No. 22A17

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *ET. AL.*,
Applicants,

v.

STATE OF TEXAS AND STATE OF LOUISIANA,
Respondents.

On Application for a Stay of the Judgment Issued by the United States District Court for the Southern District of Texas

To the Honorable Samuel A. Alito, Jr.,
Associate Justice of the United States and
Circuit Justice for the Fifth 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 RESPONDENTS

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Movant Immigration Reform Law Institute respectfully requests leave to file the accompanying brief as *amicus curiae* in support of the respondents' opposition to the stay application.* The state respondents consented to this motion, and the federal applicants took no position.

IDENTITY AND INTERESTS OF MOVANT

Movant Immigration Law Reform Institute ("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 to assisting courts in understanding and accurately applying

* 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.

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 the Federation for American Immigration Reform, of which IRLI is a supporting organization, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has a direct interest 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 *amicus curiae* brief in support of the respondents. Movant respectfully submits that its proffered *amicus* brief brings several relevant matters to the Court's attention:

- First, on the issue of standing, the *amicus* brief demonstrates that the States meet the sovereign-interests test for special solicitude under *Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007), and qualify for *parens patriae* standing under *Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923). *See Amicus* Br. at 10-13.
- Second, on the issue of standing, the *amicus* brief demonstrates that the States' procedural injuries lower the Article III thresholds for redressability and immediacy. *See Amicus* Br. at 13.
- Third, the *amicus* brief demonstrates that the District Court's *vacatur* remedy is consistent not only with the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA") under 8 U.S.C. § 1252(f)(1), *see Amicus* Br. at 13-15, but

also with the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"). *See Amicus* Br. at 15-20.

- Fourth, the *amicus* brief demonstrates that the challenged memoranda violate the INA substantively, *see Amicus* Br. at 20-21, and the APA procedurally. *See Amicus* Br. at 22-23.

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

Dated: July 13, 2022

Respectfully submitted,

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MOTION FOR LEAVE TO FILE UNDER RULE 33.2

Movant Immigration Reform Law Institute ("IRLI") notes 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 does 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 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: July 13, 2022

Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

Amicus Curiae Immigration Reform Law Institute ("IRLI" or "*Amicus*") respectfully submits that the Circuit Justice—or the full Court, if this matter is referred to the full Court—should deny the application to stay the judgment entered by the District Court in this action because this Court is unlikely to grant a petition for a writ of *certiorari* and the federal applicants are unlikely to prevail on the merits and suffer no cognizably irreparable harm. IRLI's interests are set out in the accompanying motion for leave to file.

INTRODUCTION

The State of Texas and the State of Louisiana (collectively, the "States") sued the federal applicants (collectively, the "Administration") under the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA") and the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), to challenge agency memoranda that purport to adopt enforcement priorities that are lax and inconsistent with mandatory duties under the

INA. Among other things, the memoranda use a claimed lack of resources as a pretext to create a *de facto* amnesty system for non-prioritized illegal aliens. Notwithstanding that the APA requires notice-and-comment rulemaking, moreover, the Administration attempted to adopt these unlawful standards merely by issuing them as memoranda.

The U.S. District Court for the Southern District of Texas entered a final judgment vacating the memoranda, App. 38a-133a, and declined to stay that judgment pending appeal. App. 33a-37a. The U.S. Court of Appeals for the Fifth Circuit denied a stay pending appeal, App. 1a-32a, and the Administration now seeks such a stay from this Court. For the reasons set out below and those advanced by the States, this Court should deny the stay application.

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); *cf. Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190.

SUMMARY OF ARGUMENT

On the issue of standing, the States' economic injuries suffice (Section II.A.1.a),

but the States also meet the sovereign-interests test for special solicitude under *Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007), because they surrendered to the federal government their sovereign right to exclude aliens, and Congress gave them—via the APA—a cause of action against recalcitrant federal officers to enforce national immigration policy (Section II.A.1.b). Moreover, under *Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923), the States can assert *parens patriae* standing against those federal officers' unlawful actions, notwithstanding the supremacy of the federal government on immigration issues, because the officers are violating the INA and the APA (Section II.A.1.b). Further, the States' APA procedural injury lowers the Article III thresholds for redressability and immediacy (Section II.A.1.c).

The District Court's *vacatur* remedy is consistent with 8 U.S.C. § 1252(f)(1) because it does not enjoin the operation of 8 U.S.C. §§ 1221-1231 (Section II.A.2.a), and it is consistent with the APA (Sections II.A.2.b, II.A.3).

