NO. 19-35914

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 4:19-cv-05210-RMP
The Honorable Rosanna Malouf Peterson
United States District Court Judge

PETITION FOR REHEARING EN BANC

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I. INTRODUCTION AND RULE 35 STATEMENT

Although the purpose of an emergency stay is to "give the reviewing court the time to 'act responsibly,' rather than doling out 'justice on the fly,'" here the motions panel did the opposite, rushing out a published stay opinion that inaccurately prejudges the merits of this important case. *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011) (per curiam) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). The panel issued a stay even though the injunctions entered below: (1) simply preserve the status quo that has existed for over a century; (2) will imminently be reviewed by this Court; and (3) were supported by detailed factual findings of irreparable harm by two district courts. The en banc Court should vacate the panel's opinion to restore the status quo and allow the already expedited preliminary injunction appeal to proceed unconstrained by a hastily considered published order.

This case involves the public charge exclusion, a historically narrow ground for excluding immigrants from the United States first enacted over 135 years ago. Since its initial passage, Congress, courts and the executive branch have consistently interpreted the term "public charge" as denoting dependence on the public for survival. In keeping with this narrow construction, less than one percent of all immigrants have been excluded as "public charges."

Congress has refused to expand the rule to sweep in immigrants receiving less substantial public support.

Breaking with this century-long history, earlier this year the Department of Homeland Security (DHS) issued a new "public charge" rule with the stated goal to "transform[]" American immigration policy. *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (Rule). The Rule's new definition of "public charge" is so broad that, if applied to U.S.-born citizens, it would sweep in 40 percent of the population, a result Congress never imagined. DHS thus enacted by rule a sea-change in policy that Congress has repeatedly rejected.

Two district courts in this Circuit (and three elsewhere) preliminarily enjoined DHS's implementation of the Rule. After waiting for five weeks, DHS sought an emergency stay of the orders. Less than three weeks later, a divided motions panel stayed the injunctions in a sweeping, 73-page opinion based on expedited briefing without oral argument. The panel majority published its opinion, preempting the already expedited merits appeal of the injunction. The motions panel additionally violated settled precedent constraining appellate review of a preliminary injunction by ignoring the district court's detailed factual findings about the irreparable harms the States

would suffer from enactment of the Rule. Further, the motions panel misread what it considered a pivotal agency decision, causing it to misinterpret the history of the public charge exclusion.

The en banc Court should intervene to address this issue of exceptional public importance, prevent irreparable harm to the States, and maintain consistency in this Court's precedent governing appellate review of preliminary injunctions.

II. STATEMENT OF THE CASE

The Immigration and Nationality Act excludes individuals seeking to enter the United States who are likely to become a "public charge." 8 U.S.C. § 1182(a)(4). Since its first enactment in 1882, the public charge exclusion has been rarely and narrowly applied. DHS's records show that between 1892 and 1980 (the last reported data), less than one percent of all immigrants were excluded as public charges. Reply in Supp. of Mtn. for Prelim. Inj., ECF 158 (PI Reply), at 15-16.

Congress reenacted the public charge exclusion numerous times over the past 135 years. During this time, court and agency interpretations were consistent in rejecting the receipt of minimal public assistance as grounds for a "public charge" exclusion. In 1996, Congress, in conference committee

considering the most recent reenactment of the exclusion, rejected a definition of "public charge" that included individuals receiving means-tested public benefits for a period of 12 months, a definition strikingly similar to the Rule. Immigration Control & Financial Responsibility Act of 1996, H.R. 2202, 104th Cong. § 202 (1996); *see infra* n.5. In 2013, the Senate again rejected efforts to "*expand*[] the definition of 'public charge'" to include receipt of non-cash benefits. S. Rep. No. 113-40, at 42, 63 (2013).[1]

Despite consistent congressional reenactment of the public charge exclusion premised on this narrow construction, on August 12, 2019, DHS published a rule enacting what Congress expressly rejected in 1996 and again in 2013. Rule, 84 Fed. Reg. 41,292. DHS described the Rule as a "transformative" tool to reshape American immigration policy.[2] The Rule dramatically enlarges the scope of the public charge exclusion by redefining a "public charge" as an "alien who receives one or more public benefits . . . for

[1] DHS's predecessor agency confirmed in 1999 Field Guidance that receipt of in-kind benefits are not considered in making public charge determinations. *See* Immigration and Naturalization Service (INS), *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999) (1999 Field Guidance).

