No. 19-2222

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASA DE MARYLAND, INC., *et al.*

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Maryland

PETITION FOR REHEARING AND REHEARING *EN BANC* OF MOTIONS PANEL'S STAY DECISION

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STATEMENT REQUIRED BY RULE 35(b)

Appellees respectfully request that the *en banc* Court vacate the motions panel's order staying the preliminary injunction issued in this case and grant an administrative stay of that order while this petition is under consideration.

For over 135 years, a consistent standard has governed how federal immigration authorities determine whether a noncitizen is inadmissible to the United States on the ground that the person is likely to become a "public charge." The Department of Homeland Security (DHS) recently promulgated a Final Rule that would dramatically and unlawfully expand DHS's power to deny admission, and thus lawful-permanent-resident (LPR) status, to any noncitizen deemed likely at any point over a lifetime to accept even a small amount of public benefits for a short period of time.

Appellees and others challenging the Rule sought and received preliminary injunctions from five district courts across the country to safeguard the longstanding status quo that has guided public-charge determinations while their challenges to DHS's new rule can be litigated. Three courts, including the District of Maryland, issued nationwide injunctions, while the others are regional. The government moved to stay all of the preliminary injunctions pending appeal.

With limited briefing and without oral argument, and over the dissent of one judge, the motions panel issued a stay order—unaccompanied by a written

opinion—that lifts the District of Maryland's preliminary injunction during the pendency of this appeal, thereby threatening to upend the status quo. Stay motions remain pending in two other Circuits, while one other has been granted.[1] Should the Second Circuit grant a stay, DHS's new rule would go into effect in all or most of the country before any appellate court rules on the merits of the preliminary injunctions—causing irreparable harm to Appellees and to noncitizens around the country.

Rehearing *en banc* of the panel's stay order is warranted because the order cannot be reconciled with *Nken v. Holder*, 556 U.S. 418 (2009), and because the case raises an exceptionally important question. Under *Nken*, the party seeking a stay pending appeal must demonstrate that it will be irreparably harmed absent a stay. *Id.* at 434. Appellants have utterly failed to establish that they have been irreparably harmed by the preliminary injunction. The panel's stay is in direct conflict with *Nken* and must be vacated.

[1] On December 5, 2019, the Ninth Circuit stayed the preliminary injunctions issued by the Eastern District of Washington and the Northern District of California. *See* Order, *City & Cty. of San Francisco v. U.S. Customs & Immigration Servs.*, Nos. 19-17213, 19-17214,19-35914 (9th Cir. Dec. 5, 2019), ECF No. 27. The Seventh and Second Circuits have yet to rule on the government's motions for stays of preliminary injunctions issued by the Northern District of Illinois (which is limited to the State of Illinois) and the Southern District of New York (which are nationwide).

Moreover, the question of whether DHS's Final Rule is consistent with its statutory authority is of critical importance, as the Rule gives DHS virtually unfettered discretion to deny admission or LPR status to noncitizens on the basis of a subjective prediction of their future benefits use. Absent correction by the *en banc* Court, untold numbers of noncitizens—including some of Appellee CASA de Maryland, Inc. (CASA)'s members—will be denied admission or LPR status based on an unlawful exercise of agency discretion, and countless more will be deterred from obtaining public benefits that provide critical health, nutritional, and housing supports for noncitizens and their families.

BACKGROUND

Under § 212(a)(4) of the Immigration and Nationality Act (INA), a noncitizen is inadmissible to the United States and ineligible to obtain LPR status if she is "in the opinion of the Attorney General . . . likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The public-charge inadmissibility ground has appeared in U.S. immigration statutes since 1882. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, 214 (denying admission to "any convict, lunatic, idiot, or any other person unable to take care of himself or herself without becoming a public charge"). Congress has never provided a statutory definition of the term "public charge."

Since its enactment, however, courts and administrative agencies have

understood the statutory term to encompass only individuals who are likely to become primarily dependent on the government for financial support. In line with that understanding, since 1999, immigration officials making public-charge determinations have operated under guidance issued by the Department of Justice (DOJ). Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999) [hereinafter Field Guidance]; *see also* Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (proposed May 26, 1999) (to be codified at 8 C.F.R. pts. 212, 237) [hereinafter 1999 Proposed Rule] (proposing a rulemaking mirroring the Field Guidance). The Field Guidance and 1999 Proposed Rule defined the term "public charge" as a noncitizen "who is likely to become . . . primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." 64 Fed. Reg. at 28,689 (internal quotation marks omitted). In so doing, DOJ did not purport to issue a new interpretation of the public-charge inadmissibility ground. Rather, it concluded that the primarily dependent standard was dictated by "the plain meaning of the word 'charge,'" "the historical context of public dependency when the public charge immigration provisions were first enacted more than a century ago," and "the facts found in the deportation and admissibility cases" dating back more than a century. 1999 Proposed Rule, 64

Fed. Reg. at 28,677.

On August 14, 2019, DHS issued a final rule that departs sharply from the longstanding interpretation of the public-charge inadmissibility ground formalized in the Field Guidance. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248) [hereinafter Public Charge Rule, Final Rule, or Rule]. The Rule defines "public charge" as "an alien who receives one or more" of an enumerated set of public benefits "for more than 12 months in the aggregate within a 36-month period," with multiple benefits received in a single month counting as multiple months of benefits. *Id.* at 41,501 (to be codified at 8 C.F.R. § 212.21(a)). In addition to the cash benefits relevant to public-charge determinations under the Field Guidance, the Public Charge Rule also considers noncitizens' likelihood of receiving (1) Supplemental Nutrition Assistance Program (SNAP) benefits; (2) federal housing assistance; and (3) non-emergency Medicaid benefits (with certain exceptions). *Id.* (to be codified at 8 C.F.R. § 212.21(b)).