On the merits, the challenged memoranda violate the INA substantively by arbitrarily using the pretext of a lack of resources to justify nonenforcement and by creating *de facto* amnesty for non-prioritized illegal aliens (Section II.B.1). Even if INA allowed those actions, the challenged memoranda violated the APA procedurally by proceeding without notice-and-comment rulemaking by binding the discretion of staff with respect to the merits of immigration decisions (Section II.B.2).

ARGUMENT

I. THE GRANT OF A WRIT OF *CERTIORARI* IS UNLIKELY.

This Court is unlikely to grant a petition for a writ of *certiorari* in this matter. Although the Administration relies heavily on the Sixth Circuit's reversal of a

preliminary injunction, *Arizona v. Biden*, 31 F.4th 469 (2022) (granting stay); *Arizona v. Biden*, 2022 U.S. App. LEXIS 18426 (6th Cir. July 5, 2022) (reversing preliminary injunction) (No. 22-3272), a likelihood of prevailing on the merits there is different from actually prevailing on the merits here. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Even if the Fifth Circuit and Sixth Circuit decisions are inconsistent, that inconsistency is the result of an incomplete record before the Sixth Circuit.

II. THE ADMINISTRATION IS UNLIKELY TO PREVAIL

The likelihood of prevailing is the most important factor for determining an entitlement to interim relief. *Hollingsworth*, 558 U.S. at 190; *Winter*, 555 U.S. at 20. The Administration argues that the lower courts lacked jurisdiction, erred on the merits, and issued geographically overbroad relief. All of these arguments lack merit.

A. The courts below have jurisdiction.

The Administration challenges the States' standing, the lower court's authority to vacate the memoranda under 8 U.S.C. § 1252(f)(1), and the availability of a *vacatur* remedy. *See* Appl. at 13-21 (standing), 28-32 (jurisdiction for *vacatur* remedy), 32-38 (jurisdiction and equity for nationwide relief). While these arguments all lack merit, federal courts must assure themselves of jurisdiction. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). As explained in this subsection, there are no jurisdictional obstacles to the States' action.

1. The States have Article III standing.

The Administration challenges the States' standing under Article III, which poses a tripartite test: (a) judicially cognizable injury to the plaintiff, (b) causation by the challenged conduct, and (c) redressable by a court. *Lujan v. Defenders of Wildlife*,

504 U.S. 555, 561-62 (1992). The States have standing to challenge the memoranda on at least three distinct bases.

a. The States' economic injury suffices for Article III.

The Administration questions the sufficiency of the States' economic harms from illegal immigration, but—for Article III—any measurable "trifle" of injury suffices: "We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $ 5 fine and costs, and a $1.50 poll tax." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (citations omitted). Although criticized,[1] *SCRAP* remains a precedent that this Court should not dispense without full briefing and argument. In short, the Administration cannot evade responsibility for the harms its unlawfully lax immigration policies have caused and will continue to cause.

b. The States suffer sovereign injury.

The Administration also cites *Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923), and *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982), for the proposition that "a State cannot sue the federal government as *parens patriae* [because] it is the federal government, not the States, that represents the interests of citizens." Appl. at 21 n.4. Further, although this Court's decisions give state plaintiffs "special solicitude in our standing analysis," *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), the Administration argues that such solicitude applies to "uniquely sovereign

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[1] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 895-96 (1983).

harm" like losing territory, but not to "humdrum" harms such as alleged "indirect fiscal burdens" from a federal policy. Appl. at 20-21 (interior quotation marks omitted). The Administration is wrong on both assertions.

First, the *dicta* from *Snapp* cites *Mellon*, and *Mellon* was clear that this Court did "not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here." *Mellon*, 262 U.S. at 485. The sovereignty inherent in the entity defendants—such as the United States and its Department of Homeland Security—perhaps could cite federal supremacy over the States, but the officer defendants—such as Secretary Mayorkas—cannot, at least not *vis-à-vis* a charge that they are acting *ultra vires* the INA or the APA:

> It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of [the Eleventh] Amendment.

Ex parte Young, 209 U.S. 123, 154 (1908) (interior quotation marks omitted); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) (same for federal officers and federal sovereign immunity). Nothing in the *Mellon* line of cases stops the States from acting as *parens patriae* to enjoin unlawful actions by federal officers.

