IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAKE THE ROAD NEW YORK, ET AL.,

Plaintiffs-Appellees,

—v.—

CHAD F. WOLF, ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY, ET AL.,

NO. 19-5298

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appellants, all defendants in the district court sued in their official capacities, are Chad F. Wolf, Acting Secretary of Homeland Security, Matthew T. Albence, Acting Director of United States Immigration and Customs Enforcement, Kenneth T. Cuccinelli II, Acting Director of United States Citizenship and Immigration Services, Mark L. Morgan, Acting Commissioner of U.S. Customs and Border Protection, and William P. Barr, Attorney General of the United States.

Appellees, all plaintiffs below, are three associations: Make the Road New York, La Union del Pueblo Entero, and WeCount!

Joint *amici curiae* in the district court were the States of California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, Washington, and the District of Columbia.

B. Rulings under Review

Defendants seek review of the district court's September 27, 2019, Opinion and Order, Judge Ketanji Brown Jackson, Docket No. 40 and 41, *Make the Road New York, et al. v. Kevin McAleenan, et al.*, 1:19-cv-02369-KBJ.

C. Related Cases

This case has not previously been before this Court.

DISCLOSURE STATEMENT

The Immigration Reform Law Institute is a 501(c)(3) nonprofit corporation. It does not have a parent corporation and does not issue stock.

All parties have consented to the filing of this *amicus curiae* brief. No party or party's counsel authored any part of this brief. No person or entity, other than *amicus* or its members, has made a monetary contribution to its preparation or submission.

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
BIA	Board of Immigration Appeals
ECF	Docket Entry for District Court
INA	Immigration and Nationality Act
IRLI	Immigration Reform Law Institute
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996
Op'n	District Court's Opinion re Grant of Motion for Preliminary Injunction. ECF No. 40

IDENTITY OF *AMICUS CURIAE*

The Immigration Reform Law Institute is a nonprofit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens, and assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases and federal venues. For more than twenty years, the Board of Immigration Appeals has solicited supplementary briefing prepared by IRLI staff.

SUMMARY OF THE ARGUMENT

The District Court granted plaintiffs' motion for a preliminary injunction, finding subject matter jurisdiction to review the government's discretionary application of expedited removal procedures to all aliens described in the statute, 8 U.S.C. § 1225(b)(1)(A)(iii)(II) ("subclause II"). The Court found that (1) the review-stripping provisions 8 U.S.C. § 1252 applied to plaintiff associations' claims of harm to their members under the INA but not the APA, (2) associational standing to remedy three kinds of harm to three different classes of association members was established, and (3) procedures used to "implement" the government's notice of expanded application failed to provide notice-and-comment, and arbitrarily ignored harms to the anonymous alien members that were imminent and non-remediable.

Amicus IRLI invites this Court's attention to gaps and flaws in the District Court's jurisdictional rulings on subject-matter and standing. The District Court

erred in failing to recognize that both statutes provide a cause of action, and IIRIRA tightly restricted review over challenges to implementation of expedited removal, in particular by enacting jurisdictional time limits that were brushed aside by the District Court.

The Court based its standing analysis on a passionate but misplaced belief that the expedited removal process is unjust and its implementation has always been flawed. IRLI describes how the "implementation" of expedited removal has proceeded exactly as Congress ordained. Thus, vague findings (made decades after promulgation of the controlling regulations) of agency failure to explicitly weigh the concerns of the associations and the *amici* States, or of the fear of mistaken removal, or of the trauma of circumscribing daily activities to avoid encounters with immigration officers in the interior, do not and cannot constitute legally cognizable harm.

ARGUMENT

I. The District Court lacked subject-matter jurisdiction over both the INA and the APA claims.

The District Court erred by concluding that "the INA does not bar the Court's exercise of subject-matter jurisdiction over Plaintiffs' APA claims." Op'n at 33-34.

Jurisdiction cannot be waived. *Floyd v. District of Columbia,* 129 F.3d 152, 155 (D.C. Cir. 1997). "If an adequate remedy at law exists" for the agency action

about which a plaintiff complains, then "equitable relief is not available under the APA." *R.J. Reynolds Tobacco Co. v. U.S. Dep't of Agriculture*, 130 F. Supp. 3d 356, 378 (D.D.C. 2015); 5 U.S.C. § 704. Even when the APA provides the only remedy, the APA presumption of judicial review "is just a presumption… and under [5 U.S.C.] § 701(a)(2) judicial review is not available where the subject action is committed to agency discretion by law." *Lincoln v. Vigil*, 508 U.S. 182, 190-91 (1993) (internal quotation marks omitted). Additionally, "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," the APA waiver of sovereign immunity does not apply. 5 U.S.C. § 702.