Because the public-charge inadmissibility ground is forward-looking (and because most non-LPRs are not eligible for the enumerated public benefits), immigration officers' task under DHS's Rule would *not* be to determine whether a noncitizen has in fact received one or more of those benefits for more than 12 months within a 36-month period, but instead to assess whether she is "more likely

than not" to do so at any point over the rest of her life. *Id.* (to be codified at 8 C.F.R. § 212.21(c)). Thus, under the Rule, a noncitizen could be deemed "likely . . . to become a public charge," and therefore ineligible to become an LPR, based on a prediction that she is likely to experience a temporary, isolated need for only a small amount of public benefits in the near or distant future.

Appellee CASA is a nonprofit membership organization that seeks "to create a more just society by building power and improving the quality of life in low-income immigrant communities." JA29. It does so by providing a wide variety of social, health, job training, employment, and legal services to its members, who have varying immigration statuses. JA30. Even before the Public Charge Rule was finalized, its draft and proposed versions sparked widespread confusion and fear, leading many of CASA's members to disenroll from or forgo federal, state, and local public benefits to which they or their family members, including U.S. citizen children, are entitled. JA31–32. Because these benefits provide recipients with critical food, health, and housing support, CASA has invested significant resources in public education and individual legal and health-counseling services in order to stem the harm caused by the Rule's chilling effect. JA 32–33.

In view of the serious harm that the Public Charge Rule has caused and would continue to cause if permitted to go into effect, CASA and two of its members filed suit in the District of Maryland challenging the legality of the Rule.

CASA and its members moved for a preliminary injunction to prevent the Rule from going into effect as planned on October 15, 2019. After holding a lengthy hearing, JA121–234, the district court entered a preliminary injunction in a carefully reasoned opinion issued on the eve of the Rule's effective date, JA235–74. The district court concluded that CASA has organizational standing to sue, JA248; that its claims are justiciable, JA 249, 251–52; and that it is likely to prevail on the merits of its claim that the Public Charge Rule violates the Administrative Procedure Act (APA) because the Rule is "not in accordance with law," JA266 (quoting 5 U.S.C. § 706(2)(A)).[2] Four other district courts around the country also preliminarily enjoined the Rule based on similar legal conclusions.[3]

After filing their appeal, Appellants moved for a stay of the preliminary injunction pending appeal in the district court. ECF No. 69. In a detailed order,

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[2] Appellees have raised several other standing and merits arguments that the district court's preliminary injunction decision did not address. JA248, 266–67.

[3] *See Cook Cty. v. McAleenan*, No. 19 C 6334, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019), *appeal docketed*, No. 19-3169 (7th Cir. Oct. 31, 2019); *Washington v. U.S. Dep't of Homeland Sec.*, No. 4:19-CV-5210-RMP, 2019 WL 5100717 (E.D. Wash. Oct. 11, 2019), *appeal docketed*, No. 19-35914 (9th Cir. Oct. 31, 2019); *New York v. U.S. Dep't of Homeland Sec.*, No. 19 Civ. 7777 (GBD), 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019), *appeal docketed*, No. 19-3591 (2d Cir. Oct. 31, 2019); *Make the Road N.Y. v. Cuccinelli*, No. 19 Civ. 7993 (GBD), 2019 WL 5484638 (S.D.N.Y. Oct. 11, 2019), *appeal docketed*, No. 19-3595 (2d Cir. Oct. 31, 2019); *City & Cty. of San Francisco v. U.S. Customs & Immigration Servs.*, Nos. 19-cv-04717-PJH, 19-cv-04975-PJH, 19-cv-04980-PJH, 2019 WL 5100718 (N.D. Cal. Oct. 11, 2019), *appeal docketed*, Nos. 19-17213, 19-17214 (9th Cir. Oct. 31, 2019).

the district court denied a stay. ECF No. 79. Appellants then sought identical relief from this Court, App. B (Mot.), which a motions panel granted by a two-to-one vote in an order unaccompanied by a written opinion, App. A.

ARGUMENT

I. THE PANEL CLEARLY MISAPPLIED *NKEN* BY ENTERING A STAY ABSENT ANY SHOWING OF IRREPARABLE HARM

A stay pending appeal is "an exercise of judicial discretion," not a "matter of right." *Nken*, 556 U.S. at 433 (quoting *Virginia Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34. In order to carry this burden, the requesting party must (1) make "a strong showing" that it is likely to succeed on the merits and (2) demonstrate that it will be irreparably injured absent a stay. *See id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Moreover, the requesting party must show that (3) a stay will not "substantially injure other parties interested in the proceedings" and (4) the public interest favors a stay. *See id.* (quoting *Hilton*, 481 U.S. at 776). Of those four factors, the first two "are the most critical." *Id.* Courts assess the final two factors, which merge when the government is a party, only if the requesting party "satisfies the first two factors." *Id.* at 435. Thus, a stay cannot issue if the requesting party fails to establish irreparable harm. *See id.*

Appellants did not carry their burden on any of the stay factors, and in particular they utterly failed to articulate any cognizable harm—let alone an irreparable one—attributable to the district court's preliminary injunction. Appellants' Motion for Stay Pending Appeal devoted a mere four sentences to attempting to set out the irreparable harm that they supposedly would suffer if the preliminary injunction were to remain in place during the pendency of this appeal. Mot. 18. According to Appellants, the district court's preliminary injunction harmed them by forcing DHS to "grant lawful-permanent-resident status to aliens whom the Secretary would deem likely to become public charges in the exercise of his discretion." *Id.* Appellants characterized this harm as irreparable because "DHS currently has no practical means of revisiting public-charge admissibility determinations once made." *Id.*