Second, the interests that the States seek to protect—namely, protecting their citizens from criminal aliens attracted to and released into their territory by the challenged memoranda—are every bit as "sovereign" as the territorial interests in Massachusetts' waterfront. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982)

(excluding an alien seeking admission is an act of sovereignty). Where Massachusetts could not "invade Rhode Island to force reductions in greenhouse gas emissions, [or] negotiate an emissions treaty with China or India, [or] in some circumstances … exercise of its police powers to reduce" a threat to public safety, *Massachusetts*, 549 U.S. at 519, this Court afforded Massachusetts special solicitude to protect itself by suing a federal agency and its officers to ensure that those federal actors complied with a federal law that protects a sovereign interest surrendered to the federal government when Massachusetts joined the Union. *Id.* The same applies here, except that the States actually retain their sovereign right to make war and to enter treaties when "actually invaded, or in such imminent Danger as will not admit of delay." U.S. CONST. art. I, § 10, cl. 3. On July 7, 2022, Governor Greg Abbot of Texas invoked this constitutional authority, and has begun acting on it. Executive Order No. GA-41, at 2 (Texas July 7, 2022).[2] Even as that situation develops, this Court should recognize that the States here enjoy the same solicitude—if not more—that the Court already found to protect these quasi-sovereign interests via a federal cause of action to enforce federal law against unlawful actions by federal officers.

Massachusetts specifically distinguished state-standing cases from cases filed by private individuals: "It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual." *Massachusetts*, 549 U.S. at 518. Undeterred, the Administration seeks to rely on

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[2] Available at https://gov.texas.gov/uploads/files/press/EO-GA-41.pdf (last visited July 13, 2022).

private-party cases to denigrate the States' standing. *See* Appl. at 15 (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984), and *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973)). Quite simply, the Administration's private-party cases do not address the special solicitude that this Court has found for State plaintiffs.

c. The States' procedural injury lowers the Article III threshold for immediacy and redressability.

The States assert procedural injury from the Administration's failure to have acted by APA notice-and-comment rulemaking. Because the States have concrete injuries, *see* Section II.A.1.a-II.A.1.b, *supra*, this type of procedural injury lowers the Article III threshold for immediacy and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-72 & n.7 (1992) (a proper procedural-injury plaintiff "can assert that right without meeting all the normal standards for redressability and immediacy"); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) (procedural claims are fully formed at the procedural violation and "can never get riper"). Moreover, procedural-rights plaintiffs have standing for a "do-over" under the proper procedures and standards, even if the agency might make the same choice. *See FEC v. Akins*, 524 U.S. 11, 25 (1998); *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002) ("If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter"). The States have procedural standing to challenge the memoranda.

2. Section 1252(f)(1) does not bar *vacatur* of rules.

By its terms, § 1252(f)(1) applies only to bar certain relief with respect to aliens

by cabining that relief to the INA proceeding for the individual alien:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.*

8 U.S.C. § 1252(f)(1) (emphasis added). "It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231," but the "ban does not extend to individual cases." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999). Further, it "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Garland v. Gonzalez*, 142 S.Ct. 2057, ____ (2022). This provision does not apply here for two independent reasons.

a. *Vacatur* neither enjoins nor restrains the operation of 8 U.S.C. §§ 1221-1231.

As this Court has recognized, *vacatur* is an equitable remedy distinct from an injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156 (2010). Equally important, vacating the Administration's memoranda does not "enjoin or restrain the operation of [8 U.S.C. §§ 1221-1231]" within the meaning of § 1252(f)(1). Vacating a rule does not "tell[] someone what to do or not to do." *Garland v. Gonzalez*, 142 S.Ct. 2057, ___ (2022) (internal quotation marks omitted). If vacating the memoranda restrains the operation of anything, it restrains the operation of 8 U.S.C. § 1103(a)(1)-

(2) and 6 U.S.C. § 202(5), the authority under which the Administration claims to have issued the memoranda. *See* Appl. at 22-23. These provisions are not covered by Section 1252(f)(1). *See Biden v. Texas*, 2022 U.S. LEXIS 3269, at *42-43 (June 30, 2022) (No. 21-954) (remanding the rescission of the "Remain in Mexico" policy to the District Court to determine whether the rescission complied with another provision not so covered, 5 U.S.C. § 706).

b. Section 1252(f)(1) did not impliedly repeal either the APA itself or even APA remedies.

