGOs lack a case or controversy under Article III for several reasons (Sections II.A.2-II.A.5). The INA differs from the statute at issue in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which precludes the NGOs' reliance on a diverted-resources injury (Section II.A.2). The NGOs' interests in their private funding and expenditures, moreover, fall outside the INA's zone of interests (Section II.A.3) and do not align with the NGOs' claims (Section II.A.4). As the Ninth Circuit held, the NGOs lack third-party standing (Section II.A.5). Finally, the NGOs' claims lack both an APA cause of action and the APA's waiver of sovereign immunity, given the availability of special statutory review under the INA (Section II.A.6).

On the likelihood of the NGOs' prevailing on the merits, the Government's actions qualify for the APA's good-cause exceptions and the foreign-affairs exception (Section II.B.1), and the eventual promulgation of the Government's final rule will moot the NGOs' APA procedural claims in any event (Section II.B.2). Substantively under the INA, Judge Leavy's dissent correctly analyzed the absence of any inconsistency under the INA between allowing all physically present aliens to *apply* for asylum and using categorical criteria to *deny granting* asylum to some of those aliens (Section II.B.3).

On the remaining stay criteria, the negative impacts on the Executive Branch's ability to conduct foreign affairs and protect national security — including the security of incoming aliens and law-enforcement officers — easily qualify as irreparable harm (Section III.A). By contrast, the NGOs lack any irreparable harm,

even assuming that their claimed injuries were cognizable under Article III (Section III.B). The public interest favors a stay because the merits favor the Government and because — in public-injury cases like 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 GRANT OF A WRIT OF *CERTIORARI* IS LIKELY.

There is a reasonable possibility that this Court will grant the Government's eventual petition for a writ of *certiorari* in this matter. The decisions below have blocked the President's and the Acting Attorney General's chosen method of dealing with a national crisis on our southern border. Whether one views the current crisis at the border as the result of large-scale abuse of the asylum process or merely of a massive increase in the numbers of asylum seekers, the lower courts' injunctive relief poses vital questions about the terms of the asylum statute at issue here. The Government argues that that statute provides the Executive Branch sufficient flexibility to meet crises, such as the present one; the lower courts and the NGOs argue Congress has, in effect, decreed that the Executive Branch may not act quickly to resolve such crises, even those more acute than the present one. Because of the clear national importance of these issues, and because one circuit court has already held that the asylum statute does not afford such flexibility, the Government meets the first criterion for a stay.

II. THE GOVERNMENT IS LIKELY TO PREVAIL.

The Government is likely to prevail on the merits not only because it is correct

on the substantive merits under both the APA and the INA, but also because the NGOs have neither standing nor an APA cause of action.

A. The courts below lacked jurisdiction for interim relief.

Before reaching the question of the Government's likelihood of prevailing on the merits, 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. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998); *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (plaintiff must establish standing to obtain interim relief.). The first half of the *Steel Company* jurisdictional inquiry is easy: this Court has jurisdiction over this stay application. The second half is also easy enough: the NGOs lack an Article III case or controversy.

1. 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*.

The All Writs Act provides an alternate, supplemental form of jurisdiction to stay the district court's interim relief, 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) (interior quotation marks and citations omitted, emphasis added) (*citing Ex parte Crane*, 5 Pet. 190, 193 (1832)

(Marshall, C.J.); *Ex parte Bradstreet*, 7 Pet. 634 (1833) (Marshall, C.J.)). 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) (interior quotation marks omitted). 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.* (interior quotation marks omitted); *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). As the Government explains, Appl. 24-25, the lower federal courts have unhitched *Havens Realty* from its constitutional and statutory moorings, impermissibly extending their reach beyond the limits of Article III's case-or-controversy requirement, and thereby satisfying the "judicial usurpation of power" test that this Court has repeatedly set.

2. The NGOs do not have standing under *Havens Realty*.

Relying on Ninth Circuit precedent under *Havens Realty*, the district court and the Ninth Circuit found that the NGOs had organizational standing within the INA's zone of interests on the theory that the Government's actions have caused the NGOs to expend additional resources to combat the Government's rule and threaten the NGOs' funding from third parties. Compl. ¶¶ 78-99; App. 88a-90a (district court); *id.* 28a-33a (Ninth Circuit). Because these injuries are self-inflicted and outside the relevant statutory zone of interests, *amicus* IRLI respectfully submits that such injuries do not suffice.

This type of diverted-resources standing derives from *Havens Realty*; 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., dissenting); *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 Realty*, 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*, 133 S.Ct. 1138, 1152-53 (2013); *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976). Moreover, if mere spending could manufacture standing, any private advocacy group could establish standing against any government action. But that clearly is not the law. *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972) (organizations lack 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 Article III standing.

Relying on *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 102-09 (1979), *Havens Realty* 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 Realty*.