Appellants' alleged harm amounts to nothing more than a complaint that the preliminary injunction delays implementation of its preferred policy. But if mere delay of the implementation of a regulation constitutes irreparable harm, then the government would be entitled to an automatic stay in APA cases any time a motions panel disagrees with a district court's assessment of the merits. That cannot be so. Appellate courts apply an abuse-of-discretion standard in reviewing the grant of a preliminary injunction. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004); *Mountain Valley Pipeline LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353,

366 (4th Cir. 2019). By contrast, a party can satisfy the merits prong of the stay factors by making a "strong showing" of success on the merits. *Nken*, 556 U.S. at 434. Absent a meaningful irreparable-harm inquiry, a motions panels could lift a preliminary injunction based on what amounts to an accelerated *de novo* review of the district court's decision to issue a preliminary injunction, with limited briefing (as in this case) and usually without oral argument (also as in this case). In other words, the requirement that a party seeking a stay demonstrate *both* a likelihood of success on the merits *and* irreparable harm ensures that stay proceedings do not devolve into "justice on the fly." *Id*. at 427.

Perhaps implicit in Appellants' discussion of the harm caused by the district court's preliminary injunction is an assumption that noncitizens granted LPR status under preexisting law might one day in the future receive public benefits and thereby drain the public fisc. But any harm based on noncitizens' future receipt of benefits is inherently speculative and an insufficient basis for the issuance of a stay. *See Nken*, 556 U.S. at 434 ("[S]imply showing some 'possibility of irreparable injury' fails to satisfy the second [stay] factor." (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998))). Noncitizens "who are unlawfully present and nonimmigrants physically present in the United States . . . are generally barred from receiving federal public benefits other than emergency assistance." Final Rule, 84 Fed. Reg. at 41,313; *see also* 8 U.S.C. §§ 1611, 1621, 1641(b).

Therefore, Appellants cannot rely on noncitizens' past receipt of public benefits to forecast their future receipt of the same. Nor have Appellants made any non-speculative showing that noncitizens who adjust to LPR status during the pendency of this appeal will become eligible for, apply for, or receive public benefits in the future.

Even if the possibility of future receipt of public benefits by noncitizens were a cognizable harm, several provisions of the INA allow the government to recoup its expenditures and mitigate the risk that benefits will be received in the first place. For example, the INA requires certain applicants for LPR status to obtain affidavits of support obligating sponsors to reimburse states and the federal government for noncitizens' receipt of means-tested public benefits. 8 U.S.C. § 1183a(b). The statute also authorizes the removal of "[a]ny alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry." *Id.* § 1227(a)(5). Most noncitizens also are prohibited from receiving many federal benefits during the first five years in which they possess LPR status, *see id.* § 1613, 1641(b), and the INA further restricts LPRs' eligibility for means-tested benefits by attributing their sponsors' income and resources to them, *id.* § 1631(a). To the extent that those provisions do not restrict LPR access to public benefits to Appellants' satisfaction,

Congress at any time could further limit noncitizen eligibility to public benefits—but it has not done so.

Because Appellants have not established any irreparable harm caused by the district court's preliminary injunction, the Court should grant *en banc* review to rectify the motions panel's misapplication of *Nken*.

II. THE STAY THREATENS TO UPEND THE STATUS QUO ON AN ISSUE OF EXCEPTIONAL IMPORTANCE AND TO IRREPARABLY HARM APPELLEES

The panel's stay order unleashes fundamental changes to immigration law correctly held at bay by the preliminary injunction. Although the purpose of a stay is to "suspend[] judicial alteration of the status quo," *Nken*, 556 U.S. at 429 (internal quotation marks omitted), the stay order in this case does exactly the opposite. And it does so on a question of exceptional importance to the many noncitizens, including CASA's members, who seek admission to and adjustment of status in the United States and who will be deterred from obtaining critical public benefits, including for their U.S. citizen children.

As addressed at greater length in Appellees' stay opposition and in the district court's detailed opinion accompanying its grant of a preliminary injunction, DHS's Rule cannot be reconciled with the plain meaning of the phrase "public charge." At the time of the 1882 enactment of the public-charge inadmissibility ground, dictionaries defined the word "charge" as a "person or thing committed to

another[']s custody, care or management; a trust." *Charge*, Webster's Dictionary (1828 online ed.), https://perma.cc/T3CB-5HUT; *see also Charge*, Webster's Dictionary (1886 ed.), https://perma.cc/WJ9Y-CHFG (similar). In ordinary usage, therefore, a "public charge" was a person entrusted to the public's care—one who was so incapable of providing for himself that he depended on the public for long-term subsistence. The 1882 Act also imposed on each noncitizen who entered the United States a 50-cent head tax for the purpose of creating an "immigrant fund." Act of Aug. 3, 1882, ch. 376, § 1, 22 Stat. at 214. Because this fund provided for temporary and limited public assistance for noncitizens upon arrival, Congress could not possibly have intended that a noncitizen's perceived likelihood of receiving public assistance of that sort should render her inadmissible.

In line with the unambiguous meaning of "public charge," courts and agencies reviewing public-charge determinations have consistently focused on a noncitizen's ability and willingness to work as it relates to that person's capacity to avoid becoming primarily dependent on the government for support. *See, e.g.*, *Howe v. United States ex rel. Savitsky*, 247 F. 292, 293–94 (2d Cir. 1917) ("physically []fit" noncitizen could not be denied admission on public-charge grounds because "Congress meant the act to exclude persons who were likely to become occupants of almshouses"); *United States ex rel. Barlin v. Rodgers*, 191 F. 970, 973–77 (3d Cir. 1911) (noncitizens were inadmissible on public-charge

grounds due to physical limitations or agedness that, in the judgment of immigration officials, would have prevented them from earning a living). Likewise, *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409 (A.G. 1964), which remains binding on DHS today, *see* 8 C.F.R. § 1003.1(g)(1), holds that a "healthy person in the prime of life cannot ordinarily be considered likely to become a public charge," 10 I. & N. Dec. at 421.