In unequivocal language, Congress delegated authority to the Secretary of Homeland Security to invoke and implement expedited removal procedures against a designated "subclause II" class of aliens.[1] IIRIRA, P.L. 104-208, §302 (1996), as codified at 8 U.S.C. § 1225(b)(1)(A)(iii)(I) ("Such designation shall be in the sole and unreviewable discretion of the [Secretary] and may be modified at any time."). Subclause II aliens are "not admitted or paroled into the United States," and have "not affirmatively shown, to the satisfaction of an immigration officer, that the

[1] The purpose of the expedited removal procedures enacted under IIRIRA remains "to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted …, while providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum claims." H.R. Conference. Report. No. 104-828, at 209 (1996).

alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility" made under "this subparagraph." 8 U.S.C. § 1225(b)(1)(A)(ii).

Using the phrase "notwithstanding any other provision of law"—which by its own terms includes both APA jurisdiction and federal question jurisdiction under 28 U.S.C. § 1331—IIRIRA also stripped the District Court of jurisdiction to review, *inter alia*, "a decision" by the Secretary "to invoke the provisions" of the expedited removal statute; "the procedures and policies adopted by the [Secretary] to implement the provisions of" 8 U.S.C. § 1225(b)(1); or the "application of such section to individual aliens." IIRIRA §306(a), as codified at 8 U.S.C. § 1252(a)(2)(B)(ii)-(iv).

For each of these three jurisdiction-stripping subclauses, Congress provided precise exceptions ("as provided in subsection [8 U.S.C. § 1252](e)") to the bars to judicial review in subparagraph § 1252(a)(2). Review is narrowly available for "determinations under section [1225](b) and its *implementation*…." 8 U.S.C. § 1252(e)(3)(A). As relevant here, the exceptions include restrictions (1) on venue (U.S. District Court for the District of Columbia), *id.*; (2) on subject matter ("whether … a regulation, or a written policy directive, or … written procedure issued … to implement [section 1225(b)(1)] is unconstitutional; or … not consistent with the applicable provisions of this title or is otherwise in violation of

law"), § 1225(e)(3)(A)(ii); and (3) a jurisdictional limitation on the time for filing a challenge ("no later than 60 days after the date the challenged… regulation, directive, … or procedure … is *first implemented*"), § 1225(e)(3)(B) (emphasis added).

a. The IIRIRA 60-day filing deadline is fatal to Plaintiffs' jurisdictional claims.

Congress directed that unless the jurisdictional venue, subject matter, and time limitation conditions of 8 U.S.C. § 1252(e)(3) are met, "no court may enter … injunctive relief … in *any* action *pertaining to* an order to exclude an alien in accordance with section 235(b)(1)…." 8 U.S.C. § 1252(e)(1)(A) (emphasis added). Absent implementation of a notice of applicability, no subclause II alien could ever be ordered removed under 8 U.S.C. § 1225(b)(1). The text "*any* action *pertaining to* an [expedited removal] order" thus clearly encompasses implementation of such notices, the agency action challenged by the plaintiffs.

The District Court declined even to discuss the applicability of the section 1252(e)(3)(B) jurisdictional deadline, noting in passing that it only applied to due process claims that it did not reach. *See* Op'n at 43, note 16. The Court ignored that the time limitation at 8 U.S.C. § 1252(e)(3)(B) is jurisdictional and not a statute of limitations. "Congress designed the statute so that the 60 days ran from a fixed point, the initial implementation of the challenged provisions, rather than from the date of application of IIRIRA to a particular alien." *American Immigration*

Lawyers Ass'n v. Reno , 18 F. Supp. 2d 38, 46-47 (D.D.C. 1998) *aff'd* 199 F.3d 1352 (D.C. Cir 2000) ("*AILA*").