Section 1252(f)(1) expressly bars lower courts acting to "enjoin or restrain the operation of [8 U.S.C. §§ 1221-1231]" outside "the application of such provisions to an individual alien against whom [removal] proceedings … have been initiated." 8 U.S.C. § 1252(f)(1). These limitations have two significant effects on the general availability of APA review to non-alien plaintiffs. First, unlike the individual aliens covered by § 1252(f)(1), the States here do not have a subsequent INA opportunity to review the allegedly unlawful agency action. Second, non-alien plaintiffs like the States plainly had a right to judicial review before the 1996 INA amendments that added § 1252(f)(1). Both of these differences go to why non-alien plaintiffs like the States retain their general right to APA review and APA remedies.

First, because non-alien plaintiffs like the States lack an alternate remedy, the APA provides review: "Agency action made reviewable by statute and *final agency action for which there is no other adequate remedy in a court* are subject to judicial review." 5 U.S.C. § 704 (emphasis added). By contrast, the "individual alien" had his or her APA claim displaced by special statutory review, 5 U.S.C. § 703, under the

INA's 1996 amendments.

Second, given that parties such as the States had a pre-1996 right of review, the 1996 INA amendments cannot be read expansively because repeals by implication are disfavored. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (requiring "clear and manifest" legislative intent to repeal the prior authority). Indeed, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975); *cf. Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 890 n.2 (1990) (recognizing systemic APA review, even where individual review is unavailable). Under the APA, § 1252(f)(1) does not provide a "clear and manifest" indication of congressional intent to terminate systemic APA review by plaintiffs with no future INA proceeding in which to challenge an INA administrative action.

Indeed, the relative order of the APA's and INA's enactment provides further assurance that the States retain their APA cause of action and remedies. Although the APA—as enacted—did not override any pre-APA statute that *expressly or impliedly* denied review, 5 U.S.C. § 702 ("[n]othing herein … confers authority to grant relief if any other statute that grants consent to suit expressly *or impliedly* forbids the relief which is sought") (emphasis added), post-APA statutes must deny review *expressly*. 5 U.S.C. § 559 ("[s]ubsequent statute may not be held to supersede or modify this subchapter …, except to the extent that it does so expressly");

Dickinson v. Zurko, 527 U.S. 150, 154-55 (1999).[3] Section 1252(f)(1), as a *post-APA* statute, can only preclude APA review if it does so *expressly,* but it does not do so beyond precluding action to "enjoin or restrain the operation of [8 U.S.C. §§ 1221-1231]," 8 U.S.C. § 1252(f)(1), words this Court must read narrowly under the canon against repeals by implication for review generally, and under 5 U.S.C. § 559 for APA review specifically.

Finally, whereas Congress has plenary authority to channel aliens' claims to the INA proceedings available to individual aliens such as the ones in *Aleman Gonzalez*, *see Landon*, 459 U.S. at 32 ("an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned") (interior quotation marks omitted), Congress cannot abridge the Due Process rights of non-alien plaintiffs.

3. The APA provides a *vacatur* remedy.

In 1967, this Court recognized that the APA provides "generous review provisions" that require "hospitable interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). The 1976 APA amendments to 5 U.S.C. § 702 went even

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[3] The leading *implied-preclusion* authorities concern *pre-APA* statutes. *See, e.g.*, *Block v. Community Nutrition Inst.,* 467 U.S. 340 (1984) (Agricultural Marketing Agreement Act of 1937); *FCC v. ITT World Commc'ns, Inc.,* 466 U.S. 463, 469 (1984) (Communications Act of 1934). Like implied preclusion, these decisions have no bearing on the preclusion of review under *post-APA* statutes like INA and its 1996 amendments.

further and "*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.). Against these generous provisions for judicial review, the Administration understandably harkens back to the good old days of pre-APA nonreviewability. *See* Appl. at 17 (direct injury required for pre-APA equitable review); 32 (equity practice in 1789). As used here, the term "direct injury" means "a wrong which directly results in the violation of a legal right." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) ("where, although there is damage, there is no violation of a right no action can be maintained"). *Amicus* IRLI respectfully submits that *vacatur* is the presumptive APA remedy and is not synonymous with nationwide injunctions as the Administration tries to argue.

