Nos. 18-17436, 18-17274

In the United States Court of Appeals for the Ninth Circuit

EAST BAY SANCTUARY COVENANT; AL OTRO LADO; INNOVATION LAW LAB; CENTRAL AMERICAN RESOURCE CENTER,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States; MATTHEW G. WHITAKER, Acting Attorney General; JAMES MCHENRY, Director, Executive Office for Immigration Review (EOIR); KIRSTJEN NIELSEN, Secretary, U.S. Department of Homeland Security; LEE FRANCIS CISSNA, Director, U.S. Citizenship and Immigration Services; KEVIN K. MCALEENAN, Commissioner, U.S. Customs and Border Protection; RONALD VITIELLO, Acting Director, U.S. Immigration and Customs Enforcement,
Defendants-Appellants.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 3:18-cv-6810-JST
HON. JON S. TIGAR, DISTRICT JUDGE

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: March 22, 2019

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IDENTITY, INTEREST AND AUTHORITY TO FILE

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

STATEMENT OF THE CASE

In these consolidated appeals, several institutional plaintiffs ("Plaintiffs") have sued Executive Branch offices and officials (collectively, the "Government") under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), and the

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity — other than *amicus*, its members, and its counsel — contributed monetarily to this brief's preparation or submission.

Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"), to challenge the promulgation of a new rule, *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (2018). The rule implements the Attorney General's authority to "establish additional limitations and conditions, consistent with [8 U.S.C. §1158], under which an alien shall be ineligible for asylum under [§1158(b)(1)]." 8 U.S.C. §1158(b)(2)(C). The first appeal — No. 18-17274 — challenged the district court's entry of a temporary restraining order ("TRO"), and the second appeal — No. 18-17436 — challenges the district court's subsequent entry of a preliminary injunction. A motions panel of this Court denied the Government's motion to stay the TRO pending appeal. *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018).

The Government promulgated its rule on November 9, 2018, as an interim final rule, invoking two APA good-cause exceptions: (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.*

Once the rule was promulgated, 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.

ARGUMENT

Plaintiffs who seek interim relief must establish that they likely will succeed on the merits and likely will suffer irreparable harm without relief, that the balance of equities favors them versus the defendants' harm from interim relief, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Further, even interim relief requires jurisdiction. *City of Los*

Angeles v. Lyons, 461 U.S. 95, 103 (1983). These factors weigh against Plaintiffs.

I. THIS COURT LACKS JURISDICTION FOR PLAINTIFFS' REQUESTED RELIEF.

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); *see also Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 95 (1998) (courts must establish jurisdiction before deciding merits). To sue in federal court, therefore, a plaintiff must not only satisfy Article III's case-or-controversy requirement but also identify a statutory grant of subject matter jurisdiction to the court in question: "A federal court's subject-matter jurisdiction, constitutionally limited by Article III, extends only so far as Congress provides by statute." *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 492 (D.C. Cir. 1984). Moreover, because "[a] lack of subject matter jurisdiction goes to the very power of a court to hear a controversy," a decision rendered by a court without jurisdiction "can be accorded no weight either as precedent or as law of the case." *Orff v. United States*, 358 F.3d 1137, 1149-50 (9th Cir. 2004) (internal quotation marks and alterations omitted). Plaintiffs fail both the Article III and statutory tests, and each failure is independently fatal:

A. Plaintiffs cannot satisfy the Article III case-or-controversy requirement.

Under Article III, federal courts cannot issue advisory opinions, *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911), but must instead focus on the cases or controversies presented by affected parties before the court. U.S. CONST. art. III, §2. "'All of the doctrines that cluster about Article III — not only standing but mootness, ripeness, political question, and the like — relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen v. Wright,* 468 U.S. 737, 750 (1984) (*quoting Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). This consolidated appeal fails under several overlapping strands of Article III doctrine.

1. Because the entry of a preliminary injunction mooted the appeal in No. 18-17274, *vacatur* of the motions panel's decision in No. 18-17274 is required.

Before addressing Plaintiffs' standing, the Government puts forward several reasons why the motions panel decision in No. 18-17274 does not control here. *See* Gov't Br. at 23. While fully agreeing with the Government, *amicus* IRLI respectfully submits that this Court should disregard the motions panel decision as moot.

