No. 19-5272

In the U.S. Court of Appeals for the District of Columbia Circuit

O.A., *ET AL.*,
Plaintiffs-Appellees,

vs.

DONALD J. TRUMP, AS PRESIDENT OF THE UNITED STATES, *ET AL.*,
Defendants-Appellants.

On Appeal from a final order of the U.S. District Court for the District of Columbia, No. 18-cv-2718-RDM (Hon. Randolph D. Moss, U.S. District Judge)

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

Christopher J. Hajec
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
DC Bar #464777
1250 Connecticut Av NW, Ste 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

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 26, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Av NW Suite 700-1A
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amicus curiae* Immigration Reform Law Institute ("IRLI") presents the following certificate as to parties, rulings, and related cases.

A. Parties and *Amici*

IRLI adopts the appellants' statement of parties and *amici*, except that IRLI has now appeared as an *amicus* in this Court.

B. Rulings under Review

IRLI adopts the appellants' statement of rulings under review.

C. Related Cases

IRLI adopts the appellants' statement of related cases but also notes that there are no related cases within the meaning of this Court's rules.

Dated: May 26, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Av NW Suite 700-1A
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (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

GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§ 551-706
DHS	Department of Homeland Security
ECF	Electronic Case Filing
Gov't	Government, meaning the federal defendants-appellants
INA	Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537
IRLI	Immigration Law Reform Institute
JA	Joint Appendix

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Immigration Law Reform Institute ("IRLI") seeks the Court's leave to file this brief for the reasons set forth in the accompanying motion.[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 lawful permanent residents 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

In this consolidated action, two sets of plaintiffs (collectively, "Plaintiffs") have sued Executive Branch offices and officials (collectively, the "Government") under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), and the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA"), to challenge the

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

promulgation of a new rule, *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (2018). The rule implements the Attorney General's authority to "establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under [§ 1158(b)(1)]." 8 U.S.C. § 1158(b)(2)(C). The Government promulgated its rule on November 9, 2018, as an interim final rule, invoking two APA good-cause exceptions: (1) the exception from notice-and-comment procedures when prior notice and comment are "impracticable, unnecessary, or contrary to the public interest," *id.* § 553(b)(B), and (2) the exception from the requirement for a 30-day grace period before a rule's taking effect for "good cause found." *Id.* § 553(d)(3). The Government also invoked the APA's foreign-affairs exception, which applies "to the extent that there is involved … a … foreign affairs function of the United States." *Id.* § 553(a)(1). At the same time, the Federal Register notice also requested comments and evinced plans to promulgate a final rule, with a comment deadline of January 8, 2019. *See* 83 Fed. Reg. at 55,934. The interim final rule bars from eligibility for asylum all aliens who enter the country in contravention of a presidential proclamation suspending entry across the southern border. *Id.*

Once the rule was promulgated, the President issued a proclamation pursuant to 8 U.S.C. § 1182(f) suspending just such entry, except at ports of entry. Neither

the interim final rule nor the proclamation affects the eligibility of aliens for either withholding of removal under 8 U.S.C. § 1231(b)(3) or protection under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 8 C.F.R. §§ 1208.16-1208.18 ("CAT"). *See Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57,661, 57,663 (2018); 83 Fed. Reg. at 55,934. The proclamation does not apply to unaccompanied minors. 83 Fed. Reg. at 57,663. The district court granted Plaintiffs' motion for summary judgment, and the Government appealed.

Amicus adopts the facts as stated by the Government. Gov't Br. at 10-18.

SUMMARY OF ARGUMENT

The individual Plaintiffs' interest in *obtaining* asylum here is not a "legally protected interests" within the meaning of Article III, and their procedural right to *apply* for asylum is not tethered to a concrete interest, as required to make a merely procedural right justiciable under Article III (Section I.A.1). The institutional Plaintiffs cannot base their standing on the self-inflicted injury of their own diversion of resources to counter the Government's actions (Section I.A.2), and they lack third-party standing to assert clients and future clients' immigration claims (Section I.A.3). Because no Plaintiff has standing, Plaintiffs lack standing to serve as class representatives (Section I.A.4). The INA makes removal-related actions reviewable in the Courts of Appeals, which denies Plaintiffs a waiver of sovereign immunity for

APA review in district court because of the adequate alternate remedy of appellate review (Sections I.B.1-I.B.2), which also displaces non-APA equity review against federal officers in district court (Section I.B.3).

