IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICANS FOR IMMIGRANT JUSTICE, et al., *Plaintiffs*, v. **U.S. DEPARTMENT OF HOMELAND SECURITY**, et al., *Defendants*.	No. 1:22-cv-03118 (CKK)

IMMIGRATION REFORM LAW INSTITUTE'S
[PROPOSED] BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

IRLI is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated achieving responsible immigration policies that serve the best interest of the nation. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec*., 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec*., 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010). 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.

[1] Consistent with Fed. R. App. P. 29(a)(4)(E), counsel for movant authored this motion and brief in whole, and no counsel for a party authored the motion and brief in whole or in part, nor did any person or entity, other than the movant and its counsel, make a monetary contribution to preparation or submission of the motion and brief.

ARGUMENT

As the D.C. Circuit has recognized, "a preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Trump v. Thompson*, 20 F. 4th 10, 31 (D.C. Cir. 2021) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). For a movant "[t]o obtain a preliminary injunction" the movant must establish "that he [is] likely to succeed on the merits, . . . suffer irreparable harm in the absence of preliminary relief, that the balance of equities tip[ped] in his favor, and that an injunction is in the public interest." *Roane v. Barr (In re Fed. Bureau of Prisons' Execution Protocol Cases)*, 980 F.3d 123, 134 (D.C. Cir. 2020) (quoting *Winter*, 555 U.S. at 20).

Before the court can consider the *Winter* factors, however, it must determine whether Plaintiffs have standing to bring their claims. This Court should deny Plaintiffs' motion because they fail to meet their burden to show they have third-party standing.

I. Plaintiffs' Motion for Preliminary Injunction Should be Denied Because They Cannot Establish Standing.

This Court should deny Plaintiffs' Motion for Preliminary Injunction because they do not have standing. Standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). A plaintiff must establish the required elements for a federal court to review its claims. *Id*. ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."). While prudential limitations are important, "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). *See also Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012) ("If no petitioner has Article III standing, then this court has no jurisdiction to consider these petitions.") (citation omitted). Thus, federal courts "have an

independent obligation to be sure of [their] jurisdiction," regardless of whether the issue is raised by the parties. *Id.* (quoting *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002)). Importantly, "defect[s] in Article III standing . . . constitute defect[s] in subject matter jurisdiction." *Siegel v. United States Dep't of the Treasury*, 304 F. Supp. 3d 45, 49 (D.D.C. 2018).

Whether an Article III case or controversy exists "is a threshold question in every federal case, determining the power of the court to entertain the suit." *Warth*, 422 U.S. at 498. The court must ask "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on his behalf." *Id*. *See also Sierra Club v. Jackson*, 648 F.3d 848, 852 (D.C. Cir. 2011) ("Article III of the Constitution limits the federal courts to adjudication of actual, ongoing controversies."). To establish Article III standing the plaintiff must show (1) he "ha[s] suffered an injury in fact;" (2) that there is "a causal connection between the injury and the conduct complained of;" and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61. *See also Maloney v. Murphy*, 984 F.3d 50, 58-59 (D.C. Cir. 2020) ("To establish Article III standing, a plaintiff must allege '(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision.'") (quoting *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019)).

Generally, parties must "assert [their] own legal rights and interests, and cannot rest [their] claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. *See also Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 15 (D.D.C. 2010) ("Article III requires the party who invokes the court's authority to show that *he personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.") (emphasis in original)

(citation and quotation marks omitted). This is because, under separation of powers principles, "[t]he Article III judicial power exists only to redress or otherwise protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth*, 422 U.S. at 498-99.

Third party standing is a "'limited exception[]' to the general rule that 'a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'" *Id*. at 23 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). Accordingly, "the burden is on the plaintiff 'to establish that [he] has third party standing, not on the defendant to rebut third party standing.'" *Id*. To meet this burden, Plaintiffs "must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect [their] own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Importantly, "Plaintiffs' assertion of third-party standing does not excuse their burden to establish that they have Article III standing in their own right." *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 356 n.13 (D.D.C. 2020) (citations omitted). In other words, "the third-party standing doctrine requires plaintiffs to demonstrate, *in addition to* their own Article III standing," the elements required for third-party standing. *Id*. (emphasis original).

To establish the required injury, organizational plaintiffs must show a "concrete and demonstrable injury to [its] activities—with the consequent drain on [its] resources—[that] constitutes far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). As this Court has explained, there are two factors to consider when

> determining whether an organization meets this standard. First, an organization must show that the challenged conduct perceptibly

> impair[s] the organization's ability to provide services. This initial showing must also demonstrate a direct conflict between the defendant's conduct and the organization's mission. Second, an organization must show that it used its resources to counteract [the alleged] harm.

Capital Area Immigrants' Rights Coal. v. Trump, 471 F. Supp. 3d 25, 38 (D.D.C. 2020) (alteration original) (internal citations and quotation marks omitted). Thus, "a plaintiff asserting a procedural violation must show a causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury to its particularized interest." *Id*.

