No. 20-1784

In the United States Court of Appeals for the Third Circuit

AARON HOPE, *et al.*,
Petitioners-Appellees,

v.

CLAIR DOLL, Warden of the York County Correctional Facility, *et al.*,
Respondents-Appellants.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, NO. 1:20-CV-00562-JEJ
HON. JOHN E JONES, III, DISTRICT JUDGE

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

Christopher J. Hajec
Director of Litigation
Immigration Reform Law Institute
25 Massachusetts Ave, NW, Ste 335
Washington, DC 20001
Tel: 202-232-5590
Fax: 202-464-3590
Email: chajec@irli.org

Lawrence J. Joseph
Cal. Bar #154908
1250 Connecticut Av NW, Ste 700-1A
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

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: May 7, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

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

STATEMENT OF THE CASE

Twenty criminal alien detainees (hereinafter, "Petitioners") in the removal process petitioned the district court for a writ of habeas corpus to seek immediate release from detention because of the heightened health risk they allegedly face from the Covid-19 virus. The respondents are federal officers or offices involved with Petitioners' removal or detention (hereinafter, the "Government").

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[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.

Petitioners' crimes include assault, assault with a deadly weapon, firearms charges, cocaine trafficking, and money laundering. Gov't Br. at 6-7. Several were subject to mandatory detention under 8 U.S.C. § 1226, and several had failed previously to appear for criminal trials or committed additional crimes while out on bail, parole, probation, or other conditions of release. Gov't Br. at 35.

Petitioners moved for a temporary restraining order ("TRO"), which the district judge issued without waiting to hear from the Government. *See* Appellants' App. at 14 (ordering immediate release on Petitioners' own recognizance to shelter at home). The district judge found Petitioners likely to prevail on the merits on not only a Due Process claim — the judge could not see a rational basis for detention based on flight risk, Appellants' App. vol. I, at 11 — but also on an Eighth Amendment deliberate-indifference claim. *Id.* at 11 n.11. The Government sought reconsideration and subsequently filed a lengthy brief with rebuttal evidence to Petitioners' claims, but the district judge held that the Government failed to cite new evidence or supervening changes in the law that would justify reconsideration. The Government appealed, and a prior panel of this Court found appellate jurisdiction.

STANDARD OF REVIEW

Plaintiffs or petitioners who seek interim relief must establish that they likely will succeed on the merits and likely will suffer irreparable harm without interim 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).

Although appellate courts review factual issues under the abuse-of-discretion standard, they review legal conclusions *de novo*: "[A] court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Even interim relief, moreover, requires jurisdiction, *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983), an issue this Court reviews *de novo*. *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 358 (3d Cir. 2015) (courts "exercise plenary review over a threshold question of law, such as that presented by an Article III standing challenge"); *Stehney v. Perry*, 101 F.3d 925, 929 (3d Cir. 1996) (same for sovereign immunity); *Coleman v. Kaye*, 87 F.3d 1491, 1497 (3d Cir. 1996) ("plenary review over jurisdictional issues").

SUMMARY OF ARGUMENT

Petitioners lack standing under all three parts of the standing inquiry: (1) they have no legally protected interest in their release into the United States while their removal proceedings resolve (Section I.A.1); (2) they *do* have the right to avoid detention by simply leaving the United States, which makes their detention a self-inflicted injury not caused by the Government (Section I.A.2); and (3) release is not an available remedy for terms-of-confinement claims, so their desired remedy is not within the power of a court to grant (Sections I.A.3, I.B.3). The voluntary nature of

their continued detention also renders their constitutional claims untenable (Section I.B.2). Similarly, Petitioners' lack of standing and the self-inflicted nature of their detention also vitiate their claims of irreparable harm (Section II.A), making the balance of the equities tip sharply to the Government (Section II.B). Finally, the public interest tracks the merits and the Government's interests in protecting the public (Section II.C).

ARGUMENT

I. PETITIONERS ARE NOT LIKELY TO PREVAIL.

The first — and most important — *Winter* factor is the likelihood of movants' prevailing. *Winter,* 555 U.S. at 20. Petitioners are unlikely to prevail for two reasons. First, Petitioners cannot prevail because they lack a right to be released *into the United States*, even assuming they could establish that the terms of their confinement violated the Constitution. Instead, their available remedies are judicial modification of the terms of confinement in the United States or release to their own country. Second, Petitioners' merits claims are weak and unlikely to prevail; Petitioners prevailed below only because the district judge applied the post-judgment criteria for reconsideration to the *initial* consideration of the Government's arguments after the district judge had issued the TRO *ex parte*, without Government input.