On the INA merits, the Government's actions qualify for the APA's good-cause exceptions and the foreign-affairs exception (Section II.A), and the categorical denial of asylum to aliens who cross the border illegally is within the discretion that Congress delegated to the Executive Branch, notwithstanding that the INA requires an opportunity to *apply* for asylum (Section II.B). Because the Constitution does not provide any due-process rights to arriving aliens beyond what Congress has provided statutorily, the INA analysis ends the merits inquiry (Section II.C).

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION FOR PLAINTIFFS' REQUESTED RELIEF.

Federal courts are courts of limited jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 95 (1998) (courts must establish jurisdiction before deciding merits). To sue in federal court, therefore, a plaintiff must not only satisfy Article III's case-or-controversy requirement but also identify a statutory grant of subject matter jurisdiction: "A

federal court's subject-matter jurisdiction, constitutionally limited by Article III, extends only so far as Congress provides by statute." *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 492 (D.C. Cir. 1984). Plaintiffs fail both tests, and each failure is independently fatal.

A. Plaintiffs lack standing.

Under Article III, federal courts cannot issue advisory opinions and instead must focus on cases or controversies presented by affected parties. *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911). To establish standing, a plaintiff must show that: (1) the challenged action constitutes an "injury in fact," (2) the injury is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision, and (3) nothing otherwise precludes judicial review. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). An "injury in fact" must satisfy a tripartite test: it must be a legally cognizable injury to the plaintiff, be caused by the challenged conduct, and be redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The plaintiff, moreover, must show that it "has sustained or is immediately in danger of sustaining some direct injury" from the challenged action, and that injury must be "both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (interior quotation marks omitted). Standing doctrine also includes prudential elements, including the need for those seeking to assert

absent third parties' rights to have their own Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004). Finally, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), plaintiffs must establish standing for each form of relief that they request.

1. The individual Plaintiffs lack standing.

Although the individual Plaintiffs understandably wish to expand their asylum options, they simply have no right to do so. 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). Plaintiffs have no such rights, so this is an instance where standing merges with the merits. *See* Section II, *infra* (Plaintiffs lack a right to asylum); *Land v. Dollar,* 330 U.S. 731, 735 (1947) (when jurisdiction and the merits "intertwine," federal courts resolve the jurisdictional and merits issues together).

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* qualify as *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 Plaintiffs' interest in asylum.

"[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, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Instead, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (interior quotation marks omitted). As explained in Section II, *infra*, Congress authorized the President to place additional categorical limits on asylum, so Plaintiffs lack a legally protected interest in obtaining asylum.[2]

[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*

While Plaintiffs have a procedural right to *apply* for asylum, 8 U.S.C. § 1158(a)(1), they have no chance of being *granted* asylum on the merits. *See* Section II, *infra*. A purely procedural right — untethered from a concrete right — does not confer Article III standing: deprivation of a procedural right without some concrete interest that is affected by the deprivation — a procedural right *in vacuo* — is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). While Plaintiffs may not have known the consequences of their illegally crossing the border, "ignorance of the law will not excuse any person, either civilly or criminally." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 581 (2010) (interior quotation marks omitted). Plaintiffs have no right that a federal court can enforce.

2. The institutional Plaintiffs lack diverted-resources standing.

The institutional Plaintiffs cannot premise standing on their diverted resources, which are self-inflicted injuries and, thus, cannot support standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Under the unique statutory and factual situation in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), a housing-rights organization's diverted resources provided it standing, but that argument must fail

---

is an element of the threshold inquiry under Article III of the Constitution, not a merely prudential inquiry.

in most other settings.

