IN THE UNITED STATES COURT
FOR THE DISTRICT OF COLUMBIA

M.A. *et al.* *Plaintiff*, *v.* Alejandro Mayorkas *et al.*, *Defendant*.	Case No. 1:23-CV-01843-TSC

BRIEF AMICUS CURIAE OF ADVOCATES OF VICTIMS OF ILLEGAL ALIEN CRIME IN SUPPORT OF THE STATE OF KANSAS ET AL.'S MOTION TO INTERVENE

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IDENTITY OF *AMICUS CURIAE*

Amicus curiae Advocates for Victims of Illegal Alien Crime ("AVIAC") is a 501(c)(3) non-profit organization that was founded in 2017 in response to crimes committed by illegal aliens. AVIAC is led by individuals who have lost family members due to these crimes.[1] AVIAC's mission includes being a source of support for such victims across the country, a resource for policies that will enforce our Nation's immigration laws, and to defend local efforts to combat crime by illegal aliens.[2]

STATEMENT

The complaint in this matter was file on June 23, 2023. ECF 1. The complaint alleged that the Department of Homeland Security's ("DHS") final rule Circumvention of Lawful Pathways, 88 Fed. Reg. 31,314 (May 16, 2023) is in excess of DHS authority and is arbitrary and capricious. Compl. ¶¶ 133–176. On Sept. 28, 2023 Plaintiffs filed a motion for summary judgment. ECF 53. On October 27, 2023, Defendants filed their response and cross motion for summary judgment. ECF 53. On December 12, 2023, Plaintiffs filed their reply. ECF 61. While the cross-motions for summary judgment were pending, the parties filed a joint stipulation to hold the case in abeyance on February 5, 2025 so that the parties could discuss a settlement and "implementa-

[1] https://www.aviac.us/ (viewed Jan. 24, 2024)

[2] The undersigned counsel certifies that counsel for the *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. *Amicus* files an accompanying motion for leave to file this brief, and all the parties have stated that they do not oppose this motion.

tion of the challenged rule *and related policies*." Joint Stipulation to Hold Case in Abeyance, ECF 66 (emphasis added). Immediately after it became apparent that DHS might not aggressively defend this case, the States of Kansas, Alabama, Georgia, Louisiana, and West Virginia filed a timely motion to intervene to protect their rights on March 7, 2024. ECF 67. This brief *amicus curiae* is in support of that motion.

ARGUMENT

I. The federal courts need to address the undemocratic practice of *sue-and-settle*.

The Administrative Procedure Act ("APA") establishes the process under which agencies may issue regulation. 5 U.S.C. § 500–596. The Act also gives the members of the public injured by agency action the right to judicial review of such actions. 5 U.S.C. §§ 702, 706. In the context of environmental law there arose the practice of friendly parties bringing lawsuits against the Environmental Protection Agency that would result in settlements and consent decrees under which the agency would effectively regulate through settlement, rather than under the process in the APA. U.S. Chamber of Commerce, Report on Sue and Settle, May 2013.[3] This practice has been disparagingly named *sue and settle* and has expanded to other areas of law. *Id*.

The sue-and-settle process creates several contradictions with the APA and a democratic government. First, it amounts to rulemaking without following the procedure dictated by the APA. For example, the

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[3] https://www.uschamber.com/assets/archived/images/legacy/reports/SUEANDSETTLEREPORT-Final.pdf

APA generally requires notice-and-comment to allow public participation in the regulatory process. 5 U.S.C. § 553. Under sue-and-settle, only the parties participate in what effectively becomes rule making and the public entirely is cut out of the process. Second, agencies are allowed to change policy with new administrations and new situations by making changes to regulation. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). Under the sue-and-settle process, agencies are bound indefinitely to a consent decree, even when made by a previous administration. *See Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017) (holding a 20-year-old settlement agreement was still binding on subsequent administrations). Third, the only way for outsiders to have influence to participate in sue-and-settle rulemaking is to go through the expense of intervention within a very short timeframe. *E.g.*, *W. Watersheds Project v. Jewell*, No. 2:14-cv-00731-JNP-BCW, 2016 U.S. Dist. LEXIS 141490, at *4–6 (D. Utah Oct. 12, 2016) (denying motion to intervene because it was not made when the case was stayed for settlement).

