No. 19A785

In the Supreme Court of the United States

U.S. DEP'T OF HOMELAND SECURITY, *ET. AL.*,
Petitioners,

v.

STATE OF NEW YORK, *ET AL.*,
Respondents.

U.S. DEP'T OF HOMELAND SECURITY, *ET. AL.*,
Petitioners,

v.

MAKE THE ROAD NEW YORK, *ET AL.*,
Respondents.

On Motion to Lift or Modify the Stay

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF FEDERAL PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Movant Immigration Reform Law Institute ("IRLI") respectfully seeks leave to file the accompanying brief as *amicus curiae* in support of the application to stay the injunctive relief entered by the district court in these matters.* The federal government takes no position on IRLI's motion, and the other parties have not indicated a position on this motion.

IDENTITY AND INTERESTS OF MOVANT

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases, including an *amicus* brief in the district court proceedings in this litigation. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

REASONS TO GRANT LEAVE TO FILE

By analogy to this Court's Rule 37.2(b), movant respectfully seeks leave to file the accompanying

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* Consistent with FED. R. APP. P. 29(a)(4)(E) and this Court's Rule 37.6, counsel for movant and *amicus curiae* authored this motion and brief in whole, and no counsel for a party authored the motion and brief in whole or in part, nor did any person or entity, other than the movant/*amicus* and its counsel, make a monetary contribution to preparation or submission of the motion and brief.

amicus curiae brief in support of the federal stay applicants' opposition to the stay respondents' motion to lift or modify the stay. Movant respectfully submits that its proffered *amicus* brief brings several relevant matters to the Court's attention, complementing the federal government's arguments on the issues that the application raises:

- **Lack of direct *parens patriae* standing or direct injury**. The state and local respondents cannot press *parens patriae* standing against federal government agencies, and they lack sufficient injury of their own. *See* IRLI *Amicus* Br. at 4-5.
- **The challenged rule complies with immigration law**. IRLI's *amicus* brief analyzes the evolution of the immigration laws' public-charge provisions from the earliest immigration statutes through the present, an analysis that undermines the 1999 "field guidance" agency memorandum on which the respondents and the district court have relied. *See* IRLI *Amicus* Br. at 5-7.
- **Irrelevance of 1999 proposed rulemaking**. Because the respondents' and the district court's analyses depend in part on a 1999 notice of proposed rulemaking that the agency never finalized, IRLI's *amicus* brief addresses the lack of authority inherent in an aborted rulemaking (*i.e.*, a proposed rule that never became final). *See* IRLI *Amicus* Br. at 8 (collecting cases).
- **Administrative-law irrelevance of superseded guidance**. Because the respondents' and the district court's analysis depends in part on a

1999 guidance memorandum that the challenged 2019 final rule expressly supersedes, IRLI's *amicus* brief addresses the requirements that courts can and cannot impose on an agency when it revises prior guidance that was exempt from notice-and-comment requirements when initially issued. *See* IRLI *Amicus* Br. at 8-9.

- **Invoking the National Emergencies Act or Coronavirus Aid, Relief, and Economic Security Act petitions the wrong branch of government**. The *amicus* brief analyzes why the respondents' invocation of both the National Emergencies Act, 50 U.S.C. §§ 1601-1651, and the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), petitions the wrong branch of government: if respondents seek relief in this emergency, they must seek it from Congress or the Executive Branch, not the courts. *See* IRLI *Amicus* Br. at 12-16.
- **This Court should not short-circuit the Administrative Procedure Act's process for petitioning the government to amend a rule**. The *amicus* brief explains the process in the Administrative Procedure Act ("APA") for respondents to petition to amend a rule and to seek APA review of any agency's denial of that petition or unreasonable delay in responding — a process that respondents have not followed. *See* IRLI *Amicus* Br. at 16-18.

These issues are all relevant to deciding the stay application, and movant Immigration Reform Law Institute respectfully submits that filing the brief will aid the Court.

Dated: April 20, 2020

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Immigration Reform Law Institute ("IRLI") respectfully submits that the Circuit Justice — or the full Court if this matter is referred to the full Court — should not lift or modify the stay.