If No. 18-17274 has become moot on appeal, the appropriate course is *vacatur*, *see United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) ("those who have been prevented from obtaining the review to which they are entitled should not

be treated as if there had been a review"), which means that this Court and the courts of this Circuit must "accord[] no weight [to the decision] either as precedent or as law of the case." *Orff*, 358 F.3d at 1149-50 (internal quotation marks omitted). If No. 18-17274 is moot, the motions panel decision is a nullity.

An appeal from a TRO is rendered moot by the issuance of a preliminary injunction that entirely supersedes it. *Serv. Emps. Int'l Union v. Nat'l Union of Healthcare Workers*, 598 F.3d 1061, 1068-69 (9th Cir. 2010); *McCray v. Ace Parking Mgmt.*, 453 F. App'x 740, 742 (9th Cir. 2011); *Schainmann v. Brainard*, 8 F.2d 11 (9th Cir. 1925); *cf. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314 (1999) ("an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter"). Here, the preliminary injunction expressly contemplates that injunction's superseding the TRO, ER:7 n.3, so nothing remains of No. 18-17274, including the motions panel decision.

2. Plaintiffs lack standing.

To establish standing, a plaintiff must show that: (1) the challenged action constitutes an "injury in fact," (2) the injury is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision, and (3) nothing otherwise precludes judicial review. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). An "injury in fact" must satisfy a

tripartite test: it must be a legally cognizable injury to the plaintiff, be caused by the challenged conduct, and be redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Standing doctrine also includes prudential elements, including the need for those seeking to assert absent third parties' rights to have their 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). Finally, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), plaintiffs must establish standing for each form of relief that they request. Several aspects of Plaintiffs standing fail under Article III.

a. The underlying injury is not legally cognizable.

The most fundamental problem with Plaintiffs' standing is that they seek to enforce a procedural right to have individual removal proceedings, with no concrete right — either Plaintiffs' rights or aliens' rights — connecting the alleged procedural injury to an Article III case or controversy. "But deprivation of a procedural right without some concrete interest that is affected by the deprivation — a procedural right *in vacuo* — is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *Defenders of Wildlife*, 504 U.S. at 573 n.8 (procedural standing fails "without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the

procedure observed)"); *cf. Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002) (denial-of-access rights are "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court"). Because asylum is a discretionary privilege, it is undisputed the Government may consider an alien's manner of entry in a case-by-case determination of asylum, *compare* Gov't Br. at 37-39 *with* ER:16 (preliminary injunction decision); *see* Section II.B, *infra* (INA allows categorically denying asylum based on illegal entry). To argue that the Government cannot adopt a rule that memorializes such adjudications elevates form over substance. Or, rather, it elevates procedure *in vacuo* over concrete Article III injuries.

At bottom, there are no concrete Article III injuries. The asylum-ineligibility rule seeks to deter aliens abroad from undertaking *illegal* border crossings, 8 U.S.C. §1325(a), and aliens abroad do not have rights under our Constitution. *Boumediene v. Bush*, 553 U.S. 723, 755-62 (2008). Instead, "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). Excluding an alien seeking admission is an act of sovereignty. *Id.* Accordingly, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (interior quotation marks omitted); *Angov v. Holder*, 736 F.3d 1263, 1273 (9th Cir.

2013) (same). Here, because the Government followed the INA (*i.e.*, "the procedure authorized by Congress"), there is no underlying due-process injury in the Government's adopting the asylum-ineligibility rule over having case-by-case determinations to reach the same permissible result.

There is no authority — either substantively or under Article III — to compel an agency to hold individual hearings when the agency can proceed via a rulemaking:

> We also reject [the] argument … that the agency must not make categorical exclusions, but may rely only on case-by-case assessments. Even if a statutory scheme requires individualized determinations, which this scheme does not, the decisionmaker has the authority to rely on rule-making to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority. The approach pressed by [plaintiff] — case-by-case decisionmaking in thousands of cases each year — could invite favoritism, disunity, and inconsistency. The [agency] is not required continually to revisit issues that may be established fairly and efficiently in a single rulemaking proceeding.