Not only has Congress repeatedly reenacted the public-charge provision without displacing the longstanding definition of the key term, but it also rejected in 1996 and 2013 attempts to adopt a definition of "public charge" similar to the one DHS now seeks to impose administratively. *See* H.R. Rep. No. 104-828, at 137–40 (1996) (Conf. Rep.); S. Rep. No. 113-40, at 63 (2013). Congress's rejection of analogues to the Public Charge Rule confirms the Rule is inconsistent with the INA's statutory text. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) ("Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").

Moreover, the disruption to the status quo caused by the panel's stay order will result in irreparable harm to an untold number of noncitizens. As DHS acknowledges, the "likely outcome" of the Public Charge Rule "is that some individuals who would may [sic] have been able to immigrate under the 1999 Interim Field Guidance will now be deemed inadmissible as likely public charges."

Final Rule, 84 Fed. Reg. at 41,309. Although Appellants claimed that their inability to "revisit[] public-charge inadmissibility determinations once made" means that the district court's injunction irreparably harms them, Mot. 18, noncitizens—including CASA's members—are the ones who truly will be harmed by adverse public-charge determinations allowed by the panel's stay that cannot later be undone. And because an adverse public-charge determination could be a prelude to deportation, the stay threatens to uproot individuals and split apart families. *See* 8 U.S.C. § 1227(a)(1)(A) (rendering deportable "[a]ny alien who at the time of entry or adjustment of status was" inadmissible).

The stay also will irreparably harm CASA as an organization by forcing it to divert substantial resources to providing increased education to counteract unnecessary disenrollment or forgoing of public benefits and to counseling and legal services to help its members avoid adverse immigration consequences from the Rule. JA32–33. In anticipation of the Rule's enactment, CASA devoted 15 part-time health promoters and 15 to 20 community organizers to mitigating the Rule's chilling effects. JA33. The Rule's complexity also has required extensive training for CASA's staff and has reduced the number of individuals CASA is able to serve in its healthcare and legal clinics on a daily basis. JA32. In addition to significantly impairing CASA's ability to provide direct services to its members, the Rule has frustrated CASA's efforts to engage in time-sensitive affirmative

advocacy for local healthcare expansion. JA33–34. If the panel's stay order remains in effect during the pendency of this appeal, CASA will need to devote additional resources to counteracting the Rule's deleterious impacts on its membership at the continued expense of the organization's affirmative advocacy.

The *en banc* Court should vacate the panel's order to restore the longstanding status quo that the stay has disrupted and to prevent CASA, its members, and other noncitizens from suffering irreparable harm.

III. THE COURT SHOULD SUSPEND THE STAY ORDER WHILE CONSIDERING THIS PETITION

Appellees also request that the Court issue an administrative stay of the motions panel's order during the Court's consideration of this petition. Had a panel of this court reversed the district court's preliminary injunction ruling, the panel's decision would be stayed automatically while Appellees sought *en banc* review. *See* Fed. R. App. P. 41(b). Because the panel's stay order inflicts the same irreparable harm on Appellees, relief similar to that provided by Rule 41(b) is appropriate here. *Cf. Nken*, 556 U.S. at 426 (appellate courts possess inherent power "to hold an order in abeyance while it assesses the legality of the order").

CONCLUSION

For the foregoing reasons, this Court should grant *en banc* review of the motions panel's order staying the district court's preliminary injunction and issue

an administrative stay of that order pending the Court's consideration of this petition.

Dated: December 20, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Rule 35(b)(2)(A) of the Federal Rules of Appellate Procedure because it contains 3,900 words. In addition, this motion complies with the typeface and type-style requirements of Rule 32(a)(5)–(6) of the Federal Rules of Appellate Procedure because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Jonathan L. Backer
Jonathan L. Backer

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ *Jonathan L. Backer*
Jonathan L. Backer

APPENDIX A

FILED: December 9, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2222
(8:19-cv-02715-PWG)

CASA DE MARYLAND, INC.; ANGEL AGUILUZ; MONICA CAMACHO PEREZ

Plaintiffs - Appellees

v.

DONALD J. TRUMP, in his official capacity as President of the United States; CHAD WOLF, in his official capacity as Acting Secretary of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, II, in his official capacity as Acting Director, U.S. Citizenship and Immigration Services; U.S. CITIZENSHIP AND IMMIGRATION SERVICES

Defendants - Appellants

O R D E R

Upon consideration of submissions relative to appellants' motion for a stay pending appeal, the court grants the motion.

Judge Wilkinson and Judge Niemeyer voted to grant the motion. Judge Harris

voted to deny.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

No. 19-2222

IN THE UNITED STATES COURT OF APPEALS
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CASA DE MARYLAND, INC., *et al.*,

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On Appeal from the United States District Court for the District of Maryland

APPELLANTS' MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

The federal government respectfully requests a stay pending its appeal of the district court's preliminary injunction (and associated stay under 5 U.S.C. § 705) barring implementation of a Department of Homeland Security (DHS) rule interpreting the statutory provision that renders inadmissible any alien who DHS determines is "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). *See Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The Rule defines the term "public charge" to mean those aliens who receive certain public benefits, including specified noncash benefits, for more than twelve months in the aggregate within a thirty-six-month period. The Rule also describes how the agency will determine whether an alien is likely to become a public charge.

The government is likely to prevail on appeal. As a threshold matter, plaintiff CASA de Maryland (CASA) has not established standing to sue under Article III and zone-of-interest principles. CASA alleges that the Rule has caused it to devote resources to educating immigrants about the Rule. But CASA's budgetary choice is not a cognizable injury. Nor is it even marginally related to the interests Congress sought to further through the public-charge statute.