STANDARD OF REVIEW

A stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

STATEMENT OF THE CASE

In the underlying two 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) (hereinafter, the "Rule"), promulgated by the U.S. Department of Homeland Security ("DHS"). As relevant here, the plaintiffs in one case are a group of states and one city (hereinafter, the "State and Local Respondents") who now ask this Court to lift or modify a previously issued stay in favor of DHS. *Dep't of Homeland Sec. v. New York*, 140 S.Ct. 599 (2020).

In both underlying cases, the plaintiffs invoke a guidance document issued by the former Immigration

and Naturalization Service ("INS") on the scope of the "public charge" grounds for excluding an alien under the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA"). Specifically, in 1999, the INS issued a notice of proposed rulemaking ("NPRM"), *Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,676 (May 26, 1999) (the "1999 NPRM"), and an intra-agency guidance memorandum as "field guidance." *Field Guidance on Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999) (the "1999 Field Guidance"). In their motion, the State and Local Respondents ask this Court to lift or modify the stay previously entered to account for a change in the balance of equities from the Covid-19 pandemic.

SUMMARY OF ARGUMENT

As signaled in describing the standard of review, the attempt to rebalance the equities would become relevant only if this were a "close" case, which it is not (Section I). The State and Local Respondents do not make any effort to shore up their likelihood of prevailing, which is fatal to their motion for three independent reasons. First, they lack *parens patriae* standing against DHS and they fail to identify their own injuries adequately (Section I.A). Second, the challenged Rule accurately interprets the INA's public-charge provisions, so the APA challenge to the Rule must fail (Section I.B). Third, even if they could strike the Rule somehow, they cannot resurrect the 1999 Field Guidance that they prefer because it is a procedural nullity and inconsistent with the INA (Section I.C).

If this Court were inclined to consider the motion, notwithstanding the lack of a need to balance equities, the motion still must fail at least three reasons. First, the facts on which the State and Local Respondents rely are disjointed and inconsistent both internally and *vis-à-vis* facts about the Covid-19 pandemic: they claim simultaneously to be concerned with essential workers — whom the law requires to have health insurance — and unemployed workers, though the Covid-19 virus primarily affects the elderly and those with pre-existing medical conditions who are less likely to work in essential industries (Section II.A). Second, to the extent that the State and Local Respondents seek to leverage the Covid-19 pandemic through the National Emergencies Act, 50 U.S.C. §§ 1601-1651 ("NEA") or the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 6428(d)(1), 134 Stat. 281 (2020) ("CARES Act"), they petition the wrong branch of government; this Court has no warrant in either the NEA or the CARES Act to revisit the relief in this litigation (Section II.B). Finally, insofar as this is an APA action, the State and Local Respondents should follow APA procedures for going outside the administrative record to address post-promulgation developments by petitioning DHS to amend the Rule (which the State and Local Respondents have not done) and waiting for DHS either to respond or to delay a response, neither of which has yet happened (Section II.C).

ARGUMENT

I. THE STATE AND LOCAL RESPONDENTS ARE UNLIKELY TO PREVAIL ON THE MERITS, AND THE QUESTION IS NOT CLOSE.

The State and Local Respondents' motion focuses entirely on the argument that the Covid-19 pandemic has altered the balance of the equities, and thus requires altering or halting the stay. For that argument to work — that is, for the balance of the equities even to matter — this must be a "close" case, *Hollingsworth*, 558 U.S. at 190, which it is not. The State and Local Respondents do not even attempt to argue otherwise.

A. The State and Local Respondents lack standing.

Most harm that the State and Local Respondents seek to prevent will fall on their residents who are not citizens or legal permanent residents ("LPRs"). State and local governments lack standing to assert *parens patriae* standing against the Federal Government. *Alfred L. Snapp & Son v. Puerto Rico,* 458 U.S. 592, 610 n.16 (1982). Harms to third parties, then, form no part of the State and Local Respondents' standing.

With respect to any harm to the State and Local Respondents themselves, the factual showing of harm is inadequate to establish standing. Under Article III, appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998), and "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). When a plaintiff argues for harm

that is not obvious, that plaintiff must establish the nonobvious harm with evidence. *Va. House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1955 (2019) (party asserting federal jurisdiction "bears the burden of doing more than simply alleging a nonobvious harm") (interior quotation marks omitted). For harm to the State and Local Respondents themselves, the motion — like their underlying case — provides merely anecdotal evidence. *See* Mot. at 19-20. As statisticians caution, the plural of "anecdote" is not "data." For each anecdotal piece of evidence, there may be other offsetting anecdotes (for example, aliens who shelter in place to avoid both Covid-19 and immigration consequences) so that the net impact on the State and Local Respondents is nonexistent.

