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

OPPOSITION TO PETITION FOR REHEARING EN BANC

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INTRODUCTION AND SUMMARY

Plaintiffs seek en banc review of an unpublished summary order granting a stay of an injunction pending appeal. Plaintiffs have not identified a case in which this Court has ever provided en banc review in that posture, and their request for extraordinary relief here should be denied.

Even if there were a circumstance in which en banc review of a summary stay order were appropriate, this is not such a case. Plaintiffs premise their petition on an assertion that the government has not demonstrated irreparable harm. But the only court of appeals to expressly address the issue held that the government made an adequate showing. And because two other courts have entered nationwide injunctions, plaintiffs will experience the harms they allege only if two other courts of appeals agree with the panel's decision to stay the nationwide injunction in this case, which would further undercut plaintiffs' argument in favor of en banc review. On the other side of the ledger, plaintiffs do not address their standing at all, and primarily rely on asserted harms to their members that have not been accepted by any court. They provide no basis for concluding that the panel erred, much less for holding that review by the full Court is warranted. The petition for rehearing should be denied.

STATEMENT

1. The Immigration and Nationality Act (INA) provides that "[a]ny alien who, . . . in the opinion of the [Secretary of Homeland Security] 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).[1] 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 alien in and admitted to the United States 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). Simultaneously issued "field guidance" adopted that proposed rule's definition. 64 Fed. Reg. 28,689 (May 26, 1999) (1999 Guidance).

In August 2019, the Department of Homeland Security (DHS) promulgated the Rule at issue. The Rule defines "public charge" to mean "an alien who receives

[1] The statute refers to the Attorney General, but 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; *see also* 6 U.S.C. § 211(c)(8).

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. 41,292, 41,501 (Aug. 14, 2019). 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 circumstances," the alien is inadmissible as "[l]ikely at any time in the future to become a public charge." 84 Fed. Reg. at 41,369, 41,501-04. Among other things, the framework identifies factors to be considered in making public-charge inadmissibility determinations. *Id.* The Rule's effective date was October 15, 2019.

3. CASA de Maryland, an organization that provides services to immigrant communities, and two individuals challenged the Rule. As relevant here, they allege that the Rule does not reflect a permissible construction of "public charge."

On October 14, 2019, the district court granted plaintiffs' request for a nationwide preliminary injunction barring DHS from implementing the Rule. Mem. Op. & Order (PI Op.), Dkt. No. 65. The court did not decide whether the individual

plaintiffs had standing, but concluded that CASA's use of resources to provide education about the Rule was a sufficient injury in fact. *Id.* at 10-14. The court also decided that CASA fell within the zone of interests protected by the public-charge provision, because 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. PI 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 the Attorney General. *Id.* at 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 filed a motion in this Court for a stay pending appeal on November 15, and this Court granted the motion on December 9, in an unpublished summary order. Briefing on the merits is underway, with oral argument tentatively calendared for the week of March 17, 2020.

Three other courts of appeals are considering challenges to the Rule. On December 5, 2019, the Ninth Circuit issued a stay pending appeal of three injunctions (one of them nationwide) against the Rule. *City & Cty. of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). A petition for rehearing en banc is pending; the government's opposition is due January 10, 2020. On December 23, 2019, the Seventh Circuit, by a 2-1 vote, denied the government's motion for a stay of an

injunction against application of the Rule within the State of Illinois. Order, *Cook County v. Wolf*, No. 19-3169 (7th Cir. Dec. 23, 2019). The government's motions to stay two nationwide injunctions against the Rule that were issued in companion cases by the U.S. District Court for the Southern District of New York are being heard in tandem, with oral argument scheduled for January 7, 2020. *See New York v. DHS*, No. 19-3591 (2d Cir.); *Make the Road New York v. Cuccinelli*, No. 19-3595 (2d Cir.).