The Administration argues against "nationwide vacatur," Appl. at 13, a phrase first used in a federal decision in 2017, *Lee v. Caregivers for Indep., LLC*, 2017 U.S. Dist. LEXIS 95322, at *7 (S.D. Ohio June 21, 2017) (No. 1:16cv946), and used in only five federal decisions[4] other than the Fifth Circuit's decision rejecting the argument

[4] *Ctr. for Biological Diversity v. Jewell*, 2017 U.S. Dist. LEXIS 231372, at *12 (D. Ariz. Oct. 25, 2017) (No. CV-14-02506-TUC-RM); *Empire Health Found. v. Azar*, 2021 U.S. Dist. LEXIS 154198, at *10 (E.D. Wash. Mar. 12, 2021) (No. 2:16-CV-209-RMP); *City & Cty. of San Francisco v. United States Citizenship & Immigration Servs.*, 992 F.3d 742, 743 (9th Cir. 2021) (Vandyke, J., dissenting); *Skyworks, Ltd. v.*

below.[5] In making this argument, the Administration implicitly relies on the body of criticism of nationwide *injunctions* as having "little basis in traditional equitable practice" and, when issued excessively, as "not normal." *Dep't of Homeland Sec. 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)). While *vacatur* and injunction are both forms of equitable relief, they are not the same thing.[6]

Indeed, on the States' side of the ledger, there is wide consensus that *vacatur* is the presumptive remedy for agency actions that violate the APA. *See*, *e.g.*, *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) ("relief under [the APA] … normally will be a vacatur of the agency's order"); *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 856-57 (9th Cir. 2020) (rejecting geographic limitation on APA *vacatur*). Quite simply, a "reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be" unlawful under

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CDC, 542 F. Supp. 3d 719, 735 (N.D. Ohio 2021); *Cook Cty. v. Texas*, 2022 U.S. App. LEXIS 17659, at *17-18 (7th Cir. June 27, 2022) (No. 21-2561).

[5] *Texas v. United States*, 2022 U.S. App. LEXIS 18687, at *40 n.18 (5th Cir. July 6, 2022) (No. 22-40367) (App. __a).

[6] The Administration invokes *Aberdeen & R. R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 308 n.11 (1975), to argue that "set aside" orders and injunctions both have coercive effect, Appl. at 30, but this Court clearly indicated that the two forms of relief are different in the same footnote. *Aberdeen & R. R. Co.*, 422 U.S. at 308 n.11. In any event, jurisdiction under 28 U.S.C. § 1253 applies to a three-judge panel's order granting *or denying* an injunction, and a set-aside order without an injunction would thus qualify, even if a set-aside order is not itself an injunction.

the APA's criteria. 5 U.S.C. § 706(2). Even if the Administration's novel position could eventually carry the day, that day should not arrive before full briefing and argument.

B. The Administration is unlikely to prevail on the merits.

The lower courts found the memoranda to violate the INA substantively and the APA procedurally. The Administration is unlikely to prevail by reversing either of these two equally fatal findings.

1. The memoranda are substantively invalid.

Amicus IRLI supports the States' discussion of the merits and adds two points. First, invoking a lack of resources to avoid mandatory detention is disingenuous at best. Second, by de-prioritizing illegal aliens with no aggravating factors other than their illegal entry, the Administration not only acts unlawfully but also exacerbates the problem that Congress directed it to address.

With regard to a purported lack resources to carry out the INA's mandatory detention of aliens, the District Court found the Administration to have acted in bad faith, or, at least, "not good faith":

> And on this point about insufficient resources and limited detention capacity, the Court finds that the Government has not acted in good faith. Throughout this case, the Government has trumpeted the fact that it does not have enough resources to detain those aliens it is required by law to detain. The Government blames Congress for this deficiency. At the same time, however, the Government has submitted two budget requests in which it asks Congress *to cut* those very resources and capacity by 26%. Additionally, the Government has persistently under-utilized existing detention facilities. To say that this is incongruous is to say the least.

App. 93a (emphasis in original, record citations omitted). While "agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary," *In re Aiken Cty.*, 725 F.3d 255, 259 (D.C. Cir. 2013) (Kavanaugh, J.), they act arbitrarily and capriciously when they claim that a lack of resources authorizes them to do *less* than authorized resources allow. Courts "are not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2575 (2019) (interior quotation marks omitted). The Administration clearly opposes the INA and is abusing its discretion to evade compliance with it.

In addition, the memoranda create *de facto* amnesty for mere illegal aliens (that is, those who is not a threat to border security, national security, or public safety):

> The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against t hem. We will use our discretion and focus our enforcement resources in a more targeted way. Justice and our country's well-being require it.