For more than a generation, the agency has progressively implemented expedited removal for subclause II aliens using the exact same procedures rejected by the District Court. First, the expedited removal statute was implemented in 1996. *See* IIRIRA §309. Challenges to its constitutionality have thus been time-barred for more than twenty years.

Next, final regulations *implementing* 8 U.S.C. § 1225(b)(1) were published in 1997. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures; 62 Fed. Reg. 10311 (Mar. 6, 1997). The Attorney General implemented these regulations only after conducting full and proper APA notice-and-comment procedures.

The 1997 regulations continue to govern all aspects of expedited removal. Part 235

> regulate[s] how the inspecting officer is to determine the validity of travel documents, how the officer should provide information to and obtain information from the alien, and how and when an expedited removal order should be reviewed.

AILA,18 F. Supp. 2d, at 43. *See, e.g*., 8 C.F.R. § 235.3(b)(1)(ii) (delegating sole discretion to apply expedited removal procedures at any time to any class of aliens described in "subclause II," effective upon publication of a notice in the Federal

Register); 8 C.F.R. § 235.3(b)(2) (requiring that an examining immigration officer create a record of the proceedings, inform the alien of due process rights, solicit and record the alien's responses to questions as to status and inadmissibility, and serve a Notice and Order of Expedited Removal); 8 C.F.R. § 235.3(b)(4) (mandatory diversion for credible fear screening); 8 C.F.R. § 235.3(b)(5) (additional review procedures if U.S. citizen, lawful permanent resident, or asylee status is claimed); and 8 C.F.R. § 235.3(b)(7) (requiring concurrence of supervising officer to issue order). *See also* 8 C.F.R. § 208.30(d)(4) (privilege to consult with third party before and after credible fear interview). Section 235.3 specifies the record an immigration officer must create during the expedited removal process and the advisements that the officer must give to individuals subject to expedited removal. *United States v. Baraja-Alvarado,* 655 F.3d 1077, 1081 (9th Cir. 2011). This Circuit recognizes these regulations as the "implementing regulations" for the expedited removal system. *See AILA*,18 F.Supp. 2d at 43-45.

The 60-day jurisdictional deadline to file challenges to the above procedures and practices, or any others implemented by the 1997 regulations, thus applies to claims of defects in the "implementation" of mandatory APA notice-and-comment requirements. That deadline expired prior to June 1, 1997.

Initially, Attorney General Janet Reno exercised her discretion to apply expedited removal only to the mandatory class of "arriving aliens" seeking entry into the United States. 8 U.S.C. § 1225(b)(1)(A)(i). The 1997 regulations, however, expressly reserved the agency's right "to apply the expedited removal procedures to additional classes of aliens within the limits set by the statute, if, in the Commissioner's discretion, such action is operationally warranted." 62 Fed. Reg. 10312, 10314 (Mar. 6, 1997). Attorney General Reno chose not to apply the screening to any subclause II aliens due to uncertainty at that time about the agency's operational capabilities and resources. *Id.* at 10312-13.

But in 2002, invoking its authority to designate "any … aliens" described in subclause II, the Bush administration applied expedited removal screening for aliens who arrived by sea, were not admitted or paroled, and, prior to a determination of inadmissibility by an immigration officer, had not been continuously physically present in the United States for two years. The designation and implementation for the expanded class were made, as required by 8 C.F.R. § 235.3(b)(1)(ii), by notice published in the Federal Register. *See* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924, 68925-26 (Nov. 13, 2002). By operation of the jurisdictional deadline, the final date for challenges to (1) the validity of implementation of the full temporal extent of expedited removal

screening to "any" subclause II aliens, (2) the validity of agency practices used to determine "continuous presence" during the two-year period, or (3) the use of publication of a notice in the Federal Register to "implement" expanded application of expedited removal screening procedures, would have been no later than January 13, 2003. 8 U.S.C. § 1252(e)(3)(B).

In 2004, the government again expanded the use of expedited removal to an additional class of subclause II aliens, those encountered by an immigration officer within 100 air miles of a land border who fail to establish to the satisfaction of an immigration officer that they had been continuously physically present in the United States for 14 days. Again, implementation occurred through notice in the Federal Register. *See* Notice Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004). The 2004 notice applied the new designation, but otherwise made no changes whatsoever to the procedures or practices needed to apply expedited screening to this additional class of subclause II aliens, practices that the agency had fully *implemented* years earlier under the 1997 regulations.