In any event, standing that accrues after a plaintiff files suit is insufficient to establish standing to sue. Plaintiffs that lack standing will not prevail on the merits and, so, do not present the "close" case that would be needed for the State and Local Respondents' new evidence on the balance of the equities to matter.

B. The Rule permissibly construes "public charge."

The respondents and the district judge all seek to revert to the 1999 Field Guidance, but the Rule permissibly interprets the INA. As argued in Section I.C, *infra*, the 1999 Field Guidance impermissibly interprets the INA, but DHS need not have adopted the only possible INA interpretation. DHS needs only to have adopted a *permissible* one, *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), as it has done.

The district court erred by using congressional inaction to depart from the statute's plain meaning: "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval[.]" *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (interior quotation marks omitted), *abrogated in part on other grounds*, PUB. L. NO. 102-166, §§ 101-102, 105 Stat. 1071, 1072-74 (1991). Instead, the "plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (internal quotation marks omitted). The plain meaning here supports DHS.

While dictionary definitions should suffice, *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (absent a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning"); *Public Charge*, Black's Law Dictionary (3d ed. 1933) ("one who produces a money charge upon, or an expense to, the public for support and care"); *accord* Black's Law Dictionary (4th ed. 1951), the Rule is consistent with other INA provisions. *See* 8 U.S.C. § 1601(5) ("a compelling government interest to enact new rules … to assure that aliens be self-reliant"); 8 U.S.C. § 1601(2)(A) ("aliens … [should] not depend on public resources to meet their needs"). "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest

immigration statutes." 8 U.S.C. § 1601(1).[2] "Strong sentiments opposing the immigration of paupers developed in this country long before the advent of federal immigration controls." 5 Gordon *et al.*, *Immigration Law and Procedure*, § 63.05[2] (Rel. 164 2018). Indeed, those sentiments predated the founding of the Nation: "American colonists were especially reluctant to extend a welcome to impoverished foreigners[.] Many colonies protected themselves against public charges through such measures as mandatory reporting of ship passengers, immigrant screening and exclusion upon arrival of designated 'undesirables,' and requiring bonds for potential public charges." JAMES R. EDWARDS, JR., PUBLIC CHARGE DOCTRINE: A FUNDAMENTAL PRINCIPLE OF AMERICAN IMMIGRATION POLICY 2 (Center for Immigration Studies 2001) (citing E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965 (Univ. of Penn. Press, 1981)). Nothing about the challenged Rule is inconsistent with the INA.

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[2] *See* Act of March 3, 1875, § 5, 18 Stat. 477 (excluding convicts and sex workers, thought likely to become dependent on the public coffers for support); Immigration Act of 1882, § 2, 22 Stat. 214 (barring admission of "any person unable to take care of himself or herself without becoming a public charge."); Act of March 3, 1891, § 1, 26 Stat. 1084 (excluding "paupers"); Act of March 3, 1903, § 2, 32 Stat. 1213, 1214 (excluding "professional beggars"); Act of February 5, 1917, § 3, 39 Stat. 874, 875 (excluding "vagrants"); Act of March 3, 1903, § 26; 32 Stat. 1213, 1220 (authorizing bonds that promise, in consideration for admission, that an alien will not become a public charge); Act of February 20, 1907, § 26, 34 Stat. 898, 907.

C. INS's 1999 Field Guidance is a nullity and cannot support a likelihood of the plaintiffs' prevailing.

Neither INS's aborted 1999 NPRM nor the interim 1999 Field Guidance support the State and Local Respondents' merits claims. Indeed, both are nullities, and both were inconsistent with the INA when promulgated.