First, the *Havens Realty* 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.

Second, and related to the first issue, the injury that an organizational plaintiff claims must align with the other components of its standing, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000); *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C. Cir. 1996), including the allegedly cognizable right. In *Havens Realty,* 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. *See* Section II.A.4, *infra*.

Third, and most critically, the *Havens Realty* statute eliminated prudential standing, so the zone-of-interest 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-interest test or other

prudential limits on standing.[1] Typically, it would be fanciful to suggest that a statute has private, third-party spending in its zone of interests. Certainly, that is the case for the INA. *See* Section II.A.3, *infra*.

3. Private funding and expenditures are outside the relevant zone of interests.

The Ninth Circuit found the NGOs' diverted-funding injuries within the INA's and §1158's zone of interests because various INA provisions recognize the right to counsel, including *pro bono* counsel. App. 38a. But the challenged agency actions do not impose any burden on the right of counsel, and the NGOs' diverted-resource injuries do not relate in any legal way to aliens' right to counsel.

4. The NGOs cannot rely on third-party funding to create an Article III case or controversy with the Government.

The Ninth Circuit also considered it relevant that the NGOs' funding depended in part on the volume of refugees processed, which provided the NGOs standing to challenge any threat to their funding stream. App. 33a-35a; *accord id.* 91a (district court). The bounty or wager that third parties put on the NGOs' serving asylum-seeking illegal immigrants cannot establish standing to sue the federal government over federal immigration policy:

> There is no doubt, of course, that as to this portion of the recovery — the bounty he will receive if the suit is successful — a *qui tam* relator has a concrete private

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[1] 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.

> interest in the outcome of the suit. But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing.

Stevens, 529 U.S. at 772 (interior quotation marks, alterations, and citations omitted). Just like the bounty or hypothetical wager in *Stevens*, the NGOs' interests in third-party funding here are insufficiently related the NGOs' asserted injury from the Government's actions.[2]

5. The NGOs lack third-party standing.

The Ninth Circuit held that the NGOs lack third-party standing, App. 27a-28a, which was correct. Third-party standing requires that the plaintiff has its own Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004). The NGOs fail these tests, not only because they lack their own standing, but also because they either lack a close relationship or (if they have one) nothing would hinder the actual rights-holders from suing on their own behalf. Future relationships do not count because an *"existing* attorney-client relationship is,

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

of course, quite distinct from the *hypothetical* attorney-client relationship posited here." *Kowalski,* 543 U.S. at 131 (emphasis in original). The NGOs thus lack third-party standing.

Equally problematic is that fact that primary focus of the Government's prophylactic effort here is to deter aliens abroad from undertaking *illegal* border crossings, 8 U.S.C. §1325(a); App. 28a, and aliens abroad do not have rights under our Constitution. *Boumediene v. Bush*, 553 U.S. 723, 755-62 (2008). Indeed, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). The only third parties who might have a right to assert are aliens who illegally crossed the border on or after November 9, 2018, who want to claim asylum, but are ineligible for withholding of removal or CAT protection.

If the NGOs press third-party standing in response to the application, this Court should reject that theory, not only because the NGOs cannot meet the criteria for third-party standing but also because the third parties lack judicially cognizable rights in the first place.[3]

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[3] Even this category of illegal alien might not have standing to press a claim or be able to show irreparable harm to support injunctive relief, at least for any APA procedural claims. As explained in Section II.B.2, *infra*, the eventual final rule here, with or without a 30-day grace period, will cure the APA violations, and §1158(c)(2)(B) expressly allows terminating asylum based on criteria promulgated under §1158(b)(2)(C). Thus, the Government could terminate pending asylum proceedings, once the final rule issues.

6. Neither APA review nor the APA's waiver of sovereign immunity extends to the NGOs' challenge.

As the Government indicates, Appl. 26 (*citing Block v. Community Nutrition Inst.*, 467 U.S. 340, 344-345, 349-351 (1984)), APA review should be unavailable for these removal issues because the INA channels judicial review to the affected aliens' removal proceedings. *See* 8 U.S.C. §1252(g). The APA excludes APA review for "statutes [that] preclude judicial review" and ones with "special statutory review." 5 U.S.C. §§701(a)(1), 703. When a statute provides special statutory review, APA review is unavailable. *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984). Only when preclusion-of-review statutes provide *no opportunity whatsoever* for review does the Court rely on its equitable authority to provide review. *Leedom v. Kyne,* 358 U.S. 184, 188-90 (1958). That extraordinary relief is not available where — as here — review is available in enforcement proceedings. *Board of Governors of the Federal Reserve System v. MCorp Financial,* 502 U.S. 32, 43-44 (1991). The INA's special statutory review displaces APA review.