A. Petitioners lacked Article III standing for their release.

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). Appellate courts must determine not only their own appellate jurisdiction, but also the lower courts' jurisdiction, *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 95 (1998), even if the parties concede jurisdiction: "Although the parties did not raise the issue in their briefs on the merits, we must first consider whether we have jurisdiction to decide this case." *Demore v. Kim*, 538 U.S. 510, 516 (2003) (interior quotation marks omitted); *cf. Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991) (jurisdictional arguments are an exception to rule that courts ordinarily do not consider issues raised only by an *amicus*). Jurisdiction poses several barriers that this Court should resolve before reaching the merits.

Under Article III, a "bedrock requirement" is that federal courts are limited to hearing cases and controversies. U.S. CONST. art. III, § 2; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 471 (1982). As relevant here, courts assess Article III standing under a tripartite test for an "injury in fact": judicially cognizable injury to the plaintiff, causation by the challenged conduct, and redressability by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). For related reasons, Petitioners fail all three prongs of the standing analysis.

1. Petitioners lack an injury in fact.

Although immigration detainees understandably resent detention pending completion of their immigration proceedings, they simply have no right to be in the United States until those proceedings resolve. An Article III "injury in fact" requires "an invasion of a *legally protected interest* which is … concrete and particularized" to that plaintiff. *Defenders of Wildlife*, 504 U.S. at 560 (emphasis added). Petitioners have no such rights.

As the Supreme Court recently explained in rejecting standing for *qui tam* relators based on their financial stake in a False Claims Act penalty, not all *interests* are *legally protected* interests:

> 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*. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion[.]

Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 772-73 (2000) (emphasis added, interior quotation marks, citations, and alterations omitted); *accord McConnell v. FEC*, 540 U.S. 93, 226-27 (2003). Thus, not all pecuniary losses necessarily qualify as an injury in fact. The same is true with Petitioners' liberty interests.

"[Article] III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue." *Diamond v. Charles*, 476 U.S. 54, 70 (1986); *cf. Stevens*, 529 U.S. at 772-73 (claimed interest must qualify as a "legally protected right"). Because excluding aliens is an act of sovereignty, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), and federal immigration law allows — or even *requires* — these detentions, Petitioners lack a legally protected interest in their release into the United States while they challenge their removal.[2] Consequently, this Court should hold that Petitioners lack a legally protected interest in their release into the United States during their removal proceedings.

2. Petitioners lack causation.

For purposes of Article III, the Government did not *cause* Petitioners' detention. Immigration detainees fighting removal can avoid detention by leaving the United States. *See*, *e.g.*, 8 U.S.C. § 1229a(d); 8 C.F.R. § 1003.25(b) (stipulated removal). The ability to end detention by simply leaving the United States distinguishes Petitioners from dissimilarly situated citizens and long-term residents in civil and criminal detentions.

Detention while a detainee tries to gain entry to or avoid removal from the

[2] Although this requirement is analogous to the prudential zone-of-interests test, *Stevens* and *McConnell* make clear that the need for a *legally protected interest* is an element of the threshold inquiry under Article III of the Constitution, not a merely prudential inquiry that a party could waive.

United States is a part of the entry and removal process. Thus, immigration detainees like Petitioners cannot analogize their circumstances to compelled detention in the criminal or civil contexts for residents or citizens. Unlike residents or citizens in compelled criminal or civil detention, immigration detainees like Petitioners "carry the keys of their prison in their own pockets." *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1947) (interior quotation marks omitted). A detainee's ability to escape detention by simply leaving the United States undermines any liberty claim.

As explained under the merits in Section I.B.2, *infra*, such detainees choose detention over the other perfectly viable and lawful choice — leaving the United States — they cannot credibly ask a court to compare them to lawful residents facing compelled civil or criminal detention. Instead, under standing's causation requirement, a "self-inflicted injury" cannot manufacture an Article III case or controversy. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Petitioners' detention is their own choice.

Amicus IRLI does not dispute that the detainees may have an Article III case or controversy with the United States on whether the detainees qualify to enter or remain in the United States, but "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), so a plaintiff or petitioner must have standing for each remedy he or she seeks. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Detainees cannot bootstrap claims for release into the United States onto an

immigration claim about whether they can enter or remain in the United States. Until their immigration claims resolve, such detainees must choose between detention and leaving. The choice they make does not entitle them to raise new claims, premised only on their own choice. In other words, they cannot choose detention, then challenge the detention that they chose.