Relying on *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 102-09 (1979), *Havens* held that the Fair Housing Act at issue there extends "standing under § 812 … to the full limits of Art. III," so that "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section," 455 U.S. at 372, thereby collapsing the standing inquiry into the question of whether the alleged injuries met the Article III minimum of injury in fact. *Id.* The typical organizational plaintiff and typical statute lack several critical criteria from *Havens*.

First, the *Havens* organization had a statutory right (backed by a statutory cause of action) to truthful information that the defendants denied to it. Because "Congress may create a statutory right[,] … the alleged deprivation of [such rights] can confer standing." *Warth v. Seldin*, 422 U.S. 490, 514 (1975). Under a typical statute, by contrast, a typical organizational plaintiff has no claim to any rights related to its own voluntarily diverted resources.

Second, and related to the first issue, the injury that an organizational plaintiff claims must align with the other components of its standing, *Stevens*, 529 U.S. at 772; *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C. Cir. 1996), including the allegedly cognizable right. In *Havens*, the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information given in violation of the statute). By contrast, under the

INA (or any typical statute), there will be no rights even *remotely* related to — much less *aligned with* — a third-party organization's discretionary spending.

Third, and most critically, the *Havens* statute eliminated prudential standing, so the zone-of-interest test did not apply. When a plaintiff — whether individual or organizational — sues under a statute that *does not eliminate prudential standing*, that plaintiff cannot bypass the zone-of-interest test or other prudential limits on standing. *See*, *e.g.*, *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 939 (D.C. Cir. 1986) (applying zone-of-interest test under *Havens*) (R.B. Ginsburg, J.). Typically, it would be fanciful to suggest that a statute has private, third-party spending in its zone of interests. Certainly, that is the case for the INA. *Fed'n for Am. Immigration Reform v. Reno*, 93 F.3d 897, 904 (D.C. Cir. 1996).

As Judge Millett recently recognized, "[t]he problem is not *Havens*[; the] problem is what our precedent has done with *Havens*." *People for the Ethical Treatment of Animals v. U.S. Dept. of Agriculture*, 797 F.3d 1087, 1100-01 (D.C. Cir. 2015) (Millett, J., dubitante). But non-mutual estoppel does not apply to the federal government, *United States v. Mendoza,* 464 U.S. 154 (1984), and *stare decisis* cannot be applied so conclusively that, in effect, it operates as preclusion against non-parties to the prior litigation. *South Central Bell Tel. Co. v. Alabama,* 526 U.S. 160, 167-68 (1999). While Plaintiffs identify some *Havens*-based precedent, those "cases cannot be read as foreclosing an argument that they never

dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality); *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004). *Amicus* respectfully submits that this Court has a constitutional obligation to consider diverted-resource standing without regard to either issue preclusion or a preclusive resort to *stare decisis* from decisions that did not expressly consider the foregoing reasons that render *Havens* inapposite here.

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

3. The institutional Plaintiffs lack third-party standing.

The institutional Plaintiffs cannot claim third-party standing because they fail the *Kowalski* test, not only because they lack their own standing, *see* Section I.A.2, *supra*, but also because they either lack a close relationship or (if they have one) nothing would hinder the actual rights-holders from suing on their own behalf. *Kowalski*, 543 U.S. at 128-30. Future relationships do not count because an "*existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here." *Id.* at 131 (emphasis in original). Accordingly, the institutional Plaintiffs lack third-party standing.

4. The class allegations do not alter the standing analysis.

Plaintiffs gain nothing, *vis-à-vis* the Article III threshold, by styling their suit as a class action:

> That a suit may be a class action, however, adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.

Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976) (citation and interior quotation marks omitted). Instead, "[t]o have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974). If Plaintiffs lack standing in their own right, *see* Sections I.A.1-I.A.3, *supra*, they also lack standing as class representatives.

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

As the Government explains, the INA channels review of removal actions to the courts of appeals, which displaces APA review in the district courts. Gov't Br. at 20-33. In addition, those INA review procedures also deprive federal courts of equity jurisdiction over — and deprive plaintiffs of a waiver of sovereign immunity from — this action. All these jurisdictional defects bar judicial review in this action.