Plaintiffs can "satisfy the first prong of the injury inquiry if they show 'that their activities have been *impeded*' in some way." *Id*. at 40 (quoting *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006)) (emphasis in original). Thus, only a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources" is sufficient to establish injury. *Havens Realty Corp.*, 455 U.S. at 379. Importantly, "self-inflicted expenditures," *Citizens for Resp. & Ethics in Wash. v. U.S. Off. of Special Couns.*, 480 F. Supp. 3d 118, 128 (D.D.C. 2020), do not constitute diverted resources. *See also Chesapeake Climate Action Network v. Exp.-Import Bank of the United States*, 78 F. Supp. 3d 208, 231 (D.D.C. 2015) ("[A] plaintiff cannot convert its ordinary program costs into an injury in fact, unless the government's actions have required the organization to expend resources to pursue its mission.") (citation and quotation marks omitted). Thus, although this court has found organizational injury in the past based on the necessity for remote access in light of Covid-19 restrictions on in-person access to detention centers, *S. Poverty Law Ctr. v. U.S. Dep't of Homeland Sec.*, Civil Action No. 18-760 (CKK), 2020 U.S. Dist. LEXIS 106416, at *1 (D.D.C. June 17, 2020), such restrictions no longer exist as the pandemic has ended. *See, e.g.,*

Scott Pelley, *President Joe Biden: The 2022 60 Minutes Interview*, CBS News (Sep. 18, 2022, 7:43 PM), https://www.cbsnews.com/news/president-joe-biden-60-minutes-interview-transcript-2022-09-18/. The long distances between Plaintiffs' offices and detention centers, which Plaintiffs are in control of, are not procedural impediments but self-inflicted injuries that do not suffice to confer standing. *Citizens for Resp. & Ethics in Wash.*, 480 F. Supp. 3d at 128.

Moreover, Plaintiffs cannot use their own organizational injuries to raise constitutional claims on behalf of prospective clients. Indeed, the D.C. Circuit has previously rejected the attempted use of third-party standing to bring claims on behalf of "large and diffuse group[s] of individuals, none of whom are parties to the lawsuit," *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1364 (2000)—a description that necessarily includes Plaintiffs' claims on behalf of detained aliens who may possibly become clients at some time in the future. That group is so large and diffuse that it could include every detained alien in the U.S., and allowing Plaintiffs to sue on its behalf would convert Plaintiffs into tribunes for this group, with a privileged access to the courts.

Plaintiffs also fail to satisfy the "close-relationship" requirement for third-party standing. As the D.C. Circuit explained, "the reason for the close relation factor is to ensure that the plaintiff will act as an effective advocate for the third party." *Lepelletier v. FDIC*, 164 F.3d 37, 43 (D.C. Cir. 1999). Plaintiffs allege that the existence of confidential relationships with current clients and the potential for confidential relationships with other alien detainees are sufficient to satisfy the close relationship factor. Pls. Mot. for Prelim. Inj, Doc No. 55-1 at 21. While confidential relationships such as those between an attorney and client are of the type that "have most often been found to support third party standing," *Turner*, 502 F. Supp. 3d at 361, no such relationship has been recognized for assertions of a future relationship that may not even come to fruition. In

fact, the Supreme Court has been clear that possible future clients cannot provide the basis for the "close-relationship" requirement. *See Kowalski v. Tesmer*, 543 U.S. 125, 127 (2004) ("In two cases in which this Court found an attorney-client relationship sufficient to confer third-party standing the attorneys invoked known clients' rights, not those of the *hypothetical* clients asserted here.") (emphasis original) (internal citations omitted). Furthermore, as Justice Thomas stated, "[i]t is doubtful whether a party who has no personal constitutional right at stake in a case should ever be allowed to litigate the constitutional rights of others." *Id.* at 135 (Thomas, J., concurring). Finally, courts must "deny third party standing where the litigant's interests in the subject of the suit to some extent conflict with those of the [third parties] whose rights [the litigant] purports to advance." *Al-Aulaqi*, 727 F. Supp. 2d at 33.

Plaintiff organizations represent numerous detained aliens with different views and interests. Indeed, the organizations themselves have different and potentially conflicting goals and missions. Pls. Am. Compl., Doc. 53 at 11-14. Such organizational missions include "serv[ing] as a watchdog on immigration detention practices and policies," attorney recruitment and training, and working with public defenders representing criminal aliens. *Id*. These organizational goals may conflict with or supersede the various needs and interests of different detained aliens. Moreover, one organization, Immigration Justice Campaign, does not represent aliens but recruits attorneys and supervises their representation, creating more distance between its interests and those of detained aliens.