[2] *See* Eileen Sullivan & Michael D. Shear, *Trump Sees an Obstacle to Getting his Way on Immigration: His Own Officials*, N.Y. TIMES (Apr. 14, 2019), https://www.nytimes.com/2019/04/14/us/politics/trump-immigration-stephen-miller.html.

more than 12 months in the aggregate within a 36-month period." 84 Fed. Reg. at 41,501 (to be codified at 8 C.F.R. § 212.21(a)). If applied to U.S.-born individuals, the new definition would sweep in more than 40 percent of the population. PI Reply at 16.

The Rule's core policy change is to make receipt of even small amounts of commonly-used, non-cash benefits such as health insurance and food and housing assistance a basis for deeming an individual a public charge. 84 Fed. Reg. at 41,501 (to be codified at 8 C.F.R. § 212.21(a), (b)). Under the new 12/36 standard, receipt of two cash or noncash benefits in a given month counts as two months, three benefits as three months, and so forth, regardless of amount.

Shortly after DHS announced the Rule, fourteen states (Plaintiff States) sued and moved to enjoin and stay the Rule. The district court granted the preliminary injunction and entered a stay on October 11, 2019. Order Granting Pl. States' Mot. for Section 705 Stay and Prelim. Inj. (Inj.) (Att. A to Dkt. 16). The court made detailed factual findings about the imminent irreparable harms the States would suffer, citing from over 50 declarations submitted by the States and numerous amicus briefs filed by domestic violence, healthcare, disability, education, and elder care service providers. Inj. at 13-23. The court

concluded based on all this evidence that the Rule was likely to have devastating effects on public health in the Plaintiff States by significantly reducing vulnerable populations' access to healthcare, food assistance, and housing benefits. *Id.*

Consistent with the warnings of virtually every medical association and healthcare services provider to submit a comment, the court concluded the Rule would result in decreased vaccination rates and heightened risks of outbreaks of dangerous communicable diseases. *Id.* The court found the Rule would likely inflict the most harm on young children by pressuring entire families to disenroll from benefits programs out of fear of compromising their immigration status. *Id.* at 22-23. The court found that children who suffer untreated illness, severe hunger and malnutrition, or homelessness as a result of the Rule are likely to carry the trauma of their childhood deprivation with them for many years. *Id.* This would, in turn, trigger increased costs and revenue losses for the Plaintiff States "potentially fifty years or more down the road." *Id*. at 22. The court also concluded the States were likely to succeed in proving, among other things, that the Rule was arbitrary and capricious and in violation of the Administrative Procedure Act, as it contravenes Congress's express rejection of the same proposed "public charge" definition. *Id*. at 34-50.

Another district court in this Circuit also preliminary enjoined the Rule based on similar factual findings and legal conclusions. *See City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, No. 19-cv-04717, 2019 WL 5100718 (N.D. Cal. Oct. 11, 2019). Every other district court to consider similar challenges did the same. *See New York v. U.S. Dep't of Homeland Sec.*, No. 19 CIV. 7777, 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019); *Casa De Maryland, Inc. v. Trump*, No. PWG-19-2715, 2019 WL 5190689 (D. Md. Oct. 14, 2019); *Cook Cty. v. McAleenan*, No. 19 C 6334, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019).

On December 5, the motions panel stayed both injunctions in a published order, over a dissent by Judge Owens. *See* Order on Mots. for Stay Pending Appeal (Order), Dkt. 27.

III. ARGUMENT

A. En Banc Review Is Warranted Because the Motions Panel's Order Conflicts With Settled Law of This Circuit

The Order conflicts with longstanding precedent of this Circuit constraining appellate review of preliminary injunction decisions. *See* Fed. R. App. P. 35(a)(1). By exhaustively addressing the merits over 38 pages and publishing its opinion, the panel rewards parties for seeking emergency stays

even when no true emergency exists and preempts the already-expedited review of preliminary injunctions established by Circuit Rule 3-3(b).