Simply put, these aliens have no right to remain in or be at large in the United States, *Plasencia*, 459 U.S. at 32, and they cannot manufacture that right by deciding to stay while they challenge their removal. *Clapper*, 133 S.Ct. at 1152-53. Having the right to a determination of admissibility or removability does not create the right to reside at large here while the immigration system resolves that inquiry.

3. Petitioners lack redressability.

As explained in Section I.B.3, *infra*, release is not a viable remedy in cases about the *conditions* of confinement. Instead, the proper remedies are judicially altered terms of confinement. Under the circumstances, Petitioners lack redressability for their release remedy, even if they would have redressability for a judge to alter the terms of their confinement.

B. Petitioners' merits claims are unlikely to prevail.

Amicus IRLI supports the Government's merits arguments. *See* Gov't Br. at 18-34. The following two subjections supplement those arguments on a few points.

1. The district court failed to consider the Government's evidence and applied the wrong standard of review.

Where the TRO remedy (namely, release) was "the whole ball game," that relief should not have issued as interim relief. *Winter*, 555 U.S. at 33. *A fortiorari*, the district court should not have issued the TRO without considering the Government's evidence. This is especially true where the claims are constitutional. In the context of standing, the Supreme Court has remarked that "concrete adverseness … sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). In the same vein, *amicus* IRLI respectfully submits that it would have helped the district judge to understand the case if he had had the benefit of the Government's adverse case. The Government readily dispels the claim of a lack of a rational basis for Petitioners' detention under the Due Process Clause and the deliberate-indifference claim under the Eighth Amendment. *See* Gov't Br. at 19-22, 22-29. Once a court has considered the other side of the story, Petitioners are unlikely to prevail on either claim.

As the Government explains, the district court then compounded its error by holding the Government to the heightened standard of review for reconsideration applicable to post-judgment motions (*e.g.*, new evidence, supervening legal authority), when the Government was simply making its *initial* showing. *See* Gov't Br. at 14-15. While this argument suffices to vacate the injunction, this Court should

go further to ensure that the district judge does not repeat the error on remand.

2. An Eighth Amendment cruel-and-unusual finding is absurd for immigration detainees who can elect to leave the country to pursue their immigration challenges from their own countries.

Immigration detainees are detained because they have chosen to seek to avoid removal. Because these detainees have chosen detention over the other perfectly viable and lawful alternative — leaving the United States — they cannot credibly compare themselves to citizens and lawful residents who face compelled civil or criminal detention. Since no one is keeping them here, they cannot challenge the legislative grace that allows them to stay temporarily at the taxpayers' expense.

As the Supreme Court has explained, "in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." *Reno v. Flores*, 507 U.S. 292, 305-06 (1993) (interior quotation marks omitted); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) ("in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act"). Congress has plenary power over immigration, U.S. CONST. art. I, §8, cl. 4; *Plasencia*, 459 U.S. at 32 (controlling immigration an act of sovereignty), and its actions here are neither challenged nor open to challenge. If Petitioners chose to stay, they must stay on the terms that Congress provided. A third choice — release into the United States — is not an

option that Congress gave them.

3. The district court should not have ordered *habeas* release based on the terms of confinement.

The Government correctly argues that the remedy for a terms-of-confinement claim is to alter the terms of confinement, not to release the detainee. Gov't Br. at 29-31. The circuits are split on the question of whether such claims outside the "core" of habeas can nonetheless be brought in a habeas petition. *See Wilborn v. Mansukhani*, 795 F.App'x 157, 163-64 (4th Cir. 2019) (collecting cases). But the question of *how to bring the claim* is different from *what remedies are available* when a petitioner or plaintiff properly presents the claim. Release remains an improper remedy, even if the claim were properly presented.

"[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973), abrogated in part on other grounds, Prison Litigation Reform Act of 1995, PUB. L. NO. 104-134, title VIII, 110 Stat. 1321, 1321x66 (1996). By contrast, if a detainee challenges the *conditions of confinement*, that falls under civil rights litigation. *Preiser*, 411 U.S. at 499. How a petitioner or plaintiff initiates suit can go to subject-matter jurisdiction, *Cardona v. Bledsoe*, 681 F.3d 533, 537 (3d Cir. 2012) (habeas action lacked subject-matter jurisdiction where success "would not *necessarily* result

in a change to the duration of his sentence") (emphasis in original), but the Government is correct that the terms-of-confinement remedy should be a judicial change to the terms of confinement, not release.

Dicta in *Preiser* left open the possibility of arguing terms of confinement in habeas litigation: "This is not to say that habeas corpus may not also be available to challenge such prison conditions." *Id.* (citing *Johnson v. Avery*, 393 U.S. 483 (1969); *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971)). The *Preiser dicta* left the door open for challenges to the terms of confinement in habeas actions:

> When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal.