Even if that 2004 application of expedited removal screening procedures to the additional class had been "not consistent" with an "applicable provision" of Title 8, or was "otherwise in violation of law," and even if that alleged inconsistency or violation occurred in an action *not* governed by the 1997 regulations, it would still have been a challenge to the validity of the system, and

thus time-barred if not filed with the U.S. District Court for the District of Columbia within 60 days, that is, by October 11, 2004.

In 2017, the acting Secretary under the incoming Trump administration exercised her discretion to eliminate an existing exemption—for subclause II aliens who were Cuban nationals—from the expedited removal screening designations implemented by the 2002 and 2004 Federal Register notices. *See* Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 Fed. Reg. 4902 (Jan. 17, 2017). As in 2002 and 2004, the Secretary designated the new class by notice in the Federal Register. The 1997 regulations continued to govern all other aspects of implementation.

Later that month, President Trump published an Executive Order directing the Secretary of Homeland Security, John Kelly, to apply expedited removal to "all" aliens described in subclause II who had not already been designated for such screening. *See* Exec. Order No. 13767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 30, 2017) ("Executive Order"). The Executive Order did not set a date by which the new designation was to be operational.

b. The residual subject matter not barred by the jurisdictional filing deadline is practically a null set.

A fourth notice—issued pursuant to the Executive Order and 8 C.F.R. § 235.3(b)(1)(ii) and the subject of this appeal—designated the class of all remaining subclass II aliens described in 8 U.S.C. § 1225(b)(1)(A)(iii)(II) who were "not previously designated" in 2002, 2004, or 2017. *See* Notice Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019).

Plaintiffs challenged this fourth notice in the correct venue, U.S. District Court for the District of Columbia. ECF 1. The District Court granted a preliminary injunction against implementation of the 2019 designation, on the ground that plaintiffs were likely to succeed with their claims of APA subject matter jurisdiction, and that DHS violated the APA by "fail[ing] to engage in required notice and comment rulemaking before implementing the July 23rd Notice," Op'n at 65. Plaintiffs asserted that their claims

> all go to the manner in which Defendants *implement* the designation decision, including the process by which that designation is made, as well as the manner in which Defendants implement the expedited removal statute through written rules and policies that set out the procedures that apply in expedited removal proceedings.

ECF 28, Plaintiffs Reply in Supp't Motion for Prelim. Inj., at 7 (Sep. 3, 2019). "Section 1225(b)(1)(A)(iii) … did not—and could not—require Defendants to

[expand expedited removal] without fair procedures." *Id.* The District Court agreed:

> DHS fail[ed] to acknowledge the due process problems in the *existing* expedited removal system, and ... due to this unexplained oversight the record amply demonstrates that the agency cannot have ensured the New Designation's fair application to those newly subject to the Rule… [so that] the flaws in the *pre-existing scheme* were so glaring that the agency's failure to account for them when it adopted the New Designation renders the July 23rd Notice irretrievably infirm.

Op'n at 83-84 (emphasis added).

District court jurisdiction over these new claims was nonetheless defective because they are time-barred. The 1996 statute and the 1997 regulations were the final government actions that "implemented" virtually all aspects of expedited removal screening. Notably, the agency met the APA requirement for notice and comment in 1997, when it apparently received no public comments regarding the regulation authorizing designation by Federal Register notice; nor were any timely challenges filed to the application by notice procedure. Sixty days after implementation of the 1997 regulations, jurisdiction also lapsed for the current plaintiffs' claims of systemic "glaring" "flaws *in the preexisting scheme*" (emphasis added), including alleged due process deficiencies. Lapsed jurisdiction also extends to review of any "glaring" flaws in the 1997 regulatory interpretations of the subclause II provision mandating that the alien bear the affirmative burden to convince the immigration officer of his or her two-year continuous presence.

In summary, the jurisdictional deadline has passed for virtually all aspects of expedited removal practices and procedures, including most elements of the implementation of subclause II designations under the 2002, 2004 and 2017 designations. When Congress expressly limited the deadline to bring systemic challenges to the manner and degree in which DHS did or did not address those issues, it thereby displaced any other federal statutes of jurisdiction or limitation. 8 U.S.C. §§ 1225, 1252.