This Court has long recognized that even normal appellate review of a district court's preliminary injunction order is "limited and deferential." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 422 F.3d 782, 793 (9th Cir. 2005). In considering a preliminary injunction appeal in the ordinary course, this Court "*do[es] not decide the ultimate merits of the case*, but only the temporal rights of the parties until the district court renders judgment on the merits of the case based on a fully developed record." *Id*. at 793 (emphasis added). "Factual findings in support of a decision to grant a preliminary injunction are reviewed for clear error." *See Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986); *Arc of Cal. v. Douglas*, 757 F.3d 975, 983-84 (9th Cir. 2014); *Nat'l Wildlife Fed'n*, 422 F.3d at 795 ("[a]s long as [factual] findings are plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced it would have reached a different result" (citing *Wardley Int'l Bank, Inc. v. Nasipit Bay Vessel*, 841 F.2d 259, 261 n.1 (9th Cir. 1988))).

Review of a motion to stay an injunction is even more circumscribed. There, the moving party carries a heavy burden of proof, *Nken*, 556 U.S. 433-

34, and the court focuses primarily on whether such relief is critical to prevent irreparable harm, since "the merits comes before the court on an accelerated schedule[, and] . . . , while not exactly half-baked," will have more clarity on the already-expedited preliminary injunction appeal. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1139 (9th Cir. 2011) (Mosman, D.J., concurring) .

The motions panel ignored this limited scope of review and instead reviewed de novo the facts and merits of the case. As an initial matter, the district court made extensive factual findings detailing the irreparable harms the States would suffer if the Rule were to take effect. The court considered public comments from leading professional and medical associations warning the Rule would result in widespread public health crises, including reduced access to vaccinations and increased risk of deadly outbreaks; delayed, less effective treatment for emergent health conditions; childhood hunger and malnutrition; and rising homelessness and housing instability. Inj. at 13-14. The court also relied on numerous declarations from experienced state and local health officials from the Plaintiff States attesting to the grave public health crises likely to follow the Rule's implementation. *Id*. at 2, n.1; *see also* ECF 43 (Decl. of Washington Health Exchange's CEO, warning that by reducing enrollment and dramatically increasing uncompensated care, the Rule

"threatens the Exchange's own sustainability" and "undermin[es] the stability of the commercial health insurance market").

The district court further considered hundreds of pages of briefing and evidence from dozens of amici curiae, *all of which* warned of the Rule's dire public health consequences for vulnerable populations. Inj. at 2, n.1. The court even considered the findings of DHS's own predecessor agency, which concluded in formal guidance that immigrants' reluctance to use the benefits at issue has an "adverse impact not just on the potential recipients, but on public health and the general welfare." *See* 1999 Field Guidance, 64 Fed. Reg. 28,692; *see also Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114, 51,270 (proposed Oct. 10, 2018) (conceding the Rule could result in "worse health outcomes" and "increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated"). From its careful consideration of all the evidence, the district court properly concluded the Plaintiff States would suffer "immediate and ongoing harm" if the Rule were to take effect. Inj. at 53.

The motions panel considered *none* of these findings, much less determined they were "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Arc of Cal.*, 757 F.3d at 984.

Without any reference to the underlying evidence, the motions panel concluded that the Plaintiff States' harms were "largely financial" and "short-term." Order at 71-72. This conclusion, beyond intruding on the fact-finding role of the district court, also reflects a troubling misunderstanding of the benefits programs at issue: Plaintiff States' residents who suffer catastrophic illness, homelessness, or hunger because of the Rule's predictable and intended effects will not simply recover from those harms following resolution of this judicial process. Inj. at 55. Rather, as the district court explained, even temporarily disrupting access to those benefits can cause cascading, negative long-term effects to the individuals and the Plaintiff States where they reside. *Id.* at 22; *see also id*. at 19 ("[D]isenrollment of disabled individuals from services in childhood is the type of harm that may result in extra costs to Plaintiff States far into the future because of the citizen [or] legal permanent resident children reaching adulthood with untreated disabilities."); *id*. at 22 ("[T]he Plaintiff States face increased costs to address the predictable effects of the [resulting] adverse childhood experiences . . . *potentially fifty years or more down the road*." (emphasis added)).

The motions panel also seems to have issued its ruling under the misimpression the Rule "exempts those benefits received by aliens under 21

years of age [and] women during pregnancy," but that is simply incorrect. Order at 5. The Rule plainly considers children's and pregnant women's receipt of food or housing assistance as evidence they are likely to become public charges; it exempts only their receipt of Medicaid benefits. 84 Fed. Reg. 41,328.

