UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-2537 Caption [use short title] New York v. U.S. Dep't of Homeland Sec.

Motion for: Leave to File Amicus Brief

Set forth below precise, complete statement of relief sought:

Unopposed motion for leave to file an amicus brief in support of federal appellants

MOVING PARTY: Immigration Reform Law Institute **OPPOSING PARTY:** None

☐ Plaintiff ☐ Defendant X - *Amicus Curiae*

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Lawrence J. Joseph **OPPOSING ATTORNEY:** None

[name of attorney, with firm, address, phone number and e-mail]

1250 Connecticut Avenue, NW, Suite 700-1A

Washington, DC 20036

Tel: 202-355-9452; email: ljoseph@larryjoseph.com

Court- Judge/ Agency appealed from: S.D.N.Y.; George B. Daniels, J.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain): Federal and state parties consented; non-governmental appellees "take no position" but will not oppose

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☑ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Lawrence J. Joseph **Date:** 10/5/2020 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 20-2537

In the United States Court of Appeals for the Second Circuit

STATE OF NEW YORK, *ET AL.*,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *ET AL.*,
Defendants-Appellants.

MAKE THE ROAD NEW YORK, *ET AL.*
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *ET AL.*,
Defendants-Appellants.

On Appeal from the U.S. District Court for the Southern District of New York

IMMIGRATION REFORM LAW INSTITUTE'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS

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: info@irli.org

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 Movant

CORPORATE DISCLOSURE STATEMENT

Movant Immigration Reform Law Institute is a 501(c)(3) not-for-profit corporation. It neither issues stock nor has a parent corporation that issues stock.

Dated: October 5, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

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 Movant

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

Pursuant to FED. R. APP. P. 29(a) and Circuit Rule 27.1, movant Immigration Reform Law Institute ("IRLI") respectfully seeks this Court's leave to file the accompanying *amicus* brief in support of the federal appellants and reversal. The federal appellants and the state-and-local appellees consented to filing the amicus brief. The non-governmental appellees described their position as "tak[ing] no position" and indicated that they "do not intend to file a response to [the] motion."

In support of this motion for leave to file the accompanying *amicus* brief, IRLI states as follows:

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.

2. IRLI has litigated or filed *amicus* briefs in many important immigration cases, including prior phases of this litigation before the district court, this Court, and the Supreme Court. 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.

3. By motion dated August 13, 2020, IRLI sought leave to file a similar *amicus* brief in support of the federal appellants' motion to stay the district court's

preliminary injunction. By order dated October 1, 2020, this Court denied IRLI's motion as moot because the Court had granted the stay by order dated September 11, 2020.

4. The proffered *amicus* brief addresses issues two primary points that IRLI raised as an *amicus* in the district court in response to the motion for a new preliminary injunction:

- The state-and-local plaintiffs-appellees petitioned the federal defendants-appellants administratively for the relief that they subsequently sought via a preliminary injunction, *see* 5 U.S.C. § 553(e), but they neither waited a reasonable time nor filed suit to compel agency action unreasonably delayed. *See* 5 U.S.C. § 706(1). This Circuit's decisions — and basic administrative law — required seeking to compel action, not sidestepping the administrative process altogether. *See* IRLI *Amicus* Br. at 4-6 (citing *McHugh v. Rubin*, 220 F.3d 53, 61 (2d Cir. 2000)).
- Given the Supreme Court's stay of the first preliminary injunction, *Dep't of Homeland Sec. v. New York*, 140 S.Ct. 599 (2020), and its refusal to lift that stay when appellees made the same arguments on which appellees rely here, *New York v. Dep't of Homeland Sec.*, 206 L.Ed.2d 847 (2020), it seems likely that the Supreme Court will ultimately vacate any preliminary injunction here. That *vacatur* will expose the supposed beneficiaries of the appellees' efforts

to the very harm that appellees claim to want to avoid (namely, having the beneficiary aliens' reliance on public benefits count against them). A vacated preliminary injunction will not shield aliens who rely on the district court's action. *See* IRLI *Amicus* Br. at 6-7.

Under the circumstances, movant IRLI respectfully submits that its *amicus* brief would aid the Court in deciding the important issues raised here.

WHEREFORE, for the foregoing reasons, IRLI respectfully seeks this Court's leave to file the accompanying *amicus* brief.

Dated: October 5, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

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

Counsel for Movant Immigration Reform Law Institute

Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590
chajec@irli.org

CERTIFICATE OF COMPLIANCE

1. The foregoing motion complies with the type-volume limitation of FED. R. APP. P. 27(d)(2) because the motion contains 525 words, excluding the parts of the document exempted from counting.