What subject-matter jurisdiction remains is so circumscribed as to be nearly a null set: Whether the fourth implementation, when viewed in the light of the three prior implementations as well as the original 1997 decision not to implement any screening for subclause II aliens, was reasonable. The set is likely null because all prior implementations occurred though Federal Register notices prescribed by regulation, yet their reasonableness was never successfully challenged. In 2019, only the geographic scope of the subclause II class designation, an expressly discretionary statutory criterion, was changed. Because the District Court found jurisdiction only after ranging far beyond this theoretical sliver of subject matter, and failed to consider the § 1252(e)(3)(B) jurisdictional deadline at all, the injunction was issued in grievous error.

II. Plaintiffs have not suffered the requisite cognizable harm to establish standing.

Even if the District Court had jurisdiction to hear plaintiffs' time-barred claims, it still erred in finding that plaintiffs' members would suffer imminent injury and irreparable harm if the July 23, 2019, Notice were not preliminarily enjoined "as *void ab initio*." Op'n at 120. "Plaintiffs' members plainly face sufficiently imminent injury… because, by its own terms, the July 23rd Notice publicly authorized immigration officers to subject non-citizens who are apprehended anywhere in the United States and have been present here for two years or less to expedited removal 'effective immediately.'" Op'n at 45-46. The District Court found

> that Plaintiffs' evidence, including amici's brief, established ample grounds for an interim injunction…. Record evidence [establishes] that (1) some of Plaintiffs' members who are lawful residents of the United States would face a substantially increased risk of being erroneously removed; (2) some of Plaintiffs' members who are undocumented non-citizens and therefore subject to the New Designation could actually be removed through the expedited removal process, instead of traditional removal procedures; and (3) many people, including Plaintiffs' members, are being traumatized right now by the paralyzing fear of the agency's persistent threat to invoke its potentially invalid rule and thereby foregoing necessary activities of daily life.

Op'n at 102. "The expedited removal of an individual who may have been living and working in the United States for a significant period of time has the potential

to cause trauma," the District Court found. Op'n at 93. "Significantly, even an undocumented non-citizen who has no defense to the charge that he is in this country illegally gets a few more hours to spend with his family and friends and to wind up his personal affairs under the traditional removal procedures." *Id.* at 100.

The alleged failures by the agency to consider harms stemming from the risk of erroneous removal, deprivation of the due process of "traditional" (that is, INA §240) removal proceedings, and the trauma and fear experienced not only by aliens subjected to expedited removal but by their "households," "communities," and even the "States" where they are physically present, form the rest of the District Court's basis for its finding that the July 23, 2019, agency action was arbitrary and capricious: "An agency cannot possibly conduct reasoned non-arbitrary decision making concerning policies that might impact real people and not take such real life circumstances into account." Op'n at 86.

a. Harm to persons other than Plaintiffs' members comes only from improper extra-record evidence.

As an initial error, the District Court improperly relied for record evidence on a brief filed by *amici* States in support of the plaintiff advocacy groups. The court deemed the *amici*'s arguments critical "evidence" of the harms the States and their undocumented residents would allegedly suffer absent preliminary relief. Op'n at 85-86 (citing Amicus Brf., ECF 24-1 at 26-29). No resident of an *amicus* State was actually identified.

This express reliance by the District Court on arguments of *amici* as evidence of harm sufficient to establish standing was improper. Judicial review of APA claims is limited to the administrative record. *Edison Electric Inst. v. OSHA*, 849 F.2d 611, 617-18 (D.C .Cir. 1988) ("Ordinarily… neither party is allowed to supplement the record with… evidentiary material that was not before the agency.") Consideration of extra-record material is presumptively "incompatible" because it "disrupts the orderly functioning of the process of judicial review," by substituting a new record for the one upon which the agency acted. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962).

Review of the docket below shows that the "evidence" proffered by the *amici* parties was not before the agency on July 23, 2019, the date of publication of the Notice. The record is empty of any motion by plaintiffs or *amici* to supplement the administrative record, or to establish that any of the very limited exceptions to record review recognized in this Circuit were applicable. *See City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C.Cir. 2010).

In particular, the District Court improperly relied on *amici* for its evidence of an "anticipated radius of injury [that] also encompasses those persons' households, neighborhoods, communities, workplaces, cities, counties, and States." *Id.* at 93-94. The District Court should never have considered these "critical" policy-based

statements in opposition to expedited removal from the various *amici* States as evidence supporting injunctive relief.

b. Screening for expedited removal is the legal standard, not a legal wrong.