ARGUMENT

Plaintiffs' petition seeks review of an unpublished summary order granting a stay until the case can be heard on the merits. Their petition does not fall within the standards for rehearing en banc. Review of the decision, which did not set any precedent, is not necessary "to secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35(b)(1)(A). And the stay order will have practical effect only if (i) the Second Circuit stays (or limits) the nationwide injunctions before it, and (ii) the Ninth Circuit's stay remains in place. Thus, rehearing en banc could only be practically relevant if two other Circuits *agree* with this panel's ruling; quite the opposite of a decision that "conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). To the extent that anything about this case is "exceptional," *id.*, it is the district court's improper intrusion on the Executive Branch's authority to determine which aliens should be granted lawful-permanent-resident status, not this Court's stay order.

Plaintiffs have not identified a case in which this Court has ever utilized en banc proceedings to review a panel's unpublished decision staying an injunction pending appeal. Indeed, because courts of appeals generally lack appropriate mechanisms to facilitate expedited en banc review of such stays, at least two courts of appeals have categorically prohibited requests for en banc review of interlocutory orders like the panel's order here. *See* 10th Cir. R. 35.7 ("The en banc court does not consider procedural and interim orders," including "stay orders"); Clerk's Office, U.S. Court of Appeals for the Fifth Circuit, *Practitioner's Guide to the U.S. Court of Appeals For the Fifth Circuit* 73 (2019), https://go.usa.gov/xpzfN ("Procedural and interim matters, such as stay orders . . . are not matters subject to en banc consideration.").

Plaintiffs provide no basis for this Court to take the extraordinary step of rehearing the panel's unpublished stay order en banc. Their petition should be denied.

1. Plaintiffs' primary argument is that the government failed to demonstrate irreparable harm sufficient to justify a stay pending appeal. But they do not dispute that "DHS currently has no practical means of revisiting public-charge [in]admissibility determinations once made," Pet. 9, and thus do not contest that aliens who adjust their status while the Rule is enjoined will, in effect, be granted lawful-permanent-resident status indefinitely even though the Executive Branch believes that they are likely to become public charges. Even the district court recognized the government's "substantial interest in administering the national

immigration system." PI Op. 34. The government's harm did not consume a large portion of the government's motion, *see* Pet. 9, simply because it is easily explained and essentially undisputed—hardly a basis for granting rehearing en banc. Indeed, the Ninth Circuit granted a stay to the government based on the same assertion of irreparable harm. *See San Francisco*, 944 F.3d at 805-06.

Plaintiffs likewise err in asserting that the panel's stay order implies that "the government would be entitled to an automatic stay in APA cases any time a motions panel disagrees with [the] district court's assessment of the merits." Pet. 9. As an initial matter, this case does not present the question whether a "preliminary injunction [that] delays implementation of [the government's] preferred policy," *id.*, by itself establishes irreparable harm, because the injunction here involves an additional harm to the government: it requires the government to make adjustments to lawful-permanent-resident status that are likely to be irrevocable. Not every APA case will have that unique attribute. In addition, demonstrating irreparable harm and a likelihood of success on the merits do not entitle the government to an "automatic stay"; rather, the court must conclude that the balance of harms tips in the government's favor. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Plaintiffs have not presented an adequate reason for the full Court to conduct that balancing anew.

Plaintiffs assert that the government cannot rely on the future effects of aliens receiving public benefits because it is "speculative" that aliens affected by the injunction "will become eligible for, apply for, or receive public benefits in the

future." Pet. 11. But plaintiffs do not dispute that the preliminary injunction would result in the government granting lawful-permanent-resident status to aliens who, based on the Executive Branch's interpretation of the law, are not eligible for such status. That is an intrusive and irreparable harm no matter what the long-term fiscal effects of the preliminary injunction may prove to be.