The case docket here suggests that sue-and-settle is likely in play. *See* Stipulation, ECF 66. This stipulation is more troubling than normal because the parties indicate that they are discussing settlement over policies not even challenged by the complaint. *See* Stipulation, ECF 66 ("and related policies"). The fact that new issues are being discussed for settlement further emphasizes the timeliness of Kansas's motion to intervene. Until the courts or Congress address the undemocratic process of sue-and-settle, the only means for affected outside parties to participate in the law-making process is through such intervention. *See* ECF 67 at 21–22 (Describing injury to the state Interve-

nors).

II. DHS cannot waive standing for Plaintiffs.

A troubling aspect of any potential settlement is standing. DHS vigorously asserted that the Plaintiffs lack standing. Cross Mot. for Sum. J., ECF 53, at 12–17. The parties are in settlement discussions "regarding implementation of the challenged rule and related policies." Stipulation, ECF 66. Should any settlement take place at this point, it would effectively be a waiver of the standing requirement. Yet, "[s]tanding cannot be waived or forfeited." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019).

Standing might be less of an issue if the complaint solely sought to enforce Defendants' personal rights. Nonetheless, the complaint seeks to change the immigration system for the entire nation. Compl., Prayer for Relief. Worse yet, the parties have indicated that, not only are they are discussing settlement of claims that affect the nation at large but also, they are discussing related policies that have not even been challenged in the complaint. Stipulation, ECF 66. Parties are free to settle and dismiss claims on their own but a court is powerless to give a court order "if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing." *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019).

Some of the complaint's calls for relief are specific to individual plaintiffs. Compl. (f)–(g). Such individual relief could be settled between the parties in some form. *Frank*, 139 S. Ct. at 1046. However, most of Plaintiffs' relief calls for judicial intervention. Comp. (a)–(e). Therefore, most of the claims cannot be settled without litigation to de-

termine whether Plaintiffs have standing. *Frank*, 139 S. Ct. at 1046. The stipulation asserts that the negotiations "could eliminate the need for further litigation." ECF 66. Unless Plaintiffs intend to surrender most of their claims, one can infer from the stipulation that the parties are waiving the standing requirement when they have no power to do so. *Bethune-Hill*, 139 S. Ct. at 1951. Intervention by the states would allow the standing requirement to be litigated.

III. Standing is not an issue for the state Intervenors under Supreme Court Precedent.

The proposed state Intervenors persuasively argue that the have standing to intervene. Mot. ECF 67 at 20–22. For brevity, *Amicus* does not recycle their arguments. Instead, *Amicus* points out that under Supreme Court precedent, proposed Intervenors have no need to establish standing on their own.

Only one party needs to have standing. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). An intervenor need only establish standing to pursue claims not asserted by the parties. *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439–40 (2017). A proposed intervenor-defendant does not need to establish standing when their position is the same as a defendant that has standing. *McConnell v. FEC*, 540 U.S. 93, 233 (2003). Here neither Defendants nor proposed state intervenors have asserted any claims. Mot. to Intervene, ECF 67 at 6–7; Cross Mot. for Sum. J., ECF 53 at 27–56. Therefore, proposed Intervenors do not present new claims for which standing needs to be established. "Requiring standing of someone who seeks to intervene as a defendant runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction." *Roeder v. Islamic Republic of Iran*, 333 F.3d

228, 233 (D.C. Cir. 2003).

One oddity in the law on intervenor standing is that D.C. Circuit precedent remains inconsistent with Supreme Court precedent. The D.C. Circuit observed there was a circuit split on the question of whether an intervenor must separately establish standing. *Deutsche Bank Nat'l Tr. Co. v. FDIC,* 717 F.3d 189, 193 (D.C. Cir 2013) (citing *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533 (D.C. Cir. 1999)). And the D.C. Circuit came down on the side of requiring showing standing. *Id*. Yet it did so *after* the Supreme Court had already resolved the circuit split in favor of not requiring standing for intervenors when they are not asserting a claim or counter-claim separate from an existing party. *Compare Deutsche Bank,* 717 F.3d. at 193 (2013) *with McConnell*, 540 U.S. at 233 (2003). The D.C. Circuit's precedent on this question still has not aligned itself with that of the Supreme Court. *E.g., Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 318 (D.C. Cir. 2015).

CONCLUSION

For the foregoing reasons, this Court should grant the motion of the State of Kansas *et al*. to intervene.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

This brief complies with the Fed. R. App. P. 29(a)(4) because it contains 1,534 words.

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