Lastly, Plaintiffs cannot establish that the required hindrance to their clients' ability to make their own constitutional claims exists. "A hindrance requires a 'genuine obstacle' preventing the third-party from asserting her legal rights." *United States v. TDC Mgmt. Corp.*, 263 F. Supp. 3d 257, 273-74 (D.D.C. 2017) (quoting *Al-Aulaqi*, 727 F. Supp. 2d at 30). *See also Am.*

Immigration Lawyers Ass'n v. Reno, 199 F.3d at 1362 ("'If there is some genuine obstacle . . . the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent.'") (quoting *Singleton v. Wulff*, 428 U.S. 106, 116 (2000)). As this Court has explained, "[t]he Supreme Court has recognized as sufficient hindrances justifying third party standing (1) a third party's financial disincentive to litigate; (2) a party's desire to protect her personal privacy; and (3) the imminent mootness of a party's claims[.]" *Al-Aulaqi*, 727 F. Supp. 2d at 31 (internal citations omitted).

Here, there are no hindrances to Plaintiffs' currently detained clients filing suit on their own behalf. The obstacles alleged by Plaintiffs "include[e] language barriers, limited understanding of the U.S. legal system, inadequate access to legal resources, and fear of retaliation." Doc. 55-1 at 30. These so-called obstacles could be broadly applied to detained aliens in general, creating a system in which groups such as Plaintiffs can attempt to rewrite immigration detention rules and standards through third-party suits. Furthermore, although this Court has previously found that limited time and the inability to conduct in-person meetings due to COVID-19 created a hindrance, such restrictions on in-person visits no longer exist. *See S. Poverty Law Ctr. v. U.S. Dep't of Homeland Sec.*, Civil Action No. 18-760 (CKK), 2020 U.S. Dist. LEXIS 106416, at *47-48 (D.D.C. June 17, 2020) (finding a sufficient hindrance"[I]n light of the restrictions implemented due to COVID-19, [because] the already-limited time that detained individuals have to speak with their counsel would also have to cover a suit to vindicate these interests.").

The second alleged hindrance—"the same access to counsel barriers that form the subject of this action"—must also fail. Doc. 55-1 at 22. Plaintiffs allege that aliens at the detention centers

in question are subject to violations of their First and Fifth Amendment rights, as well as violations of the Administrative Procedure Act ("APA"). *Id*. Even if these claims are assumed to be meritorious, Plaintiffs still fail to show that these "barriers" have prevented their current clients from suing on their own behalf. No more can be inferred from the evidence Plaintiffs put forward than that Plaintiffs have either not tried to persuade their current clients to bring suit themselves or, having tried, have failed so to persuade them—and if the latter, Plaintiffs have not met their burden to show that their failure results from the "barriers" they complain of. Much less have they shown that these same "barriers" will prevent them from persuading possible future clients to bring suit. A particularized factual showing is required to meet Plaintiffs' burden, and they have not provided one. *See, e.g., Freedom Watch, Inc. v. McAleenan*, 442 F. Supp. 3d 180, 186 (D.D.C. 2020) ("[T]o satisfy Article III's requirements to establish standing, the alleged injury in fact must be (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."); *California v. Trump*, 2020 U.S. Dist. LEXIS 58154, at *15 (D.D.C. 2020) (explaining "the well-established principle that Article III standing demands a particularized harm") (citation omitted).

Finally, as this Court has previously recognized, although "imminent mootness of a party's claims can constitute a sufficient hindrance under *Powers* . . . the purpose of the hindrance requirement is to ensure that the rightholder did not simply decline to bring the claim on his own behalf, but could not in fact do so." *Al-Aulaqi*, 727 F. Supp. 2d at 32 (internal citations and quotation marks omitted). For this reason, circumstances that could moot an ongoing case that have been found to be hindrances have not been mere possibilities, such as the chance a given alien might at some point be released from detention, but have been certain to occur in a short, set time. For example, many of the imminent mootness cases deal with pregnancy and abortion. In such cases, nature puts a short time limit—nine months—on a woman's ability to bring suit. *See,*

e.g., Singleton, 428 U.S. at 117 (explaining that any woman claiming the right to abortion would eventually face an obstacle—giving birth—to her bringing suit); *Craig v. Boren*, 429 U.S.190, 192-93 (1976) (allowing a vendor to challenge a law banning certain male minors from buying alcohol because they would reach the legal drinking age during the lawsuit); *Hutchins by Owens v. District of Columbia*, 144 F.3d 798, 803 (D.C. Cir. 1998) (granting parents third-party standing to challenge a D.C. curfew law because minor plaintiffs could age-out of the challenged statute's impact).

In sum, Plaintiffs, to meet their burden to show their third-party standing, must show both that they themselves suffer an injury that is not self-inflicted and that their current or prospective clients have been or will be unable, rather than simply unwilling, to sue on their own behalf. They have failed to make either showing.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be denied.

Dated: December 12, 2022

Respectfully submitted,

/s/ *Gina M. D'Andrea*

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