Undeterred by its limited appellate role, the motions panel similarly ignored the district court's finding that DHS "made no showing of hardship, injury to themselves, or damage to the public interest from continuing to enforce the status quo" definition of public charge. Inj. at 54; Order at 68-70. Instead, the motions panel substituted its own finding that DHS had established irreparable harm because it allegedly had no mechanism in place to review public charge determinations once made and thus might not be able to retroactively apply the Rule. Order at 69.

The motions panel's view of irreparable harm conflicts with this Circuit's established precedent that returning the nation "temporarily to the position it has occupied for many previous years" is neither irreparable nor the kind of harm that warrants an emergency stay of a preliminary injunction. *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778 (9th Cir. 2018) (no irreparable harm

based on temporarily restoring law to the prevailing interpretation for many years before the challenged rule); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 500 (9th Cir. 2018), *cert. granted*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019) (affirming injunction against termination of DACA program despite agency's "belief that DACA was unlawful").

In dissent, Judge Owens correctly identified both the "lack of irreparable harm to the government at this early stage" and the "likelihood of substantial injury to the plaintiffs" as weighing heavily in favor of denying DHS's emergency request and allowing appellate review of the district court's order to "proceed in the ordinary course." Order (Owens, J., concurring in part and dissenting in part, at 1) (citing *Nken*, 556 U.S. at 427, 433-34). The Court should grant en banc review to prevent irreparable harm to the Plaintiff States and correct the motions panel's erroneous and unfounded decision.

B. The Stay Order Resolves Questions of Exceptional Importance That Should Be Heard by the En Banc Court

This case presents questions of exceptional importance. Fed. R. App. P. 35(b)(1)(B). The Rule makes "transformative" changes to U.S. immigration policy. *See supra* at 4 n.2.

En banc review is particularly warranted because the motions panel elected to publish its order that reached out to address the merits of the case. The motions panel's hasty and error-stricken analysis of 135 years of statutory, judicial, and administrative developments defeats the purpose of a stay in the first instance, "which is to give the reviewing court the time to 'act responsibly,' rather than doling out 'justice on the fly.'" *Leiva-Perez*, 640 F.3d at 967 (quoting *Nken*, 556 U.S. at 427); *see, e.g.*, Order (Bybee, J., concurring, at 4) (mistraining focus on "the merits of DHS's Final Rule" rather than deferential review of district court order). "Designating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed." *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001). While full discussion of the motions panel's errors is not possible in such condensed briefing, the panel committed at least three significant errors in assessing DHS's likelihood of success.

First, the motions panel's historical analysis rests on its misinterpretation of a single agency decision in 1948. Order at 41-42. If not for this misinterpretation, the cited authorities draw a consistent line from 1882 to the present rejecting DHS's construction of the public charge exclusion. Had the

decision been rendered after full merits briefing and oral argument, this mistake likely would have been avoided.

The motions panel recognized that the 1882 Congress sided with the Plaintiff States on the precise question at issue here: "[t]he 1882 act did not consider an alien a 'public charge' if the alien received merely some form of public assistance." Order at 38. It found that this position changed, however, with a Bureau of Immigration Affairs (BIA) decision, *Matter of B—*, 3 I. & N. Dec. 323 (BIA 1948), which "articulated a new definition of 'public charge.'" Order at 41. The motions panel failed to recognize, however, that *Matter of B—* applied to a different statutory section governing *deportation* of immigrants pursuant to 8 U.S.C. § 1227(a)(5). This framework does not apply to immigrants seeking entry or adjustment of status under 8 U.S.C. § 1182(a)(4).[3] *See In re Harutunian*, 14 I. & N. Dec. 583, 584 (BIA 1974) ("The test set forth in *Matter of B—* . . . for determining deportability as a person who has becomepublic charge . . . , is inapplicable to a determination of excludability . . . as a person likely to become a public charge . . ").[4]

[3] *Matter of B—* was decided under the 1917 Immigration Act, which had analogous provisions. *See* Act of Feb. 5, 1917, §§ 3, 19, 39 Stat. 876, 889.