Lopez v. Davis, 531 U.S. 230, 243-44 (2001) (interior quotation marks and citations omitted). Any other resolution — in addition to wasting agency resources — would push the Government into "pure ad hocery … that affords less notice, or less convenient notice, to affected parties." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Of course, Plaintiffs' real goal in seeking case-by-case procedure is not individualized adjudications but delay and the

ability to overwhelm federal enforcement resources, which is not a permissible basis for procedural standing.

b. Plaintiffs' diverted resources do not establish standing.

Plaintiffs cannot premise standing on their diverted resources, which are self-inflicted injuries and, thus, cannot support standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Standing for diverted resources relies on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), but as Judge Millett of 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). 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"). Instead, 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.

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 — much less *aligned with* — a third-party organization's discretionary spending.

Third, 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. 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* Gov't Br. at 33-35.[2]

In sum, the institutional Plaintiffs cannot establish standing based on diverted resources.

c. Plaintiffs cannot rely on third-party funding to create an Article III case or controversy with the Government,

Plaintiffs also premise their standing on lost income because the State of California funds Plaintiffs based on the number of asylum seekers that Plaintiffs

[2] The moot motions panel decision found Plaintiffs' 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. *East Bay Sanctuary Covenant*, 909 F.3d at 1244-45. But the challenged agency actions do not impose any burden on the right of counsel, and Plaintiffs' diverted-resource injuries do not relate in any legal way to aliens' right to counsel.

assist. Even if it were not impermissibly speculative that the asylum rule would depress the volume of asylum seekers that Plaintiffs can assist, this financial injury would not qualify as cognizable under Article III.

The bounty or wager that third parties put on Plaintiffs' 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 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, emphasis added). Just like the bounty or hypothetical wager in *Stevens*, Plaintiffs' interests in third-party funding here are insufficiently related Plaintiffs' asserted injury from the Government's actions.

To be sure, the Supreme 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*). In paying Plaintiffs for assisting immigrants, 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 Plaintiffs are no more consequential here than the hypothetical wager in *Stevens*.

d. Plaintiffs lack third-party standing.

Plaintiffs cannot claim third-party standing for would-be asylum seekers because Plaintiffs fail the *Kowalski* test for two reasons. First, Plaintiffs lack their own standing, *see* Sections I.A.2.a-I.A.2.c, *supra*; second, Plaintiffs lack a close relationship or (if they have one) nothing would hinder the actual rights-holders from suing on their own behalf. *Kowalski*, 543 U.S. at 128-30. Future relationships do not count because an "*existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here." *Id.* at 131 (emphasis in original). Accordingly, Plaintiffs lack third-party standing to press the rights — if any — of asylum seekers.

B. Plaintiffs lack statutory subject-matter jurisdiction and a waiver of sovereign immunity for this action.

As the Government explains, the INA channels review of removal actions to the courts of appeals and the District of Columbia, which displaces APA review in the district courts nationwide. Gov't Br. at 31-33. In addition, those INA review procedures also deprive this Court of equity jurisdiction over, and deprive plaintiffs

of a waiver of sovereign immunity from, this action. All of these jurisdictional defects bar review by the district court here.

1. The United States has not waived sovereign immunity for this action.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Moreover, such waivers are strictly construed, in terms of their scope, in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Thus, aside from lacking statutory subject-matter jurisdiction — as the Government argues, *see* Gov't Br. at 31-33 — Plaintiffs also lack a waiver of sovereign immunity for this APA action.

In the 1976 APA amendments to 5 U.S.C. §702, Congress "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (quoting S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.). But that waiver has several restrictions that preclude review in this action.

As relevant here, 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 not available. *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984). *Amicus* IRLI respectfully submits that INA review is exactly the type of statutory review that precludes APA review.[3] *See* Section I.B.2, *infra*.

2. This Court lacks statutory subject-matter jurisdiction for this action.

The Government argues that the INA's review-channeling provisions place review of all issues related to removal proceedings in the INA's review of final removal orders and in the District of Columbia. *See* Gov't Br. at 31-33. By placing review of removal orders in the applicable courts of appeals, Congress displaced district court jurisdiction:

> It is well settled that even where Congress has not expressly stated that statutory jurisdiction is "exclusive," as it has here with regard to final [agency] actions, a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute.

Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 77 (D.C. Cir. 1984)

[3] With the advent of general-purpose review statutes like the APA, the term "nonstatutory" has become something of a "misnomer." *Air New Zealand Ltd. v. C.A.B.*, 726 F.2d 832, 836-37 (D.C. Cir. 1984) (Scalia, J.). "Statutory review" means review pursuant the governing substantive statute (here, the INA), and "nonstatutory review" means review pursuant to a general-purpose provision (*e.g.*, originally equity, but now also the APA or 28 U.S.C. §1361).

(footnote omitted); *accord Peck v. Cingular Wireless, Ltd. Liab. Co.*, 535 F.3d 1053, 1057 (9th Cir. 2008). Under the circumstances here, this Court does not have jurisdiction for this action.

3. Plaintiffs' adequate INA remedies displace equity jurisdiction.

In addition to lacking a cause of action and a waiver of sovereign immunity, Plaintiffs also have no claim in equity: "It is a basic doctrine of equity jurisprudence that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Morales v. TWA*, 504 U.S. 374, 381 (1992) (interior quotation marks and alterations omitted). Here, the INA provides Plaintiffs with an adequate and exclusive means of judicial review, so Plaintiffs cannot rely on any equitable theory of judicial review to bring suit in district court. *See, e.g., ITT World Commc'ns*, 466 U.S. at 468 (holding that "[l]itigants may not evade" a provision that vests the courts of appeals with exclusive jurisdiction by requesting a district court to enjoin agency "action as ultra vires").

II. PLAINTIFFS CANNOT PREVAIL ON THE MERITS.

The first — and indispensable — *Winter* factor is the plaintiff's likelihood of success on the merits. *Winter*, 555 U.S. at 20-24; *Nken v. Holder*, 556 U.S. 418, 438 (2009) (Kennedy, J., concurring). Assuming *arguendo* that this Court reaches the merits, this Court should reject Plaintiffs' procedural and substantive challenges to the asylum-ineligibility rule.

A. The asylum-ineligibility rule's promulgation did not violate the APA's procedural requirements.

The Government issued its interim final rule to address not only a public-safety and humanitarian emergency, but also issues of national security and foreign relations. 83 Fed. Reg. at 55,950-51. These grave and weighty concerns easily meet the APA's exceptions for notice-and-comment rulemaking and for suspending the 30-day grace period for a rule's taking effect. 5 U.S.C. §553(a)(1), (b)(B), (d)(3). Significantly, the foreign-affairs question here (namely, negotiations with Mexico) aligns 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). The Supreme Court has found it imperative that the United States speak with one national voice — not 50 states' voices — on issues, such as immigration, that touch foreign relations, even though the states joined the union as sovereigns. *Arizona v. United States*, 567 U.S. 387, 395 (2012). Given the APA's foreign-affairs exception, 5 U.S.C. §553(a)(1), the 88 federal district courts do not have authority, *vis-à-vis* APA procedural issues, to interfere in these aspects of sovereignty, which the Constitution commits to the political branches. *Trump v. Hawaii*, 138 S.Ct. 2392, 2419 (2018). The APA poses no procedural barrier to the asylum-ineligibility rule.

B. The asylum-ineligibility rule complies with the INA.

The substantive validity of the asylum-ineligibility rule hinges on whether the

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

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

It would suffice to reverse the grant of a preliminary injunction if Plaintiffs' APA and INA claims lack merit. *See* Sections II.A-II.B, *supra*. *Amicus* IRLI

respectfully submits that this Court should also consider the "flip-side" of how *granting* a preliminary injunction would injure the very flexibility that the APA and the INA provide the Government.

Before addressing the legal issues of APA and INA flexibility, *amicus* IRLI respectfully submits that the Government has correctly recognized a real emergency. Aliens are crossing the southern border at unprecedented levels, far exceeding the ability of the immigration system to process them in an orderly manner. Most asylum claims — approximately 83% — are deemed to lack merit, and most of the valid claims (*e.g.*, those based on CAT claims) could continue under the new rule. In addition to the public-safety and humanitarian concerns about harm to both federal enforcement officers and the illegal border crossers themselves, removing the magnetic pull of near-automatic parole into the United States while awaiting the orderly processing of baseless asylum claims injures *bona fide* asylum seekers, whose claims are slowed by the mass of baseless claims.