App. 137a. This nonenforcement provision is, at best, inconsistent with the INA, which makes it "a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). With respect to the APA, the Administration "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (quoting *Adams v. Richardson*, 156 U. S. App. D. C. 267, 480 F.2d 1159 (1973) (*en banc*)). It is up to Congress, not the Executive Branch, to draw such bright lines.

2. The memoranda are procedurally invalid.

The APA exempts various forms of guidance from notice-and-comment rule-making: "Except when notice or hearing is required by statute, this subsection does not apply … to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). At the outset, "the exceptions to notice and comment are to be narrowly construed and only reluctantly countenanced." *AICPA v. IRS*, 746 F.App'x 1, 18 (D.C. Cir. 2018) (internal quotation marks omitted, collecting cases). None of these exceptions applies to the memoranda.

The Administration's arguments that the memoranda do not bind agency staff so as to require notice-and-comment rulemaking are both factually and legally misplaced. The District Court held that the memoranda are "both facially binding and applied in a way that demonstrates [they are] binding." App. 116a. Even if this Court were to accept the memoranda's fig-leaf disclaimers about retaining discretion, that would not undo the District Court's finding that the Administration *applies* the memoranda in a binding manner.

An "agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy." *Pacific Gas & Elec. Co. v. F.P.C.,* 506 F.2d 33, 38-39 (D.C. Cir. 1974). Accordingly, such statements are not entitled to deference when an agency relies on them to resolve a *future* substantive question because, logically, the future action (not the initial statement) is the final agency action. *Id.*; *accord Texaco, Inc. v. F.P.C.,* 412 F.2d 740, 744 (3d Cir. 1969); *Amrep Corp. v. FTC,* 768 F.2d 1171, 1178 (10th Cir. 1985); *Mada-Luna v. Fitzpatrick,* 813 F.2d 1006, 1013-14 (9th Cir.

1987). The memoranda therefore cannot qualify as a general enforcement policy that is exempt from notice-and-comment rulemaking.

Nor can the memoranda qualify as an exempt procedural rule. "The distinctive purpose of § 553's third exemption, for 'rules of agency organization, procedure or practice,' is to ensure "that agencies retain latitude in organizing their internal operations." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044-48 (D.C. Cir. 1987) (citing *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)). Rules that qualify under this APA exception generally do not "alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Sec.*, 653 F.3d 1, 5-6 (D.C. Cir. 2011) (internal quotation marks omitted). These rules address the "technical regulation of the form of agency action and proceedings," *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1113-14 (D.C. Cir. 1974), not substance. In keeping with the procedural nature of the exception, the rule must "genuinely leave[] the agency and its decisionmakers free to exercise discretion." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). As the District Court found—as a fact—the memoranda do not leave agency staff free to exercise discretion.

III. THE ADMINISTRATION WILL NOT SUFFER IRREPARABLE HARM, AND THE EQUITIES FAVOR DENYING A STAY.

Vacating the Administration's unlawful memoranda does not impair authority to implement 8 U.S.C. §§ 1221-1231. *See* Section II.A.2.a, *supra*. Although the Administration has Article III standing to defend its memoranda, *Diamond v. Charles*, 476 U.S. 54, 62-63 (1986), the concept of irreparable harm requires more.

Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149-50, 162 (2010). In close cases—and this is not a close case—the Court should balance the equities. *Hollingsworth*, 558 U.S. at 190. But where the parties dispute the lawfulness of government actions, the public interest collapses into the merits. *See*, *e.g.*, *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("the public interest [is] not served by the enforcement of an unconstitutional law") (interior quotation omitted); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (recognizing "greater public interest in having governmental agencies abide by the federal laws"); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("no public interest in the perpetuation of unlawful [government] action"). If this Court accepts that the memoranda violate the INA and the APA, *see* Section II.B, *supra*, the case is neither close nor one where the equities tip to the Administration.

CONCLUSION

This Court should deny the application for a stay and reject the invitation to deem the stay application a petition for a writ of *certiorari*.

Dated: July 13, 2022

Respectfully submitted,

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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 19 pages (and 483, 235, and 5,083 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: July 13, 2022

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 13th day of July 2022, 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 U.S Priority Mail, postage pre-paid, with a PDF courtesy copy served via electronic mail on the following counsel:

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The undersigned further certifies that, on this 13th day of July 2022, the delivery of an original and ten true and correct copies of the foregoing document were arranged for same-day hand delivery to the Court.

Executed July 13, 2022,

/s/ Lawrence J. Joseph

Lawrence J. Joseph