Amicus IRLI respectfully submits that this Court has incorrectly analyzed the availability of judicial review on the question of whether "the INA … expressly strips the Court of jurisdiction." *Trump v. Hawaii*, 138 S.Ct. 2392, 2407 (2018) (assuming without deciding reviewability). Under the APA and the APA's waiver of sovereign immunity, the presence of special statutory review withholds both APA review and the sovereign's waiver of immunity. 5 U.S.C. §§701(a)(1), 703. While jurisdiction-stripping statutes may require an express statement from Congress, *Trump*, 138 S.Ct. at 2407, the same is true in reverse for waivers of sovereign immunity. *Lane v.*

Pena, 518 U.S. 187, 192 (1996) (waivers of immunity are strictly construed in favor of the sovereign). The presence of special statutory review under the INA suggests the absence of a waiver of sovereign immunity for APA review.

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

In order to warrant a stay, there must be a "fair prospect" of the Government's prevailing. *Hollingsworth*, 558 U.S. at 190. As explained in the following sections, the Government likely will prevail on both the procedural APA issues and the substantive INA issues.

1. The Government properly invoked the APA's good-cause and foreign-affairs exceptions.

The Government's challenged actions here deal with an emergency not only on humanitarian and public-safety grounds, but also on national security and foreign relations grounds. 83 Fed. Reg. at 55,950-51. These grave concerns easily meet the APA's exceptions for notice-and-comment rulemaking and the suspending the 30-day grace period for a rule's taking effect. 5 U.S.C. §553(a)(1), (b)(B), (d)(3); Appl. 34-38. Significantly, the foreign-affairs question here (namely, negotiations with Mexico) align with the INA merits (namely, the two asylum exemptions for aliens removed to a "safe third country"). *See* 8 U.S.C. §1158(a)(2)(A) (ineligibility to apply for asylum), (b)(2)(C) (termination of asylum). Federal courts should not interfere in these aspects of sovereignty that the Constitution commits to the political branches. *Trump*, 138 S.Ct. at 2419. The NGOs are unlikely to prevail on their APA procedural claims.

2. The Government's ongoing APA rulemaking will cure any alleged defects in the interim rule.

The substance of asylum under §1158 and the justiciability of APA procedural

challenges work together to make the NGOs unlikely to prevail on their procedural arguments, even if a reviewing court were to agree with the NGOs on the procedural merits. For this reason, whatever the perceived strengths of the NGOs' procedural arguments, only the substantive INA merits present an issue on which the NGOs could realistically have even a chance of prevailing.

When the Government promulgates its final rule, with a 30-day grace period for the final rule's taking effect and after notice-and-comment rulemaking, procedural APA arguments against the interim rule's adoption will become moot. *Schering Corp. v. Shalala*, 995 F.2d 1103, 1105 (D.C. Cir. 1993) ("action is moot when nothing turns on its outcome"); *Louisiana Forestry Ass'n v. Sec'y United States DOL*, 745 F.3d 653, 667 n.11 (3d Cir. 2014) (postponement of accelerated effective date moots challenge to an accelerated effective date); *cf. Am. Maritime Ass'n v. United States*, 766 F.2d 545, 554 n.14 (D.C. Cir. 1985) (substantive challenges not moot when the interim and final rules share the same substance); *accord Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 711 F.2d 370, 377 (D.C. Cir. 1983). Then only the NGOs' substantive INA challenge will remain.

Once the Government has promulgated its fully APA-compliant final rule,[4] the temporal alignment of the President's proclamation *vis-à-vis* the interim and final

[4] As indicated, the interim final rule is fully APA compliant because it meets the APA's good-cause exceptions, *see* Section II.B.1, *supra*, but the eventual final rule will take these good-cause issues off the table by meeting APA requirements, without the need for good-cause exceptions.

rules will not matter. The INA asylum provisions make clear that asylum "does not convey a right to remain permanently in the United States, and may be terminated" for various reasons. 8 U.S.C. §1158(c)(2). Those reasons include instances when "the alien meets a condition described in subsection (b)(2)." *Id.* §1158(c)(2)(B). Subsection (b)(2) refers to reasons to exempt an alien from eligibility for asylum, *id.* §1158(b)(2), including the Government's authority "by regulation [to] establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under [§1158(b)(1)]." *Id.* §1158(b)(2)(C). When the final rule issues, any asylum proceedings then underway or any grants of asylum already provided to aliens who entered the United States illegally on or after November 9, 2018, would be terminable under §1158(c)(2).