In any event, the statute at issue requires DHS to make predictive judgments regarding those "likely at any time to become a public charge," 8 U.S.C. § 1182(a)(4)(A), and the Rule defines the term "public charge" to be limited to aliens who receive public benefits for longer than a specified period of time. It is not speculative to suggest that the Rule will, in fact, identify aliens who are likely to receive public benefits. And plaintiffs' suggestion that the Rule will not identify such aliens is in significant tension with their assertion that the "stay order unleashes fundamental changes to immigration law" because "many noncitizens . . . will be deterred from obtaining critical public benefits," Pet. 12; *see also San Francisco*, 944 F.3d at 806 (noting the tension between plaintiffs' argument that the government will not be harmed by a stay and their claim that large numbers of aliens will disenroll in public benefits to avoid a public-charge inadmissibility determination).

2. Plaintiffs do not demonstrate that the panel erred in assessing likelihood of success on the merits, much less that any issue warrants review by the full Court. The district court held that plaintiff CASA de Maryland had standing because it has "devoted significant resources to educating its members about the Rule," which has

reduced CASA's "advocacy for health-care expansion." PI Op. 10 (quoting Dkt. No. 27 ¶¶ 15, 123). Plaintiffs continue to rely on this asserted injury, Pet. 15-16, and do not acknowledge that this Court has already held that an organization's "diversion of resources" that "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). In fact, plaintiffs do not address their standing at all, which provides an independent basis for concluding that the government is likely to succeed on appeal.

Plaintiffs likewise ignore the bulk of the government's merits argument. As the government explained, Congress prohibited DHS from considering 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" inadmissibility determinations. Plaintiffs offer no response.

Plaintiffs note that Congress has also required many aliens seeking adjustment of status to obtain affidavits of support, and authorized states and the federal government to seek reimbursement from the sponsor for means-tested public benefits received by a sponsored alien. *See* Pet. 11; 8 U.S.C. §§ 1182(a)(4)(C), (D), 1183a. But they neglect to mention that aliens who fail to submit a required affidavit

of support are inadmissible on the public-charge ground regardless of their individual circumstances. 8 U.S.C. §§ 1182(a)(4), 1183a(a)(1). Thus, the statute itself makes the mere *possibility* that an alien might receive unreimbursed, means-tested public benefits sufficient to render certain aliens inadmissible on the public-charge ground.

Plaintiffs likewise note that Congress took numerous steps to limit aliens' eligibility for means-tested public benefits, Pet. 11-12, without taking account of Congress's stated reasons for doing so. 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 reaffirmed the policy " (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 Congress 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).

Plaintiffs ignore these provisions, which strongly support the government's interpretation of the public-charge inadmissibility provision. Instead, plaintiffs assert that the term "public charge" has a longstanding meaning with which the Rule is inconsistent. But Congress has never defined the term; rather, the defining feature of Congress's approach to the public-charge inadmissibility provision over the last 135 years has been its repeated and intentional decision to leave the term's definition to the Executive Branch's discretion. In an extensive report that formed 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). 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 "different 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.*

Plaintiffs label one 19th-century definition of "charge" the "ordinary" meaning relevant here, even though that definition was just one of several listed in dictionaries

at the time. Pet. 12-13. Other relevant sources recognized a different meaning. For example, both the 1933 and 1951 editions of Black's Law Dictionary defined the term "public charge," "[a]s used in" the 1917 Immigration Act, to mean simply "one who produces a money charge on, or an expense to, the public for support and care." *Public Charge*, Black's Law Dictionary (3d ed. 1933); Black's Law Dictionary (4th ed. 1951). Those sources belie plaintiffs' claim that "public charge" has for over a century been a term of art with the meaning they prescribe.

Plaintiffs fare no better in noting that Congress has provided support for aliens in limited circumstances. Pet. 13. Congress's decision to exclude aliens who might rely on public assistance is not inconsistent with its decision to assist aliens who have already been admitted—especially since immigration officials cannot with perfect accuracy predict which aliens would become public charges. And as for the 1882 statute upon which plaintiff relies, Congress raised the funds used to support distressed aliens through a head tax on "each and every" alien who arrived in U.S. ports, Act of Aug. 3, 1882, ch. 376, §§ 1-2, 22 Stat. 214—hardly an indication that Congress approved of alien use of publicly funded benefits.

