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' STAY MOTION

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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: August 13, 2020

Respectfully submitted,

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TABLE OF CONTENTS

Corporate Disclosure Statement i
Table of Contents ii
Table of Authorities iii
Identity, Interest and Authority to File 1
Statement of the Case 1
Summary of Argument 3
Argument 4
I. Plaintiffs are not likely to prevail because they seek extra-pleading relief outside the APA's waiver of sovereign immunity. 4
II. The equities continue to balance against interim relief and toward DHS. 6
Conclusion 7
Certificate of Compliance 9
Certificate of Service 10

TABLE OF AUTHORITIES

CASES

Armstrong v. Exceptional Child Ctr., Inc.,
575 U.S. 320 (2015) 4-5

Dep't of Commerce v. New York,
139 S.Ct. 2551 (2019) 5

Dep't of Homeland Sec. v. New York,
140 S.Ct. 599 (2020) 2, 4

McHugh v. Rubin,
220 F.3d 53 (2d Cir. 2000) 5

New York v. Dep't of Homeland Sec., 2020 WL 1969276,
2020 U.S. Dist. LEXIS 134494, at *1 (S.D.N.Y. July 29, 2020).......................2

Telecomms. Research & Action Center v. FCC,
750 F.2d 70 (D.C. Cir. 1984)..5

Volkswagenwerk A. G. v. Falzon,
461 U.S. 1303 (1983) 4

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982) 7

Winter v. Natural Resources Defense Council, Inc.,
555 U.S. 7 (2008) 2, 4, 6-7

STATUTES

Administrative Procedure Act,
5 U.S.C. §§ 551-706 .... 1, 4-6

5 U.S.C. § 553(b) 3

5 U.S.C. § 553(e) 3

5 U.S.C. § 706(1) 3

REGULATIONS AND RULES

FED. R. APP. P. 29(a)(4)(E) 1

Circuit Rule 29.1(b) 1

FED. R. CIV. P. 15(d) 5

Inadmissibility on Public Charge Grounds,
84 Fed. Reg. 41,292 (Aug. 14, 2019) 1

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Immigration Law Reform Institute ("IRLI") files this brief under cover of a 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.

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.

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[1] Consistent with 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.

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.*, 2020 WL 1969276, 2020 U.S. Dist. LEXIS 134494, at *1 (S.D.N.Y. July 29, 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, which was the same rationale for which the Supreme Court denied a motion to lift the stay.

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 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). Plaintiffs cannot make any of these required showings.

As the State and Local Plaintiffs noted below, DHS has not responded to a March 6, 2020, letter from the States' attorneys general sent to request a temporary halt to the Rule. *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 amended 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(b), (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 be vacated — 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 State and Local 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)

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[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 officials 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 would be to supplement their complaint, *see* FED. R. CIV. P. 15(d), and seek to compel DHS 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 occurred 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 from DHS's advantage on 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 stay the district court's second injunction pending the resolution of a timely filed petition for a writ of *certiorari*.

Dated: August 13, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 27(d)(2)(A) and 32(a)(7)(B) because the brief contains 1,652 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. 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.

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 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.

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