[4] *See also Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,676 (May 26, 1999) (explaining the "significant respect" in which "a public charge determination for purposes of inadmissibility differs

Apart from this misreading of *Matter of B—*, the court and agency decisions the panel cites all reject DHS's construction of the "public charge" provision. *See Harutunian*, 14 I. & N. Dec. at 588 (cited by Order at 43) (receipt of "essentially supplementary benefits, directed to the general welfare of the public as a whole" not a basis for exclusion); *Adjustment of Status for Certain Aliens*, 52 Fed. Reg. 16205, 16,209 (May 1, 1987) (cited by Order at 44) (Medicaid and "assistance in kind, such as food stamps, public housing, or other non-cash benefits" *not* a basis for exclusion because they are not "designed to meet subsistence levels").

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," as it did with the public charge exclusion numerous

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from the context of deportability"). The panel also misread *Matter of B—* in two other ways. First, contrary to the panel's view that *Matter of B—* "articulated a new definition of 'public charge,'" Order at 41, the BIA itself emphasized that the rule it set forth "is not new," *Matter of B—*, 31 I. & N. at 326, and cited cases and Solicitor of Labor opinions dating back to 1929 for that assertion. Second, the panel interpreted *Matter of B—* as holding that "[p]ermanent institutionalization would not be the sole measure of whether an alien was a public charge," and that the BIA "would also consider whether an alien received temporary services from the government." Order at 41-42. Order at 41-42. But the INS decision says nothing about whether "temporary" services, or any services other than long-term institutionalization, are sufficient to trigger a public charge finding. Nor was that issue presented, because the respondent in that case was a long-term resident of a state mental institution.

times since 1882. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). The motions panel's erroneous reading of *Matter of B—,* which formed the linchpin of its historical analysis, warrants en banc reconsideration.

Second, the motions panel improperly disregarded the significance of Congress's repeated rejection of the Rule's definition of "public charge." Congress rejected a strikingly similar definition in 1996 in enacting the current version of the public charge exclusion. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009, Sec. 531(a)(4)(b), *codified as amended at* 8 U.S.C. § 1182.[5] It did so again in 2013. The motions panel's neglect of this expression of congressional intent conflicts with Supreme Court precedent that executive agencies may not enact through rulemaking law that Congress refused to enact. *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 533 (2009) (rejecting a federal agency's interpretation as improper attempt "to do what Congress declined to do"); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that

[5] The version of the law adopted by the House defined "public charge" to "include[] any alien who receives [means-tested public] benefits for an aggregate period of at least 12 months." H.R. Rep. No. 104-828, at 138 (1996). That public charge definition was stricken from the bill adopted by the full Congress and signed by the President. Pub. L. 104-208, Div. C, 110 Stat. 3009.

Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983) ("[i]n view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in" prior agency interpretations); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (after conference committee rejected one house's bill and enacted statute without it, agency could not adopt interpretation mirroring rejected bill).

Third, the motions panel departed from this Court's precedent by holding it was not arbitrary and capricious for DHS to implement the Rule despite the agency's own professed uncertainty and refusal to consider potentially devastating effects of the Rule on public health. DHS has repeatedly conceded the Rule might lead to "food insecurity, housing scarcity," and worse outcomes for "public health and vaccinations." *See* 84 Fed. Reg. at 41,313; *see also* 83 Fed. Reg. at 51,270 (acknowledging the Rule could lead to "increased prevalence of communicable diseases, including among members of the U.S. citizen population"). DHS made no attempt to understand the potential magnitude of these harms, in conflict with law of this Circuit. *See, e.g.*, *Ctr. for*

Biological Diversity v. Zinke, 900 F.3d 1053, 1072 (9th Cir. 2018) (the agency "must explain why uncertainty justifies its conclusion, 'otherwise we might as well be deferring to a coin flip'" (quoting *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011)).

IV. CONCLUSION

Plaintiffs-Appellees respectfully request that the Court grant rehearing en banc and vacate the Order.

RESPECTFULLY SUBMITTED this 19th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Rehearing En Banc complies with the type-volume limitation of Ninth Circuit Rules 35-4 and 40-1 because it contains 3,730 words. This Petition for Rehearing En Banc complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared in a proportionally spaced typeface using 14 point font.

/s/ Jeffrey T. Sprung
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