First, an NPRM that never matures into a final rule is a nullity: "any notion of ascribing weight to anything that has remained in the 'proposed regulation' limbo for a like period [of 13 years] is totally unpersuasive." *Tedori v. United States*, 211 F.3d 488, 492 n.13 (9th Cir. 2000); *NRDC v. Abraham*, 355 F.3d 179, 201 (2d Cir. 2004); *Matter of Appletree Markets, Inc.*, 19 F.3d 969, 973 (5th Cir. 1994); *Public Citizen, Inc. v. Shalala*, 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (citing *Public Citizen Health Research Group v. Commissioner, F.D.A.*, 740 F.2d 21, 32-33 (D.C. Cir. 1984)); *Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 829 (10th Cir. 2000). INS's 1999 NPRM does not support relief here.

Second, once shorn of the 1999 NPRM of which it was a part, the 1999 Field Guidance was a mere "interpretative rule[], general statement[] of policy, or rule[] of agency organization, procedure, or practice" that the APA exempts from notice-and-comment requirements. *See* 5 U.S.C. § 553(b)(A). The challenged rulemaking nullified INS's 1999 Field Guidance: "This final rule supersedes the 1999 Interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds." 84 Fed. Reg. at 41,292. Since federal courts lack authority

under the APA to require any more of an agency when it changes prior APA-exempt guidance, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101-02 (2015), the 1999 Field Guidance has no ongoing administrative-law relevance here.

Third, to the extent that the 1999 Field Guidance remained extant, it obviously violates the INA and so has no claim to deference under the first step of the deference analysis to employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." *Chevron,* 467 U.S. at 843 n.9 The INS's 1999 Field Guidance violated the plain meaning of the INA, *see* Section I.A, *supra*, by attempting to insert a new meaning into a longstanding statutory term of art: "But where a phrase in a statute appears to have become a term of art … any attempt to break down the term into its constituent words is not apt to illuminate its meaning." *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990). So, while the 1999 Field Guidance no longer exists, it would not aid the State and Local Respondents' case if it did.

II. EVEN ASSUMING THIS CASE PRSENTS A CLOSE QUESTION, THE STATE AND LOCAL RESPONDENTS DO NOT ESTABLISH ANY RIGHT TO RELIEF.

The prior section recapitulates why the plaintiffs here cannot prevail on the merits and, so, are not entitled to a preliminary injunction, *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008), and do not present the "close" case required for a court to balance the equities when considering a stay application. *Hollingsworth*, 558 U.S. at 190. In this

section, *amicus* IRLI explains why the State and Local Respondents' motion would fail to warrant relief, even if this were a "close" case.

For stays, the question of irreparable injury requires a two-part "showing of a threat of irreparable injury to interests that [the applicant] properly represents." *Graddick v. Newman,* 453 U.S. 928, 933 (1981) (Powell, J., for the Court[3]). "The first, embraced by the concept of 'standing,' looks to the status of the party to redress the injury of which he complains." *Id.* "The second aspect of the inquiry involves the nature and severity of the actual or threatened harm alleged by the applicant." *Id.* The State and Local Respondents ' do not meet either prong of that test.

As for standing, the State and Local Respondents do not have standing, *see* Section I.A, *supra*, and their allegations in the motion do not establish standing, much less irreparable harm. *See* Section II.A, *infra*. With respect to irreparable harm, the lack of standing "negates giving controlling consideration to the irreparable harm" that the State and Local Respondents claim. *Heckler v. Lopez*, 464 U.S. 879, 886 (1983) (Brennan, J., dissenting from the denial of motion to vacate the Circuit Justice's stay). Indeed, a lack of standing necessarily implies a lack of irreparable harm because the latter sets a higher bar for injury than Article III. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010). In sum, the State and Local Respondents could not establish

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[3] Although *Graddick* began as an application to a circuit justice, the application was referred to the full Court. *Graddick,* 453 U.S. at 929.

that the balance of equities tips in their favor, even if that were relevant under *Hollingsworth*.

A. The State and Local Respondents' disjointed factual allegations do not establish irreparable harm.

Most of the harms that the State and Local Respondents identify befall third-party residents, and the State and Local Respondents lack *parens patriae* standing to press these harms against the Government. *Alfred L. Snapp,* 458 U.S. at 610 n.16. But even for the nonobvious harms to the State and Local Respondents themselves, the evidence is insufficient.