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

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). "Absent a waiver,

sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Such waivers, moreover, are strictly construed, in terms of their scope, in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Thus, aside from lacking statutory subject-matter jurisdiction — as the Government argues, *see* Gov't Br. at 20-35 — Plaintiffs also lack a waiver of sovereign immunity for this APA action.

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

As relevant here, the APA excludes APA review for "statutes [that] preclude judicial review" and ones with "special statutory review." 5 U.S.C. §§ 701(a)(1), 703. When a statute provides special statutory review, APA review is not available. *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984). *Amicus* IRLI respectfully submits that INA review is exactly the type of statutory review that

precludes APA review.[3] *See* Section I.B.2, *infra*.

2. The district court lacked statutory subject-matter jurisdiction for this action.

The Government argues that the INA's review-channeling provisions place review of all issues related to removal proceedings in the INA's review of final removal orders. *See* Gov't Br. at 20-31; 8 U.S.C. § 1252(e)(1)(A); *id.* § 1252(a)(5), (b)(9). By placing review of removal orders in the applicable courts of appeals, Congress displaced district court jurisdiction:

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

Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 77 (D.C. Cir. 1984) (footnote omitted). Under the circumstances here, the district court did not have federal-question jurisdiction for this action.[4]

---

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

[4] Review under 8 U.S.C. §1252(e)(3) does not lie here because no Plaintiff has proceedings under that subsection. *See* Gov't Br. at 16 ("all individual plaintiffs in this case were in full removal proceedings under 8 U.S.C. § 1229a, or had been granted asylum").

3. Plaintiffs' adequate INA remedies displace equity jurisdiction.

In addition to lacking a cause of action and a waiver of sovereign immunity, Plaintiffs also have no claim in equity: "It is a basic doctrine of equity jurisprudence that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Morales v. TWA*, 504 U.S. 374, 381 (1992) (interior quotation marks and alterations omitted). Here, the INA provides Plaintiffs with an adequate and exclusive means of judicial review in the federal courts of appeals, so Plaintiffs cannot rely on any equitable theory of judicial review to bring suit in district court. *See, e.g., ITT World Commc'ns*, 466 U.S. at 468 (holding that "[l]itigants may not evade" a provision that vests the courts of appeals with exclusive jurisdiction by requesting a district court to enjoin agency "action as ultra vires"). Only when preclusion-of-review statutes provide *no opportunity whatsoever* for review may federal courts rely on their equitable authority to provide review. *Leedom v. Kyne*, 358 U.S. 184, 188-90 (1958). That extraordinary relief is not available where — as here — review is available in enforcement proceedings. *Board of Governors of the Federal Reserve System v. MCorp Financial*, 502 U.S. 32, 43-44 (1991). The INA's special statutory review displaces review in equity.

II. PLAINTIFFS' CLAIMS LACK MERIT.

Assuming *arguendo* that this Court reaches the merits, this Court should reject

Plaintiffs' challenges to the asylum-ineligibility rule. Because the district court held that the rule substantively violated the INA, it did not reach Plaintiffs' arguments for invalidating the rule on APA procedural grounds, App'x:133 (Slip Op. at 4). This Court could either reject Plaintiffs' procedural APA arguments or remand to the district court after vacating the district court's substantive INA holding: "federal courts of appeals generally are courts of review, not first view." *Rodriguez v. Penrod*, 857 F.3d 902, 906 (D.C. Cir. 2017). Either way, this Court should reject Plaintiffs' merits arguments if this Court finds jurisdiction.

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

The Government issued its interim final rule to address not only a public-safety and humanitarian emergency, but also issues of national security and foreign relations. 83 Fed. Reg. at 55,950-51. These grave and weighty concerns easily meet the APA's exceptions for notice-and-comment rulemaking and for the suspension of the 30-day grace period for a rule to take effect. 5 U.S.C. § 553(a)(1), (b)(B), (d)(3). Significantly, the foreign affairs question here (namely, negotiations with Mexico) aligns with the INA merits (namely, the two asylum exemptions for aliens removed to a "safe third country"). *See* 8 U.S.C. § 1158(a)(2)(A) (ineligibility to apply for asylum), (b)(2)(C) (termination of asylum). The Supreme Court has found it imperative that the United States speak with one national voice — not 50 states' voices — on issues, such as immigration, that touch foreign relations, even though