Leaving behind the foundationless findings of harm to vaguely delineated "households, neighborhoods, communities, workplaces, cities, counties, and States" improperly taken from the States' *amicus* brief, the District Court also recognized three kinds of irreparable harm actually pled by the plaintiffs.

Of these three theories of legal harm, amicus IRLI first addresses the supposedly imminent deprivation of a right to removal through "traditional" proceedings, what the District Court called "the delta between what the law requires with respect to the traditional process and the process … afforded… if they are encountered by immigration officers." Op'n at 99, 102. Plaintiffs asserted that before the Notice was published, "DHS lacked authority to subject noncitizens present for more than 14 days to expedited removal," while after publication, millions of noncitizens *lost their previous right* to full removal proceedings, and are now subject to expedited removal as implemented …." ECF 28, Plaintiffs Reply in Supp't Motion for Prelim. Inj., at 17 (Sep. 3, 2019) (emphasis added).

This harm is not cognizable. The federal government has "broad, undoubted power over … the status of aliens," and Congress has "specified which aliens may be removed from the United States and the procedures for doing so." *Arizona v.*

United States, 567 U.S. 387, 394, 396 (2012); *see* U.S. Const. art I § 8, cl. 4. Here, Congress has not provided a "right" to section 240 removal proceedings in U.S. immigration law, especially not one that might have been violated by the July 23 Notice.

To describe section 240 proceedings as "traditional" is a mis-characterization. Since 1996, the INA has classified all members of the plaintiff associations who have not been admitted as "applicants for admission." 8 U.S.C. § 1225(a)(1). No such applicant may be admitted without first being "inspected by immigration officers." *Id.*, § 1225(a)(3). The unadmitted applicant for admission always bears the burden to establish non-inadmissibility and entitlement to any immigration status claimed. 8 U.S.C. § 1361.

Whether at a port of entry or during an encounter in the interior, during inspection the immigration officer determines, *inter alia*, whether an alien is "inadmissible under section 212(a)(6)(C) or (212)(a)(7)." *Id.*, § 1225(b)(1)(i). If the alien undergoing inspection is, like the plaintiffs' anonymous members, inadmissible on either ground, *and* is among "any or all" of the class of "subclause II" aliens designated by the Secretary, the government "*shall* order the alien removed without further hearing or review unless the alien indicates either an intention to apply for asylum… or a fear of persecution." *Id.*; § 1225(b)(1)(iii). The INA affords the procedural right to a credible fear interview with an asylum

officer, with limited review of an adverse determination by an immigration judge, for subclause II aliens making the requisite indication. *Id.*, §1225(b)(1)(B). This process created by Congress, however, never included a right to "traditional" removal procedures where the Secretary has provided otherwise in her "sole and unreviewable discretion." A "right" that can be taken away in the sole discretion of an executive official is no right at all.

Plaintiff associations' members' claim that they are injured by a risk of deprivation of a non-existent procedural right cannot constitute cognizable imminent harm arising the from the challenged agency action. Plaintiffs thus could not have been legally harmed by the "delta," the difference in procedure afforded to their undocumented members, as compared to aliens *not* in the subclause II class or inadmissible on any other ground.

c. The "trauma" of avoiding daily activities for fear that an encounter with immigration officials would lead to expedited removal was not a cognizable legal wrong.

Equally non-cognizable was the second type of legal harm found by the District Court, the "trauma" plaintiffs' anonymous undocumented members were experiencing due to the increased risk that they would be screened for expedited removal if encountered by an immigration officer. The Court glibly affirmed plaintiffs' claim that the subject Notice was a "threat" to "many people including Plaintiffs' members" because the "fear" of being screened for expedited removal if

encountered by an immigration officer was "paralyzing" to their conduct of "necessary activities of daily life." Op'n at 102. This "fear" was "traumatic." *Id.*

When it enacted the expedited removal process under IIRIRA, Congress expressly recognized one and only one kind of cognizable fear: fear of persecution. *See* 8 U.S.C. § 1225(b)(1)(i). The fear of persecution by a foreign government is of course completely distinct from the fear of encountering a U.S. immigration officer in the interior. The risk of a plaintiff-member encountering an immigration officer has not changed since publication of the Notice. Any "trauma" arising from enforcement operations or the inspection process itself cannot be legally attributable to publication of the Notice.