Preiser, 411 U.S. at 499 (citing Note, *Developments in the Law -- Habeas Corpus*, 83 HARV. L. REV. 1038, 1084 (1970)). As explained below, however, the *Preiser dicta* does not help Petitioners for two independent reasons.

First, as the Court acknowledged, "the question is not before us." *Preiser*, 411 U.S. at 500.[3] So the statement was pure *dicta*.

Second, any relief for a petitioner would be subject to the government's right to transfer detainees to a different facility:

[3] The Court has subsequently declined to reach the issue. *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979); *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1862-63 (2017).

> [F]ederal courts, although never so holding, have often assumed the right to review prison conditions on habeas corpus in response to claims that they violated the eighth amendment proscription of cruel and unusual punishment. … The basis for habeas jurisdiction in these cases is that, insofar as the manner of the prisoner's detention violated his … eighth amendment rights, he was held unlawfully in custody. The prisoner would be released from such a confinement, *subject, of course, to the state's right to transfer him to a valid — and perhaps physically identical — confinement*.

Habeas Corpus, 83 HARV. L. REV. at 1083-84 (emphasis added). For the district judge simply to release dangerous aliens with histories of skipping hearings had no basis in the law.

II. THE OTHER *WINTER* FACTORS SUPPORT THE GOVERNMENT.

Given the lack of not only a likelihood of prevailing on the merits but also jurisdiction, this Court could vacate the injunction without considering the other three *Winter* factors. In any event, each additional *Winter* factor supports *vacatur*.

A. Petitioners 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, Petitioners do not even have standing for the relief that they seek. *See* Section I.A, *supra*. But even assuming *arguendo* that Petitioners could satisfy Article III, they still could not show irreparable harm.

Again, assuming *arguendo* that Petitioners' alleged injuries could qualify as an "injury in fact" under Article III, the self-inflicted nature of the harm disqualifies the harm as irreparable: "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). Petitioners do not allege a cognizable harm: if they want to pursue their immigration status, they must do so on the terms that Congress provided.

B. The balance of equities favors the Government.

The third *Winter* factor — the balance of equities, *Winter,* 555 U.S. at 20 — tips strongly in the Government's favor for two reasons. First, the Government's advantage on jurisdiction and the substantive merits tips the equities in its favor. *See* Sections I.A-I.B, *supra*. Second, Petitioners' tenuous interest — if even cognizable, *see* Section I.A, *supra* — undercuts Petitioners' ability to assert a countervailing form of irreparable harm. *See* Section II.A, *supra*. For all these overlapping reasons, the balance of the equities tips decidedly in the Government's favor.

C. The public interest favors the Government.

The last *Winter* factor — the public interest, *Winter,* 555 U.S. at 20 — also favors the Government. Where the parties dispute the lawfulness of government

programs, this public interest can collapse into the merits. *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). But even a plaintiff likely to prevail on the merits is not automatically entitled to an injunction against the Government. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law"). "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.,* 319 U.S. 315, 318 (1943). In public-injury cases, equitable relief that affects competing public interests "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff" because courts also consider adverse effects on the public interest. *Yakus v. United States*, 321 U.S. 414, 440 (1944). In that regard, the district court should not have released dangerous felons — many of whom Congress has mandated to be detained — without even considering the Government's evidence.

CONCLUSION

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

Dated: May 7, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Christopher J. Hajec
Director of Litigation
Immigration Reform Law Institute
25 Massachusetts Ave, NW, Ste 335
Washington, DC 20001
Tel: 202-232-5590
Fax: 202-464-3590
Email: chajec@irli.org

Lawrence J. Joseph, Cal. Bar #154908
Law Office of Lawrence J. Joseph
1250 Connecticut Av NW, Ste 700-1A
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

STATEMENT OF RELATED CASES

Amicus curiae Immigration Reform Law Institute adopts the appellants' statement of related cases.

COMBINED CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies compliance of the accompanying brief with the following requirements of the FEDERAL RULES OF APPELLATE PROCEDURE and the Local Rules of this Court.

1. Pursuant to Local Rule 28.3(d), counsel for *amicus curiae* is a member of this Court's bar.

2. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and 29(c)(5) and this Court's order dated April 12, 2018, because:

This brief contains 3,849 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

3. 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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4. Pursuant to Local Rule 31.1(c), (1) the electronic submission of this document is an exact copy of the corresponding paper document filed with the Court; and (2) the document has been scanned for viruses with Norton 360 (version

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Dated: May 7, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com