The motion's evidence is not only disjointed and self-contradicting but also conflicts with judicially noticeable facts and laws:

- The motion claims that affected residents work in "essential industries [such as] providing health-care, preparing and delivering food to residences, cleaning hospitals and public spaces, and caring for the sick or aging," Mot. at 21, but somehow lack healthcare, notwithstanding the "employer mandate" in the Affordable Care Act. *See Nat'l Fed'n of Indep. Business v. Sebelius*, 567 U.S. 519, 539 (2012) ("[m]any individuals will receive the required coverage through their employer").
- The motion seeks to protect the unemployed as well as essential workers, without acknowledging the disconnect between those two sets of injuries.
- The motion focuses on essential workers and the unemployed without acknowledging that overall mortality from Covid-19 falls disproportionately on the elderly and those with pre-existing medical

problems — such as those with chronic lung disease, serious heart conditions, severe obesity, or chronic kidney disease undergoing dialysis — that make them unlikely to be workers, much less workers in essential industries. *See* CDC, Coronavirus Disease 2019 (COVID-19): Older Adults ("8 out of 10 deaths reported in the U.S. have been in adults 65 years old and older");[4] CDC, Coronavirus Disease 2019 (COVID-19): People Who Are at Higher Risk for Severe Illness.[5]

- The motion provides data on "noncitizens" who work in essential industries, Mot. at 21, but fails to break that data down into relevant subsets of noncitizens who might be affected by the Rule.

While some of these flaws in the motion's evidentiary basis might be correctable — for example, the number of noncitizens actually affected by the Rule in relevant industries — a movant bears the burden to establish standing and irreparable harm. The State and Local Respondents have not met that burden.

B. Invoking the current Covid-19 emergency does not aid the State and Local Respondents.

The motion attempts to leverage the Covid-19 emergency for relief, but the State and Local Respondents petition the wrong branch of government: "policy arguments are more properly

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[4] Available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html (last visited April 20, 2020).

[5] Available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited April 20, 2020).

addressed to legislators or administrators, not to judges." . *Chevron*, 467 U.S. at 864. Congress holds the power here, except where Congress has delegated its emergency powers to the President.

1. The NEA delegates unreviewable emergency authority to the President.

By invoking the President's Covid-19 emergency, the State and Local Respondents ask this Court to delve into an area that the NEA leaves to Congress and the President, under "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving [the case]." *Vieth v. Jubelirer,* 541 U.S. 267, 277-78 (2004) (interior quotation marks omitted). As the only unelected branch of government, courts are the *least* fit to answer such questions: "making judges supreme arbiters in political controversies … [would] dethrone [the people] and [make them] lose one of their … invaluable birthrights." *Luther v. Borden,* 48 U.S. 1, 52-53 (1849). Whatever sympathy the motion elicits, the relief requested belongs to the political branches to consider.

The NEA provides the President with unfettered discretion to *declare* an emergency, subject only to the power of Congress to *terminate* an emergency:

> As a firm believer in a strong Presidency and Executive flexibility, I could not support this bill if it would impair any of the rightful constitutional powers of the President. [The bill] will have no impact on the flexibility to

> declare a national emergency and to quickly respond if the necessity arises.

121 CONG. REC. 27,632, 27,636 (Sept. 4, 1975) (Rep. Hutchinson), *reprinted in* S. Comm. on Gov't Operations & the Special Comm. on Nat'l Emergencies and Delegated Emergency Powers, 94th Cong., 2d Sess., The National Emergencies Act Source Book: Legislative History, Texts, and Other Documents, at 252-53 (1976) (hereinafter, "NEA Source Book"); 121 CONG. REC. 27,632, 27,645 (Sept. 4, 1975) (Red. Drinan), *reprinted in* NEA Source Book, at 279 ("H.R. 3884 [has] no standard really, whatsoever, when and why the President can proclaim a national emergency"). Consistent with the statutory text, 50 U.S.C. § 1621(a), a President has full discretion to declare an emergency in the first instance.