On the merits, numerous statutory provisions demonstrate that Congress intended to require aliens to rely on their own resources, rather than taxpayer-supported benefits, to meet their basic needs. For example, Congress required many aliens to obtain sponsors who must promise to reimburse the government for public

benefits the alien receives, and declared any alien who fails to obtain a required sponsor automatically likely to become a public charge.

The Rule—which renders inadmissible aliens who are likely to rely on government support for a significant period to meet basic needs—fully accords with Congress's intent. The district court's contrary conclusion was based on a misreading of the history of the term "public charge." Neither the Immigration Act of 1882 nor any subsequent legislation precludes the interpretation that DHS adopted in the Rule. To the contrary, over the last 130 years, Congress has repeatedly and intentionally left the definition and application of the term "public charge" to the discretion of the Executive Branch.

The remaining factors likewise weigh in favor of a stay. While the Rule is enjoined, the government will grant lawful-permanent-resident status to aliens who the Secretary would deem likely to become public charges in the exercise of his discretion. Any harm plaintiffs might experience does not constitute irreparable injury sufficient to outweigh that harm to the federal government and taxpayers.[1]

[1] Four other district courts have issued preliminary injunctions barring DHS from implementing the Rule, all of which the government has appealed. *See New York v. USDHS*, 19-cv-7777 (S.D.N.Y.) (nationwide injunction); *Make the Road New York v. Cuccinelli*, 19-cv-7993 (S.D.N.Y.) (nationwide); *Cook County, Illinois v. McAleenan*, 19-cv-6334 (N.D. Ill.) (Illinois); *City and County of San Francisco v. USCIS*, No. 19-cv-4717 (N.D. Cal.) (Plaintiff Counties); *California v. USDHS*, No. 19-cv-4975 (N.D. Cal.) (Plaintiff States and the District of Columbia); *Washington v. USDHS*, No. 19-cv-5210 (E.D. Wash.) (nationwide).

STATEMENT

1. The Immigration and Nationality Act (INA) provides that "[a]ny alien who, . . . in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A).[2] That assessment "shall at a minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." *Id.* § 1182(a)(4)(B). Under a separate provision, an admitted alien is deportable if, within five years of the date of entry, the alien "has become a public charge from causes not affirmatively shown to have arisen" within that time. *Id.* § 1227(a)(5).

2. Congress has never defined the term "public charge," instead leaving the term's definition and application to the Executive's discretion. The challenged Rule is the first time the Executive Branch has defined the term in a final rule following notice and comment. A never-finalized rule proposed in 1999 would have defined "public charge" to mean an alien "who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) the receipt of public cash assistance for income maintenance purposes, or (ii) institutionalization for long-term care at Government expense." 64 Fed. Reg. 28,676, 28,681 (May 26, 1999).

[2] In 2002, Congress transferred the Attorney General's authority to make inadmissibility determinations in the relevant circumstances to the Secretary of Homeland Security. *See* 8 U.S.C. § 1103; 6 U.S.C. § 557.

Simultaneously issued "field guidance" adopted the proposed rule's definition. 64 Fed. Reg. 28,689 (May 26, 1999) (1999 Guidance).

In August 2019, DHS promulgated the Rule at issue. The Rule defines "public charge" to mean "an alien who receives one or more [specified] public benefits . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." 84 Fed. Reg. at 41,501. The specified public benefits include cash assistance for income maintenance and certain noncash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. *Id.* As DHS explained, the Rule's definition of "public charge" differs from the 1999 Guidance's definition in that: (1) it incorporates certain noncash benefits; and (2) it replaces the "primarily dependent" standard with the 12-month/36-month measure of dependence.

The Rule also sets forth a framework for evaluating whether, considering the "totality of an alien's individual circumstances," the alien is "[l]ikely at any time to become a public charge." 84 Fed. Reg. at 41,369, 41,501-04. Among other things, the framework identifies factors the adjudicator must consider in making public-charge inadmissibility determinations. *Id.* The Rule's effective date was October 15, 2019.

3. CASA, an organization that provides a variety of services to immigrant communities, and two individuals, Angel Aguiluz and Monica Camacho Perez,

challenged the Rule. As relevant here, they alleged that it is not a permissible construction of "public charge." Dkt. 27, at 4.

On October 14, 2019, the district court granted plaintiffs' request for a nationwide preliminary injunction barring DHS from implementing the Rule. Attachment A (Op.). The court did not decide whether the individual plaintiffs had standing, but concluded that CASA's decision to provide education about the Rule was a sufficient injury in fact. *Id.* at 10-14. The court also concluded that CASA is within the zone of interests protected by the public-charge provision, reasoning that the "plain language of this provision indicates that the interests to be regulated are the health and economic status of immigrants." *Id.* at 17.

On the merits, the court concluded that plaintiffs were likely to prevail on their claim that the Rule's definition of "public charge" was not consistent with the statute. Op. 31-32. The court reasoned that the Rule's definition contradicted the "history and context" of the term, including prior decisions by the Supreme Court and by the Attorney General. Op. 23-31.

4. The government sought a stay from the district court on October 25, which the district court denied on November 14. The government notified plaintiffs that it would file this motion seeking a stay pending appeal. Plaintiffs oppose the motion.

ARGUMENT

I. The Government Is Likely To Prevail On The Merits

A. CASA Lacks Standing

The district court erred in holding that CASA has standing to seek injunctive relief. CASA cannot show, as it must to establish standing on its own behalf, that the Rule will "perceptibly impair[]" its "ability to" provide education and health services to immigrant communities. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The district court held that CASA alleged a proper injury because it has "devoted significant resources to educating its members about the Rule," which has reduced CASA's "advocacy for health-care expansion." Op. 10 (quoting Dkt. No. 27 ¶¶ 15, 123). But this Court has already held that a "diversion of resources" which "reduc[es] the funds available for other purposes" is not a cognizable injury, because the harm "results not from any actions taken by the defendant, but rather from the organization's own budgetary choices." *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) (cleaned up). "To determine that an organization that decides to spend its money on educating members, responding to member inquiries, or undertaking litigation . . . suffers a cognizable injury would be to imply standing for organizations with merely 'abstract concern[s] with a subject that could be affected by an

adjudication.'" *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976)).