Clearly, Congress hoped and anticipated that fear of placement in expedited removal after an encounter with an immigration officer—including traumatic fear that caused a paralyzing effect on the ability of the illegal alien to conduct the activities of daily living—would have a major deterrent effect on the incidence of illegal presence without admission or parole and thus serve the national interest. For example, Congress attached significant adverse consequences to expedited removal orders, to strengthen the deterrent effect of the procedure. *See* 8 U.S.C. § 1182(a)(9)(A)(i); 8 C.F.R. § 212.2 (five year bar if removed for lack of documents); 8 U.S.C. § 1182(a)(6)(C) (lifetime bar if removed for misrepresentation).

The agency was under no obligation to consider this deterrent fear at all, much less to weigh it as an adverse factor against the unchallenged benefits articulated in the Notice itself. *See* Op'n at 94 (listing public benefits the government anticipated would result from the full nationwide designation of the subclause II class.)

d. The fear of erroneous removal is too speculative to constitute an irremediable harm.

Finally, the third irreparable harm found by the District Court was a generalized fear of that any person—citizen or alien (of any immigration status) alike—would be *erroneously* identified by immigration authorities as a subclause II alien, wrongfully deprived of due process needed to correct that error, and consequently removed unlawfully from the United States. Op'n, *e.g.* at 84, 89, 92. This fear of erroneous removal was raised in *AILA*, in 1998, and rejected by the District Court on lack of causation grounds, as too attenuated and speculative. 18 F. Supp. 2d at 40-41.

It is even more so here. To establish injury-in-fact based on risk of erroneous removal, plaintiffs' members would have had to show that they were lawfully present after inspection or parole and possessed documentation of their lawful immigration status, but somehow would still likely be: (1) selected for interrogation by an immigration officer while more than 100 air miles from a land border; (2) erroneously classified as an unadmitted or paroled alien described in

subclause II and inadmissible due to a lack of valid immigration documents; (3) erroneously detained, but unable to obtain *habeas* relief pursuant to 8 U.S.C. §1252(e)(2); (4) unable to establish their lawful presence under administrative review pursuant to 8 C.F.R. § 235.3(b)(5); (5) issued an expedited removal order in error, which would not be rectified by supervisory review pursuant to 8 C.F.R. § 208.30(d)(4); (6) actually removed from the United States; and (9) unable to remedy such erroneous removal from abroad. Further, because the challenge is only to the *implementation* of the Notice, standing requires a showing that the claimed injury would likely not occur had the agency conducted notice-and-comment review and considered public comments, in particular comments that would be filed by the plaintiff associations and *amici* parties in this case.

This string of causation is far more speculative than the attenuated theory of causation rejected in *AILA*. *See* 18 F. Supp. 2d at 51-52 (citing *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1991)); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-89 (1973)). Even if the scenario above were likely, the harm would not be irremediable because any of the plaintiffs' anonymous members who are *not* subclause II aliens would have both equitable and *habeas* remedies available for the abuse of discretion by an immigration agent in at least two relevant scenarios: erroneous determinations that the alien failed to show the requisite continuous

presence, or that he entered without inspection or parole. *See* e.g. *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1268 (M.D. Ga 2012) (finding a *Bivens* action against offending agents for violation of Fourth or Fifth Amendment rights, or a claim under the Federal Tort Claims Act, available for a wrongfully detained and deported U.S. citizen). *Habeas* would also provide a remedy against detention pending expedited removal where the additional review available under 8 C.F.R. §§ 235.3(b)(4) (mandatory diversion for credible fear screening); § 235.3(b)(5) (additional review procedures if U.S. citizen, lawful permanent resident, or asylees status is claimed); or § 208.30(d)(4) (privilege to consult with third party before and after credible fear interview) was defective or not provided. Even more than in *AILA*, a harm so speculative and attenuated is not cognizable.

CONCLUSION

For the foregoing reasons, the order of the court below should be reversed.

Dated: December 23, 2019.

Respectfully submitted,

/s/ Michael M. Hethmon

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RULE 32 CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I certify that the foregoing brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 5,187 words, including footnotes, but excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on December 23, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

/s/ Michael M. Hethmon
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