Significantly, a future final rule with a 30-day grace period on its effective date would not constitute an impermissibly retroactive rulemaking if it applied to illegal entrants under a presidential proclamation issued on or after November 9, 2018. 83 Fed. Reg. at 55,952 (proposed 8 C.F.R. §208.13(c)(3)). Although courts sometimes consider the regulated community's reliance in evaluating whether an agency acted arbitrarily, the reliance must be "legitimate," *Smiley v. Citibank (S.D.), N.A*, 517 U.S. 735, 742 (1996), or "reasonable," *Judulang v. Holder*, 565 U.S. 42, 48 (2011), such as when "*new* liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements." *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 295 (1974) (emphasis added); *accord United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 670-75 (1973)

(allowing reliance on agency guidance as defense in prosecution for past actions) ("*PICCO*"); *cf. INS v. St. Cyr*, 533 U.S. 289, 321-24 (2001) (keeping discretionary waivers of deportation available to deportable aliens who pleaded guilty to crimes prior to repeal of the legislative basis for that relief). The discharger in *PICCO* and the convicted alien in *St. Cyr* could reasonably rely on the status quo at the time of the discharge and guilty plea. But those decisions did not hold that the industrial discharger or alien could claim the same reliance for new discharges or new guilty pleas. An alien cannot claim that it was reasonable to commit a crime on or after November 9, 2018, knowing — or being deemed to know — that the President had imposed prospective restrictions on such criminality.

3. The Government's response to the crisis at the southern border complies with the INA's substantive requirements.

With respect to the lawfulness of the Government's proposed rule, the question hinges on whether the Government's proposed additional criteria for denial of asylum qualify as "consistent with this section." 8 U.S.C. §1158(c)(2)(B). As Judge Leavy explained in his partial dissent, categorical prohibitions on the *granting* of asylum are fully consistent with the mandatory right to *apply* for asylum. *See* App. 67a-70a (Leavy, J., dissenting in part); *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. *Cf. Trump*, 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 prohibit allowing applications that are doomed to fail.

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* IRLI addresses the three other potential stay factors. All of these factors weigh in favor of staying the lower courts' interim relief until the conclusion of any timely filed petition for a writ of *certiorari*.

A. The Government's harm is irreparable.

For stays, the question of irreparable injury requires a two-part "showing of a threat of irreparable injury to interests that [the applicant] properly represents." *Graddick v. Newman,* 453 U.S. 928, 933 (1981) (Powell, J., for the Court[5]). "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 to standing, the Government clearly has standing to defend the regulation

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[5] Although *Graddick* began as an application to a circuit justice, the Chief Justice referred the application to the full Court. *Graddick,* 453 U.S. at 929.

it promulgated. *Diamond v. Charles,* 476 U.S. 54, 62-63 (1986). As to irreparable harm, the Government credibly alleges not only a separation-of-powers injury that lower courts are thwarting the Executive Branch, but also the less theoretical injury that — in the absence of the challenged provisions — illegal aliens will attempt border crossings that endanger them and federal officers alike. All these governmental injuries are irreparable. The sovereignty injuries, moreover, go to the core of the Executive Branch's powers over foreign policy, national security, and immigration enforcement.

B. The equities balance in favor of the Government.

The third stay criterion — the balance of equities — tips in the Government's favor for two reasons. First, the Government's advantage on the substantive merits tips the equities in its favor. *See* Section II, *supra.* Second, the NGO's tenuous interest — if even cognizable, *see* Sections II.A, *supra* — undercuts the NGOs' ability to assert a countervailing form of irreparable harm. Specifically, 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). Thus, even assuming *arguendo* that impairment of the interests of criminal border crossers who ignored the implications of our laws and regulations could qualify as an injury, it cannot constitute irreparable harm; similarly, self-inflicted NGO expenditures cannot qualify as irreparable injury: "self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003); *accord Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) ("injury …

may be discounted by the fact that [a party] brought that injury upon itself"); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002). Here, the balances tip decidedly in the Government's favor.

C. The public interest favors a stay.

The last stay criterion is the public interest. Where the parties dispute the lawfulness of government programs, this last criterion 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). The courts below had a vastly insufficient basis to enjoin the Government's conduct of our foreign policy, national security, and immigration controls.

CONCLUSION

This Court should stay the district court's interim relief, pending the timely filing and resolution of a petition for a writ of *certiorari.*

Dated: December 14, 2018

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing motion for leave to file, motion for leave to file in compliance with Rule 33.2, and the accompanying *amicus* brief are proportionately spaced, have a typeface of Century Schoolbook, 12 points, and contain 3, 2, and 20 pages (and 590, 237, and 5,292 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: December 14, 2018

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 14th day of December 2018, in addition to filing the foregoing document via the Court's electronic filing system circa 12:00 p.m. (noon), one true and correct copy of the foregoing document was served by U.S. Mail, postage pre-paid, with a PDF courtesy copy served via electronic mail on the following counsel circa 12:00 p.m. (noon):

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The undersigned further certifies that, on this 14th day of December 2018, an original and ten true and correct copies of the foregoing document were served on the Court by hand delivery.

Executed December 14, 2018, at Washington, DC,

/s/ Lawrence J. Joseph

Lawrence J. Joseph