As enacted, the NEA relied on congressional oversight,[6] 121 CONG. REC. 27,632, 27,636 (Sept. 4, 1975) (Rep. Moorhead), *reprinted in* NEA Source Book, at 254 ("Congress would assume the major role of reviewing and overseeing the conduct of the

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[6] In *INS v. Chadha,* 462 U.S. 919, 946 (1983), this Court rejected the one-house veto provisions of former 8 U.S.C. § 1254(c)(2) (1982) for failing to meet the constitutional requirements of bicameralism and presentment. Following Chadha, Congress amended the NEA to replace *concurrent* resolutions with *joint* resolutions, PUB. L. NO. 99-93, § 801, 99 Stat. 405, 448 (1985); H.R. REP. NO. 99-240, at 86 (1985) (Conf. Rep.) ("Senate amendment amends the National Emergencies Act to stipulate that a national emergency may be terminated by joint resolution of the Congress," and "Conference Substitute is identical to the Senate amendment").

Executive branch in a national emergency situation"), not on judicial review:

> Unlike inherent Presidential powers which can be reviewed by the Supreme Court, emergency powers are specific legal delegations of authority to a President. The Supreme Court has generally given deference to such delegations of authority. The laws are viewed as persuasive evidence of Congressional intent that the President should be permitted special latitude during crises. Thus, *unless the Congress itself imposes controls, emergency powers shall remain largely unchecked*.

120 CONG. REC. 29,975, 29,983 (Aug. 22, 1974) (Sen. Pearson), *reprinted in* NEA Source Book, at 84-85 (emphasis added). *Amicus* IRLI respectfully submits that this Court should not entertain arguments on the President's priorities for dealing with emergencies. It falls exclusively to Congress and legislative processes to terminate or amend an emergency declared by the President.

2. The CARES Act makes permissible choices to protect our citizens and LPRs, and those choices are not reviewable here.

The State and Local Respondents implicitly complain that noncitizens need certain forms of welfare because the CARES Act does not provide emergency assistance to "nonresident alien[s]." *See* PUB. L. NO. 116-136, § 6428(d)(1), 134 Stat. at ___ (pagination not available). While noncitizens theoretically could sue a relevant official over the CARES Act's exclusion of

nonresident aliens, two obvious barriers come to mind. First, that would be a separate lawsuit. Second, the exclusive federal power over admitting aliens and setting the terms of their residence might overcome a disparate-treatment claim. *Graham v. Richardson*, 403 U.S. 365, 376, 380 (1971) (successful challenge to states' excluding resident aliens from welfare benefits as inconsistent with equal protection and exclusive federal power regarding aliens). While the State and Local Respondents and the nonresident aliens whom they purport to represent are free to petition Congress with their concerns, U.S. CONST. amend. I, cl. 6, this Court has no warrant to review the CARES Act here.

C. The relief requested is inconsistent with administrative law.

The State and Local Respondents note — impatiently — that DHS has not responded to a March 6, 2020, letter from the States' attorneys general sent to request a temporary halt to the Rule. Mot. at 12.[7] On March 13, 2020, DHS issued guidance that provides relief with respect to Covid-19 and the public-charge rule, *id.* at 12-13, 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 13-14 & n.27; App. 48-51. Insofar as this is largely an APA suit, the State and Local Respondents should follow the APA process, and that process does not support relief here.

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[7] Agencies within the City of New York sent a similar letter on March 18, 2020. *Id.*; App. 226-29.

The APA expressly allows the public to send such letters to petition an agency 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) (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 responded directly yet, the proper response by the petitioning officials would be to challenge the inaction as unreasonable delay, but that approach holds a danger. If DHS were to issue a notice of proposed rulemaking, that could moot this litigation. *In re Int'l Union, United Mine Workers of Am.*, 231 F.3d 51, 54 (D.C. Cir. 2000). In any event, DHS has not even come close to the sort of unreasonable delay that would give the State and Local Respondents a window to compel DHS to issue an NPRM, and the Covid-19 emergency would be over before DHS finalized any new rule.

By contrast, if the State and Local Respondents ignore the process that the APA provides in § 553(e), they are effectively seeking relief based on non-record evidence that occurred after the filing of the underlying 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 Respondents have not made any showing that would fit within an exception to that rule. *Id.* This Court could reject the motion on that basis alone.

In sum, the APA provides a process for resolving the State and Local Respondents' concerns, and they have initiated that process by petitioning DHS for relief. Neither the APA nor the APA's waiver of the Government's sovereign immunity allow this Court or the State and Local Respondents to short-circuit that process via this motion.

CONCLUSION

This Court should deny the State and Local Respondents' motion.

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Respectfully submitted,

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