The district court acknowledged that holding, Op. 10, but nevertheless held that CASA's "reallocation of its resources" was caused by a "definition of the public charge rule that is dramatically more threatening to its members." Op. 13. That does not distinguish this case from *Lane*, in which a gun-rights organization had to spend resources educating members about an unfavorable change to interstate gun-transfer laws. *See Lane*, 703 F.3d at 675.

Nor is this case analogous to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), as the district court erroneously suggested. Op. 11. There, an organization that promoted equal access to housing had standing to challenge discriminatory housing practices because those practices impeded its counseling and referral services. *Id.* at 379; *see Lane*, 703 F.3d at 674 (noting that in *Havens Realty* the organization's ability to perform services was impaired). CASA alleges no similar impairment of its services. Rather, CASA alleges merely that the Rule altered the subject matter of its educational and advocacy efforts. But if that change were sufficient to show organizational standing, *any* regulatory change adverse to an organization's clients would give rise to organizational standing. Such a holding would not only conflict with *Lane*, but would render meaningless the Supreme Court's admonition in *Havens Realty Corp.* that a "setback to the organization's abstract social interests" is insufficient for organizational standing. 455 U.S. at 379.

CASA's putative injuries are also outside the statute's zone of interests. The public-charge inadmissibility provision is designed to ensure that aliens who are admitted to the country or become permanent residents do not rely on public benefits. It does not create judicially cognizable interests for anyone outside the government, except for an alien in the United States who otherwise has a right to challenge a determination of inadmissibility, for no third party has a judicially enforceable interest in the admission or removal of an alien. CASA's desire to avoid changes to the content of its programming is not even "marginally related" to the statute's purpose: to ensure that aliens do not rely on public benefits. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). Contrary to the district court's conclusion, the "plain language" of the provision does not "regulate[]" the "health and economic status of immigrants"; nor is CASA's mission to "create a more just society by building power and improving the quality of life in low-income immigrant communities," Op. 17, related to the statute's purpose.

In holding that CASA came within the statute's zone of interests, the district court impermissibly broadened the "zone of interests" to include all those entities for whom the statute is relevant. In that vein, the district court relied on DHS's statement in the Rule that "non-profit organizations . . . may need or want to become familiar with the provisions of this final rule." Op. 18 (quoting 84 Fed. Reg. at 41,301). But the mere fact that the Rule is relevant to these organizations' work does not mean the organizations' interests are among those protected by the statute.

B. The Rule Adopts A Permissible Construction Of The Statute

1. The INA renders inadmissible "[a]ny alien who" is "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). In determining whether an alien is likely to become a public charge, DHS must review the alien's circumstances, including the alien's "age"; "health"; "family status"; "assets, resources, and financial status"; and "education and skills." *Id.* § 1182(a)(4)(B)(i).

Related provisions of the INA illustrate that the receipt of public benefits, including noncash benefits, is relevant to the determination whether an alien is likely to become a public charge. Congress expressly instructed that, when making a public-charge inadmissibility determination, DHS must not consider any past receipt of benefits, including various noncash benefits, if the alien "has been battered or subjected to extreme cruelty in the United States by [specified persons]." 8 U.S.C. § 1641(c); *see also id.* § 1182(a)(4)(E), 1182(s). The inclusion of that provision presupposes that DHS will ordinarily consider the past receipt of benefits in making "public charge" determinations.

In addition, many aliens seeking adjustment of status must obtain affidavits of support from sponsors. 8 U.S.C. § 1182(a)(4)(C) (requiring most family-sponsored immigrants to submit affidavits of support); *id.* § 1182(a)(4)(D) (same for certain employment-based immigrants); *id.* § 1183a. Aliens who fail to obtain a required affidavit of support qualify by operation of law as likely to become public charges, regardless of their individual circumstances. *Id.* § 1182(a)(4). Congress further

specified that the sponsor must agree "to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line," *id.* § 1183a(a), and granted federal and state governments the right to seek reimbursement from the sponsor for "any means-tested public benefit" that the government provides to the alien, *id.* § 1183a(b).

The import of the affidavit-of-support provision is clear: To avoid being found inadmissible as likely to become a public charge, an alien governed by the provision must find a sponsor who is willing to reimburse the government for *any* means-tested public benefits the alien receives while the sponsorship obligation is in effect. Through this requirement, Congress thus provided that the mere *possibility* that an alien might obtain unreimbursed, means-tested public benefits in the future was sufficient to render that alien likely to become a public charge, regardless of the alien's other circumstances. And Congress enacted the affidavit-of-support provision in 1996—the same year that it enacted the current version of the public-charge inadmissibility provision—against the backdrop of a longstanding interpretation of the term "public charge" for purposes of deportability, *see* 8 U.S.C. § 1227(a)(5), as applying whenever an alien or the alien's sponsor fails to honor a lawful demand for repayment of a public benefit. *See Matter of B*, 3 I. & N. Dec. 323 (BIA and AG 1948); Sen. Hearing 104-487, at 81 (March 12, 1996) (noting that interpretation).

Congress also took other steps to limit aliens' ability to obtain public benefits. Congress provided that, for purposes of eligibility for means-tested public benefits,

the alien's income is "deemed to include" the "income and resources" of the sponsor. 8 U.S.C. § 1631(a). And Congress barred most aliens from obtaining most federal public benefits until they have been in the country for five years or, in some cases, indefinitely. *See* 8 U.S.C. §§ 1611-1613, 1641; 83 Fed. Reg. at 51,126-33.