2. The foregoing motion complies with the typeface and type-style requirements of FED. R. APP. P. 27(d)(1)(E), 32(a)(5), and 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: October 5, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 700
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 October 5, 2020, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Second Circuit — together with its accompanying *amicus* brief — by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Lawrence J. Joseph
Lawrence J. Joseph

No. 20-2537

In the United States Court of Appeals for the Second Circuit

STATE OF NEW YORK, *ET AL.*,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *ET AL.*,
Defendants-Appellants.

MAKE THE ROAD NEW YORK, *ET AL.*
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *ET AL.*,
Defendants-Appellants.

On Appeal from the U.S. District Court for the Southern District of New York

IMMIGRATION REFORM LAW INSTITUTE'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS IN SUPPORT OF 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: info@irli.org

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

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Immigration Reform Law Institute is a 501(c)(3) not-for-profit corporation. It neither issues stock nor has a parent corporation that issues stock.

Dated: October 5, 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
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS AND RULES

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Immigration Law Reform Institute ("IRLI") files this brief pursuant to the accompanying motion for leave to file.[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, including prior proceedings in this litigation before the district court, this Court, and the Supreme Court. 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.

STANDARD OF REVIEW

Plaintiffs who seek interim relief must establish that they likely will prevail on the merits and likely will suffer irreparable harm without interim relief, that the balance of equities favors them over considerations of preventing harm to the

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E) and Circuit Rule 29.1(b), 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.

defendants from interim relief, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.,* 555 U.S. 7, 20 (2008).

STATEMENT OF THE CASE

In these two related cases, plaintiffs challenge under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), a final rule, *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019), promulgated by the U.S. Department of Homeland Security ("DHS"). The Supreme Court stayed the district court's prior preliminary injunction, *Dep't of Homeland Sec. v. New York*, 140 S.Ct. 599 (2020), and denied a subsequent motion to lift. *New York v. Dep't of Homeland Sec.*, 206 L.Ed.2d 847 (2020). The plaintiffs in one case — a group of states and one city (hereinafter, the "State and Local Plaintiffs") — moved the district court for a new preliminary injunction, based only on the new equitable balancing that they claim flows from the COVID-19 pandemic. In denying a motion to lift the stay, the Supreme Court had rejected the same rationale (namely, that such a new balancing justified a new preliminary injunction).

Plaintiffs cannot make any of the required *Winter* showings. As the State and Local Plaintiffs noted below, DHS has not responded to a March 6, 2020, letter from the States' attorneys general requesting DHS to halt to the Rule temporarily in response to the COVID-19 pandemic. *See* Pls.' Memo. at 11 (ECF #169). On March 13, 2020, DHS issued guidance that provides relief with respect to COVID-19 and

the public-charge rule, *id.*, but the States' attorneys general wrote again on March 19, 2020, to advise DHS that the relief did not address all the harms that their first letter had raised. *Id.* at 12 n.46. The State and Local Plaintiffs have not moved to supplement their complaint to address the COVID-19 pandemic or to address their letters to DHS.

SUMMARY OF ARGUMENT

In addition to DHS's argument that this Court should defer to the findings implicit in the Supreme Court's stay and refusal to lift that stay, IRLI argues that the State and Local Plaintiffs' pending petitions to DHS to amend the public-charge rule to account for the after-arising COVID-19 pandemic compel the State and Local Plaintiffs to take one of two actions: (1) await a DHS response, or (2) sue to compel a response. *See* 5 U.S.C. §§ 553(e), 706(1); Section I, *infra*. The APA's waiver of sovereign immunity does not allow a reviewing court to enjoin the federal government based on extra-record, after-arising grounds that are the subject of a pending petition to amend a rule.

On the equities, the illusory relief that the preliminary injunction affords will injure the very aliens that the plaintiffs claim to want to protect: If the injunction is vacated on appeal to the Supreme Court — as the Supreme Court's stay suggest that it will — the aliens will suffer from having relied on the preliminary injunction. *See* Section II, *infra*.

ARGUMENT

I. PLAINTIFFS ARE NOT LIKELY TO PREVAIL BECAUSE THEY SEEK EXTRA-PLEADING RELIEF OUTSIDE THE APA'S WAIVER OF SOVEREIGN IMMUNITY.