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

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

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

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

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

Finally, the "exclusion of aliens is a fundamental act of sovereignty by the political branches." *Hawaii*, 138 S.Ct. at 2407 (interior quotation marks omitted). Because "decisions in these matters may implicate our relations with foreign powers" and implicate "changing political and economic circumstances," these "decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). Thus, the Government's flexibility here — while clearly present in the INA itself — also arises from the nature of sovereignty and the separation of powers: "In accord with ancient principles of the international law of nation-states, … the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers — a power to be exercised exclusively by the political branches of government.'" *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (citations, internal alterations, and quotation marks omitted). The district court overstepped its bounds by attempting to set federal immigration policy.

III. THE REMAINING *WINTER* FACTORS WEIGH AGAINST PLAINTIFFS.

Although the lack of jurisdiction and Plaintiffs' weakness on the merits are enough to vacate the preliminary injunction, *amicus* IRLI addresses the three other *Winter* factors. All three remaining factors weigh in favor of *vacatur*.

A. Plaintiffs cannot establish irreparable harm.

The second *Winter* factor concerns the irreparable harm that a plaintiff would suffer, absent interim relied. *Winter*, 555 U.S. at 20. Even injuries that can qualify as cognizable 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). Here, Plaintiffs do not even have standing. *See* Section I.A.2, *supra*. But even assuming *arguendo* that Plaintiffs could meet Article III, they still could not show irreparable harm from the denial of interim relief.

First, insofar as the Government can deny asylum requests — on a case-by-case basis — for illegally crossing the border, ER:16; Gov't Br. at 37-39, Plaintiffs cannot suffer cognizable harm from a categorical rule that achieves the same result. If the substantive harm itself is permissible, the manner of its delivery cannot constitute irreparable harm.

Second, and again assuming *arguendo* that Plaintiffs' alleged injuries could qualify as an "injury in fact" under Article III, Plaintiffs' self-inflicted injuries cannot constitute irreparable harm: "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).

B. The balance of equities tips to the Government.

The third *Winter* factor — the balance of equities, *Winter,* 555 U.S. at 20 — 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, Plaintiffs' tenuous interest — if even cognizable, *see* Sections I.A.2, *supra* — undercuts Plaintiffs' ability to assert a countervailing form of irreparable harm. *See* Section III.A, *supra*. Here, the balances tip decidedly in the Government's favor.

C. The public interest favors the Government.

The fourth *Winter* factor is the public interest. *Winter,* 555 U.S. at 20. 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). Here, in addition to addressing dangers to Government enforcement personnel and illegal aliens themselves, the challenge rule seeks to avoid having our immigration policy act as a magnet for illegal immigration, *cf.* 8 U.S.C. §1601(6) ("[i]t is a compelling government interest to remove the

incentive for illegal immigration provided by the availability of public benefits"), as well as to focus the available federal enforcement resources on legitimate claims of asylum.

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 district court has a vastly insufficient basis to enjoin the Government's conduct of our foreign policy, national security, and immigration controls.

IV. THIS COURT SHOULD LIMIT ANY RELIEF TO THE PARTIES BEFORE THE COURT.

For practical, jurisprudential, and jurisdictional reasons, "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Nationwide injunctions effectively preclude other circuits from ruling on the enjoined agency action and thus "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," which deprives the Supreme Court of the benefit of decisions from several courts of appeals. *United States v. Mendoza*, 464 U.S. 154, 160 (1984). That practical harm is reason enough to reject nationwide relief. If this Court finds Plaintiffs entitled to any relief, this Court should limit the relief to California. Especially where Plaintiffs base

their standing on funds received from the State of California for assisting immigrants in California, this case presents no reason for this Court to allow an injunction broader than needed to remedy the injuries that the Plaintiffs allege.

CONCLUSION

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

Dated: March 22, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Immigration Reform Law Institute states that it knows of no related case pending in this Court.

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

This brief contains 5,821 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2019, I electronically submitted the foregoing *amicus curiae* brief to the Clerk via the Court's CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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