As Congress explained, those and other provisions were driven by its concern about the "increasing" use by aliens of "public benefits [provided by] Federal, State, and local governments." 8 U.S.C. § 1601(3). Congress emphasized that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," *id.* § 1601(1), and that it "continues to be the immigration policy of the United States that (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (B) the availability of public benefits not constitute an incentive for immigration to the United States," *id.* § 1601(2). Consistent with these pronouncements, Congress expressly equated a lack of "self-sufficiency" with the receipt of "public benefits by aliens," *id.* § 1601(3), which it defined broadly to include any "welfare, health, disability, public or assisted housing . . . or any other similar benefit," *id.* § 1611(c) (defining "federal public benefit"). And it stressed the government's "compelling" interest in enacting new welfare-reform and public-charge legislation "to assure that aliens be self-reliant." *Id.* § 1601(5).

Consistent with that statutory context and history, the Rule defines a "public charge" as an "alien who receives one or more [enumerated] public benefits" over a specified period of time. 84 Fed. Reg. at 41,501. That definition respects Congress's understanding that the term "public charge" would encompass individuals who rely on taxpayer-funded benefits to meet their basic needs. At a minimum, the Rule is "a permissible construction of the statute." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

2. The district court concluded that the Rule's definition of "public charge" is "precluded by the meaning of the term," based on the court's understanding of the "history and context of the Immigration Act of 1882," a 1915 Supreme Court decision, a prior Attorney general decision, and Congress's purported rejection of a definition of "public charge" similar to the one DHS has chosen. Op. 31. In so doing, the district court suggested that the term "public charge" cannot include aliens who temporarily rely on public benefits to meet their needs. Op. 23, 27.

Judicial and administrative interpretations of the term "public charge" undermine the district court's suggestion that the term "public charge" cannot include persons who require temporary aid. Since at least 1948, the Attorney General has taken the authoritative position that an alien qualifies as a "public charge" for deportability purposes if the alien fails to repay a public benefit upon a demand for repayment, regardless of the amount of the unpaid benefit or the length of time the alien received the benefit. *See Matter of B*, 3 I. & N. Dec. at 326. Courts have also held

that an alien's reliance on public support for basic necessities on a temporary basis is sufficient to render the alien a "public charge." *See, e.g.*, *Guimond v. Howes*, 9 F.2d 412, 414 (D. Me. 1925) (wife was "likely to become a public charge" in light of evidence that she and her family had been supported by the town twice in two years); *Ex parte Turner*, 10 F.2d 816, 816 (S.D. Cal. 1926) (similar).

Moreover, far from suggesting that Congress meant to require a restrictive definition of the term, examination of the statute's history demonstrates that Congress has repeatedly and intentionally left the term's definition and application to the discretion of the Executive Branch. In an extensive Report that formed an important part of the foundation for the enactment of the INA, the Senate Judiciary Committee emphasized that because "the elements constituting likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law." S. Rep. No. 81-1515, at 349 (1950); *see also id.* at 803 (reproducing Senate resolution directing Committee to make "full and complete investigation of our entire immigration system" and provide recommendations). The Report also recognized that "[d]ecisions of the courts have given varied definitions of the phrase 'likely to become a public charge,'" *id.* at 347, and that "[d]ifferent consuls, even in close proximity with one another, have enforced [public-charge] standards highly inconsistent with one another." *Id.* at 349. But instead of adopting a definition of public charge—much less the one plaintiffs urge—the Report concluded that the public-charge

inadmissibility determination properly "rests within the discretion of" Executive Branch officials. *Id.*

The statute itself reflects Congress's broad delegation of authority to the Executive Branch, as it expressly provides that public-charge inadmissibility determinations are made "in the opinion of the Attorney General." 8 U.S.C. § 1182(a)(4). The 1999 Guidance—which defined the term public charge by reference to cash assistance—represents an exercise of the Executive Branch's longstanding discretion to define the term "public charge" and provides an example of the term's evolution to reflect the modern welfare state. Indeed, the public-charge definition in that Guidance, which plaintiffs seek to reinstate, is itself broader than the one that the district court derived from *Gegiow*.

The district court's analysis is in any event mistaken on its own terms. The district court noted nineteenth-century dictionary definitions that defined a "charge" as a "person or thing committed or intrusted to the care, custody, or management of another." Op. 23 (quoting Webster's Dictionary (1886 ed.)). Yet, as the court acknowledged, contemporaneous dictionaries also defined "charge" as "an obligation or liability"—and that was the way in which the word was used when a "pauper" was said to be "chargeable to the parish or town." Op. 24 (quoting Stewart Rapalje et al., Dict. Of Am. And English Law (1888)). That was also the way that several legal authorities defined the term "public charge" in the early twentieth century. *See Ex parte Kichmiriantz*, 283 F. 697, 698 (N.D. Cal. 1922) ("[T]he words 'public charge,' as

used in the Immigration Act, mean just what they mean ordinarily; . . . a money charge upon, or an expense to, the public for support and care." (citation omitted)); Arthur Cook et al., *Immigration Laws of the United States* § 285 (1929) (noting that "public charge" meant a person who required "any maintenance, or financial assistance, rendered from public funds, or funds secured by taxation").

Similarly misplaced was the district court's reliance on the 1882 Immigration Act's creation of a fund to provide care for newly arrived immigrants. Op. 24. Congress's intent to keep already-admitted immigrants from being destitute is consistent with its intent to deny admission to aliens who might require such aid.