The first — and most important — *Winter* factor is the likelihood of movants' prevailing. *Winter,* 555 U.S. at 20. Here, the only relevant development since the filing of the operative complaint and the district court's granting of the first — and now-stayed — preliminary injunction is the additional equities that the State and Local Plaintiffs claim from the COVID-19 pandemic. While the parties may dispute which decision should govern the likelihood of the Plaintiffs' prevailing — the Supreme Court's implicit finding against them in granting the stay or this Court's more recent decision finding for them — IRLI respectfully submits that this Court need not solve that puzzle.[2]

The APA expressly allows the public to petition agencies to amend, promulgate, or repeal a rule. 5 U.S.C. § 553(e). Agency denials are normally reviewable, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 336 (2015)

[2] In IRLI's view, the stay granted in *Dep't of Homeland Sec. v. New York*, 140 S.Ct. 599 (2020), set the law of the case, which this Court is obligated to follow: "Since the question on the merits is unchanged, it is essentially the 'law of the case' that a stay would be appropriate, unless, of course, the response presents new information." *Volkswagenwerk A. G. v. Falzon*, 461 U.S. 1303, 1304 (1983) (O'Connor, J., Circuit Justice). As indicated, however, this Court need not reach that issue.

(Breyer, J., concurring), as is action unreasonably delayed. *Telecomms. Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) ("*TRAC*"). Since DHS has not yet responded finally to the State and Local Plaintiffs' petitions, the proper response by the petitioning plaintiffs would be to challenge the inaction as unreasonable delay. The proper response is decidedly *not* for a court to rule on the new, changed merits:

> When an administrative agency simply refuses to act upon an application, the proper remedy — if any — is an order compelling agency action, not plenary review of the application by a district court.

McHugh v. Rubin, 220 F.3d 53, 61 (2d Cir. 2000) (citing *TRAC*). DHS has not come close to the sort of unreasonable delay that would give the State and Local Plaintiffs an action to compel DHS to commence a rulemaking, but — if the State and Local Plaintiffs disagree — their exclusive remedy is to supplement their complaint, *see* FED. R. CIV. P. 15(d), and seek to compel DHS to respond to the petition (*e.g.*, to commence a rulemaking).

By contrast, if the State and Local Plaintiffs ignore the process that the APA provides in § 553(e), they are effectively seeking relief based on extra-record evidence that arose after the filing of the operative complaint. Recalling that at issue here is the APA's waiver of sovereign immunity, it warrants emphasis that APA review ordinarily follows the administrative record before the agency. *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2573-74 (2019). The State and Local

Plaintiffs have not made any showing that would fit within an exception to that rule. *Id.* This Court should find the State and Local Plaintiffs unlikely to prevail on *this* injunction on that basis alone.

In sum, the APA provides a process for resolving the State and Local Plaintiffs' concerns, and they have initiated that process by petitioning DHS for relief. Neither the APA nor the APA's waiver of the federal government's sovereign immunity allows federal courts or the State and Local Plaintiffs to short-circuit that process via a renewed motion for a preliminary injunction based on non-record matters outside — and post-dating — the operative complaint.

II. THE EQUITIES CONTINUE TO BALANCE AGAINST INTERIM RELIEF AND TOWARD DHS.

The remaining *Winter* factors also counsel for staying the injunction pending appeal. Thus, even if the State and Local Plaintiffs were likely to prevail, the preliminary injunction should be stayed consistent with the Supreme Court's stay of the prior injunction and its refusal to lift that stay.

The second *Winter* factor concerns the irreparable harm that a plaintiff would suffer, absent interim relied. *Winter,* 555 U.S. at 20. IRLI remains confident that the Supreme Court will reverse this Court's recent holding on the various plaintiffs' standing, a reversal that would nullify an injunction that the district court issued without jurisdiction. In that circumstance, aliens who relied on the district court's injunction will find themselves injured by the district court's unjustified assurance

that those aliens could rely on public benefits without affecting their immigration status.

The third *Winter* factor — the balance of equities, *Winter,* 555 U.S. at 20 — tips strongly in DHS's favor because of DHS's advantage on both jurisdiction and the substantive merits. *See* Section I, *supra*.

The last *Winter* factor — the public interest, *Winter,* 555 U.S. at 20 — also favors DHS. Even a plaintiff likely to prevail on the merits is not automatically entitled to an injunction against the federal 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"). In this case — where any interim relief likely will be vacated on appeal — even the aliens whom the district court is trying to help will rue the district court's intervention in their immigration affairs. An injunction can prevent public-charge actions only while it remains in effect; after it is vacated, DHS can exclude immigrants based on actions they took in misplaced reliance on a preliminary injunction.

CONCLUSION

For the foregoing reasons and those argued by DHS, the court should vacate the district court's second injunction.

Dated: October 5, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

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

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

CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 1,651 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 and type-style requirements of FED. R. APP. P. 32(a)(5) and 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: October 5, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
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 October 5, 2020, I electronically submitted the foregoing *amicus curiae* brief — as an exhibit to the accompanying motion for leave to file — to the Clerk via the Court's CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

/s/ Lawrence J. Joseph

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