Plaintiffs assert that courts and agencies have construed the term "public charge" consistent with their position, Pet. 13-14. In so doing, they ignore a longstanding interpretation of the term "public charge" for purposes of deportability, *see* 8 U.S.C. § 1227(a)(5), as applying when an alien or the alien's sponsor fails to honor a lawful demand for repayment of a qualifying public benefit. *See Matter of B*, 3

I. & N. Dec. 323 (BIA & AG 1948). And plaintiffs assert that the Rule is unlawful because its definition is 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. 409, 421-22 (BIA 1962; AG 1964), without acknowledging that DHS cited a hypothetical alien who is "young, healthy, employed, attending college, and not responsible for providing financial support for any household members" as an example of an individual who "would not be found inadmissible" under the Rule. 83 Fed. Reg. 51,114, 51,216 (Oct. 10, 2018).

Similarly, plaintiffs erroneously assert that the 1999 Guidance and proposed rule were "dictated by" the plain meaning and history of the term "public charge." Pet. 4. The proposed rule specifically noted that the term was "ambiguous," that it had "never been defined in statute or regulation," and that the proposed rule's definition was only one "reasonable" interpretation of the term. 64 Fed. Reg. at 28,676-77. The 1999 Guidance did not purport to bind the agency for all time, and it is a bedrock principle of administrative law that an agency may alter its interpretation of a statute it is charged with enforcing. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Lacking any textual support for their position, plaintiffs rely on failed legislative proposals from 1996 and 2013. Pet. 14. The principle that failed legislative proposals

are a dubious means of interpreting a statute is particularly applicable here. *Solid Waste Agency of N. Cook Cty v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160 (2001). Congress did not "discard[]" the Rule's definition "in favor of other language" eventually enacted. Pet. 14 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987)). The 1996 legislation left the term undefined, and in 2013 no legislation on the subject was ultimately enacted; in neither case did Congress adopt an alternate definition of "public charge." And the legislative history suggests that Congress only dropped the 1996 proposal because the President objected to a rigid definition of the term. *See* 142 Cong. Rec. S11881-82 (daily ed. Sept. 30, 1996). In addition, both the 1996 and 2013 proposed definitions were significantly broader than the Rule: the 1996 proposal covered a similar amount of benefits usage within a period of seven years rather than three, *see* H.R. Rep. 104-828, at 138, 240-41 (1996) (Conf. Rep.), and the 2013 proposal included receipt of *any* amount of public benefits, S. Rep. No. 113-40, at 42, 63 (2013).

3. Plaintiffs do not even attempt to defend the imposition of a nationwide injunction, rather than one limited to the states in which CASA's members reside. As explained in our motion, this Court's precedents demand that an injunction be no more burdensome to the government than necessary to provide complete relief to the plaintiffs. Stay Mot. 19 (citing *Virginia Soc'y for Human Life, Inc. v. Federal Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001)). The district court's statement that "the ordinary remedy in APA challenges to a rulemaking is to set aside the entire rule if

defective," PI Op. 35, cannot be reconciled with this Court's rejection of an 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. And there is no basis for presuming that an injunction extending beyond the localities where CASA has identified members is necessary to remedy the alleged injuries. *See* Stay Mot. 19-20.

4. Plaintiffs' request for suspension of the stay is likewise without merit. The whole point of a stay pending appeal is that the Court has considered the issue and determined that the appellant should not be subject to the injunction while the appeal proceeds. That is why the panel's stay order has immediate effect, while a ruling by a merits panel would not. And as noted, the stay order will have practical effect only if other Circuits agree with this Court's ruling. There would be no basis for an "administrative stay" maintaining a nationwide injunction when three courts of appeals (including this one) have ruled otherwise, yet that is the only situation in which an administrative stay would have any effect in this case.

CONCLUSION

The petition for rehearing and request for an administrative stay should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This opposition complies with the type-volume limit of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,898 words. This opposition 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/ Gerard Sinzdak
GERARD SINZDAK

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 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/ Gerard Sinzdak
GERARD SINZDAK