The district court also concluded that the Supreme Court's decision in *Gegiow v. Uhl*, 239 U.S. 3 (1915), established that "public charge" includes only persons who are likely to be destitute. Op. 25-26. But *Gegiow* did not settle the meaning of "public charge" in subsequent immigration laws, let alone adopt a fixed definition of the term that the Executive Branch must apply. Rather, the "single question" presented in *Gegiow* was "whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked" under "the act of February 20, 1907." 239 U.S. at 9-10. Thus, when the Court opined that the determination whether an alien was likely to become a public charge depended on the alien's "permanent personal" characteristics, it did so simply to make clear that the determination must be based on something particular to the alien and not on the general state of "local conditions." *Id.* at 10.

And to the extent *Gegiow* defined the term "public charge" as used in the 1907 Act, there is no reason to believe Congress approved that definition, especially given that a 1917 immigration statute was expressly designed to "overcome" *Gegiow* and other cases. S. Rep. 64-352, at 5 (1916) ("The purpose of this change is to overcome recent decisions of the courts limiting the meaning of the description of the excluded class. . . . (See especially *Gegiow v. Uhl*, 239 U. S., 3.)"); *see* H.R. Rep. 64-886, at 3-4 (Mar. 11, 1916); *United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (explaining that in the wake of the 1917 act, the public-charge statute "is certainly now intended to cover cases like *Gegiow*"). The district court asserted that this amendment left intact *Gegiow*'s purported focus on whether a person would be destitute, because "the amendment simply clarified that the term public charge covers people that would become 'destitute' due to the inability to work in a local economy." Op. 26-27. Yet in *Gegiow* there was no reason to think that the alien would be destitute: "the only ground for the [immigration officer's denial of admission]" had been "the state of the labor market at Portland at that time." *Gegiow*, 239 U.S. at 8-9. There is no basis for presuming that subsequent Congresses incorporated the definition that the district court attributes to *Gegiow*.

The district court similarly erred in concluding that the Rule is invalid because it is allegedly inconsistent with the Attorney General's decision in *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421-22 (AG 1964). Op. at 27, 31. The Rule's 12/36 standard is not, in fact, inconsistent with the Attorney General's statement in *Matter of*

Martinez-Lopez that "[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency." 10 I. & N. Dec. at 421-22. The alien in *Matter of Martinez-Lopez* was "an able-bodied man in his early twenties," had no dependents, had previously worked in the United States, and "was sponsored by a brother who had lived in the United States for several years and was earning approximately $85.00 a week in permanent employment." *Id.* at 423. Nothing in the Rule suggests that DHS will ordinarily find aliens with those characteristics likely to become a public charge. The Rule requires consideration of numerous factors under the totality of the circumstances. And as DHS noted in announcing the proposed Rule, less than a quarter of all noncitizens receive cash or noncash public benefits. 83 Fed. Reg. at 51,193. There is no reason to conclude that the Rule will result in healthy, working-age aliens being declared public charges in the ordinary course.

In any event, even assuming an inconsistency between the Rule and *Matter of Martinez-Lopez*, DHS is not forever bound by *Matter of Martinez-Lopez*. *See FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). DHS recognized it was proposing a new definition for public charge and explained its basis for doing so. *See* 83 Fed. Reg. at 51,122. That is all the law requires.

Finally, the district court also found it significant that, in 1996 and 2013, Congress declined to adopt legislation that would have expressly defined the term

"public charge" to include receipt of certain noncash benefits. Op. 13-14. But "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160 (2001). And here, Congress likely rejected the proposals to preserve Executive Branch flexibility to define the term; there is no indication that Congress believed proposed definitions would have been irreconcilable with the historical understanding of the term.

II. The Remaining Factors Favor A Stay

Both the government and the public will be irreparably harmed if the Rule does not go into effect. So long as the Rule is enjoined, DHS will grant lawful-permanent-resident status to aliens whom the Secretary would deem likely to become public charges in the exercise of his discretion. DHS currently has no practical means of revisiting public-charge admissibility determinations once made. *See* Dkt. 69-1 ¶ 4. Thus, the injunctions will inevitably result in the grant of lawful-permanent-resident status to aliens who are likely to become public charges under the Rule.

Conversely, CASA's alleged injury is insufficient to provide a basis for standing, much less irreparable harm sufficient to justify a preliminary injunction. And any injury to CASA would in any event be outweighed by the harms to the government and the public.

III. The Court Should At Least Stay The Injunction In Part

At a minimum, the Court should stay the injunction insofar as it sweeps more broadly than necessary to redress CASA's alleged injury. As this Court has explained, "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Virginia Soc'y for Human Life v. Federal Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). The district court's statement that "the ordinary remedy in APA challenges to a rulemaking is to set aside the entire rule if defective," Op. 35, cannot be reconciled with that decision, which rejected the argument that under the APA "the proper scope of injunctive relief is an order setting aside the unconstitutional regulation for the entire country." *Virginia Soc'y*, 263 F.3d at 393-94.

The district court noted that CASA had identified members "located in Maryland, Virginia, D.C., and Pennsylvania," but speculated that "if CASA's members are traveling and enter through a port of entry outside of this geographic area, they could be subject to a Public Charge determination." Op. 35. Even on its own terms, this speculation does not suggest that CASA has been forced to divert resources to address this scenario. And although the district court justified its injunction's scope based on the need for uniformity in immigration enforcement, that asserted need cannot overcome the fundamental principle that an injunction "must be narrowly tailored to remedy the specific harm shown." *East Bay Sanctuary Covenant v. Barr*, 934

F.3d 1026, 1028-29 (9th Cir. 2019) (internal quotation marks omitted); *see Trump v. Hawaii*, 138 S.Ct. 2392, 2424-29 (2018) (Thomas, J., concurring).

CONCLUSION

The preliminary injunction and stay under 5 U.S.C. § 705 should be stayed pending the federal government's appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 4,846 words. This motion also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Joshua Dos Santos
JOSHUA DOS SANTOS

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Joshua Dos Santos
JOSHUA DOS SANTOS