the states joined the union as sovereigns. *Arizona v. United States*, 567 U.S. 387, 395 (2012). Given the APA's foreign-affairs exception, 5 U.S.C. § 553(a)(1), the 94 federal district courts do not have authority, *vis-à-vis* APA procedural issues, to interfere in these aspects of sovereignty, which the Constitution commits to the political branches. *Trump v. Hawaii*, 138 S.Ct. 2392, 2419 (2018). The APA poses no procedural barrier to the asylum-ineligibility rule.

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

The substantive validity of the asylum-ineligibility rule hinges on whether the Government's proposed additional criteria for denying asylum qualify as "consistent with this section." 8 U.S.C. § 1158(c)(2)(B). A categorical prohibition on the *granting* of asylum is fully consistent with the mandatory right to *apply* for asylum. *Compare* 8 U.S.C. § 1158(a)(1) (universal right to *apply* for asylum) *with id.* § 1158(c)(2)(A)-(C) (various bars to subsection (b)(1)'s permissive *grant* of asylum). For example, an alien "who arrives in the United States … whether or not at a designated port of arrival" has an unfettered right to *apply* for asylum, 8 U.S.C. § 1158(a)(1), but immigration officials lack the authority to *grant* that application if the alien in question has been convicted of certain crimes. *Id.* § 1158(c)(2)(A)(ii). Through these provisions, "Congress has decided that the right to apply for asylum does not assure any alien that something other than a categorical denial of asylum is inevitable." *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1256 (9th Cir.

2018) (Leavy, J., dissenting in part). The INA does not create a right to obtain the discretionary grant of asylum merely by giving aliens the right to apply for asylum. The Supreme Court recognized that the INA makes a similar distinction between obtaining a visa to enter the United States and being deemed admissible to enter the United States. *Hawaii*, 138 S.Ct. at 2414 ("plaintiffs' interpretation … ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA"). Neither the INA nor the Constitution prohibits allowing applications that are doomed to fail.

C. The asylum-ineligibility rule complies with Plaintiffs' due-process rights.

The asylum-ineligibility rule seeks to deter aliens abroad from undertaking *illegal* border crossings, 8 U.S.C. § 1325(a), and aliens abroad do not have rights under our Constitution. *Boumediene v. Bush*, 553 U.S. 723, 755-62 (2008). Instead, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32. Excluding an alien seeking admission is an act of sovereignty. *Id.* Accordingly, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212 (interior quotation marks omitted). Here, because the Government followed the INA (*i.e.*, "the procedure authorized by Congress"), Plaintiffs have suffered no due-process injury.

III. THIS ACTION CANNOT SUPPORT CLASS CERTIFICATION.

Although the Government does not challenge the district court's certification of a class action, App'x:195-206 (Slip Op. 66-77), this Court could vacate that order because the lack of Article III standing by any one plaintiff requires rejection of class certification. *See* Section I.A.4, *supra* (discussing class standing issue); *Gen. Tel. Co. of the SW. v. Falcon*, 457 U.S. 147, 156 (1982) ("class representative must be part of the class and possess the same interest and suffer the same injury as the class members") (interior quotation marks omitted). Although class-certification issues can be "logically antecedent" to jurisdictional issues — and, as such, can be resolved before jurisdiction as questions of statutory standing, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830-31 (1999) — here the Article III issue predominates on the class-certification issue: no Plaintiff has standing.

CONCLUSION

For the foregoing reasons and those argued by the Government, the district court's order should be vacated and its judgment reversed.

Dated: May 26, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Christopher J. Hajec
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, DC Bar #464777
Law Office of Lawrence J. Joseph
1250 Connecticut Av NW, Ste 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 COMPLIANCE WITH RULE 32

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 4,520 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: May 26, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Av NW, Ste 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 the 26th day of May, 2020, I electronically filed the foregoing brief — together with the accompanying motion for leave to file — with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, causing the service on counsel for the parties to this action via electronic means.

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. 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